

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
DZ BANK	:	DECISION
	:	DTA NO. 821251
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 April 1, 2000 through	:	
June 30, 2003.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on May 1, 2008 with respect to the petition of DZ Bank. Petitioner appeared by KPMG LLP (Arthur C.E. Burkard, Esq., and Russell D. Levitt, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Michael J. Hall and James Della Porta, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a brief in opposition and the Division of Taxation filed a reply brief. Oral argument, at the request of the Division of Taxation, was held on November 12, 2008 in New York, New York.

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

ISSUE

Whether Credit Edge is a taxable information service pursuant to Tax Law § 1105(c).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "15," which has been modified. The modified finding of fact and the Administrative Law Judge's findings of fact are set forth below.

On January 12, 2004, petitioner, DZ Bank, filed a claim for credit or refund of sales and use taxes paid in the amount of \$171,843.66. Attached to the claim were purchase invoices from Moody's/KMV (KMV) which establish the amount of sales tax paid. The invoices indicate that petitioner had purchased the following products from KMV: Credit Monitor, Portfolio Manager, Private Firm Model and Credit Edge. According to the claim, KMV had been the subject of a sales tax audit by the State of New York, which had represented that certain products, including those listed on the purchase invoices, were not subject to the imposition of sales and use taxes.

By letter dated February 18, 2005, the Division of Taxation (Division) denied petitioner's claim for refund in full. The refund denial provided, in part, as follows:

Section 1105(c)(1) provides for the imposition of sales tax on information services, except where the information furnished is personal and individual in nature. Section 1105(a) of the Tax Law also provides for the imposition of sales tax on the sale of tangible personal property except as otherwise provided. The term "tangible personal property" is defined in Section 1101(b)(6) to include pre-written software.

The "KMV Subscription Agreement" provided in support of your refund application provides for the installation and use by the subscriber of pre-written software and databases, which include third party data obtained and redistributed by KMV, LLC, to evaluate credit facilities and investment portfolios. These services represent information services which are not personal and individual in nature. Since such services are taxable under Section 1105(c)(1) of the Tax Law, your refund application is denied in full.

KMV has the right to use and license others to use certain databases and software so as to incorporate its market and credit risk measurements and modeling capabilities into solutions that

allow businesses to better manage market and credit exposures. Generally, KMV sells products to financial institutions that invest for their own account in securities, or whose business or investment activities expose them to credit risk. Among the products it sells are Credit Monitor, Portfolio Manager, Private Firm Model and Credit Edge. KMV charges a fixed fee for each of these products.

Credit Monitor is a Windows based product that offers credit measures on nearly 25,000 global, publicly traded companies, and nearly 130 privately held companies. It allows portfolio managers to access and manage credit risk for investments in these public and private companies. KMV's EDF (Expected Default Frequency) credit measures are probabilities of default used by lenders and investors. A public firm's probability of default is determined based upon the market value of its assets, its volatility and its current capital structure. Customers have direct access to the credit measures, which are not processed or manipulated during the retrieval process. Credit Monitor is updated monthly.

Portfolio Manager is a Windows based product that provides numeric values for the risk parameters of investment portfolios. The numeric values are used by the customer to determine a dollar cost for the risk parameters of an investment portfolio. Portfolio Manager is updated monthly.

Private Firm Model is a credit-related service, whereby KMV evaluates the performance of credit models and provides analysis of internal rating system behavior. It is a Windows based product that uses market information to provide a detailed portrait of the future prospects of the sectors and regions of the global economy in which private companies operate. Private Firm Model is updated monthly.

Credit Edge is similar to Credit Monitor in that it offers KMV credit measures on thousands of publicly held companies. However, Credit Edge is a web-based product, is updated daily and is accessed on-line by KMV's customers.

Petitioner has been a subscriber to KMV's Credit Monitor, Portfolio Manager and Private Firm Model since December 31, 1999, pursuant to the executed KMV Subscription Agreement (Agreement). The Subscription Agreement provides that "KMV owns or has the right to use and license others to use certain Databases and Software" and that petitioner "wishes to use the Databases and Software for its internal business purposes." The definition portion of the agreement defines the following terms as follows:

(a) "'Data Vendors' shall mean third-party suppliers from whom KMV acquires data for the provision of services hereunder, as identified in Exhibit B hereto and as may be amended from time to time by notice from KMV to Subscriber."

(b) "'Databases' shall mean the databases identified in Exhibit A attached hereto, including all revisions, modifications, updates, and replacements thereto which may be provided to Subscriber hereunder." Exhibit A contained the databases Credit Monitor, Portfolio Manager and Private Firm Model.

(c) "'Service' shall mean the provision by KMV to Subscriber of the Software, the Databases,"

(d) "'Software' shall mean the computer programs described in Exhibit A attached hereto, in object code format only, including all corrections, modifications, and enhancements thereto, which may be provided to Subscriber hereunder."

Pursuant to the Agreement, petitioner was granted a nonexclusive, nontransferable license to install, access and use the software and databases solely for internal business purposes. KMV

retained all property rights, including copyrights and trade secrets, in the databases and software. Petitioner was permitted to use the databases and software on an unlimited number of personal computers and local or wide area network file servers, so long as access to and use of such computers and servers was restricted to petitioner's employees and all such computers and servers were installed in facilities controlled by petitioner. Petitioner was prohibited from allowing its customers, borrowers, consultants, independent contractors or agents to use the software or databases, or any information derived from them. It also could not, without the prior written consent of KMV, sell, transfer, assign, publish, distribute, disseminate, allow access to or convey any of the databases or software. KMV had the right under the Agreement to periodically inspect, at petitioner's location, the computer systems on which the databases and software were stored, processed and used for purposes of establishing compliance with the terms of the Agreement.

The Agreement further provided that in the event that either KMV or petitioner terminated the Agreement for any reason, petitioner was required to destroy or return to KMV any and all machine readable material containing the databases, and any and all related documentation, and expunge all data or information from the databases in its data storage facilities.

KMV obtained data from third-party suppliers to provide its services to petitioner. Exhibit B of the Agreement listed the data vendors as ASX Operations Pty Limited; Disclosure Incorporated, Primark Global Information Services; DRI/McGraw-Hill, a division of McGraw-Hill, Inc.; Interactive Data, Financial Times Information, a Pearson Company; Standard & Poor's Compustat and Global Vantage, a division of The McGraw-Hill Companies, Inc.; and Standard & Poor's Ratings Services, a division of The McGraw-Hill Companies, Inc.

According to the Agreement, data obtained from the vendors included the following information about companies: accounting treatment, common equity, common shares outstanding, common/ordinary dividends, company name, country of incorporation, currency name, debt in current liabilities, deferred taxes, equity value, issue description and par value, minority interest, operation income before depreciation, other liabilities, preferred dividends, preferred stock, price close monthly, retained earnings, sales, SIC code, Standard & Poor's Ratings Services ratings, statement date, total assets, total current liabilities, total liabilities, and total long-term debt.

The information that KMV purchased from the data vendors was incorporated into KMV's software that was sold to customers, such as petitioner. The third-party data obtained from the data vendors was licensed to KMV for redistribution to its subscribers. KMV relied on the third-party data in preparing and providing the databases to the subscribers. The availability of any third-party data to the subscribers ceased automatically if a data vendor terminated its relationship with KMV. The third-party data was updated monthly and incorporated into the software. The updated information could include most recent financial statements, new securities and new rating information. The software could be acquired from KMV by either CD-ROM or by secure web-site download. Petitioner chose to have the products and monthly updates of the products delivered by CD-ROM.

Pursuant to the General Provisions of the Agreement, the Agreement constituted the entire agreement of the parties, and excluded all representations, conditions, warranties and other terms not expressly stated therein. Furthermore, the Agreement could be modified only by a writing signed by the party to be charged.

We modify finding of fact "15" of the Administrative Law Judge's determination to read as follows:

As previously mentioned, Credit Edge is a product similar to Credit Monitor but is a web-based product, is updated daily and is accessed on-line by KMV's customers. Its use by petitioner was not governed by the Agreement. According to KMV's web site regarding Credit Edge, the product provides a platform to deliver KMV's credit measures and financial analysis data from a variety of forward-looking timely sources to support trading and investment decisions. Credit Edge helps to focus resources on credit problems and opportunities by highlighting emerging changes in risk. To access Credit Edge, petitioner was required to download software provided by KMV. Petitioner then entered its portfolio data online into KMV's web-site database. KMV's Expected Default Frequency credit measures provided actual probabilities of default.¹

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge addressed the four products at issue, which were: Credit Monitor, Portfolio Manager, Private Firm Model and Credit Edge. Three of the products were covered by a Subscription Agreement between petitioner and KMV. The agreement indicates that KMV was selling to petitioner pre-written software and databases that were installed on petitioner's computers and servers. Under these circumstances, the Administrative Law Judge concluded that petitioner purchased pre-written computer software as that term is defined in Tax Law § 1101(b)(14). As section 1105(a) imposes sales tax upon the sale of tangible personal property, and tangible personal property includes pre-written computer software pursuant to Tax Law § 1101(b)(6), the Administrative Law Judge determined that petitioner was not entitled to a refund of the sales tax paid on its purchases of these three products. Petitioner did not take an exception with respect to this conclusion.

¹We have modified this fact to more accurately reflect the record.

The Credit Edge product was not covered by the Subscription Agreement. The Administrative Law Judge stated that Credit Edge was similar to Credit Monitor but the Administrative Law Judge noted that Credit Edge is a web-based product that was updated daily and was accessed on-line by KMV's customers. The Administrative Law Judge found the Credit Edge product to be an electronic financial consulting service, which service was not included in the purview of Tax Law § 1105(c). As such, the Administrative Law Judge held that petitioner was entitled to a refund of the sales tax paid on its purchases of this product.

Lastly, the Administrative Law Judge addressed whether the Division should be estopped from denying petitioner's claim for refund due to alleged representations made by the Division during its audit of KMV such that KMV reasonably relied on discussions with the Division that the sales of the products discussed herein were not subject to sales tax. The Administrative Law Judge rejected this argument stating that petitioner failed to establish the exact nature of the representations made and the factual basis of these representations. The Administrative Law Judge held that petitioner failed to demonstrate a case of detrimental reliance. Petitioner did not take an exception to this conclusion.

ARGUMENTS ON EXCEPTION

In its exception, the Division argues that the Credit Edge product is taxable as an information service sold to petitioner. The Division states that Tax Law § 1105(c)(1) imposes sales tax on the receipts for the service of furnishing of information by printed matter, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons. The Division claims that if the information is provided in an on-line format, the service is taxable under Tax Law § 1105(c)(9).

Petitioner argues in opposition that Credit Edge is an electronic financial consulting analytical service and not a taxable information service. Petitioner further states that if Credit Edge is determined to be an information service, such service is sufficiently personal or individual in nature and is not of a type that might be substantially incorporated into reports furnished to other persons.

OPINION

As stated by the Administrative Law Judge, petitioner has the burden of establishing that the purchase of Credit Edge is not subject to the imposition of sales and use tax (*see*, Tax Law § 1132[c]). This is the only product in issue. Unlike the other three products outlined in the findings of fact, Credit Edge was not covered by the Agreement between petitioner and KMV. Therefore, we look to the record to determine what type of service was provided through Credit Edge.

Petitioner has not submitted any evidence to demonstrate that Credit Edge is anything but a taxable information service. After reviewing the transcript below, it is clear that petitioner's witness was not competent to testify credibly regarding the product. "[T]he credibility of witnesses is a determination within the domain of the trier of the facts, the person who has the opportunity to view the witnesses first hand and evaluate the relevance and truthfulness of their testimony" (*Matter of Spallina*, Tax Appeals Tribunal, February 27, 1992). We agree with the Administrative Law Judge's assessment of Mr. Ortolf's credibility and defer to his findings on this issue.

Petitioner argues that its case is analogous the *RiskMetrics* advisory opinion (*The RiskMetrics Group, LLC*, TSB-A-00[2]S, January 21, 2000). Although advisory opinions are not binding on petitioner, an advisory opinion may lend some guidance to a similarly situated

taxpayer. However, petitioner failed to establish that its facts were the same as those in that advisory opinion.

In his determination below, the Administrative Law Judge held that Credit Edge provided an electronic financial consulting service, which he deemed fell outside the enumerated taxable services set forth within Tax Law § 1105(c). We reverse the Administrative Law Judge on this conclusion. The record does not support this statement. Moreover, the record fails to establish that Credit Edge product was anything other than a taxable information service. As such, we find petitioner failed to sustain its burden of proof and, thus, petitioner's refund claim is denied in full.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;
2. The determination of the Administrative Law Judge is reversed to the extent that Credit Edge is a taxable information service, but in all other respects is sustained;
3. The petition of DZ Bank is denied; and
4. The Division of Taxation's Notice of Disallowance, dated February 18, 2005, is sustained.

DATED: Troy, New York
May 11, 2009

/s/ Charles H. Nesbitt
Charles H. Nesbitt
President

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner