

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-04(17)S
Sales Tax
June 30, 2004

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S020116A

On January 16, 2002, the Department of Taxation and Finance received a Petition for Advisory Opinion from Dataline, Inc., 110 Bi-County Boulevard, Suite 110, Farmingdale, New York, 11735.

The issues raised by Petitioner, Dataline, Inc., are:

- 1) Whether fees charged to customers for Petitioner's StaffMonitor service as described below are subject to sales tax.
- 2) Whether Petitioner should pay sales tax on the cost of telephone service it purchases for use in performing its StaffMonitor service.

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

Petitioner has developed and is marketing an employee time and attendance system monitoring service (StaffMonitor). This service tracks employees whose job tasks are performed in the field (away from a centralized location). The data gathered by the service may be integrated into a customer's scheduling, billing and payroll systems and can be adapted for use with almost any time and billing bookkeeping function required by a client. Petitioner's customer's employee calls Petitioner via the telephone using a toll-free number from the location where the employee is scheduled to work. Using the telephone key pad, the employee, in response to prompts, enters his or her employee ID, etc. Upon completion of the services performed, the employee again contacts Petitioner via telephone and, using the telephone key pad, the employee, in response to prompts, enters his or her employee ID and codes relating to the services performed at that location, etc. Petitioner's StaffMonitor service, in addition to collecting the data entered by the employee, notes the time that the employee checked in (began work) and checked out (completed work) and through a form of caller ID verifies the location at which the employee claims to be present and performing services.

StaffMonitor can be used to track an employee's attendance, time and tasks performed; and relate the attendance, time and tasks to the specific services to be billed by Petitioner's customer to its clients. The time information generated by the monitoring service may be incorporated into the customer's payroll time record keeping systems. Customers may also provide to Petitioner the expected schedule for the customer's employees which Petitioner then incorporates into the system.

The StaffMonitor service allows the customer to look up and track its employees on a real time basis. Customers access Petitioner's computer via the Internet. Using the information entered in Petitioner's computer (the expected schedule and the employees' telephone calls), the customer

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can verify whether its employees are responding to the customer's clients as scheduled and performing the scheduled services as anticipated. StaffMonitor will provide the customer a real time "alert" that an employee has not reported from the location of a scheduled appointment. Thus, presuming the customer's employees have called in to Petitioner, logging in and out from their scheduled appointments, the customer has real time access to the location and status of its employees. Missed appointments, tardiness, punctuality, amount of time expended in performing scheduled tasks and duties, performance of additional services, etc., can be noted, verified and quantified.

StaffMonitor is currently being used to service the home health care industry. It allows a home health care agency's staff coordinators to have real time access to pertinent information about each and every employee and patient appointment. This information provides the staff coordinators and the agency's management team the ability to proactively and efficiently manage its employees in the field. The information gathered through StaffMonitor may also be utilized by Petitioner's customer to generate both billing information and payroll information. The data may be downloaded by the customer (electronically over the Internet, by disc, etc.). The customer may directly incorporate the data for use in its payroll and billing systems. Petitioner, on the customer's behalf, will also deliver the data directly to customer designated independent payroll and billing companies.

Petitioner offers its customers the option of incorporating the customer's data into various standard reports and viewing screens, which reports and Internet viewing screens Petitioner may also customize for any particular customer.

Petitioner maintains ownership of all product related software and is responsible for the development, maintenance, enhancements, marketing, and support of the software, all of which is housed and maintained on Petitioner's premises.

Petitioner's charges to its customers for the above services are based on the amount charged for each incoming call to Petitioner by its telephone carrier plus a markup.

Applicable law and regulations

Section 1101(b)(13) of the Tax Law provides:

Telephone answering service. A service that consists of taking messages by telephone and transmitting such messages to the purchase of the service or at the purchaser's direction, but not including such service if it is merely an incidental element of a different or other service purchased by the customer.

Section 1105(a) of the Tax Law provides, in part:

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On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax . . . upon:

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

(b)(1) The receipts from every sale, other than sales for resale, of the following: (A) gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature; (B) telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service . . . ; (C) a telephone answering service; and (D) a prepaid telephone calling service.

Section 1105(c) of the Tax Law imposes sales tax on the receipts from the sale, except for resale, of certain enumerated services.

Section 526.5(e) of the Sales and Use Tax Regulations provides, in part:

Expenses. All expenses, including telephone and telegraph and other service charges, incurred by a vendor in making a sale, regardless of their taxable status and regardless of whether they are billed to a customer are not deductible from the receipts.

Opinion

Section 1105 of the Tax Law imposes a tax on the sales of all tangible personal property unless such property is specifically exempt or purchased by an exempt organization described in section 1116 of the Tax Law. Services are not subject to sales tax unless they are specifically enumerated as being subject to tax under section 1105 of the Tax Law.

Since the customer services provided by Petitioner do not constitute any of the enumerated services specified under section 1105 of the Tax Law, and Petitioner is not engaged in the sale of tangible personal property, the receipts from the sale of Petitioner's services are not subject to sales taxes imposed pursuant to section 1105 of the Tax Law.

Section 1105(b)(1)(C) of the Tax Law imposes sales tax on the receipts from every sale, other than a sale for resale, of "a telephone answering service." A telephone answering service is a service that consists of taking messages by telephone and transmitting such messages to the purchaser of the service or at the purchaser's direction, but not including such service if it is merely an incidental element of a different or other service purchased by the customer. (See section 1101(b)(13) of the Tax Law.)

While Petitioner's service does take messages from customers' employees, the taking of the messages is merely an incidental element of the service Petitioner's customers are purchasing. The

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customers are not hiring Petitioner to answer the phone but rather to provide verification that the customers' employees have arrived at and left the location of their scheduled appointment, and to record the services reported by the employees as having been performed at such locations. Petitioner's customers are purchasing a verified time and attendance employee tracking system which logs the off-site performance of activities by customers' employees. Through the customers' on-line Internet access to the time and attendance tracking system, the customers get real time access to the location and status of each of its employees individually. Petitioner's customers are immediately made aware of scheduled attendance problems by the alerts given over the Internet.

The essence of the transaction purchased by Petitioner's customers (attendance verification, tardiness alerts, etc.) goes beyond the mere answering of the customer's phone and forwarding of messages. Therefore, the services sold by Petitioner are something other than a telephone answering service subject to the tax imposed pursuant to section 1105(b) of the Tax Law.

Although Petitioner's charges to its customers are based on its cost of telephone service plus a markup, Petitioner does not sell telephone services to its customers. Petitioner merely uses the telephone contacts made by a customer with the StaffMonitor service to gauge the customer's usage of the service. Petitioner is the end user of the telephone services it purchases. Therefore, Petitioner's purchases of telephone services are not eligible for exclusion from tax as a sale for resale. See section 526.6(c) of the Sales and Use Tax Regulations. Petitioner's purchase of telephone service is an expense it incurs in providing its StaffMonitor service to its customers and charges made by the telephone service provider to Petitioner are subject to sales tax. See section 1105(b)(1)(B) of the Tax Law and section 526.5(e) of the Sales and Use Tax Regulations.

DATED: June 30, 2004

/s/
Jonathan Pessen
Tax Regulation Specialist IV
Technical Services Division

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