

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petitions :
of :
EQUIFAX SERVICES, INC. : DECISION
for Revision of Determinations or for Refunds of : DTA NO. 800295, 800296
Sales and Use Taxes under Articles 28 and 29 of the : AND 800373
Tax Law for the Period June 1, 1977 through :
May 31, 1980. :
_____ :

Petitioner, Equifax Services, Inc., P.O. Box 4081, Atlanta, Georgia 30302, filed an exception to the determination of the Administrative Law Judge issued on October 1, 1987 with respect to its petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1977 through May 31, 1980 (File Nos. 800295, 800296 and 800373). Petitioner appeared by Bond, Schoeneck & King (Gary M. Clark, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Thomas C. Sacca, Esq., of counsel).

Both parties filed briefs on exception. Oral argument was not requested.

After reviewing the entire record in the matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether petitioner's activity of furnishing motor vehicle reports constitutes an information service within the meaning of Tax Law section 1105(c)(1).

II. Whether the motor vehicle reports furnished by petitioner are personal and individual in nature within the meaning of Tax Law section 1105(c)(1).

III. Whether petitioner acts in an agency or representative capacity within the meaning of Tax Law section 1105(c)(1) when it obtains motor vehicle reports.

IV. Whether the fees charged by the Department of Motor Vehicles, which are an element of cost in furnishing motor vehicle reports, were properly includible in taxable receipts.

FINDINGS OF FACT

We adopt the facts as stated in the Administrative Law Judge’s determination and such facts are incorporated herein by this reference. Such facts may be summarized as follows:

The Division of Taxation issued three notices of determination and demand for payment of sales and use taxes due to petitioner as follows:

<u>Date of Notice</u>	<u>Period</u>	<u>Tax</u>	<u>Interest</u>	<u>Total</u>
9/18/81	6/1/77-2/28/79	\$2,237,744.06	\$628,491.77	\$2,866,235.83
6/18/82	3/1/79-8/31/79	710,044.96	205,282.86	915,327.82
12/28/82	9/1/79-5/31/80	149,180.26	46,000.58	195,180.84

At the hearing, the Division of Taxation conceded that the tax assessed for the quarterly period ended November 30, 1979 was barred by the statute of limitations.

On December 15, 1982, the Division of Taxation issued two notices of assessment review to petitioner which reduced the amount of tax assessed as follows:

<u>Period</u>	<u>Adjusted Tax Due</u>	<u>Interest to 12/28/82</u>	<u>Total</u>
6/1/77-2/28/79	\$253,170.44	\$114,560.26	\$367,730.70
3/1/79-8/31/79	98,978.51	35,637.01	134,615.52

To the extent at issue herein, the assessment of sales and use taxes was premised upon the Division’s

position that petitioner is engaged in providing a taxable information service.

The petitioner, Equifax Services, Inc. (Equifax), acts as a service agency for 113 clients which are primarily insurance companies. Among the services which Equifax provides to its insurance company clients is the request on their behalf and delivery of motor vehicle report data (MVRs) from the Departments of Motor Vehicles (DMVS) in various states, including New York. A MVR is a report prepared by a DMV which contains information on the driving record of individual licensed drivers, information used by Equifax's insurance company clients as an underwriting tool for automobile policy writing.

In approximately 85 to 90 percent of the cases it handles, Equifax renders its MVR service to its client as follows: the client, from a terminal located on its own business premises, data-enters its MVR requests and transmits them over telephone lines to Equifax's Albany Office, where the requests are recorded onto magnetic tape. If the client requests a New York MVR, the tapes are hand-delivered to the New York DMV. If the client requests out-of-state MVRs, Equifax's Albany office transmits the requests to the appropriate out-of-state Equifax office for capture on magnetic tape and hand-delivery to the appropriate DMV. The DMVS, including New York, process the tapes and record the requested MVRs on magnetic tapes. Equifax picks up the tapes, separates the MVRs according to client, and transmits the MVRs via telephone lines to the terminal at the client's premises, where the client itself prints out the MVRs.

In the remaining 10 to 15 percent of the cases handled by Equifax, its clients request the MVRs through the mail or by telephone. In these instances, the information requested is entered on a magnetic tape and delivered to a DMV. If the client does not have a terminal, the MVR is delivered by courier or by mail.

The request records provided by Equifax's clients contain a "user's reference code" assigned by Equifax which identifies the insurance company that requests the MVR. In most states, including New York, the "user's reference code" identifies the requesting client to Equifax alone; the DMV does not know or ask to

know which specific insurance company has made the request, although the DMV is aware that the MVR is being requested by someone other than Equifax. The DMVs permit or require the inclusion of a “user’s reference code” in automated requests for MVRs and then echo the code back when recording MVRs in response to such requests.

Equifax does not compile, collect, or analyze any of the information contained in the MVR; it merely transmits to its clients the same MVR which DMV supplied in response to a client request presented by Equifax.

Equifax makes no use whatsoever of a MVR for its own account and never charged the same MVR to the account of more than one client. Equifax never, in the normal course of business, requests a MVR from a DMV without first being specifically requested to do so by a client.

Equifax retains no copies of, or information from, previously ordered MVRs and maintains no data base of information from which it could respond to a future request for a MVR by a client. Equifax is not permitted by its clients to divulge the information in the MVRs to third parties. Both Equifax and its clients viewed a MVR as owned by the client at the moment the MVR was received by Equifax on the client’s behalf. Both Equifax and its clients view the MVR service as a sophisticated courier or delivery service.

Equifax does not guarantee the accuracy of the MVR information, but merely guarantees that it is exactly the same information provided by the DMV in response to a request. If the customers of an insurance company complain that the MVR is erroneous, the insurance company advises its customers to contact the DMV and not Equifax. The insurance company clients indicate to insurance applicants and consumers that the DMVS, not Equifax, are the source of the MVRs.

All DMVs charge a registry fee for providing a MVR. Equifax advances the registry fee on behalf of its clients and bills the clients later for reimbursement.

Equifax maintains escrow accounts in its own names with DMVs for the advance of MVR registry fees on behalf of Equifax's clients. The DMVs draw on the accounts for the payment of such registry fees.

Equifax charges its clients a service fee, on a per unit basis, for the services of requesting and delivering a MVR on the client's behalf. The service fees and registry fees are separately stated in the bills to its clients. Equifax's clients consider themselves obligated to pay Equifax its service fee and to reimburse Equifax for the state registry fee upon making their requests to Equifax for a MVR, not upon delivery of the MVR.

If a requested MVR cannot be found, a DMV will generate what is known as a "no hit." A "no hit" is caused by the client providing erroneous information. If a client request presented by Equifax results in a "no hit" rather than receipt of a MVR, the client still pays Equifax its service fee and reimburses the registry fee.

The New York State DMV does not restrict access to MVRS; any person or entity may obtain a New York MVR on any New York driver. In a number of other states, approximately twenty in number, including California, Pennsylvania, Connecticut, Kansas, Washington, Georgia, North Carolina, Arkansas, and Virginia, access to MVRs is restricted. Typically, in those states where access to MVRs is restricted, the restrictions are based upon permissible purposes for obtaining the information, such as insurance underwriting purposes or other purposes allowed under the Federal Fair Credit Reporting Act. Additional restrictions include availability only to those who have obtained actual authorizations from consumers, prohibition of creating data base, and limitation on transfer or use of the MVRs to or by the client.

Equifax does not underwrite insurance. In order to request and receive MVRs in a restricted access state, Equifax must be acting solely on behalf of an insurance company, as an extension of the company itself.

In many restricted access states, Equifax is required, as a condition of being permitted to request MVRs for clients, to provide DMVs with written certification that Equifax is acting as the agent or representative of its insurance company clients in requesting MVRs or that Equifax is requesting MVRs

solely on behalf of such clients.

The written certifications by Equifax to DMVs that Equifax is acting as its client's agent or representative in requesting MVRs are made with the knowledge and approval of its clients.

In many restricted access states, the written certifications of Equifax to DMVs typically further certify that either Equifax or its client has authorization from the consumer to request the MVR; that the MVRs are requested for permissible purposes under the Federal Fair Credit Reporting Act; that Equifax will not create a data base from the MVRs; that Equifax is securing the MVRs solely on behalf of its clients; and that the MVRs will be transmitted to the clients alone and for their sole use.

In some restricted access states, e.g. , Georgia, Washington and North Carolina, the insurance company client itself must file a certification with the DMV authorizing release of MVRs to Equifax for delivery to the client.

In terms of the MVR service performed, Equifax does nothing different in interfacing with DMVs in restricted access states from what it does in states like New York, where access to MVRs is not restricted by the DMV; Equifax performs the exact same service in all states.

The agreements between Equifax and its clients for the MVR service were verbal.

Equifax, by its automated MVR system, actively facilitates transactions between DMVs and its clients, making it easier for DMVs to transmit and for clients to secure MVRs, by performing all the accounting and record keeping functions involved in paying the registry fees to DMVs for hundreds of insurance companies through one central escrow deposit account with each DMV rather than hundreds of such accounts.

In all states, whether access to MVRs is restricted or not, the permitted or required utilization of a "user's reference code" in DMV computer programming for requests presented by Equifax is an institutional recognition that Equifax is only acting on behalf of others, its clients, in requesting MVRs.

OPINION

The Administrative Law Judge held that petitioner provided an information service within the meaning of section 1105(c)(1) of the Tax Law, the information was not personal or individual in nature, the petitioner was not acting in a representative capacity and that the cost of the DMV registry fee was not excludable from the petitioner's receipt subject to tax. We affirm.

Section 1105(c)(1) of the Tax Law imposes a tax on:

“(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.”

Our analysis of whether the petitioner provides a taxable information service is guided by the decision in Allstate Insurance Co. v. State Tax Commn. (115 AD2d 83, affd 67 NY2d 999). The plaintiff in Allstate performed a service substantially identical to that of the petitioner. In a declaratory judgment action, Special Term ruled that the service of obtaining MVRS from DMV was not an information service within the meaning of section 1105(c)(1) of the Tax Law. The Appellate Division, Third Department, while agreeing that the dispositive issue was the taxability of the transactions between the plaintiff and its clients as a sale of the service of furnishing information, reversed, holding that the case was inappropriate for a declaratory judgment because it did not present solely a question of law. Accordingly, the Court held that the petitioner should have exhausted its administrative remedies (Allstate Insurance Co. v. State Tax Commn., supra, at 834). The court's conclusion that the service of obtaining MVRS was not, as a matter of law, excluded from section 1105(c)(1) was based on an analysis of the statute that:

“The words in the phrase ‘including the services of collecting, compiling or analyzing information’ are not used as words of limitation in section 1105(c)(1). Nothing in that section precludes its application to the situation presented here, where the information was collected from a single source.” (Allstate Insurance Co. v. State Tax Commn., supra, at 833.)

This statement of the court reveals that to furnish a taxable information service a vendor need not collect, compile or analyze information and that a taxable information service can derive all of its information from a single source.

Given this background, we conclude that the petitioner provided a taxable information service. The phrase “furnishing of information” if not limited to “collecting, compiling or analyzing” information is certainly broad enough to include the service performed by the petitioner. The MVRs were information and the petitioner furnished them to its clients. In fact, it would take a tortured reading of these words to find that they do not characterize petitioner’s services. In addition, under the court’s analysis, petitioner can be said to have collected information as it collected the MVRs from DMV.

The next issue is then, whether petitioner’s services were within the exclusion of section 1105(c)(1) for the “furnishing of information which is personal or individual in nature” The MVRs are public records maintained by a State agency available to the public. The fact that the information was so widely accessible and derived from a single source precluded the service from being within the personal or individual exclusion (Rich Products v. Chu, 132 AD2d 175). The Allstate decision notes this conclusion (Allstate Insurance Co. v. State Tax Commn., supra, at 834).

Next is the issue of whether any portion of petitioner’s receipts were within the section 1105(c) exclusion from tax for “agents or other persons acting in a representative capacity.”

The terms “agent” and “representative” are not defined in the Tax Law nor in regulation. Neither do the cases clearly elucidate the meaning of the two terms. In these circumstances, the words must be construed “as an ordinary person might understand them.” (Matter of Building Contractors Assn. v. Tully, 87

AD2d 909 [1981]; Matter of Business Statistics Organization, Inc v. Lazarus Joseph, Comptroller of the City of New York, 299 NY 443 [1949]; McKinney's Cons Laws of NY, Book 1, Statutes § 313a.)

The term "representative" has the broader meaning. New York Jurisprudence, Words and Phrases, defines "representative" as "an agent . . . or any other person empowered to act for another." (NY Jur 2d, Words & Phrases, p. 647 [emphasis added].) Dictionary definitions also include this concept of a representative as a person with delegated authority to act in the place of another. (See, eg., Webster's New Collegiate Dictionary 1000 [9th ed 1987]; Webster's International Dictionary 1926 (3rd ed 1981).)

With this definition, the question becomes whether petitioner's clients purchased an information service from petitioner, establishing only a vendor-purchaser relationship, or whether the clients paid and authorized petitioner to act in their place in obtaining such a service from DMV.

We conclude that petitioner was a vendor to its clients and not the representative of its clients.

A persuasive factor which indicates a vendor-purchaser relationship between petitioner and its clients was that petitioner, not the client, advanced the DMV registry fee and was obligated to pay DMV for the MVRs requested. The fund maintained by petitioner with DMV was to pay for all requests made by petitioner, and was not designated for requests of any particular client. Further, DMV did not know who the clients were since their identity was revealed only by the user's reference code on the request record utilized by petitioner for its purposes. The MVRs were delivered by DMV to the petitioner, not the clients. For each request, petitioner billed its clients a service fee and an amount that represented the cost of the DMV registry fee.

In contrast, there is nothing in the record that indicates that petitioner's clients actually authorized petitioner to act in their place before DMV.

The absence of evidence indicating that the clients authorized petitioner to act for them distinguishes

the instant case from Matter of Mertz v. State Tax Commn. (89 AD2d 396) where the court found that the taxpayers were acting in a representative capacity within the meaning of the 1105(c)(1) exclusion. The taxpayers in Mertz had been designated by contract as the “exclusive broker” of a publisher to obtain mailing lists for the publisher. The status of “exclusive broker” indicates that the publisher had empowered the taxpayers to act in its stead. This is a qualitatively different act than merely requesting information as is the case here.

The final issue is whether the portion of petitioner’s charge to its client which represented the amount petitioner paid to DMV is excluded from the receipt subject to tax. We find that it is not excluded because Tax Law § 1101(b)(3) defines receipt as “the charge for any service taxable under this article . . . without any deduction for expenses.” Further, the Commissioner of Taxation and Finance's regulations interpreting this statutory provision specifically provide that “[a]ll expenses, . . . 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.” (20 NYCRR 526.5[e].)

The reasonableness of this regulation has already been upheld in Matter of Penfold v. State Tax Commn. (114 AD2d 696) and we find the regulation and the decision dispositive of the instant issue.

Petitioner argues that this amount of the DMV registry fee is not includible in the taxable receipt because of the exemption at Tax Law § 1116(a) for sales by New York State or its agencies. This exemption is inapplicable to the instant case because it applies only where the State or its agencies is the vendor. Here the petitioner was the vendor of the service so the exemption has no application.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner, Equifax Services, Inc. . is in all respects denied;
2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Equifax Services, Inc. is granted to the extent indicated in conclusions of law “F” and “G” of such determination and except as granted is in all other respects denied and the Notice of Determination and Demand issued on December 28, 1982 is modified as indicated in such conclusions of law “F” and “G” and except as modified the Notices of Determination and Demand issued on September 18, 1981, June 18, 1982 and December 28, 1982 are in all other respects sustained.

DATED: Albany, New York
JUL 21, 1988

John P. Dugan
President

Francis R. Koenig
Commissioner