

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>PHONE PROGRAMS, INC.</b>	:	DETERMINATION
for Revision of a Determination or for Refund of Sales	:	DTA NO. 815759
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the years 1990, 1991, and 1992.	:	

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Petitioner, Phone Programs, Inc., 166 Madison Avenue, New York, New York 10016, 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 years 1990, 1991, and 1992.<sup>1</sup>

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York 10022, on March 11, 1998 at 10:15 A.M., with all briefs to be submitted by September 2, 1998, which date began the six-month period for the issuance of this determination. Petitioner appeared by David Isaacson, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Brian J. McCann, Esq., of counsel).

***ISSUES***

I. Whether petitioner's claims for refund of sales tax paid by petitioner for telephone services that petitioner used to gather information from sporting and other events was properly denied.

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<sup>1</sup>Although both the petition and the Conciliation Order herein made reference to tax year 1996 as a period in issue, during the hearing it was determined that this reference was an error.

II. If the refund claims should be allowed, whether segments of petitioner's refund claims are barred by the statute of limitations.

***FINDINGS OF FACT***

1. The business of Phone Programs, Inc. ("petitioner") is to provide entertainment services and information programs to the public by means of electronic distribution by telephone. Since the early 1980s, when information services that are provided within the context of these programs could be owned and operated by independent vendors, Phone Programs established a relationship with New York Telephone Company wherein it bought telephone service from New York Telephone at a wholesale price pursuant to a tariff regulated by the Public Service Commission. In exchange, companies like Phone Programs enhanced the telephone service to make it a saleable commodity to the general public, and it was presented to the public at a retail price (in this case, double the wholesale rate). Such retail price became subject to sales tax in 1990, when New York State began taxing such telephone services (Tax Law § 1105[c][9]).

The company operates through the use of the Mass Announcement Network Service ("MAS") offered by New York Telephone. The MAS consists of a service and facilities whereby telephone users may, by calling a particular central office designation and number, obtain a subscriber-provided announcement of up to 57 seconds in duration with an automatic disconnect occurring after one complete announcement. A subscriber to the dedicated MAS is referred to by the Public Service Commission as an "information provider" who leases dedicated facilities and is responsible for providing the recorded announcements. The MAS is accessed by petitioner's customers (who are located in the area codes near New York City, i.e., 212, 516, 718 and 914) by dialing a phone number with a prefix of "976" which is assigned to petitioner. If a

customer is located outside such area codes, his or her call would have to include one of the four codes.

The "976" channel assigned to petitioner is able to accept an unlimited number of telephone calls simultaneously, and is able to disseminate the information simultaneously to an endless number of people. Phone Programs pays New York Telephone 20 cents each time its channel is reached by the general public, for the privilege of having exclusive use of the particular channel. New York Telephone bills the calling public 40 cents (which is set by tariff), including Federal, State and local taxes, as agent for Phone Programs. New York Telephone remits the difference to petitioner, which becomes its profit.

2. Petitioner provided the testimony of Jay Levy, an employee of petitioner's representative, David Isaacson, Esq., who bears significant knowledge and expertise in the area of telephone usage, equipment connected with telephones, and the communications field. Mr. Levy spent a substantial amount of time both at petitioner's business location on Third Avenue in New York City, later at petitioner's facilities in Elmont, Long Island, and in the field where information is gathered, Madison Square Garden, Yankee Stadium, Shea Stadium, Belmont Race Track and Aqueduct Race Track, attempting to understand the nature of petitioner's business and how it operated.

3. During the years in question, petitioner, through the MAS, provided services known as "Sports Phone," "Sports Extra" and "Coach Kurt." To accomplish the acquisition of the information which is the subject of these programs, Phone Programs employs two categories of individuals, an anchor or narrator, who was generally located at petitioner's office, and reporters or field representatives, who were observed in the "field" where the information is gathered. The field personnel are responsible for the connection of a telephone line that is paid for by petitioner,

which is connected to the facility's sound system or to a microphone where an announcer or broadcaster from the event is giving a play-by-play description of what is happening. In a racing event, for example, the information was taped on a continuous running tape where an editor at Phone Programs would extract audio clips to be used in the next 57 second piece. Live information, sounds and audio signals are transmitted by means of the telephone line, and a tape recorder dedicated to each of the incoming lines records the information from the event. A dedicated line at Phone Programs is used to send the final 57 second announcement to the Erickson Switch at New York Telephone Company, where the material is recorded and ready for dissemination to the public. Petitioner's narrator or announcer would simply introduce the information being provided, and the "actuality," the actual voice or sound from an event, would be heard. The phone lines used from such locations as Madison Square Garden or various race tracks are billed to petitioner, and it is the sales tax on such lines that is the subject of petitioner's refund claim herein.

4. Petitioner filed eight applications for refund, which are identified by six claim numbers assigned by the Division of Taxation ("Division"):

a) Claim Number 1995120136, filed on or about November 28, 1995, covers petitioner's claim for refund for 1991 in the amount of \$9,614.59 plus interest.

b) Claim Number 1995120136, filed on or about November 28, 1995, covers petitioner's claim for refund for 1992 in the amount of \$20,853.69 plus interest.

c) Claim Number 309047, filed on or about August 31, 1993, covers petitioner's claim for refund for 1990 in the amount of \$1,432.21 plus interest.

d) Claim Number 1995090282, filed on or about April 14, 1993, covers petitioner's claim for refund for 1990 in the amount of \$4,693.21 plus interest.

e) Claim Number 1995040703, filed on or about April 14, 1995, covers petitioner's claim for refund for 1992 in the amount of \$11,574.70 plus interest.

f) Claim Number 311396, filed on or about October 29, 1993, covers petitioner's claim for refund for 1991 in the amount of \$11,773.88 plus interest.

g) Claim Number 311396, filed on or about November 1, 1993, covers petitioner's claim for refund for 1992 in the amount of \$5,432.52 plus interest.

h) Claim Number 303986, filed on or about March 27, 1993, covers petitioner's claim for refund for 1990 in the amount of \$27,131.76 plus interest.

Although the initial applications for refund were based on differing legal theories, such applications were amended to reflect the same basis for refund, i.e., Tax Law § 1101(b)(4) and 20 NYCRR 526.6(c)<sup>2</sup>, the resale exclusion. Petitioner's claim for refund in each instance is based on the following, in pertinent part:

In the course of this taxpayer's business operations, it purchases personal property or services which it intends to sell, either in the form in which purchased, or as a component part of other property or services. Since the property or services which the taxpayer has purchased should be considered as purchased for resale, it is therefore not subject to tax until it has been transferred to the customer.

This taxpayer exclusively utilizes the tariffed billing and collection services of NYNEX (New York Telephone) for the purposes of billing and collecting for its taxable services and remitting the appropriate taxable amounts to the New York State Department of Taxation and Finance.

This taxpayer buys various telephone services to secure audio items and interviews which become component parts of the taxable retail services it sells to the general public.

Copies of the telephone service charges which are the subject of this refund application are attached hereto.

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<sup>2</sup> Although petitioner's refund claims and brief indicate reliance upon Regulation § 526.6(4)(c), it is clear from petitioner's argument that the reference was intended to be Regulation § 526.6(c), the resale exclusion.

5. Petitioner executed consents extending the statute of limitations for the assessment of sales and use tax in this matter such that taxes due for the taxable periods June 1, 1991 through February 28, 1994 could be determined at any time on or before March 20, 1996.

6. Refund denial letters were issued in response to each of the applications filed, in coordination with the six claim numbers. Five of the claims were denied by correspondence dated April 2, 1996 and Claim Number 309047 was denied by correspondence dated December 16, 1996. The denial explanation which responds to the claims (as amended) provides as follows:

Your claim for a refund of sales tax is being denied in full.

Refund is denied as it was determined on audit that vendor makes sales of information services and not telephone service.

This determination denying your claim in full will, according to section 1139(b) of the Sales and Use Tax Law, be final and irrevocable unless you apply for a hearing. If you decide to appeal this determination, complete the enclosed TA-9.1, Request for Conciliation Conference, and mail it within 90 days of the date of this letter.

7. A Conciliation Conference was conducted in this matter on November 21, 1996, concerning tax years 1990, 1991 and 1992, before the Bureau of Conciliation and Mediation Services. The statutory notices, referred to as the “refund denial dated April 2, 1996 and December 16, 1996,” were sustained by Conciliation Order CMS No. 155964/159055 dated March 21, 1997.

8. A timely petition was filed on April 7, 1997 with the Division of Tax Appeals, seeking review of the six notices denying eight applications for refund of sales tax paid during the period January 1990 to December 1992. The Division of Taxation filed its answer on June 12, 1997.

***SUMMARY OF THE PARTIES' POSITIONS***

9. Petitioner maintains that sales tax it paid to various telephone companies should be refunded to petitioner because the telephone services it purchased were for resale, based upon Tax Law § 1101(b)(4) and 20 NYCRR 526.6(c).

10. The Division contends that the telephone services at issue do not qualify for the resale exclusion, since such services were merely overhead items and not purchased for resale. Additionally, the Division contends that portions of several refund claims are outside the statute of limitations permitted for such claims.

### ***CONCLUSIONS OF LAW***

A. Petitioner's reliance on Tax Law § 1101(b)(4) is misplaced inasmuch as that section applies to sales of tangible personal property, not services. Pursuant to Tax Law § 1105(b), sales tax is imposed upon "[t]he receipts . . . from every sale, other than sales for resale, of telephony and telegraphy and telephone and telegraph service of whatever nature. . . ."

The resale exclusion is expanded in 20 NYCRR 526.6(c)(1) to provide the following, in part:

Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer.

Receipts from additional taxable services, except those for resale, pertinent to this matter, are further enumerated in Tax Law § 1105(c) (former [9]):

The furnishing or provision of an entertainment service or of an information service, which is furnished, provided, or delivered by means of telephony or telegraphy or telephone or telegraph service (whether intrastate or interstate) of whatever nature, such as entertainment or information services provided through 800 or 900 numbers or mass announcement services or interactive information network services.

B. Petitioner maintains that in its acquisition of the audio signals which constitute information and its sale of the same information, the telephone is merely an incidental element. Thus, petitioner argues, Phone Programs acquires audio signals which are informational in nature on a wholesale basis and resells such signals as a taxable retail sale. The Division notes that the refund claim is for sales tax charged on the telephone services which are used by petitioner as a means to acquire entertainment and sports information. Although the audio signals conveyed over the subject telephone lines were recorded by petitioner, and the recordings thereafter transmitted over another telephone line to New York Telephone Company's Erickson Switch, which digitally records the message preparing it for dissemination to the calling public, the telephone service itself used to gather information is not resold to petitioner's customers.

A critical point which is raised by the Division is that petitioner purchases telephone services from which it acquires information which it records, edits, transfers and transmits to persons who desire such information by accessing a specific telephone connection. Petitioner did not pay sales tax on the information or entertainment material it acquired, but rather *paid tax on the telephone services* (Tax Law § 1105[b]) it used to acquire such information. It is sports information or entertainment that is sold to the calling customer, and such *entertainment services, when delivered by means of telephony, are subject to sales tax* (Tax Law § 1105[c][9]). The telephone services upon which petitioner paid sales tax are not the same services that petitioner provided to the calling public for purposes of the resale exclusion.

I agree with the Division that petitioner could qualify for the resale exclusion only if the telephone services at issue could be considered a component part of the entertainment service sold by petitioner. However, the service accessed by the public, a dedicated line bearing a digital recording by use of the Erickson Switch, is not the same telephone service used to acquire



the information, upon which petitioner paid sales tax. This situation simply does not meet the resale exclusion (Tax Law § 1105[b]; 20 NYCRR 526.6[c]). The telephone services purchased by petitioner were merely a cost of doing business, i.e., an item of overhead. Accordingly, the Division's denial of petitioner's claims for refund was proper.

C. Since it has been determined that petitioner's refund claims were properly denied, the second issue regarding the statute of limitations is deemed moot.

D. The petition of Phone Programs, Inc. is denied and the refund denial letters dated April 2, 1996 and December 16, 1996 are hereby sustained.

DATED: Troy, New York  
February 18, 1999

/s/ Catherine M. Bennett  
ADMINISTRATIVE LAW JUDGE