

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
SSOV '81 LTD. :
D/B/A PEOPLE RESOURCES :
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 March 1, 1984 through March 31, 1992. :

DECISION
DTA Nos. 810966
and 810967

In the Matter of the Petition :
of :
SUSAN A. WALLACE :
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 March 1, 1984 through March 31, 1992. :

Petitioners SSOV '81 Ltd. d/b/a People Resources and Susan A. Wallace, c/o Bragar & Wexler, P.C., 900 Third Avenue, New York, New York 10002, filed an exception to the determination of the Administrative Law Judge issued on March 31, 1994. Petitioners appeared by Bragar & Wexler, P.C. (Raymond A. Bragar, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (John E. Matthews, Esq., of counsel). Petitioners filed a brief in support of their exception and the Division of Taxation filed a brief in opposition. Petitioners filed a reply brief in response to the Division of Taxation's brief in opposition. Oral argument was heard on July 21, 1994, which date began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether people Resources provided taxable information services to its members within the meaning of Tax Law § 1105(c)(1).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

The Division of Taxation ("Division") and petitioners agreed to a Stipulation of Facts which has been incorporated into the following Findings of Fact.

During the period at issue, petitioner SSOV '81 Ltd. was a corporation doing business in the State of New York under the name of People Resources. People Resources was located at 119 West 57th Street, New York, New York. The company ceased doing business in March 1992.

Susan A. Wallace was sole owner and president of People Resources through the period at issue.

People Resources was variously described in its Federal and State tax returns as a "social club" or "private club for singles". People Resources was described in its advertising as "the private club for remarkable single people." It had a membership in excess of 2,300 single adults.

The company's purpose was to enable its members to meet with other members of their own choosing. Members submitted a written resumé. Review of a sample resumé reveals the following:

- (a) Only the member's first name was listed, as well as the member number and cassette number;
- (b) The form requested the following background information: height; weight; date of birth; color of eyes; color of hair; current occupation; previous occupation, if any; schools attended and area of concentration or specialty; childhood place of residence and length of time in which the member had lived in his or her present area; the town/city of

employment; town/city of residence; marital status; number of children, if any, and the number living at home;

(c) The member was requested to express his or her feelings about himself or herself and/or other people he or she might meet regarding: smoking; drinking; drugs; religion;

(d) The member was asked to describe his or her greatest assets;

(e) The member was asked to give a verbal photograph of how he or she saw himself or herself (i.e., personality, beliefs, values, etc.);

(f) The member was asked to describe the person he or she would like to meet;

(g) The member was asked to name two or three people whom he or she admired;

(h) The member was asked to state what three wishes he or she would like granted; and

(i) The member could add anything else he or she wished.

Members were also photographed, and participated in a two- or three-minute interview conducted and taped by the company. In this process some members were counseled as to how to maximize their presentation of themselves. The member's picture was attached to his or her resumé, which became the member's biography. The member's biography and videotaped interview constituted the "member's profile". The members' profiles were placed in the member profile library for other members to view. The member profile library was utilized by People Resources' members to meet each other.

Each member had the opportunity to review the other members' profiles and issue invitations to meet such other members as they selected. When members received an invitation, they reviewed the profile of the inviter and decided whether to accept or decline. When an invitation was accepted, the accepting member completed the invitation by setting forth his or her full name and telephone number. People Resources notified the accepting member orally of the inviting member's full name and telephone number. Members could telephone the office of People Resources to be advised if invitations had been received or completed (accepted).

Members could also telephone and obtain the full names and telephone numbers of other members who had accepted their invitations.

Individuals, when they executed the membership agreement, could give People Resources permission to show their profile and/or videotape for in-house training and selling, publicity purposes and to prospective members.

On May 29, 1990, petitioners' former counsel received a letter from Arthur Proper, of the Department of Taxation and Finance, Technical Services Bureau, Sales Tax Instructions and Interpretations Unit. Mr. Proper's letter was in response to counsel's inquiry as to whether or not People Resources was required to collect sales tax on the service of providing a forum within which people may choose each other based on the information provided by the individuals themselves. Although it was determined that People Resources was in the business of collecting, compiling or analyzing information which constituted an information service within the meaning of 20 NYCRR 527.3, because the information offered by it was limited to oral responses, the service was considered exempt from sales or use tax. Since oral reports were exempt from sales tax, the issue of whether the information provided was personal and individual in nature was not addressed.

On January 11, 1990, the Division initiated an audit of People Resources by sending an appointment letter and request for records to the taxpayer for the period June 1, 1986 to November 30, 1989. Subsequently, the audit period was extended, and a second request for records was sent to People Resources for the period March 1, 1984 through February 28, 1991.

People Resources had no sales invoices, sales day books or register tapes. All receipts from sales were entered in the cash receipts journal. Petitioner's accountant prepared Federal income tax returns from the cash receipts journal. All of petitioner's sales for the audit period were made in New York City. A detailed analysis of the cash receipts journal for the audit period March 1, 1984 to February 28, 1991 resulted in additional taxable sales of \$7,363,490.30 and additional tax due of \$607,487.95. Invoices for the purchases of fixed assets were examined in

detail and it was determined that additional use tax of \$3,558.47 was due on purchases of \$43,132.97.

The auditor determined that People Resources was in the business of providing dating referral services to its members for fees. People Resources disagreed and filed for an Advisory Opinion (Petition No. S910103A).

On March 18, 1991, the Division issued an Advisory Opinion (TSB-A-91[28]S) to People Resources which concluded that it was providing an information service subject to sales tax.

Prior to September 1990, People Resources did not pay sales taxes on its sales receipts. People Resources began reporting and paying sales tax on its sales receipts for the tax quarter beginning September 1, 1990. For the period September 1990 through March 1992, People Resources paid sales taxes of \$142,796.50 on its receipts and was given credit for such payments.

On April 10, 1992, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (L-005468251-1) to SSOV '81 Ltd. d/b/a People Resources assessing sales and use taxes in the amount of \$611,046.42, plus minimum interest, for the period March 1, 1984 through February 28, 1991. On April 10, 1992, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Susan Wallace, as officer, assessing sales and use taxes in the amount of \$611,046.92, plus interest, for the same period.¹

On July 1, 1992, People Resources and Susan Wallace filed petitions for redetermination of both notices of determination.

On August 31, 1992, the Division answered both petitions.

On September 14, 1992, People Resources applied for a refund of sales and use taxes of \$142,796.50 paid for the period September 1990 through February 1992.

¹The parties stipulated that the notice of determination to Susan Wallace was issued April 10, 1992, although the actual date on the notice is May 26, 1992.

The Division did not respond to the refund claim and, on June 21, 1993, petitioners and the Division stipulated that both petitions were amended to include an appeal of the denial of the claimed refund. The parties agreed that the refund claim and the original petitions contain the identical issues and should be consolidated.

On August 19, 1993, the parties entered into an amended Stipulation of Facts wherein the period of the refund claim was stipulated to be September 1990 through March 1992, and the period in issue is March 1, 1984 through March 31, 1992.

The Division's answer, dated August 31, 1992, is deemed the answer to the two petitions, as amended.

OPINION

The Administrative Law Judge determined that People Resources' activities constituted an information service. The Administrative Law Judge found that for each customer, a resume, photograph and videotape were compiled by petitioners to create the member profile. This profile, the Administrative Law Judge concluded, was a report within the meaning of Tax Law § 1105(c)(1) and the member received a report every time another member's profile was reviewed. Relying on Matter of Murphy Heating Serv. v. Chu (124 AD2d 907, 508 NYS2d 323), the Administrative Law Judge noted that it was not necessary for members to receive a written report in order for the transfer to be taxable, but rather the member's reading of the autobiographies and the viewing of the videotapes were sufficient.

The Administrative Law Judge also rejected petitioners' alternative claim that, if it was determined that People Resources was an information service, the information provided to its members was personal and was not substantially incorporated in reports furnished to others. Relying on case law, the Administrative Law Judge determined that, contrary to petitioners' claim, it is the uniqueness of the service provided to the customer, not the "private" nature of the underlying subject matter, which determines whether information is "personal or individual." Applying this principle to the facts, the Administrative Law Judge found that because all

members had unlimited access to the profile library, the information was non-confidential and widely accessible.

Even if the information was personal or individual, the Administrative Law Judge concluded that the service was still subject to tax because the second requirement of the exclusion was not met. The statute provides that where information is substantially incorporated into a subsequent report furnished to others, the service cannot come within the exclusion. The Administrative Law Judge found that "[a]s long as the profiles were housed in the library, there was the potential that they might be viewed a number of times" (Determination, conclusion of law "D"). As a result, the Administrative Law Judge determined that information furnished to one viewing member was always incorporated in subsequent reports to others.

As a final note, the Administrative Law Judge found petitioners' dating service to be analogous to a line of New York cases that held multiple listing services to be taxable information services.

Petitioners, on exception, point out that the Administrative Law Judge did not address whether the applicability of the sales tax depends on if the alleged vendor's primary function is to collect and disseminate information. Petitioners contend that "People Resources collected fees for membership in a group of persons that were interested in developing relationships with individuals of similar backgrounds" (Petitioners' brief on exception, p. 8). Petitioners also note "[t]his process was enhanced by providing the members with the member profile library consisting of member-filled-out questionnaires, [reference omitted] photos and only video" (Petitioners' brief on exception, p. 8).

Petitioners assert that the primary function of People Resources was not to collect and disseminate information, but rather to allow individuals to meet others and date and that this function distinguishes the instant matter from the multiple listing cases cited by the Administrative Law Judge, since those services' sole function was to provide information. Petitioners also analogize members of People Resources to home-buyers who go to realtors to

look at the multiple listings of homes. Petitioners point out that real estate commissions are not subject to tax simply because a home buyer used multiple listings to facilitate a purchase.

Petitioners state that:

"[j]ust as the home buyers use the multiple listing service to see what houses they wish to look at and thereafter purchase, members in People Resources come to the library to look at the profiles to see which people they wish to thereafter meet" (Petitioners' brief on exception, p. 10).

Petitioners also argue that there was no compilation, collection or analysis of data. Relying on Matter of Finserv Computer Corp. v. Tully (94 AD2d 197, 463 NYS2d 923, affd 61 NY2d 947, 475 NYS2d 279), petitioners argue the mere filling out of a form without any analysis or editing is not a taxable event. Petitioners further note that the data received by petitioners was used in the raw form it was received from its customers which does not even rise to the level of reformatting, a process that the Court in Finserv rejected as taxable.

Petitioners contend that even if it is determined that information was being sold, the subject service was not taxable because reports were not furnished. Petitioners argue that the Administrative Law Judge incorrectly relied on Matter of Murphy Heating Serv. v. Chu (*supra*) as in that case a report (i.e. the computer screen) was prepared from a common database while in the instant matter there is only the information contained in the profile and no report in any form.

Petitioners' final argument is that if the sale of memberships is deemed to be the sale of information services, petitioners are entitled to an exclusion because the information is personal which, they contend, relates to the substance of the information. Petitioners contend that the Division and the Administrative Law Judge misinterpret the statute and cases by arguing that the profiles must be customized for each member in order to be excluded.

In support of their position, petitioners rely on Matter of Allstate Ins. Co. v. Tax Commn. (115 AD2d 831, 495 NYS2d 789, affd 67 NY2d 999, 502 NYS2d 1004). In Allstate, the Court noted that the subject information was not personal because it was filed with a governmental agency as a public record to which there was unlimited public access. Petitioners argue Allstate

logically indicates that whether information is "personal" involves a consideration of whether the substance of the information is "private." Petitioners further argue that the Administrative Law Judge erred in determining that the information was not personal because of the access afforded all members to the library. Petitioners argue that access to the library was restricted to members only which is distinct from public access.

Petitioners also argue that the second part of the exclusion has been met because information had not been substantially incorporated into reports furnished to others. Petitioners argue that the Administrative Law Judge incorrectly concludes that the profiles are all three of: 1) information; 2) the initial report; and 3) the report furnished to others.

The Division, on exception, urges the affirmation of the Administrative Law Judge's determination in all respects. Relying on Matter of Finserv Computer Corp. v. Tully (*supra*) and Matter of ADP Automotive Claims Serv. v. Tax Appeals Tribunal (188 AD2d 245, 594 NYS2d 96, *lv denied* 82 NY2d 655, 602 NYS2d 804), the Division contends that the term "information service" means supplying a customer with information that he or she did not previously possess. The Division argues that information is being provided to customers via the member profiles which constitute reports.

The Division's position is that it is irrelevant that the purpose of petitioners' business is to facilitate dating, it is the means which is controlling. The Division further argues that petitioners' business purpose could not have been realized without the particular means employed.

Relying on Allstate, the Division argues the subject service is taxable because the information provided is "both valuable and new." The Division goes on to argue that petitioners collected information from its customers. The Division contends that information was collected and compiled when response filled resumes were received from the customers and incorporated into profiles for viewing in the library to be "provided to others in a systematic fashion" (Division's brief in opposition, p. 11). The Division further contends that a report is furnished

whenever a profile is viewed. The Division argues that the information exists prior to being placed on the resume but it is the act of recording the information in a format designed by petitioners and the subsequent availability of this recorded information that constitutes a report. The Division also contends that a report is furnished every time the videotaped portion of the interview is examined.

The Division also argues that petitioner is not entitled to the exclusion. Relying on Matter of New York Life Ins. Co. v. State Tax Commn. (80 AD2d 675, 436 NYS2d 380, affd sub nom. Matter of Metropolitan Life Ins. Co. v. State Tax Commn., 55 NY2d 758, 447 NYS2d 245), the Division contends the terms "personal or individual language" refers to the service provided and not the underlying subject matter. The Division further argues that New York Life also establishes that the terms "personal" and "individual" are interchangeable. Citing case law, the Division further argues that the fact the information comes from the member library, which is a common source or data repository, means that petitioners are not entitled to an exclusion from tax.

The Division further contends that petitioners have failed to meet the second part of the exclusion requirement, that the information is not substantially incorporated in reports furnished to others because each report may be viewed by more than one member.

The Division concludes by arguing that the Administrative Law Judge correctly noted that the instant matter is analogous to those cases finding multiple listing services subject to tax. The Division argues that petitioners' members closely resemble brokers who contribute data on the houses for which he or she is the listing broker in return for access to all broker listings. This process allows brokers to review other brokers' listings of homes.

In petitioners' reply brief, they reiterate that the purpose of the service was to provide people with the opportunity to meet others. Petitioners also point out that the brokers in the multiple listing cases purchase information just for the sake of purchasing the information and using it with their customers while petitioners' customers come to look at profiles. Petitioners

note that the realtors' primary purpose is to sell houses and not disseminate information which is analogous to People Resources' effort to arrange dates.

Petitioners, as a final point, argue the Division presented a flawed analysis of New York Life. Petitioners contend that the Court recognized "personal" and "confidential" were two distinct terms because the substance of the reports were "personal" but they were "individual" also because they were tailored to the needs of the customers.

We begin by addressing petitioners' claim that People Resources' primary function was not to furnish information.

Tax Law § 1105(c)(1) imposes a tax on receipts from the "furnishing of information by printed, mimeographed or multigraphed matter . . . including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons." The statute also provides an exclusion for 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" (Tax Law § 1105(c)(1)).

We agree with petitioners that People Resources' primary function was not to provide information services and we reverse the determination of the Administrative Law Judge for the reasons stated herein.

The term "information service" has been interpreted to mean "the sale of the service of furnishing information by a business whose function it is to collect and disseminate information which is taxable under Tax Law § 1105(c)(1) and not the mere sale of information" (Matter of Audell Petroleum v. New York State Tax Commn., 69 NY2d 818, 513 NYS2d 962, 963, emphasis added; see, Matter of New York Life Ins. Co. v. State Tax Commn., *supra*). In deciding whether the function of petitioners' business was to sell information services, we are guided by New York case law addressing the imposition of sales and use tax on services (Matter of Penfold v. State Tax Commn., 114 AD2d 696, 494 NYS2d 552; Matter of Building Contrs. Assoc. v. Tully, 87 AD2d 909, 449 NYS2d 547; Matter of Woolworth Co., Tax Appeals

Tribunal, December 1, 1994). In order to determine a service's taxability, the analysis employed by the New York courts and the Tax Appeals Tribunal focuses on the service in its entirety, as opposed to reviewing the service by components or by the means in which the service is effectuated.

For example, in Matter of Penfold v. State Tax Commn. (supra), the petitioner was engaged in the business of furnishing refuse removal services. The refuse was disposed of at various landfills for which a dumping fee was charged by the landfill owners. The dumping fee was separately itemized on the bill the petitioners sent to its customers and sales tax was not charged on this portion of the bill. The Division determined that, in addition to the taxability of the removal service, the fee charged for dumping was also taxable. The petitioners argued that this was a separate, nontaxable service. The Court rejected the taxpayer's argument, holding that only one service, i.e., the removal of refuse, was purchased. The Court went on to find that the disposal of that refuse was an integral aspect of that service and could not be reasonably reckoned as separate.

In Matter of Woolworth Co. (supra), the principle of looking at a transaction as a whole to determine taxability was applied to determine whether certain services could be separated out as the performance of maintenance and repairs or were they integral parts of capital improvements. The Tax Appeals Tribunal sustained the Administrative Law Judge's determination that while different tasks performed during the renovation of a building could reasonably be concluded to be repairs and maintenance, where these services are part of a major renovation project they must be viewed in the entire context of the service and not in isolation.

In Matter of Building Contrs. Assoc. v. Tully (supra), the issue was whether debris removal from a construction site could be treated as a separate taxable trash removal service or was exempt as part of a capital improvement service. The Court noted that the analysis turns on the "end result" of the subject service. The Court concluded that because the completion of a

capital improvement project generally cannot be accomplished without removal of construction and demolition debris, the subject services then fall within the "end result" test as exempt.

Consequently, we cannot accept the Division's argument that the means by which a service is provided is the controlling factor in determining whether the subject service is taxable. To neglect the primary function of petitioners' business in order to dissect the service it provides into what appear to be taxable events² stretches the application of Article 28 far beyond that contemplated by the Legislature.

Applying the above principles to the matter before us, the service at issue cannot rationally be taxed as a separate service. There can be no dispute that the function of the service provided by petitioners was to allow members to meet others. Because this is not a service enumerated in section 1105(c) of the Tax Law, it is not subject to the sales tax imposed by this section (see, Matter of Building Contrs. Assoc. v. Tully, supra). Further, we have in the past recognized that where a service is not so enumerated, the mere fact information is transferred will not create a taxable event (Matter of Rochester Gas & Elec. Corp., Tax Appeals Tribunal, January 4, 1991). The providing of member profiles to assist members in finding dates is merely a component of the overall service. A review of the facts establishes this point.

In addition to the submission of the member profiles, in furtherance of the primary purpose of fostering dating among members, People Resources would counsel members as to how to maximize their presentation of themselves if they so requested. When a member sought a date with another member, People Resources would pass on their full name and telephone number to the member with whom a date was sought. People Resources would also convey a response to those members who had extended invitations, as well as full names and telephone numbers of those accepting.

²Our decision should by no means be construed as saying that were it not for the primary function of People Resources, this would have otherwise been a taxable service.

As a result, we find the Administrative Law Judge erred in failing to address what we find is a threshold issue in this matter; was the sale of information merely a component of People Resources' business scheme or its primary function. We conclude that this principle sets this matter apart from the decisions relied on by the Division and the Administrative Law Judge (see, Matter of ADP Automotive Claims Serv. v. Tax Appeals Tribunal, supra; Matter of Allstate Ins. Co. v. Tax Commn., supra). In ADP Automotive Claims, the primary function of the petitioner was to provide computer generated repair cost estimates to its customers from an in house database. In Allstate, the petitioner's business function was to furnish motor vehicle reports on potential insureds which were obtained from the Department of Motor Vehicles, to automobile liability insurers. In both cases, the taxpayers' business was selling information services, as opposed to supplying information as a component of another service.

As a final matter, we wish to comment on the Division's contention, made for the first time in its opposition brief on exception, that if People Resources is found not to be engaged in the sale of information services, then, in the alternative, the membership fees must be taxable as dues paid to a social club.

While we have in the past held that after the record is closed a party may raise new legal issues, the same cannot be done for new issues of fact (Matter of Howard Enters., Tax Appeals Tribunal, August 4, 1994). To do otherwise would visit prejudice upon the opposing party by depriving them of the opportunity to submit evidence on the issue (Matter of Howard Enters., supra).

In order to determine whether petitioners operated a social club requires factual findings on a topic that petitioners did not have an opportunity to address with the submission of evidence (see, 20 NYCRR 527.11[b][5] and [6] for the definitions of "club or organization" and "social clubs"). Consequently, we find the Division is precluded from raising what is a factual issue on exception.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of SSOV '81 Ltd. d/b/a People Resources and Susan A. Wallace is granted;
2. The determination of the Administrative Law Judge is reversed;
3. The petitions of SSOV '81 Ltd. d/b/a People Resources and Susan A. Wallace are granted; and
4. The notices of determination and demand for payment of sales and use tax due dated April 10, 1992 are cancelled.

DATED: Troy, New York
January 19, 1995

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

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