

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-93 (58) S
Sales Tax
November 10, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S930330A

On March 30, 1993 a Petition for Advisory Opinion was received from Trump Shuttle, Inc. (currently, Shuttle, Inc. D/B/A US Air Shuttle), 75-20 Astoria Blvd., Jackson Heights, N.Y. 11370.

The issue raised by Petitioner, Trump Shuttle, Inc. (currently, Shuttle, Inc. D/B/A USAir Shuttle), is whether Petitioner's purchase of on-line computer services is excluded from New York State Sales and Use Tax pursuant to the provisions of Section 1105(c)(1) of the Tax Law.

Petitioner is a commercial airline carrier. It has terminals in New York City, Boston and Washington, D.C. Each terminal is equipped with computer equipment (CRTs and printers) and on-line access to software. The software utilized by Petitioner's employees enables the employees to schedule or access flight information, coordinate passenger, crew and baggage information, obtain weather reports and conduct similar tasks associated with the airline business.

On June 8, 1989, Petitioner and System One Corporation entered into a contractual agreement ("contract") whereby System One agreed to provide certain software (i.e., computer) and telecommunications services and to lease certain items of equipment to Petitioner. The sales tax on the telecommunications services and items of equipment are not at issue in the audit or in this petition.

System One may provide software services to competitors of Petitioner. However, the reports generated by the software and the on-line access of the software and data base by Petitioner is confidential and used exclusively by Petitioner. These reports are not rendered to any parties other than Petitioner and the software that is modified for Petitioner can only be accessed by Petitioner.

The contract specifically states that "the software and any related documentation supplied to Petitioner by System One are for the exclusive use of Petitioner and shall not be disclosed or made available to any other person, firm, corporation, or entity". Additionally, the contract provides that System One agrees that "all information is confidential business information, shall not be disclosed to third parties without Petitioner's consent and this covenant shall survive termination of the agreement"

Each software service has been specifically modified to the specifications required by Petitioner and contains confidential Petitioner data. For example, the "Flight Plan Services" portion of the software must be formatted by System One and Petitioner to account for each of Petitioner's

flight segments. In addition, the database must be updated by Petitioner's data not less than fifteen (15) days in advance of the scheduled flight operations. The information provided by Petitioner for the database includes items such as:

- * the type and aircraft performance information for Petitioner's aircraft which will be utilized to operate the flight,
- * the flight segments over which Petitioner's aircraft will operate, and
- * the scheduled departure or arrival times for Petitioner's flight segments.

Other examples of services provided by System One that are modified for Petitioner and contain Petitioner's raw data include systems for "Flight Control", "Crew Management", "Baggage Claim", "Scratch Pad" and "Reservations" These systems can be distinguished from systems that may contain a database, for instance, of fares and flight information for all domestic airlines such as Delta, Continental, etc.

The following is a description of the services provided to Petitioner by System One. Each system was modified by System One based upon Petitioner's specifications and confidential directions. Each system contains data provided only by Petitioner and each report generated by the system is used exclusively by Petitioner's personnel.

A. Flight Control System

The Flight Control System information service processes Petitioner's daily flight information such as the flight number, the aircraft number, the aircraft's departure and arrival cities and times, and alternate cities for arrivals when weather related problems exist. As a flight departs, the crew calls back with their departure time and it is then recorded into the system by Petitioner's control center agent. When the flight arrives, the crew calls in with their arrival time and such information is recorded by Petitioner's control center agent at the arrival city. This is done on an hourly basis, and is used by Petitioner's Flight Dispatch department to track the status of each flight. Daily arrival time reports are processed by System One and are printed by Petitioner's Dispatch personnel.

B. Crew Management System

The Crew Management information service is used to process information relating to each member of Petitioner's flight crew. Specifically, Petitioner inputs information including the crew's qualifications, the crew's training experience, current and future crew training dates, crew flight hours and a listing of the last ten flights of each crew member. The initial information is input by Petitioner's Flight Operations Department and it is updated by them on a weekly basis. Various reports are available for printing on a daily basis and at the end of the month.

C. AFTN (Aeronautical Fixed Telecommunications Network)

This system is used by Petitioner's Dispatchers to generate Petitioner's daily flight plans. These flight plans are reviewed internally and are ultimately forwarded to Air Traffic Control electronically. Petitioner's personnel inputs information on each flight number, type of equipment, air speed, altitude and various points along the flight path.

D. Flight Plan

System One, by using the information provided by Petitioner's Dispatchers, processes reports containing all the necessary information for the flight crew to use during its flight route.

F. Scratch Pad System

System One provides access to software containing 1000 blank screens. The screens are used by Petitioner's personnel to design and input select information. Only Petitioner's personnel can access the system.

G. ACTS (Airline Computerized Baggage Tracing System)

Performs a programmed baggage tracing function comparing messages containing unclaimed baggage information. Input messages are entered into the system by Petitioner's Baggage Service Agents on bags that are missing or unclaimed. A report printed on a weekly basis for Petitioner's Passenger Services Group to determine the amount of mishandled baggage.

H. Baggage Claims Central File System

An information processing system for Petitioner's shuttle data. The Baggage Claims Central File System provides programmed baggage claim tracing and filing functions to assist in the detection of repetitive and duplicate baggage.

J. Sub-Host Reservations

A reservation information system used by Petitioner's Reservations Agents to book and confirm flights on Petitioner's airline. When a passenger requests space for travel on Petitioner's flights, the Reservations agent inputs the necessary information into the system and confirms the booking.

K. TSO Time Sharing

The Time Sharing Service includes the access of System One's mainframe for storage of select information by its Reservations Agents and the processing of various reports from this data.

Section 1105 of the Tax Law states, in part:

Sec. 1105. Imposition of sales tax.--On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

(c) The receipts from every sale, except for resale, of the following services:

(1) The furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons, but excluding the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons, . . .

Section 527.3 of the Sales and Use Tax Regulations state, in part:

Sale of information services. (Tax Law, §1105[c][1])

(a) Imposition. (1) Section 1105(c)(1) of the Tax Law imposes a tax on the receipts from the service of furnishing information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any manner such as by tapes, discs, electronic readouts or displays.

(2) The collecting, compiling or analyzing information of any kind or nature and the furnishing reports thereof to other persons is an information service.

(3) Among the services which are information services are credit reports, tax or stock market advisory and analysis reports and product and marketing surveys.

(b) Exclusions. (1) Sales tax does not apply to receipts from sales of information services which are for resale as such.

(2) The sales tax does not apply to the receipts from the sale of information which is personal or individual in nature and which is not or may not be substantially incorporated into reports furnished to other persons by the person who collected, compiled or analyzed such information.

Section 526.7 of the Sales and Use Tax Regulations states, in part:

Sale, selling or purchase. [Tax Law, §1101(5)] (a) Definition.

(1) The words sale, selling or purchase mean any transaction in which there is a transfer of title or possession, or both, of tangible personal property for a consideration.

(2) Among the transactions included in the words sale, selling or purchase are exchanges, barter, rentals, leases or licenses to use or consume tangible personal property.

(e) Transfer of possession

(5) It is not essential for a transfer of possession to include the right to move the tangible personal property which is the subject of a rental, lease or license to use.

Example 14: A corporation contracts with a center for access time on the computer center's equipment through the use of a terminal located in the corporation's office. The terminal is connected to the computer by telephone. The corporation's access to the computer through the terminal is not deemed to be a transfer of possession of the computer subject to tax. However, the transaction may be taxable based on the information provided to the customer.

New York State Department of Taxation and Finance, Taxpayer Services Division, Technical Services Bureau Bulletin 1978-1(S), titled COMPUTERS, states in part:

5. Data Processing Services - Information Services - Information services are commonly provided by data processing centers. An information service may consist of a data processing company using its own facilities to process customer data to produce information. The data may be provided to the data processing company in source document form, as machine readable media, or entered directly into the company's computer facilities via devices located at the customer's premises. Output may be in the form of reports on paper or other media, or may be transmitted electronically to the customer's site.

Information services are subject to tax (section 1105(c)(1)), unless the information output (paper or other media) is:

- (1) personal or individual in nature to nature recipient, and
- (2) the data processing company cannot or may not incorporate a substantial portion of the same information in reports which it furnishes to other persons.

The fact that the customer is billed each of the steps required to perform the service will not alter the application, nor will the incidental transfer of some tangible personal property affect the taxability, i.e. the sales tax status of the information service provided to the customer will determine the taxability of the total charge, (taxable or exempt under section 1105(c)(1))

Processing of the following data are examples of exempt information service:

- Accounting Reports
- Accounts Receivable
- Accounts Payable
- Sales Analysis
- Inventories
- Payrolls
- Tax Reports

In the instant matter, System One Corporation provides both an on line computer service and an information service to Petitioner. It is not engaged in the business of selling software. Petitioner directly enters data into System One via devices located at Petitioner's various locations. From the data submitted by Petitioner, System One generates reports which are delivered electronically to Petitioner. In those instances where the information in the reports is based only upon the data submitted by Petitioner, is only delivered to Petitioner and cannot be and is not included in reports to other parties, and by its nature is unique to Petitioner, the information is considered to be personal and individual in nature in accordance with the guidelines established by Technical Services Bureau Bulletin 1978-1(S), supra.

Accordingly, the receipts from charges to Petitioner for the reports generated by the Flight Control System, the Crew Management System, the AFTN, Flight Plan, ACTS, the Baggage Claims Central File System and the Sub-Host Reservations are not subject to sales tax as the information in such reports falls within the exclusion from tax provided under Section 1105(c)(1) of the Tax Law.

The tax status of receipts from charges to Petitioner for use of the Scratch Pad System and the TS0 Time Sharing Service will be determined on whether the information obtained from the

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Scratch Pad System or via the TSO Time Sharing Service qualifies for the exclusion from tax provided under Section 1105(c)(1) of the Tax Law. It cannot be determined from the facts as presented by Petitioner, as to whether the information received so qualifies.

Petitioner also receives other reports through System One which do not qualify for the exclusion from tax provided under Section 1105(c)(1) of the Tax Law since the information contained in the reports is based on data which is not uniquely personal or individual in nature to Petitioner such as Terminal Weather System, Easy Trac and Global Pricing. These reports are subject to the tax imposed by Section 1105(c)(1) of the Tax Law.

DATED: November 1, 1993

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

NOTE: The opinions expressed in Advisory Opinions
are limited to the facts set forth therein.