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NEW YORK TAX INSIGHTS
Volume 5, Issue 9, September 2014

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ALJ UPHOLDS DENIAL OF SALES TAX REFUND BECAUSE VENDOR FAILED TO FIRST MAKE REFUNDS TO CUSTOMERS

By Open Weaver Banks

In *Matter of New Cingular Wireless PSC LCC*, DTA No. 825318 (N.Y. Div. of Tax App., July 17, 2014), a New York State Administrative Law Judge upheld the denial of a sales tax refund of over $100 million, finding that the vendor had not complied with the statutory requirement that the amount in issue must first be refunded to customers.

Facts. Over a nearly five-year period, New Cingular Wireless, now known as AT&T Mobility ("ATTM"), erroneously billed, collected and remitted over $100 million in New York sales tax on its sales of Internet access services to its customers. As part of a class action settlement agreement involving 44 states, approved by the District Court for the Northern District of Illinois, ATTM agreed to reimburse its New York customers for the overcollected tax by filing a refund claim for the benefit of its customers. The class members specifically consented to ATTM's filing of a refund claim in New York, payment of the refund by the taxing authority to ATTM or directly to an escrow account, and the distribution of the settlement fund amounts, net of attorneys' fees, to the customers by an escrow agent under court supervision.

The settlement agreement also contained special provisions for taxing jurisdictions, such as New York, that require a vendor to refund the overcollected tax to its customers prior to the taxing jurisdiction granting a refund to the vendor. In that case, ATTM agreed that it would fund a pre-refund escrow fund for class members and the class members agreed that such payment by ATTM into the pre-refund escrow fund would be considered the payment by ATTM to the class members. However, ATTM did not make any payments to the pre-refund escrow fund with respect to the overcollected New York sales tax.

On review, the Department of Taxation and Finance denied ATTM's refund claim on the basis that (1) Tax Law § 1139(a) requires that the vendor must show that sales tax has been repaid to the customer in order for the vendor to be eligible for a refund; (2) the documentation submitted did not allow the Department to determine how the refund amounts were calculated; and (3) the refund claim appeared to include claims made on behalf of customers that had opted out of the settlement agreement.

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Following the Department's denial of the refund claim, ATTM and the settlement class entered into a "clarifying agreement" providing that any payments made by ATTM to either the New York escrow account or the pre-refund escrow account would be considered payments made to the settlement class, and that such funds were to be used to make refunds and should be considered refunds to the settlement class at the moment they were deposited in the accounts. However, ATTM still made no payments to the escrow fund with regard to the New York taxes.

ALJ Decision. Both parties moved for summary judgment, claiming there was no issue of material fact involved, and the ALJ agreed that the matter was ripe for summary judgment. However, he determined that since ATTM had not repaid the tax to its customers, it failed to satisfy the clear requirements of Tax Law § 1139(a) and was not entitled to the refund.

Tax Law § 1139(a) provides that "[n]o refund or credit shall be made to any person of tax which he collected from a customer until he shall first establish to the satisfaction of the tax commission, under such regulation as it may prescribe, that he has repaid such tax to the customer." The regulation promulgated pursuant to the statute, 20 NYCRR 534.2, prescribes the form of the refund application, which must include a certification by the applicant and evidence that the applicant had refunded the tax to its customer.

While the ALJ recognized that it would be an advantage to ATTM to have the Division agree to the amount of the refund before making payment to the customer, the ALJ could not reconcile ATTM's argument that reimbursement of the overcollected tax should not be required with the plain language of the statute. He also noted repeatedly that ATTM had not in fact funded either escrow account with any monies related to the New York amounts, and that ATTM appeared to be reluctant to fund such amounts unless and until the Department had determined the amount of tax due to each customer. Therefore, he found that ATTM's claim that the amount of the refund has been determined from its computer records "belies its refusal to fund the escrow accounts and its demand that the Division certify the refund amount before it would do so." He also noted that the Division auditors who reviewed ATTM's claim had found several shortcomings and areas they could not reconcile. Therefore, the ALJ denied the refund claim, and granted the Department's motion for summary judgment.

Additional Insights

When confronted with the same issue, the New Jersey Tax Court in *New Cingular Wireless PCS, LLC v. Director, Division of Taxation*, 28 N.J. Tax 1 (2014) reached an opposite result, and directed the New Jersey Division of Taxation to consider the merits of the refund claim, and determine whether tax had been incorrectly remitted and, if so, by how much (which means the case is still in litigation and not yet ripe for appeal). In that case, the Tax Court found that the vendor could make its application for a refund without first having to repay the tax to its customers, even though the New Jersey refund statute, N.J.S.A. 54:32B-20(a), is similar to Tax Law § 1139(a).

Interpreting New Jersey's refund statute, the New Jersey Tax Court held that New Cingular could make its application for a refund without first having to repay the tax to its customers. In addition, the Tax Court found the vendor had a statutory right to have its refund application considered by the Director without first having to repay its customers. Otherwise, the vendor would have to repay the sales tax to its customers without any assurance of success on its refund claim and in the event that its refund claim ultimately was denied, the vendor would be left unable to recoup the taxes it returned to its customers, resulting in a windfall to the customers.

[T]he ALJ could not reconcile ATTM's argument that reimbursement of the overcollected tax should not be required with the plain language of the statute.

The New Jersey Tax Court also found that, because of the escrow account required by the settlement agreement, it was not possible for New Cingular to "take ownership" of any refunded amounts. Finally, since the transactions contemplated by the settlement agreement would all be subject to court enforcement, the Tax Court found "sufficient safeguards" in place to ensure that the purpose of the statutory repayment requirement would be fulfilled.

The New York ALJ referenced the New Jersey decision, but found a "critical difference" in the statutory language because the New Jersey statute refers to an "actual" refund, thus inferring that there is a "timing difference placed in the New Jersey statute that does not appear in Tax Law § 1139(a)." Although not entirely clear from the ALJ's decision, it appears that the "timing difference" referred to by the ALJ might be the difference between filing a refund claim with a taxing authority and the payment of the refund claim by the taxing authority. In any event, since the New Jersey Tax Court found that the purpose of the repayment requirement was satisfied by safeguards in the settlement agreement, any "timing difference" is not really relevant because under the New Jersey decision the vendor should receive the "actual refund" without actually having to pay the class members first. By contrast, in New York, although

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the ALJ acknowledged that the vendor was "eligible" to make a refund before repaying its customers, it is quite plain that under the ALJ's reasoning any such claim will be denied for failing to satisfy the absolute repayment requirement of N.Y. Tax Law § 1139(a).

It is also worth noting that although the ALJ made several references to ATTM's failure to fund the escrow account, it does not appear that such funding would have been sufficient to satisfy the statute. The ALJ appeared skeptical that, while ATTM claimed its settlement agreement constituted payment to its customers, ATTM had not complied with the terms of that settlement agreement by funding the escrow account.

HMO HELD EXEMPT FROM NEW YORK CITY GENERAL CORPORATION TAX

By Irwin M. Slomka

Insurance corporations are not, and never have been, subject to the New York City general corporation tax. Prior to July 1, 1974, they were subject to the former City insurance corporation tax and exempt from the general corporation tax ("GCT"). When the City insurance tax was repealed in 1974 – and even though the Administrative Code no longer contained an exemption from GCT for insurance corporations – the exemption for insurance corporations remains in effect because of language in the GCT enabling legislation, which has never been amended. A recent decision of a New York City Administrative Law Judge addresses the scope of this exemption with respect to health maintenance organizations ("HMOs"), and concludes that the HMOs in question were "doing an insurance business" and therefore were not includable in a combined GCT return. *Matter of Aetna, Inc.*, TAT(H) 12-3(GC) and TAT(H) 12-4(GC) (N.Y.C. Tax App. Trib., Admin. Law Judge Div., July 22, 2014).

Facts. Aetna, Inc. is a holding company that during the years in issue (2005 and 2006) owned approximately 28 HMO subsidiaries. Under the "IPA" HMO business model employed by Aetna's HMOs, unrelated physicians come together in an organization that represents their interests in negotiating with the HMO regarding reimbursement and other matters. The physicians provide the medical services to the HMO members; the physicians are not employees of the HMO.

For the years in issue, Aetna filed combined GCT returns that included those HMO subsidiaries. Aetna later filed $1.1 million in GCT refund claims, taking the position that its HMO subsidiaries were doing an insurance business, and therefore should not have been included in its combined GCT returns. The Department of Finance denied the refund claims on the grounds that the HMOs are not insurance companies, and therefore are properly includable in Aetna's combined GCT return. This litigation ensued.

Issue. The GCT enabling legislation (Laws of 1966, ch. 772, Model Act § 41.4) defines an "insurance corporation" to include a corporation "doing an insurance business in this state." As noted above, although the City insurance corporation tax was repealed in 1974, the 1966 GCT Model Act was never amended to remove the exemption for insurance corporations. The GCT regulations also prohibit the inclusion of insurance corporations in a combined GCT return. 19 RCNY 11-92(c). At issue here is whether Aetna's HMOs are doing an insurance business in the State. If they are, then they are exempt from the GCT, and cannot be included in a combined GCT return.

Decision. The ALJ concluded that the HMOs are doing an insurance business in the State, and therefore cannot be included in a combined GCT return. The decision contains a detailed analysis of the federal and New York State treatment of HMOs, for both regulatory and tax purposes. The ALJ acknowledged that HMOs have been distinguished from traditional insurers on the grounds that there is no risk shifting to an HMO because the HMO provides prepaid medical services to its members, rather than indemnifying its members for the costs of medical care, as a traditional insurer does. In a federal regulatory decision that the ALJ appeared to consider significant, *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002), the U.S. Supreme Court held that an HMO provided health care as an insurer, and was therefore subject to Illinois insurance regulation, which was not preempted by ERISA.

As for New York State law, the ALJ pointed out that HMOs are regulated under the State Public Health Law and various provisions of the State Insurance Law. Although an Advisory Opinion issued by the Department of Taxation and Finance (*Petition of KPMG Peat Marwick*, Advisory Opinion, TSB-A-93(4)C (N.Y.S. Dep't of Taxation & Fin., Jan. 12, 1993)) concluded that a business conducted by an HMO in compliance with Article 44 of the New York State Public Health Law is *not* considered an insurance business, the ALJ noted that this Advisory Opinion predated the Supreme Court decision in *Rush*, suggesting that it may no longer be viable.

The Department pointed out that in 2009, State Tax Law § 1502-a was amended specifically to add HMOs to the definition of an "insurance corporation." The Department argued that if HMOs were truly regarded as "doing an insurance business" in New York, there would have been no need to specifically refer to HMOs in the 2009 amendments. The Department maintained that

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the amendments demonstrated that HMOs were not regarded as doing an insurance business during the years in issue, before the 2009 amendments. The ALJ rejected this argument as going "beyond the literal reading of the 2009 amendments," particularly since HMOs were subject to considerable State insurance regulation prior to those amendments.

According to the ALJ, while tax exemptions must be strictly construed against the taxpayer, the Department's narrow interpretation defeated the purpose of the GCT exemption under the Model Act. The ALJ concluded that Aetna's HMOs were doing an insurance business in the State, and therefore the Department erred in refusing to remove them from Aetna's combined GCT returns.

Additional Insights

It is somewhat surprising that the issue of whether HMOs are exempt from GCT has not been addressed until now. The decision does not mention how the HMOs filed for federal and State tax purposes. The ALJ's analysis of the federal and New York State precedent made clear that HMOs, while perhaps not traditional insurance companies, are subject to considerable regulation as insurers. If upheld, the decision could have beneficial implications for captive insurance companies, which have come under attack by both the State and City allegedly for not providing true insurance. Similar to the HMOs, captive insurance companies are also subject to considerable non-tax state regulation. Finally, it is possible that the City of New York could attempt to address this issue by seeking to amend the GCT Model Act to eliminate the insurance corporation exemption.

STATE TAX DEPARTMENT ISSUES GUIDANCE ON APPLICATION OF SALES TAX TO SALES OF COMPUTER SOFTWARE

By Hollis L. Hyans

The New York State Department of Taxation and Finance has issued guidance explaining its position on how New York's sales tax applies to sales of computer software, and, in particular, how the Department applies the sales tax rules to software accessed remotely. *Tax Bulletin* TB-ST-128 (N.Y.S. Dep't of Taxation & Fin., Aug. 5, 2014).

The Tax Bulletin restates many established – and relatively uncontroversial – rules governing the application of sales tax to computer software. The sale of prewritten computer software is subject to tax, whether delivered on a physical medium, by electronic transmission or remote access, while the sale of custom software is not subject to tax. Custom software has to be designed and developed to the specifications of a particular customer in order to qualify as exempt, and it becomes subject to tax if it is transferred to someone other than the person for whom it was originally designed and developed.

Many services related to computer software are exempt from tax, such as installation, programming, maintenance and servicing, as long as the charge for the service is reasonable and is separately stated on the invoice. Sales of software upgrades are generally subject to tax, unless the upgrade is designed and developed to the specifications of a particular purchaser. Prewritten software used directly in the production of tangible personal property or in research and development is exempt, and customized software is exempt when resold or transferred by the purchaser to a related corporation or partnership, unless the sale is part of a plan designed to avoid tax.

However, on a more controversial issue, the *Tax Bulletin* also makes clear the Department's position that sales tax applies to remote access to software over the Internet, on the theory that the purchaser has gained "constructive possession" of the software, and the right to use or control it. Presumably, the Department is relying on its regulation 20 NYCRR 526.7(e)(4), which applies to "transfer of possession with respect to a rental, lease or license to use" and provides that transfer of "custody or possession of the tangible personal property, actual or constructive" or "the right to use or control or direct the use of tangible personal property" amounts to a sale for purposes of the New York sales tax law.

[T]he *Tax Bulletin* also makes clear the Department's position that sales tax applies to remote access to software over the Internet, on the theory that the purchaser has gained "constructive possession" of the software . . . .

The *Tax Bulletin* also states that, for sourcing purposes, the situs of the sale of remotely accessed software is "the location from which the purchaser uses or directs the use of the software, not the location of the code embodying the software." The seller of the software should collect sales tax based on the proportion of the receipts attributable to the users located in New York.

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Additional Insights

The Department appears to have issued this *Bulletin*, in part, as a vehicle to confirm its position that a business providing a service over the Internet is actually selling prewritten computer software that has been "constructively" transferred to customers. The Department has previously taken this position on audit and in Advisory Opinions, although it has never been upheld by any decision by an Administrative Law Judge, the Tax Appeals Tribunal or any New York court. Many taxpayers believe the Department's position is not well-founded, and that its apparent reliance on a regulation discussing "rental, lease or license to use tangible personal property" does not support the Department's treatment of services provided through software. In one recent case regarding software, *Matter of SunGard Securities Finance LLC*, DTA No. 824336 (N.Y.S. Div. of Tax App., Feb. 6, 2014), *exception filed*, Mar. 10, 2014, the ALJ concluded that the taxpayer, a business providing data processing services, was using its own proprietary software to furnish a service, and not selling or licensing that software to its customers. Older cases, decided in other contexts, have discussed the degree of control and possession that a customer must obtain in order for the transaction to qualify as a sale, such as *American Locker Co. v. City of New York*, 308 N.Y. 264 (1955), in which the Court of Appeals held that temporary use of coin-operated lockers was found not to amount to the transfer of actual, exclusive possession, and *Darien Lake Fun Country Inc. v. State Tax Commission*, 68 N.Y.2d 630 (1986), in which the Court of Appeals concluded that the use of amusement rides by a ticket holder did not qualify as a sale because the use was limited and temporary. Constructive transfer of possession of tangible personal property still requires exclusive control, as is recognized by Example 12 to one of the regulations cited by the Department, 20 NYCRR 526.7(e)(5), which notes that a contract to use a computer for 10 hours weekly constitutes a sufficient transfer of rights for the sales tax to apply, since during the 10-hour period, no one else may use the machine.

The Department's position on sourcing the transaction also does not seem to follow the statute and regulations, which unequivocally provide that sales of tangible personal property are sourced to where the property is delivered. 20 NYCRR 525.2(a)(3). The *Bulletin* states that the "location of the code embodying the software" is not relevant in determining where the property is delivered, which leaves unanswered the question of what exactly is the "tangible personal property" that the Department believes is being delivered and where it is located.

"WHISTLEBLOWER" SUIT FILED AGAINST VANGUARD UNDER NEW YORK FALSE CLAIMS ACT

By Hollis L. Hyans

In a recently unsealed *qui tam* action filed under New York State's False Claims Act, a former lawyer with Vanguard Group Inc. claims that the company has been evading more than $1 billion in federal taxes and more than $20 million in New York State taxes. *State of New York ex rel David Danon v. Vanguard Group, Inc.*, No. 100711-13 (Sup. Ct, N.Y. Cnty, May 8, 2013).

The complaint alleges that Vanguard has "operated as an illegal tax shelter for nearly forty years," relying, among other arguments, on contentions that Vanguard did not file income tax returns before 2011, despite "clearly meeting the 'doing business/nexus' standard"; on claims that, when Vanguard did begin filing returns, it did not follow New York's shareholder sourcing rules for apportionment; and on claims that it "violate[d]" New York Tax Law Section 211.5 and Internal Revenue Code Section 482 by providing services to related parties – the Vanguard group of mutual funds – at artificially low prices.

The complaint also alleges that Vanguard "knowingly and fraudulently" failed to pay tax on its $1.5 billion "Contingency Reserve," violating the principle that income is taxable when it is actually or constructively received or due and payable. The complaint further claims that Vanguard's failure to include the Contingency Reserve on its "IRS Uncertain Tax Positions Schedule (the 'Schedule UTP')" constitutes a "fraudulent effort to conceal" the inaccurate reporting of its Contingency Reserve.

[H]ere the Attorney General, after investigation, has declined to convert the case into a civil enforcement action, so the case is being brought by the whistleblower himself.

Unlike the situation in *State of New York v. Sprint Nextel Corp.*, 114 A.D. 3d 622, *leave to appeal granted* (1st Dep't June 12, 2014), where the State Attorney General took over prosecution of the suit, here the Attorney General, after investigation, has declined to convert the case into a civil enforcement action, so the case is being brought by the whistleblower himself. He has also included conspiracy

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allegations, and claims that he was retaliated against by having been demoted and discharged by the company. He is seeking between 15 and 30 percent of all funds obtained by state and local governments.

The complaint was originally filed under seal in 2013, and then unsealed this summer and made widely available on the Internet. After application by Vanguard on August 15, 2014, the court redacted from the public file certain paragraphs of the complaint, although the publicly available docket file does not specify the protected paragraphs. Vanguard has stated that it denies the allegations and intends to defend itself vigorously.

Additional Insights

This complaint raises many novel and troublesome questions. It is the first large corporate income tax case made public under the New York False Claims Act, and the first to include a retaliation claim. According to press reports, the attorney for Mr. Danon, the whistleblower, has said that New York was chosen as the location for the lawsuit because it is the only jurisdiction in the United States that has a False Claims Act that would cover these claims, raising the question of whether New York's statute will result in the filing of more such claims here because of such a uniquely wide-reaching statute, and whether it is an appropriate role for the New York courts to hear what may be increasingly dramatic claims of widespread alleged tax violations brought by whistleblowers seeking large recoveries.

While it is difficult to evaluate the merits of most of the lawsuit's claims without further information, the claim that a New York taxpayer committed fraud by "violating" Tax Law Section 211.5 seems particularly tenuous, since it is a discretionary statute, allowing the Department the discretion to adjust intercompany pricing if it finds that any agreement or understanding between the taxpayer and a related party has resulted in an inaccurate reflection of the taxpayer's income. Nothing in Section 211.5 imposes an affirmative obligation on a company to make pricing adjustments, so it is hard to understand how a claim of fraud could be based on "violating" this statute.

In addition, there have been press reports that Mr. Danon has also filed a whistleblower claim with the Securities and Exchange Commission, and that Vanguard has demanded from Mr. Danon's attorney the return of confidential documents allegedly taken from the company when he was employed there as an attorney. The fact that Mr. Danon is an attorney also raises important issues about whether in-house lawyers can use information they learned from their confidential relationship with their employer-clients to file public claims based on such information, and profit thereby under the provisions of False Claims Acts that allow whistleblowers to receive portions of the monies recovered by the government.

STATE TAX DEPARTMENT UNVEILS CORPORATE TAX REFORM GUIDANCE ON WEB SITE

By Irwin M. Slomka

The Department of Taxation and Finance has placed on its web site an important special section devoted to developments under the recently enacted corporate tax reform legislation, which goes into effect for tax years beginning after 2014. http://www.tax.ny.gov/bus/ct/corp_tax_reform.htm. The Corporate Tax Reform link contains an FAQ section in which certain issues will be addressed. As of this writing, there are FAQs involving such diverse topics as whether business capital includes capital that generates other exempt income (it does), how the mandatory first installment for the first quarter in 2015 will be calculated (it will continue to be based on the same rules that are in effect for 2014 returns), and how the prior NOL conversion subtraction is determined for qualified New York manufacturers which, beginning in 2014, are subject to a zero tax rate on entire net income (the prior NOL conversion subtraction for those manufacturers is zero).

The web site also allows businesses and practitioners to submit questions electronically to the Department's Corporate Tax Reform Working Group. The questions will be reviewed and any answer provided will be published in the Corporate Tax Reform FAQs Web page.

INSIGHTS IN BRIEF

ALJ Finds Individual's Refund Claim Time-Barred Because of Failure to Prove That a Timely Filed Extension Request Was Made

An individual's personal income tax refund claim for the 2006 tax year filed on October 14, 2010 was found to be untimely because the claim, while filed within three years after the original return was filed (October 15, 2007), was not shown to have been made within three years immediately preceding the filing of the claim plus the period of the extension for that return. *Matter of Francis Greenburger and Isabelle Autones*, DTA No. 825103 (N.Y.S. Div. of Tax App., July 31, 2014). One of the limitations on refund claims is that the amount of the claim cannot exceed the portion of the tax paid within three years immediately preceding the claim "plus the period of any extension of time for filing the return." Tax Law § 687(a). If the taxpayer could prove that he timely filed his extension request for 2006, then his estimated tax payments – deemed paid on April 15, 2007 – would have been considered for purposes of the refund claim under that provision. The ALJ pointed out that since the taxpayer chose to file his extension

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request by regular mail, and not by registered or certified mail, he could not prove when he filed the extension, and the Department had no record of having received it. Thus, the taxpayer was not entitled to a refund of any part of his estimated tax payments for 2006.

No Sales Tax on Transfer of Tangible Personal Property to LLC in Exchange for Membership Interest in LLC

The Department of Taxation and Finance has ruled that the transfer of tangible personal property to a New York limited liability company in exchange for a pro rata share of an interest in the LLC is not a retail sale subject to sales and use tax. *Advisory Opinion*, TSB-A-14(23)S (N.Y.S. Dep't of Taxation & Fin., July 22, 2014). The Department applied the provision under the Tax Law that specifically excludes from sales tax the contribution of property to a *partnership* in exchange for a partnership interest, noting that under Tax Law § 2(6), a "partnership" includes a limited liability company.

Appellate Division Holds That a "Clerical Error" Requires NYC to Modify a Property Tax Assessment

In *Matter of Better World Real Estate Group v. New York City Department of Finance*, No 2012-01396 (2d Dep't Aug. 13, 2014), the Appellate Division, Second Department, held that the City's misclassification of a two-family house and garage in Queens as a three-family house with one store or office was a clerical mistake, and that it could be challenged by bringing an Article 78 petition directly to the Appellate Division. The court rejected the argument of the Department of Finance that the claim was time-barred, because the taxpayer had failed to bring a timely tax certiorari petition, finding that Section 11-206 of the Administrative Code expressly allows the Commissioner of Finance to "correct any assessment or tax which is erroneous due to a clerical error or to an error of description." The court found that the Article 78 petition was timely filed within four months of the Department's denial of the refund claim, and that requiring the taxpayer to have proceeded by way of a tax certiorari petition "would render Administrative Code Section 11-206 'superfluous and meaningless.'"

Receipts from Facilitating Criminal History Checks Found Not Subject to Sales Tax

A company that acts as a facilitator for the acquisition of criminal history information from the FBI, obtaining the information for its bank clients wishing to investigate the history of potential employees, is performing a nontaxable service. *Advisory Opinion*, TSB-A-14(22)S (N.Y.S. Dep't of Taxation & Fin., July 22, 2014). The company, a channeling agency authorized by the FBI, obtains information via an electronic data file from the FBI and, without examining the content, provides the information to the requesting bank, which has obtained permission to make the request from the person concerned. The company's fees, consisting of the amount paid to the FBI for processing requests, and a separately stated fee for acting as conduit, were found to arise from the performance of a service, and are not subject to sales tax.