

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

TSB-A-98(45)S
Sales Tax
July 29, 1998

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S971210E

On December 10, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from The Associated Press, 50 Rockefeller Plaza, New York, New York 10020-1666.

The issues raised by Petitioner, the Associated Press, are:

1. Whether Petitioner's purchases of information services are subject to New York State sales and use tax.
2. Whether equipment, supplies and utilities purchased on behalf of and for the use by Petitioner's members and located at member newspapers and at Petitioner's offices and bureaus in New York, are exempt from New York State sales and use tax.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner is a news gathering cooperative which was formed in 1848 by six New York City newspapers to share the cost of gathering news outside the New York metropolitan area. It was not until 1900 that Petitioner was incorporated under the New York Membership Corporation Law. As mandated by its charter and by-laws, the objects and purposes of Petitioner are "to gather, obtain and procure by its own instrumentalities, by exchange with its members and by any other appropriate means, any and all kinds of information and intelligence, telegraphic and otherwise, for the use and benefit of its members and to furnish and supply the same to its members for publication in the newspapers owned or represented by them, under and subject to such regulations, conditions and limitations as may be prescribed by the by-laws; and the mutual cooperation, benefit and protection of its members." Petitioner is restricted exclusively to the collection and dissemination of news for and to its members. Petitioner's membership has grown from the original six newspaper members to a present membership of 1,550 newspapers and 6,000 radio and broadcast stations in the U.S., and includes virtually all daily newspapers in New York and most news-oriented radio and television broadcasters.

Petitioner is administered by a president and a board of directors composed solely of publishers and broadcasters. Petitioner indicates that it is the only major U.S. news service that is a not-for-profit cooperative.

Petitioner's unique collective arrangement with its members has been designed so that members are effectively sharing the expenses of news gathering. Petitioner has no stockholders, declares no dividends, and distributes no profits. Petitioner's income is used to maintain, improve and expand service. In practice, Petitioner seeks to "break even" on a cash basis. Petitioner's members are assessed an amount equal to Petitioner's projected annual expenses,

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less non-membership income. Adjustments are made periodically to reflect anticipated changes in cash flow. In effect, Petitioner operates as the facility for a cost-sharing arrangement between the members. Without this arrangement, the costs of national and global news-gathering would be prohibitively expensive and management by the separate media organizations would be impossible.

Petitioner receives news information from three sources: its members, Petitioner's employees or freelance professionals and, as described below, information service providers. Petitioner's members are required, pursuant to their membership agreements, to contribute local news for distribution to the rest of the membership. Petitioner's members are subject to sanction and ultimately expulsion from membership for failure to provide local news on a timely basis. In return, members are entitled to receive the collective news gathering efforts of all of the other members. Members are not compensated for the news information they provide to Petitioner. Petitioner also has a specially trained staff of writers, editors, photographers, broadcasters and engineers who operate with equipment developed and refined by Petitioner to deliver reliable service to its members.

Petitioner gathers in all parts of the world, news of intelligence of current and recent events of interest to newspaper readers and distributes it daily to its members for publication in their newspapers. Petitioner maintains its principal office in New York City, but also has division points scattered over the United States, each of which is charged with the duty of collecting information from a defined territory and preparing and distributing it to newspapers within the defined area and to other division points for use within their respective areas. Each member newspaper forwards news deemed important to the divisional headquarters of its area. In addition, employees of Petitioner obtain news which is transmitted to the appropriate division headquarters and to other divisions for distribution to member newspapers within their respective areas. The news Petitioner distributes is originally obtained by direct employees of Petitioner, employees of the member newspapers and employees of foreign independent agencies with which Petitioner has contractual relations, such as the Canadian press. Petitioner, moreover, broadcasts its news reports directly over the airwaves to the listening public, through the facilities of member radio stations.

Petitioner's charter and by-laws clearly prescribe the information sharing purpose of Petitioner. Its by-laws describe it as "a mutual and cooperative association formed to gather with economy and efficiency an accurate and impartial report of the news. . . and to furnish and supply the same to its members. . ." The membership agreements for member newspapers, radio broadcasters and television broadcasters have been in effect for many years. While each agreement is tailored to a specific form of media, one theme is common to all three forms of membership agreement: they all require that local news and related information gathered by a member must be shared with Petitioner for distribution to all of the members. For example, Petitioner's Membership Agreement for Newspapers states: "Member shall promptly furnish to The Associated Press all the spontaneous news of the Member's district. . ." Petitioner's agreements with its television and radio broadcaster members provides essentially the same.

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Petitioner regularly purchases electronic services such as stock quotes, sports statistics and weather forecasts from independent providers for dissemination to its members for their editorial use. In the past, some of this information was gathered by Petitioner using its own employees and freelance professionals. Petitioner now purchases these services from independent providers on behalf of its members because it is the most cost-effective means of obtaining this information. When negotiating the fees for these services, the providers are aware that Petitioner is disseminating the services to its members. Petitioner frequently negotiates a specific format from these providers so that Petitioner does not have to reformat the information prior to distributing it to its global membership.

Petitioner has bureaus in every state and more than 80 foreign cities. It has more than 300 news and photography bureaus worldwide. As part of disseminating the collective news efforts to its members, Petitioner purchases, installs and maintains equipment and supplies on behalf of and for the use of its members at member locations, and also at Petitioner's offices and bureaus, throughout New York State, New York City and elsewhere. Most of the equipment and supplies are used by Petitioner and its newspaper members in the publication of newspapers. The equipment is similar to those items found at a typical modern printing plant including, but not limited to, computers and their integrated peripheral equipment, photographic equipment and electronic darkrooms. Equipment and supplies installed at Petitioner's offices and bureaus are used to produce and/or transmit components of a newspaper such as photographs, advertisements and Petitioner's news wire to member newspapers. The equipment and supplies at member locations are used to receive these transmissions from Petitioner and/or to produce components of a newspaper. Petitioner also incurs significant costs for electricity and other utilities related to the production of the components of a newspaper.

Applicable Law & Regulations

Section 1105 of the Tax Law provides in part:

Imposition of sales tax.--... there is hereby imposed and there shall be paid a tax . . . upon:

(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 . . . and excluding the services of advertising or other agents, or other persons acting in a representative capacity, and information services used by newspapers, radio broadcasters and television broadcasters in the collection and dissemination of news
. . . .

Section 1115 of the Tax Law provides in part:

(a) Receipts from the following shall be exempt from the tax on retail sales tax imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

* * *

(12) Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property, gas, electricity, refrigeration or steam for sale, by manufacturing, processing, generating, assembling, refining, mining or extracting, or telephone central office equipment or station apparatus . . .

(c) Fuel, gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature for use or consumption directly and exclusively in the production of tangible personal property, gas, electricity, refrigeration or steam, for sale, by manufacturing, processing, assembling, generating, refining, mining, extracting, farming, agriculture, horticulture or floriculture, shall be exempt from the taxes imposed under subdivisions (a) and (b) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten.

Section 528.13(b) of the Sales and Use Tax Regulations provides in part:

(b) *Production*. (1) The activities listed in paragraph (a)(1) of this section are classified as administration, production or distribution.

(i) *Administration* includes activities such as sales promotion, general office work, credit and collection, purchasing, maintenance, transporting, receiving and testing of raw materials and clerical work in production such as preparation of work, production and time records.

(ii) *Production* includes the production line of the plant starting with the handling and storage of raw materials at the plant site and continuing through the last step of production where the product is finished and packaged for sale.

(iii) *Distribution* includes all operations subsequent to production, such as storing, displaying, selling, loading and shipping finished products.

(2) The exemption applies only to machinery and equipment used directly and predominantly in the production phase. Machinery and equipment partly used in the administration and distribution phases does not qualify for the exemption, unless it is used directly and predominantly in the production phase.

* * *

Section 528.13(c) of the Sales and Use Tax Regulations provides in part:

(c) *Directly and predominantly.* (1) *Directly* means the machinery or equipment must, during the production phase of a process:

(i) act upon or effect a change in material to form the product to be sold, or

(ii) have an active causal relationship in the production of the product to be sold, or

(iii) be used in the handling, storage, or conveyance of materials or the product to be sold, or

(iv) be used to place the product to be sold in the package in which it will enter the stream of commerce.

(2) Usage in activities collateral to the actual production process is not deemed to be used directly in production.

* * *

(3) Machinery used to produce other machinery or equipment or parts for self use in production is considered to be used directly in production.

* * *

(4) Machinery or equipment is used predominantly in production, if over 50 percent of its use is directly in the production phase of a process.

* * *

(5) Machinery or equipment used in production by someone other than its owner is exempt under the same conditions as other machinery and equipment.

Opinion

Issue 1

The purchase of information services by Petitioner is not subject to the tax imposed under Section 1105(c)(1) of the Tax Law since, under Petitioner's distinctive collective arrangement with its members, the information services are used by its member newspapers, radio broadcasters and television broadcasters in the collection and dissemination of news.

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Issue 2

Petitioner's equipment and supplies are located at its offices and bureaus and at member locations. The equipment includes computers and peripheral equipment, photographic equipment and electronic darkrooms. The equipment and supplies are used to prepare various components of a newspaper, such as photographs, advertisements, and news articles, and to scan and/or transmit these items to member locations. The equipment and supplies at member locations are used to receive these transmissions from Petitioner and/or to produce components of a newspaper. Computers and peripheral equipment, such as keyboards and video terminals, photographic equipment and electronic darkrooms, as well as related supplies, used to perform these functions are used directly in the production of the members' newspapers. Such equipment and supplies of Petitioner when used by either Petitioner or member newspapers predominantly in the production of the members' newspapers for sale will qualify for exemption under Section 1115(a)(12) of the Tax Law. It may not be concluded whether other types of equipment and supplies purchased by Petitioner may qualify for the production exemption without knowing the details of how the equipment and supplies in question are used.

Electricity or other utilities used to operate equipment which is being used directly in production are exempt from sales tax under Section 1115(c) of the Tax Law. Utilities which create conditions necessary for production, or perform an actual part of the production process, are also exempt under Section 1115(c). See Section 528.22(c) of the Sales and Use Tax Regulations.

DATED: July 29, 1998

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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