

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

DYNAMIC TELEPHONE ANSWERING SYSTEMS, INC. :

DECISION

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, 1980
through August 31, 1982. :

Petitioner, Dynamic Telephone Answering Systems, Inc., 2473 North Jerusalem Avenue, North Bellmore, New York 11710, filed a 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 March 1, 1980 through August 31, 1982 (File No. 48561).

A hearing was held before Jean Corigliano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 27, 1986 at 1:30 P.M. Petitioner appeared by Stanley Crystal, Officer. The Audit Division appeared by John P. Dugan, Esq. (Michael Glannon, Esq., of counsel).

ISSUE

Whether the Department of Taxation and Finance by its own actions is estopped from collecting taxes assessed against the petitioner.

FINDINGS OF FACT

1. On October 12, 1983, the Audit Division issued against petitioner, Dynamic Telephone Answering Systems, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1980 through

August 31, 1982 assessing taxes in the amount of \$11,803.00 plus minimum statutory interest.

2. On December 13, 1982, petitioner, by its president, executed a consent extending the period of limitation for assessment of sales and use taxes for the period March 1, 1980 through February 28, 1981 to December 20, 1983.

3. During the audit period, petitioner was engaged in the rental of telephone answering equipment and the provision of associated operator services. Customers were billed a basic monthly fee for rental of a device which recorded messages and also referred callers to an answering service which utilized live operators. The base charge included a certain number of messages taken and transmitted by operators. Additional messages resulted in additional charges at a message unit rate. On bills sent to its customers, petitioner stated one fee for its basic service which included equipment rental and operator services, but it collected sales tax only on that portion of the basic fee which related to the rental of equipment. Operator services, in excess of those included in the basic service, were stated separately; no tax was collected for these services.

4. On audit, it was determined that the records made available to the Audit Division were adequate and sufficient for the purpose of conducting a detailed audit. However, on an Audit Method Election form executed by its treasurer on July 6, 1983, petitioner agreed to the use of a representative test period audit method to determine any sales or use tax liability.

5. The auditor deemed the entirety of petitioner's basic monthly charge of \$25.00 subject to sales tax because petitioner did not state separately that portion of the charge which was for operator services as opposed to rental of equipment. The separately stated charges for additional services were deemed

nontaxable. The auditor examined all invoices for the month of June 1982 to identify taxable and nontaxable sales. Gross sales as shown on the invoices were reduced by sales deemed nontaxable to yield taxable sales of \$9,726.29. These taxable sales were reduced by petitioner's reported sales (\$3,550.00) to calculate additional taxable sales of \$6,176.29. An error rate of 174 percent was calculated by dividing additional taxable sales by reported sales. Taxable sales reported by petitioner for each quarter under consideration were then increased by the error rate. This resulted in total additional taxable sales of \$166,098.00 and an additional tax due on that amount of \$11,803.00.

6. The entire assessment under consideration results from petitioner's failure to collect tax on that portion of the basic monthly charge which related to operator services. In determining that such charges were nontaxable, petitioner relied on a letter addressed to it by Francis Person, Chief, Instructions and Interpretations Unit, New York State Department of Taxation and Finance, dated August 30, 1976. In pertinent part, the letter stated the following:

- "1. The lease of a device which, when connected to a telephone, records a caller's message and which also, mechanically, refers the caller to another telephone number at which the lessor's operators take the caller's message, is a transaction whose receipts are subject to the sales tax imposed under Section 1105(a) of the tax law.
2. Although the service of furnishing the lessee with the messages taken by Dynamic Telephone Answering System's live operators may be deemed to be a personal information service within the exclusion contained in Section 1105(c)(1) of the Tax Law, the inclusion of such a service as an adjunct or element of the leasing of tangible personal property does not serve to transform the entire transaction into a sale of a personal information service. Accordingly, Dynamic Telephone Answering System's total monthly charge of \$25.00 is subject to tax.
3. Additional charges per call for messages delivered by live operators and originating in the office of Dynamic Telephone Answering Systems are not subject to tax, if separately stated

and described as such on the bill rendered to the lessee. These charges constitute neither the sale nor the lease of tangible personal property under Section 1105(a), nor a taxable information service under Section 1105(c)(1) of the tax law....

Accordingly, Dynamic Telephone Answering Systems, Inc. is required to be registered with the Sales Tax Bureau and collect appropriate New York State and Local Tax from their subscribers on that portion of their monthly charge which relates to the rental of telephone answering equipment, and subsequent rental and installation charges for telephone answering equipment."

7. Petitioner interpreted the above letter to mean that it was required to collect sales tax only on that portion of its monthly charges which related to the rental of equipment and argues that, at the least, the letter is ambiguous enough to allow for its interpretation and to estop the Department from assessing the taxes asserted to be due.

CONCLUSIONS OF LAW

A. That petitioner's lease of a device which recorded messages for playback and referred emergency callers to a "live" answering service is subject to the sales tax imposed under section 1105, subdivision (a) of the Tax Law. The duties performed by the answering services operators which included taking and relaying oral messages are not services subject to sales tax under section 1105, subdivision (c) of the Tax Law. Where taxable tangible property and nontaxable services are sold as a single unit, the tax is properly collected on the total price [Matter of SOQ Broadcasting Corp., State Tax Commission, May 23, 1985; cf. 20 NYCRR 527.1(b)]. Inasmuch as petitioner's basic monthly service charge included both a taxable rental of equipment and the furnishing of a nontaxable service, the entire charge of \$25.00 was subject to sales tax.

B. That if petitioner genuinely believed the departmental letter to be ambiguous, the proper course would have been to seek clarification before proceeding with its own doubtful interpretation (cf. Barrett v. Commissioner,

42 TC 993, aff'd 348 F.2d 916). But in any case, the State Tax Commission may not be estopped "from collecting taxes lawfully imposed and remaining unpaid in the absence of statutory authority" (Mc Mahon v. State Tax Comm., 45 AD2d 625, 627).


C. That the petition of Dynamic Telephone Answering Systems, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 12, 1983 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

MAY 28 1986


PRESIDENT


COMMISSIONER


COMMISSIONER