

**New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit**

TSB-A-12(22)S
Sales Tax
August 29, 2012

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S080725A

Petitioner, [REDACTED], asks whether access to software and a directory of consultants that its customers use to facilitate Petitioner's oral consultation service is subject to sales tax. Petitioner also asks whether its receipts from its services, which include certain written reports, are subject to sales tax.

Based upon the facts and sample contracts provided, we conclude that the customer's use of Petitioner's directory of consultants and software to facilitate the provision of its oral consultation services is not subject to tax. Petitioner's written research reports do not constitute a taxable information service, as long as the primary function of Petitioner's service is obtaining advice and analysis from Petitioner's experts, the information provided is not derived from any common data source, and that information is not and may not be substantially incorporated into reports furnished to others.

Facts

Petitioner's representative previously received an Advisory Opinion examining Petitioner's oral consultation services, custom written research reports, and admissions to topical meetings and seminars. *See* TSB-A-08(18)S. Petitioner represents that the facts of this Advisory Opinion are essentially the same as those in the 2008 Advisory Opinion, but in this instance Petitioner states that in some cases there are the following additional facts:

- Petitioner's customers may use software (an access portal) to assist in selecting expert consultants with whom to discuss issues and to facilitate the interactions between its customers and consultants in furtherance of the delivery of the oral component of the consultation services. This is accomplished through e-mail or online.
- Petitioner may provide custom written reports detailing the responses of a number of experts to a series of questions developed by the customer and Petitioner's research manager.
- A customer may separately contract with Petitioner to have an expert draft a written in-depth "special project" custom research report.

In addition to the relevant facts as stated in TSB-A-08(18)S, Petitioner provides oral and written consulting services to customers using its group of independent contractor consultants who are professionals with specialized knowledge on a wide variety of topics. These

consultants, who are often medical doctors, research scientists, engineers, attorneys, architects, or professional business consultants, provide a range of consultation services, from providing background education on a particular topic to an in-depth technical analysis of a discrete issue or subject as well as custom written research reports. They may also offer insight through discussions at meetings and seminars. Petitioner states that these professionals do not use or otherwise rely on any common database of information to provide their advice and expertise to Petitioner's customers. Most of the professionals who act as Petitioner's consultants work for themselves or for other employers, and must therefore take certain steps to avoid conflicts of interest. For example, they may be prohibited from providing assistance to certain competitors. Moreover, while these experts may have access to information in databases for their other employment, they are prohibited from using them to perform services for Petitioner or Petitioner's customers.

Petitioner's consultants provide customers with insight, opinion, and knowledge through either (i) an oral consultation with the consultants the customer selects, (ii) a custom written research report, or (iii) a meeting or seminar with one or more consultants addressing a particular topic. The cost of an annual subscription for a predetermined quantity of consulting services for that year can range from [REDACTED] (for the basic package) to more than [REDACTED] (for the premium package). (A limited scope "introductory" subscription is also available for [REDACTED].) In return, the experts offer a variety of perspectives based on their own first-hand experience in working with various businesses, industries and technical and medical fields. According to Petitioner, no information is archived by the Petitioner or its consultants for later reuse or sale to another customer.

Petitioner may provide two types of custom written research reports to its customers. The first type of report, which is included with the customer's consultation membership, is a report summarizing the views of a number of experts selected by a customer. This report is prepared by Petitioner's research manager based upon questions, prepared by the research manager in cooperation with the customer, that are sent to consultants selected by the research manager as having knowledge of the subject matter. In some instances, the document used to solicit responses may take the form of a questionnaire. The consultant responses are reviewed by the research manager, evaluated, vetted (some responses are discarded), edited, and used by the research manager to prepare a written report to the customer.

The second type of research report is referred to by the Petitioner as a custom, in-depth "special project" written research report on a particular topic. A consultant is selected by the customer to prepare the special project report. A separate additional charge is made for the completed special project report. According to Petitioner, their contract with the consultants requires that no aspect of these reports is archived by the Petitioner or the consultants for use by or sale to another customer. Both types of reports generally augment Petitioner's oral consultation services.

In the past, Petitioner's research manager would be assigned to a customer to facilitate its interaction with the expert consultants. The research manager would work with a customer to identify its needs and advise the customer on the most expedient means of obtaining the desired information. The research manager also coordinated the delivery of Petitioner's services to the customer, usually within the research manager's particular area of expertise. The research managers also help prevent the consultants from becoming involved in conflicts of interest.

Now, however, certain of Petitioner's customers may choose to use Petitioner's internally developed proprietary software to automate certain aspects of the process by which they request and track the use of the Petitioner's consulting services. This software allows customers to initiate oral consultation by selecting a consultant from the consultant directory. This directory contains the names, biographies, areas of expertise, and restrictions on employment (as noted above, some of the experts work for other entities, and are often prohibited from being consultants for competitors) for some of Petitioner's consultants. Once a consultant is selected, the software may be used to request, schedule, and track the customer's use of the oral consultation services, and track the use of Petitioner's other consulting services (i.e., to request written reports or to participate in a seminar). For example, the customer can use the software to identify and request a consultation with a particular consultant. Customers only have access to this software if they have an underlying subscription to the consulting services offered by Petitioner. The software is not, however, used in preparing or disseminating written questions to a group of experts, because this process still requires the aid of a research manager. There is no separate charge to the customer for the use of either the software or the directory.

Once they have access to Petitioner's software, the customer is contractually prohibited from using the software or accessing the directory for any purpose other than facilitating the delivery of consultation services. Petitioner polices violations of its usage policy and enforces the usage policy terms. The customers agree not to have contact with consultants outside of the contractual relationship with Petitioner, or to disseminate any information obtained from the consultant directory to any third party. Moreover, all consultants listed in the consultant directory have also agreed to restrictions on their activities, including that they will only provide consultation services to customers that locate them through the consultation service subscription sold by Petitioner. Any information transferred through the use of this software application in setting up an appointment is accessible by only that customer, the Petitioner, and the consultant. Petitioner's customers may also contact a research manager to help them identify suitable consultants, if they wish to do so.

Analysis

We conclude that the additional facts provided in the current Petition generally do not change the analysis of the issues discussed previously in TSB-A-08(18)S. Petitioner's oral consultation services are not subject to tax, and the access to software to facilitate oral consultation services does not change this result. Separately-stated charges for custom written reports are not subject to tax to the extent that the information is not taken from a public data

source, the report provided is personal or individual in nature, and it is not substantially incorporated into reports furnished to others.

Tax Law section 1105(c)(1) imposes sales and use tax on receipts from the service of furnishing information by printed, mimeographed or multigraphed matter, or by duplicating written or printed matter in any manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons. Section 1105(c)(9) of the Tax Law imposes a sales tax on receipts from the service of furnishing information by means of telephony or telegraphy or telephone or telegraph service, but only to the extent it would otherwise be subject to tax pursuant to paragraph (c)(1) if provided in printed form. Information services which are personal or individual in nature and which are not or may not be substantially incorporated in reports furnished to other persons are excluded from the sales tax imposed by section 1105(c)(1) or 1105(c)(9). Charges for information which is solely transmitted orally are also excluded from sales tax. *See* 20 NYCRR §527.3(b)(3).

Petitioner's oral consultations are not subject to tax. While the consultants provide information to the Petitioner's customers, the service principally involves the giving of guidance, advice, or a historical perspective based upon the expert's knowledge. Petitioner maintains that the advice being given is specific to a particular customer, and it is not reused or substantially incorporated into the reports provided to any other party. Petitioner also states that its experts are advised not to use information from a common database in providing answers, just that of their own expertise. Accordingly, we concluded that Petitioner's oral consultation service was not subject to tax.

As part of its oral consultation service, Petitioner provides access to a directory of some of its experts to enable customers to select the expert with which it would like to consult. When this directory is used by customers for purposes of selecting an expert for oral consultation, the use of the directory is merely incidental to the oral consultation service. Moreover, the primary aspect of Petitioner's service is not the use of the software directory to select the expert, but the information the expert provides to the customer. *See* TSB-A-10(47)S. Thus, when viewed as a whole, the use of the directory as part of Petitioner's oral consultation service is not subject to tax.

Petitioner's customers also use pre-written software on its website to access the consultant directory and to facilitate interaction with the expert once selected. The use of such software is not necessary to receive Petitioner's consulting service, because the customer may opt to use one of Petitioner's research managers. There is no separate charge to use the software and nothing in Petitioner's subscription fee structure changes depending on whether or not the customer uses the software or the research manager. We conclude that the primary function of Petitioner's service remains a non-taxable consultation service, and the use of software in this instance does not alter the nature of the service. *See* TSB-A-10(40)S; TSB-A-10(47)S.

In this instance, our understanding is that any report is provided to augment Petitioner's consulting service, the primary aspect of which is Petitioner's oral consultation services. However, any separately charged fee for access to the consultant directory or for the successful completion of a questionnaire or survey by Petitioner's consultants may constitute a receipt from

the sale of a taxable information service, as that would suggest that the access to Petitioner's directory was offered to its customers separate and apart from its consulting services. *See* TSB-A-10(40)S.

In providing research reports to certain customers, Petitioner's research manager collects, compiles and analyzes the consultant's responses to the customer's questions, and furnishes this information to the customer. The report to the customer of the responses thus constitutes an information service. Written reports furnished by Petitioner's consultants to its customers are only exempt from tax to the extent that the information is personal or individual in nature, and that the reports or survey results are not taken from a common data source and are not or may not be substantially incorporated into reports furnished to others. Because information is derived solely from the responses to the questions developed with the customer, rather than from a common data source, and the reports are not provided to other customers or compiled for later use by Petitioner in providing information to other customers, this information is considered personal or individual in nature. Accordingly, the research reports are excluded from the information services taxed under section 1105(c)(1) of the Tax Law. *See* TSB-A-10(40)S. However, if Petitioner is providing information collected and compiled from its customer reports to other persons, or reusing the data it collects from the questionnaires, Petitioner's receipts from separately offering use of its consultant directory would constitute receipts from the sale of a taxable information service.

DATED: August 29, 2012

/S/

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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.