

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:
of	:
HOOPER HOLMES, INC.	:
	:
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.	:

DETERMINATION

Petitioner, Hooper Holmes, Inc., P.O. Box 428, Basking Ridge, New Jersey 07920, 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 December 1, 1977 through November 30, 1980 (File No. 41022).

A hearing was held before Arthur S. Bray, Hearing Officer, at the offices of the State Tax Commission, W. A. Harriman State Office Building Campus, Albany, New York on October 7, 1986, with all briefs to be submitted by March 24, 1987. Petitioner appeared by Arnold B. Panzer, Esq. The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

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

1. On April 29, 1981 the Audit Division 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.

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

3. 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").

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

5. 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.

6. 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.

7. 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.

8. 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.

9. 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 contained a user code which alerted the DMV as to who requested the MVR.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. 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.

19. 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.

20. 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 except for the addition of the user code and the client's request code.

21. Petitioner made no representations to customers with regard to the accuracy of the information contained in the MVRs.

22. 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.

23. 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 clients' property from the moment the MVRs were delivered to petitioner by the DMV.

24. 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.

25. 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.

26. 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.

27. In accordance with State Administrative Procedure Act § 307(1), petitioner's proposed findings of fact have been substantially accepted and incorporated herein. However, it is noted that proposed findings of fact "2", "6", "9" and "20" were modified to conform with the testimony and exhibits. Proposed finding of fact "16" was rejected as being in the nature of a conclusion of law.

CONCLUSIONS OF LAW

A. That section 1105(c)(1) of the Tax Law imposes a sales tax on:

"(c) The receipts from every sale, except for resale of the following services:

(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 and 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."

B. That section 1105(c)(1) of the Tax Law imposes tax on the receipts from the service of furnishing information (20 NYCRR 527.3[a][1]). Since petitioner furnishes information, its receipts are subject to the provisions of Tax Law § 1105(c)(1).

C. That the information provided by petitioner was not personal or individual in nature within the meaning of Tax Law § 1105(c)(1). (Cf. Matter of Allstate Insurance Co. v. Tax Commn. of the State of New York, 115 AD2d 831, affd 67 NY2d 999).

D. That petitioner has not established that it was acting as an agent or in a representative capacity within the meaning of Tax Law § 1105(c)(1) when it obtained motor vehicle reports. In reaching this conclusion, it is noted that when one is acting in an agency or representative capacity one is subject to control with respect to both the manner in which the work is performed as well as the result (see ___ generally, 1 NY Jur 2d, Agency, § 8). In this instance, it appears that petitioner's customers are only interested in the result -- obtaining information contained on the MVR's. Consequently, it cannot be said that petitioner was acting as an agent or in a representative capacity within the meaning of Tax Law § 1105(c)(1).

E. That petitioner is a vendor required to collect tax on its total receipts derived from the furnishing of the MVRs. The term receipt is defined by Tax Law § 1101(b)(3) as "the charge for any service taxable under this article...without any deduction for expenses". In addition, the applicable regulation provides that all expenses, regardless of their taxable status, are not deductible from receipts (20 NYCRR 526.5[e]). On the basis of the foregoing, the Audit Division properly concluded that sales tax was due on the portion of the receipts which petitioner charges its clients premised upon the charge for reports imposed by the Department of Motor Vehicles.

F. That the petition of Hooper Holmes, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated April 29, 1981, is sustained.

DATED: Albany, New York
July 21, 1988

ADMINISTRATIVE LAW JUDGE