

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

TSB-A-06(17)S
Sales Tax
May 30, 2006

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S060109A

On January 9, 2006, the Department of Taxation and Finance received a Petition for Advisory Opinion from WebSide Story, Inc., 10182 Telesis Court, San Diego, CA 92121.

The issue raised by Petitioner, WebSide Story, Inc., is whether the fees charged to customers for Petitioner's HBX Web Analytics services and StatMarket services as described below are subject to sales tax.

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

Petitioner provides various on-demand digital marketing services including the following.

HBX Web Analytics

Petitioner provides a Web analytics service that allows its clients to obtain real-time information about online visitor and customer behavior. The data is collected by embedding Petitioner's HBX code into the client's HTML Web site code. This code routes data about a consumer's visit to a client's Web site to Petitioner's server. Petitioner's server then performs an analysis on the information received. The server and data center where the analysis is performed are located in San Diego, California. Petitioner provides over 500 statistics tailored to each client based on the path, patterns, and profiles of user behavior.

Clients are able to view the data analysis via a Web interface using identifications and passwords to log onto Petitioner's server and retrieve the data analysis specific to their Web sites. Clients can tailor reports according to their needs, and these reports can be viewed, printed and/or exported to the client's own spreadsheet program.

Examples of information that clients may obtain include the amount of time consumers view the client's Web site, which pages within a client's Web site consumers view, how consumers navigate a client's Web site, at what point consumers abandon the client's Web site, and where consumers come from (segmented by geography or Internet protocol).

StatMarket

StatMarket gathers statistics from millions of Internet users who visit any Web site that uses Petitioner's HBX technology and publishes these statistics through a convenient Web browser interface. StatMarket publishes aggregated data gathered from all Web sites using HBX Web Analytics. The information gathered is not specific to a client's specific Web site; rather it is a summary of the characteristics and activities of consumers on all clients' Web sites.

The information gathered is used by Web application design professionals to determine the number of consumers using certain Web browsers, screen resolutions, operating systems, screen colors, plug-ins, research referrers, ISPs, etc. This information allows a designer to tailor a Web site to appeal to the greatest number of consumers. StatMarket aggregates approximately 20 general statistics. No specific client data is displayed in StatMarket. The information is available to anyone subscribing to this service.

Like HBX Web Analytics, clients are able to view the aggregated data analysis via Web interface. They are given user identifications and passwords to log onto Petitioner’s server and retrieve the data analysis.

All of Petitioner’s services are charged to the clients on either a monthly, quarterly or annual basis.

Applicable law and regulations

Section 1105 of the Tax Law provides in part:

Imposition of sales tax--On and after June first, nineteen hundred seventy-one, 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, 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*, 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, and excluding meteorological services. (Emphasis added.)

* * *

(9)(i) The furnishing or provision of an entertainment service or of an information service (but not an information service subject to tax under paragraph one of this subdivision), which is furnished, provided, or delivered by means of telephony or telegraphy or telephone or telegraph service (whether intrastate or interstate) of whatever nature, such as entertainment or information services provided through 800 or 900

numbers or mass announcement services or interactive information network services. Provided, however, that in no event (i) shall the furnishing or provision of an information service be taxed under this paragraph unless it would otherwise be subject to taxation under paragraph one of this subdivision if it were furnished by printed . . . matter or by duplicating written or printed matter in any other manner. . . .

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

(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 has collected compiled or analyzed such information.

Opinion

Petitioner's HBX Web Analytics service provides clients with the ability to retrieve information about online visitor and customer behavior with regard to the client's own specific Web site. Petitioner's server collects and analyzes data to provide statistics based on path, patterns and profiles of user behaviors for the specific client Web site. Clients are able to view and retrieve the data analysis and develop reports via Petitioner's Web interface.

Services are not subject to sales tax unless they are specifically enumerated as being subject to tax under section 1105 of the Tax Law. Petitioner's HBX Web Analytics service of collecting and analyzing the client's Web site data to develop statistics and profiles of user behavior is informational in nature, and thus constitutes the rendering of an information service within the meaning and intent of section 1105(c)(1) of the Tax Law. Petitioner states that the data furnished to a client relates exclusively to the client's Web site. It appears that this

information is not substantially incorporated into reports furnished to other clients. Although aggregate data collected by HBX Web Analytics is used in Petitioner's StatMarket service, the client-specific data furnished to each HBX Web Analytics service subscriber is not included in the StatMarket service. The information Petitioner provides to the purchaser of the HBX Web Analytics service is personal or individual in nature, and provided therefore, that this data is not or may not be substantially incorporated in reports furnished to others, the charges for such service are excluded from tax. See section 1105(c)(1) of the Tax Law and section 527.3 of the Sales and Use Tax Regulations.

Petitioner's StatMarket service gathers statistics from the Internet users who visit any Web site that uses Petitioner's HBX technology. Unlike HBX Web Analytics, the StatMarket service aggregates data gathered for all Web sites using Petitioner's HBX technology. The information available through this service is a summary of the characteristics and activities of consumers on all Petitioner's clients' Web sites and is not specific to a particular client's Web site. Purchasers of this service are able to view the aggregated data analysis via Web interface. The information provided by StatMarket is commonly available to all purchasers using this service. The information is not personal or individual in nature and is substantially incorporated in reports furnished to other persons. Therefore, Petitioner's charges for StatMarket are charges for information services subject to sales tax pursuant to sections 1105(c)(1) and 1105(c)(9) of the Tax Law. See *Rich Products Corporation v Chu*, 132 AD2d 175; *Towne-Oller & Assoc. v State Tax Comm*, 120 AD2d 873.

DATED: May 30, 2006

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