STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition<br>of<br>**HOOPER HOLMES, INC.**<br>for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 1977 through November 30, 1980. | DECISION<br>DTA #800341 |

Petitioner, Hooper Holmes, Inc., P.O. Box 428, Basking Ridge, New Jersey 07920, filed an exception to the determination of the Administrative Law Judge issued on October 1, 1987 with respect to its petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1977 through November 30, 1980 (File No. 800341). Petitioner appeared by Arnold B. Panzer, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Thomas C. Sacca, Esq., of counsel).

Both parties filed briefs, oral argument was not requested.

After reviewing the entire record in this 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 § 1105(c)(1).

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

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

IV. Whether all portions of the payments received by petitioner are subject to sales and use tax.

## *FINDINGS OF FACT*

We find the facts as stated in the Administrative Law Judge's determination except that we modify finding of fact "20" of such determination to read as follows:

"Petitioner did not add, subtract or in any way alter the information contained in MVRs received from the DMV for delivery to customers. MVRs received from the DMV on magnetic tape were printed out by petitioner for delivery to customers in exactly the same format as those printed out by the DMV."

The remaining facts are summarized as follows:

On April 29, 1981 the Division of Taxation issued to petitioner, Hooper Holmes, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period December 1, 1977 through November 30, 1980 in the amount of $162,063.61 plus interest of $21,769.98 for a total amount due of $183,833.59. The notice stated that petitioner's payment of $14,470.49 which was remitted with the sales tax return for the period ended December 20, 1980 would be applied to the assessment.

The sales and use tax asserted to be due was premised upon the receipts petitioner received from the providing of motor vehicle reports.

Petitioner, Hooper Holmes, Inc., is a corporation engaged in, among other things, the service of obtaining on behalf and at the direction of its various clients, specified motor vehicle reports ("MVRs") issued by the New York State Department of Motor Vehicles ("DMV").

A motor vehicle report provides information concerning the driving record of a particular motorist, including a record of accidents and convictions for moving violations.

MVRs are chiefly of interest to automobile insurance brokers, agents and underwriters, who use the information in determining whether, or at what premium, to issue an insurance policy to a particular motorist. However, MVRs are available to any person upon request to the DMV and the payment of the statutory fee provided therefor.

MVRs are created upon request by the DMV's central computer, located in Albany, on the basis of information stored and maintained in its computerized files.

The MVRs furnished by the DMV are either printed in hard copy or recorded on some machine-readable medium, depending upon the preference specified at the time of the request. If reports are requested on a machine-readable medium, the medium on which the report will be recorded must be supplied to the DMV by the person requesting the report. The DMV's fee is the same regardless of whether the MVRs are furnished in hard copy or machine-readable form.

The MVRs furnished by the DMV made provision for a "client request code" which was provided to the DMV by petitioner together with each particular request. The client request code enabled petitioner to identify the client on whose behalf the report was being requested. The client request code was reproduced on the face of the report furnished by the DMV. The DMV itself, however, would not ordinarily know or be concerned about the actual identity of the client for whom the report was being ordered.

During the period in question, all reports ordered by petitioner from the DMV included a client request code identifying the particular client on whose behalf each MVR was requested. They also contain a user code which alerted the DMV as to who requested the MVR.

The fee for each MVR requested from the DMV was $2.00 for requests submitted in written form, and $1.00 for requests submitted on machine-readable media which could be entered directly into the DMV's computer, so as to conserve the time required to process the request by the DMV's employees. Department of Motor Vehicle regulations required, however, that any person submitting requests for MVRs on machine-readable media maintain an account with the DMV and deposit an amount equal to the estimated number of MVRS to be ordered by it over the following two months. This account was automatically debited every time an MVR was issued. The amount required to be maintained in such accounts was adjusted at the end of each month to reflect the actual number of MVRs ordered in such period, and the user was required to deposit the difference between such amount and the balance remaining on account.

Throughout the period in question, all requests for MVRs submitted by petitioner on behalf of its clients were submitted on reels of computer-readable magnetic tape, for which its account was charged $1.00 per MVR. Upon delivery of the MVR, Hooper billed the client requesting the report an amount equal to the amount paid the DMV to obtain the report together with a charge for its services, which varied from client to client depending on the expense involved in fulfilling the request. In the case of Allstate Insurance Company, the service charge per report was approximately $.40.

All clients' requests for MVRs were collected by petitioner at its central office in Albany. In addition to the Albany office, petitioner maintained branch offices in other cities within New York State. Further, petitioner maintained computer terminals and employees directly on the premises of some of its major users, including an Allstate Insurance Company office on Long Island.

All clients requesting MVRs through petitioner were required to furnish the name of the motorist in question and all additional information, such as the address or license number, needed to enable the DMV to identify the motorist for whom an MVR was being sought. Petitioner added no additional information to that provided by the client when submitting the request to the DMV on the client's behalf.

Requests for MVRs were received by petitioner in various ways. Many requests were received at petitioner's central or branch offices by mail or by phone. Requests were also received by employees located on a client's premises. In all cases, the customer-furnished information was "keyed" into a terminal, along with the particular code for the client requesting the report. This converted the information into the request which was recorded onto a computer tape located in petitioner's Albany office. Requests processed at terminals located in Hooper branch offices and those processed on the premises of a client were transmitted by wire to petitioner's Albany office, where they were collected on computer tape and combined with requests processed at the Albany office itself. The tape or tapes on which client requests had been collected were physically delivered to the DMV in Albany each day.

The MVRs created by the DMV's computer the evening before were picked up by petitioner each day at the DMV's Albany office. These MVRs were either in printed, legible form or recorded on a reel of computer tape supplied by petitioner, depending upon petitioner's prior instructions. The DMV charged $1.00 for issuing MVRs, regardless of whether the MVR was delivered in printed form or recorded on machine-readable media.

The form in which petitioner decided to receive MVRs depended upon the client's location and whether or not a terminal maintained by petitioner was located on the client's premises. With respect to MVRs to be delivered to customers located in the greater Albany area, other than customers having a terminal maintained by petitioner located on its premises, petitioner would generally elect to receive the MVR in printed form and physically deliver the report to the client in precisely the form received.

In the case of other clients, petitioner would generally elect to receive the report on magnetic tape. In such cases, petitioner would feed the tape into the terminal at its Albany office, and transmit the MVRs recorded thereon by wire to the terminal maintained by petitioner located on or closest to the client's actual location. The MVR so transmitted would then be automatically printed out at the terminal in question. The printed MVR was then sent to the client by an employee of petitioner. This means of delivery was used by petitioner solely to avoid the time and expense involved in shipping paper reports from Albany to clients in other parts of the State.

Petitioner maintained no files of MVRs or MVR information whatsoever, nor did it make any incidental use of any of the information either supplied by its customers or contained in the MVRs. Petitioner requested a separate MVR from the DMV in response to each customer request therefor, regardless of whether more than one customer had ordered an MVR with respect to the same motorist on the same day. Petitioner did not make any effort to determine whether such an event had occurred, and thus had no idea of the frequency with which such multiple orders might have occurred.

Petitioner made no representations to customers with regard to the accuracy of the information contained in the MVRs. Petitioner's clients all understood that the MVRs furnished by it were reports furnished by the DMV and not by petitioner. Clients did not regard petitioner as anything but a convenient means for obtaining such reports, and did not consider petitioner to be responsible for the accuracy of the information contained therein. In instances in which motorists complained to petitioner's clients that information contained in an MVR was not correct, such persons were referred to the DMV, and not to petitioner.

Although there was no written contract or customer agreements between petitioner and any of its clients during the taxable periods in issue, petitioner's clients understood that they were obligated to pay for the costs and expenses of obtaining an MVR from the time they made their request for the MVR. MVRs ordered through petitioner were considered as client's property from the moment the MVRs were delivered to petitioner by the DMV.

Although not contractually bound to do so, clients ordering MVRs through petitioner during the period in question obtained all of their New York State MVRs through petitioner, despite the existence of several competing services.

Petitioner's clients recognized that they were capable, if they so desired, of obtaining any or all their MVRs directly from the DMV, either in written or machine-readable form, using their own employees and equipment. Clients were also aware that, if they did so, no sales tax would be imposed on the fee paid to the DMV for the MVR.

Clients regarded petitioner's activities in obtaining MVRs from the DMV on their behalf as being performed in a purely agency or representative capacity. They did not consider themselves to be purchasing MVRs or information from petitioner.

***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:
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> (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). Petitioner, a plaintiff in Allstate sought a declaratory ruling that its service of obtaining MVRs from DMV was not an information service within the meaning of section 1105(c)(1) of the Tax Law. Special Term ruled in petitioner's favor. The Appellate Division, Third Department, while agreeing that the dispositive issue was the taxability of the transactions between 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 I, 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, e.g., 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 client request 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, Hooper Holmes, Inc., is granted to the extent that finding of fact "20" of the Administrative Law Judge's determination is modified as set forth above, and except as so granted is in all other respects denied;

2. The determination of the Administrative Law Judge is modified as indicated in paragraph "1" above, and except as so modified is in all other respects affirmed;

3. The petition of Hooper Holmes, Inc. is denied and the Notice of Determination and Demand issued on April 29, 1981 is sustained.

Dated: Albany, New York
July 21, 1988

/s/ John P. Dugan
John P. Dugan
President

/s/Francis R.Koenig
Francis R. Koenig
Commissioner