S T A T E O F N E W Y O R K

5637

2011-2012 Regular Sessions

I N S E N A T E

June 8, 2011

Introduced by Sen. DeFRANCISCO -- read twice and ordered printed, and when printed to be committed to the Committee on Investigations and Government Operations

AN ACT to amend the tax law, in relation to exempting electronic news services and electronic periodicals from sales and compensating use taxes

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Subdivision (b) of section 1101 of the tax law is amended by adding a new paragraph 37 to read as follows:

(37) ELECTRONIC NEWS SERVICE. (I) A SERVICE DELIVERED, FURNISHED OR PROVIDED TO OR ACCESSED BY THE PURCHASER ELECTRONICALLY OR DIGITALLY THAT MEETS ALL OF THE FOLLOWING CONDITIONS:

(A) THE SERVICE'S PREDOMINANT PURPOSE IS THE PRESENTATION OF NEWS CONTENT, WHICH IT PROMINENTLY FEATURES;

(B) THE SERVICE'S NEWS CONTENT (I) INCLUDES GENERAL NEWS THAT IS ACCESSIBLE WITHOUT USE OF A SEARCH FUNCTION; (II) IS NEWLY PUBLISHED OR UPDATED AT LEAST DAILY UNLESS THE SERVICE SPECIFIES SOME OTHER INTERVAL, PROVIDED, HOWEVER, THAT THE NEWS CONTENT MUST BE NEWLY UPDATED OR PUBLISHED WITHIN A TWENTY-FOUR HOUR PERIOD THAT PRECEDES OR IMMEDIATELY FOLLOWS A TIME WHEN THE NON-NEWS CONTENT IS NEWLY PUBLISHED OR UPDATED; AND (III) IS PREDOMINANTLY PURCHASED FROM CONTRACTED WIRE SERVICES OR WRITTEN OR PRODUCED BY THE EMPLOYEES OR ENGAGED INDEPENDENT CONTRACTORS OF THE PERSON PROVIDING THE SERVICE, INCLUDING, BUT NOT LIMITED TO, EMPLOYEES OR ENGAGED INDEPENDENT CONTRACTORS OF ANY AFFILIATE OF SUCH PERSON;

(C) THE SERVICE IS AVAILABLE TO THE PUBLIC;

(D) THE SERVICE HOLDS ITSELF OUT AS A "NEWS SERVICE," "NEWSPAPER," "MAGAZINE," "PERIODICAL," "JOURNAL," "POST," OR WORDS OF SIMILAR IMPORT AND DOES NOT HOLD ITSELF OUT AS SOMETHING OTHER THAN ONE OF SUCH TERMS OR A TERM OF SIMILAR IMPORT.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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(E) THE SERVICE HAS CONTINUITY AS TO ITS TITLE AND THE GENERAL NATURE OF ITS CONTENT OVER TIME;

(F) THE SERVICE IS NOT, IN WHOLE OR IN SUBSTANTIAL PART, A LISTING, CATALOG, DATABASE, OR COMPILATION;

(G) THE ONLY SEARCH FUNCTION THE SERVICE OFFERS WITHOUT A SEPARATELY-STATED, REASONABLE CHARGE IS A SEARCH OF THE SERVICE'S OR OF ANY OF ITS AFFILIATES' PRESENT OR PAST NEWS CONTENT. PROVIDED, A SERVICE THAT SATISFIES ALL THE CLAUSES OF THIS SUBPARAGRAPH EXCEPT THIS CLAUSE MAY STILL QUALIFY AS AN ELECTRONIC NEWS SERVICE FOR PURPOSES OF THIS PARAGRAPH IF THE PROVIDER OF THE SERVICE CAN SHOW THAT THE NON-NEWS CONTENT AVAILABLE THROUGH THE SEARCH FUNCTION IS MERELY AN INCIDENTAL PART OF THE SERVICE, INCLUDING, FOR EXAMPLE, BY SHOWING THAT THE COST TO THE PERSON PROVIDING THE SERVICE OF ANY NON-NEWS CONTENT AVAILABLE THROUGH THE SEARCH FUNCTION IS LESS THAN THE COST TO THAT PERSON OF PROVIDING THE NEWS CONTENT AVAILABLE THROUGH THE SERVICE. PROVIDED, FURTHER, THAT A PURCHASER'S ACCESS TO THE SERVICE'S SEARCH FUNCTION FOR WHICH THERE IS A SEPARATELY-STATED, REASONABLE CHARGE TO THE PURCHASER SHALL BE TREATED SEPARATELY AND IS NOT RELEVANT AS TO WHETHER THIS CLAUSE IS SATISFIED.

(II) THE FOLLOWING DEFINITIONS APPLY TO SUBPARAGRAPH (I) OF THIS PARAGRAPH AND SUBDIVISION (GG) OF SECTION ELEVEN HUNDRED FIFTEEN OF THIS ARTICLE:

(A) "NEWS CONTENT" MEANS THE ARTICLES, PHOTOGRAPHS, AND VIDEO AND AUDIO MATERIAL CONCERNING GENERAL NEWS OR SPECIALIZED NEWS AND DOES NOT INCLUDE LISTINGS, ADVERTISEMENTS, CATALOGS, COMPILATIONS, DATABASES, OR THE LIKE.

(B) "NON-NEWS CONTENT" MEANS ANY INFORMATION OTHER THAN NEWS CONTENT.

(C) "ARTICLE" MEANS A PROSE COMPOSITION, INCLUDING COMMENTARIES, REVIEWS, EDITORIALS, OP-EDS, LETTERS TO THE EDITOR, AND READER COMMENTS ON ARTICLES. THE TERM DOES NOT INCLUDE LISTINGS, ADVERTISEMENTS, CATALOGS, COMPILATIONS, DATABASES, OR THE LIKE.

(D) "GENERAL NEWS" MEANS MATTERS OF GENERAL INTEREST AND REPORTS OF CURRENT EVENTS.

(E) "SPECIALIZED NEWS" MEANS MATTERS OF A SPECIALIZED INTEREST, SUCH AS LEGAL, MERCANTILE, FINANCIAL, THEATRICAL, ENTERTAINMENT NEWS, POLITICAL, RELIGIOUS, OR SPORTING MATTERS.

(F) "CAP AMOUNT" MEANS THREE HUNDRED PERCENT OF THE ANNUALIZED AVERAGE DAILY NEWSSTAND PRICE OF THE THREE NEWSPAPERS WITH THE LARGEST TOTAL PAID NATIONAL DAILY CIRCULATION. THE COMMISSIONER SHALL DETERMINE THE CAP AMOUNT ANNUALLY AND SHALL CAUSE IT TO BE PUBLISHED ON THE DEPARTMENT'S WEBSITE AND GIVE OTHER APPROPRIATE GENERAL NOTICE THEREOF. THE COMMISSIONER SHALL DETERMINE AND PUBLISH THE CAP AMOUNT ANNUALLY BY APRIL FIRST BASED ON PRICES CHARGED DURING THE FIRST WEEK OF JANUARY OF THAT YEAR, WHICH CAP AMOUNT SHALL APPLY FOR THE SUCCEEDING TWELVE-MONTH PERIOD COMMENCING JUNE FIRST AND ENDING MAY THIRTY-FIRST. THE CALCULATION AND PUBLICATION OF THE CAP AMOUNT UNDER THIS CLAUSE SHALL NOT BE INCLUDED WITHIN PARAGRAPH (A) OF SUBDIVISION TWO OF SECTION ONE HUNDRED TWO OF THE STATE ADMINISTRATIVE PROCEDURE ACT RELATING TO THE DEFINITION OF A RULE.

(G) "AFFILIATE" MEANS, WITH RESPECT TO ANY PERSON, ANY OTHER PERSON THAT, DIRECTLY OR INDIRECTLY THROUGH ONE OR MORE INTERMEDIARIES, CONTROLS, OR IS CONTROLLED BY, OR IS UNDER COMMON CONTROL WITH, SUCH PERSON, AND THE TERM "CONTROL" (INCLUDING THE TERMS "CONTROLLED BY" AND "UNDER COMMON CONTROL WITH") MEANS THE POSSESSION, DIRECTLY OR INDIRECTLY, OF THE POWER TO DIRECT OR CAUSE THE DIRECTION OF THE MANAGEMENT AND POLICIES OF SUCH PERSON, WHETHER THROUGH OWNERSHIP OF VOTING SECURITIES, BY CONTRACT OR OTHERWISE.

S 2. Subdivision (b) of section 1101 of the tax law is amended by adding a new paragraph 38 to read as follows:

(38) ELECTRONIC PERIODICAL. (I) A PUBLICATION DELIVERED, FURNISHED OR PROVIDED TO OR ACCESSED BY THE PURCHASER ELECTRONICALLY OR DIGITALLY THAT MEETS ALL OF THE FOLLOWING CONDITIONS:

(A) THE PUBLICATION'S PREDOMINANT PURPOSE IS THE PRESENTATION OF NEWS CONTENT, WHICH IT PROMINENTLY FEATURES;

(B) THE PUBLICATION IS PUBLISHED AT STATED INTERVALS, AT LEAST AS FREQUENTLY AS FOUR TIMES A YEAR BUT NO MORE FREQUENTLY THAN WEEKLY, AND IS NOT UPDATED BETWEEN ISSUES. HOWEVER, THE INCIDENTAL PROVISION OF ADDITIONAL NEWS CONTENT BETWEEN ISSUES WILL NOT PREVENT THE REQUIREMENT IN THIS CLAUSE FROM BEING SATISFIED. IN DETERMINING WHETHER THE NEWS CONTENT ADDED BETWEEN ISSUES IS INCIDENTAL, AMONG THE FACTORS THE COMMISSIONER IS TO CONSIDER IS THE AMOUNT OF THE NEWS CONTENT ADDED BETWEEN ISSUES RELATIVE TO THE NEWS CONTENT IN PRECEDING ISSUES AND THE FREQUENCY OF THE PROVISION OF ADDITIONAL NEWS CONTENT BETWEEN ISSUES. PROVIDED THAT THE DISPLAY OF READER COMMENTS OR LETTERS TO THE EDITOR BETWEEN ISSUES DOES NOT AFFECT WHETHER THIS CLAUSE IS SATISFIED.

(C) THE PUBLICATION'S NEWS CONTENT IS PURCHASED FROM CONTRACTED WIRE SERVICES OR WRITTEN OR PRODUCED BY MULTIPLE EMPLOYEES OR ENGAGED INDEPENDENT CONTRACTORS OF THE PERSON PROVIDING THE PUBLICATION, INCLUDING, BUT NOT LIMITED TO, EMPLOYEES OR ENGAGED INDEPENDENT CONTRACTORS OF ANY AFFILIATE OF SUCH PERSON;

(D) THE PUBLICATION IS AVAILABLE TO THE PUBLIC;

(E) THE PUBLICATION HOLDS ITSELF OUT AS A "MAGAZINE," "PERIODICAL" OR WORDS OF SIMILAR IMPORT AND DOES NOT HOLD ITSELF OUT AS SOMETHING OTHER THAN A "MAGAZINE," "PERIODICAL," OR WORDS OF SIMILAR IMPORT;

(F) THE PUBLICATION HAS CONTINUITY AS TO ITS TITLE AND THE GENERAL NATURE OF ITS CONTENT OVER TIME;

(G) THE PUBLICATION IS NOT, IN WHOLE OR IN SUBSTANTIAL PART, A LISTING, CATALOG, DATABASE, OR COMPILATION; AND

(H) THE ONLY SEARCH FUNCTION THE PUBLICATION OFFERS WITHOUT A SEPARATELY-STATED, REASONABLE CHARGE IS A SEARCH OF THE PUBLICATION'S OR OF AN AFFILIATE'S PRESENT OR PAST NEWS CONTENT. HOWEVER: (I) THE PUBLICATION'S PROVISION OF ACCESS, AT NO ADDITIONAL CHARGE, TO A SEARCH ENGINE THAT, APART FROM THE SERVICE, IS OTHERWISE AVAILABLE TO THE PUBLIC FOR FREE IS NOT RELEVANT AS TO WHETHER THIS CLAUSE IS SATISFIED; AND (II) THE PUBLICATION'S PROVISION OF ACCESS TO A SEARCH FUNCTION FOR WHICH THERE IS A SEPARATELY-STATED, REASONABLE CHARGE TO THE PURCHASER SHALL BE TREATED SEPARATELY AND IS NOT RELEVANT AS TO WHETHER THIS CLAUSE IS SATISFIED.

(II) FOR PURPOSES OF SUBPARAGRAPH (I) OF THIS PARAGRAPH AND THE EXEMPTION PROVIDED FOR ELECTRONIC PERIODICALS IN SUBDIVISION (GG) OF SECTION ELEVEN HUNDRED FIFTEEN OF THIS ARTICLE, "ARTICLES" HAS THE SAME MEANING AS IN SUBPARAGRAPH (II) OF PARAGRAPH THIRTY-SEVEN OF SUBDIVISION (B) OF THIS SECTION AND "NEWS CONTENT" MEANS ARTICLES, PHOTOGRAPHS, AND VIDEO AND AUDIO MATERIAL DEVOTED TO LITERATURE, THE SCIENCES, THE ARTS, NEWS, AN INDUSTRY, PROFESSION, SPORT OR OTHER FIELD OF ENDEAVOR, AND DOES NOT INCLUDE LISTINGS, ADVERTISEMENTS, CATALOGS, COMPILATIONS, DATABASES, OR THE LIKE.

S 3. Paragraph 1 of subdivision (c) of section 1105 of the tax law, as amended by chapter 373 of the laws of 1995, is amended to read as follows:

(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 or 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, ELECTRONIC NEWS SERVICES, radio broadcasters and television broadcasters in the collection and dissemination of news, and excluding meteorological services.

S 4. Paragraph (i) of subdivision (b) of section 1115 of the tax law, as amended by chapter 575 of the laws of 1965, is amended to read as follows:

(i) Telephony and telegraphy and telephone and telegraph service used by newspapers, ELECTRONIC NEWS SERVICES, radio broadcasters and television broadcasters in the collection or dissemination of news shall be exempt from the tax imposed under subdivision (b) of section eleven hundred five OF THIS ARTICLE if the charge for such services is a toll charge or a charge for mileage services, including the associated station terminal equipment.

S 5. Section 1115 of the tax law is amended by adding a new subdivision (gg) to read as follows:

(GG) (1) RECEIPTS FROM THE SALE OF AN ELECTRONIC NEWS SERVICE AND CONSIDERATION GIVEN OR CONTRACTED TO BE GIVEN FOR, OR FOR THE USE OF, AN ELECTRONIC NEWS SERVICE SHALL BE EXEMPT FROM THE TAXES IMPOSED BY PARAGRAPH ONE OR NINE OF SUBDIVISION (C) OF SECTION ELEVEN HUNDRED FIVE OF THIS ARTICLE AND CLAUSE (C) OF SUBDIVISION (A) OF SECTION ELEVEN HUNDRED TEN OF THIS ARTICLE IF THE RECEIPTS FROM THE SALE OF, OR THE CONSIDERATION GIVEN FOR, OR FOR THE USE OF, THE ELECTRONIC NEWS SERVICE DOES NOT EXCEED THE CAP AMOUNT AS DEFINED IN SUBPARAGRAPH (II) OF PARAGRAPH THIRTY-SEVEN OF SUBDIVISION (B) OF SECTION ELEVEN HUNDRED ONE OF THIS ARTICLE. IF THE SUBSCRIPTION PERIOD OF THE ELECTRONIC NEWS SERVICE IS OTHER THAN A YEAR, THE CAP AMOUNT SHALL BE ADJUSTED PROPORTIONATELY IN DETERMINING WHETHER THE SUBSCRIPTION PRICE EXCEEDS THE CAP AMOUNT. IF THE CONTRACT FOR THE SALE OF THE ELECTRONIC NEWS SERVICE GRANTS MORE THAN ONE PERSON THE RIGHT TO VIEW THE ELECTRONIC NEWS SERVICE, THE RECEIPTS FROM THE SALE OF, OR THE CONSIDERATION GIVEN FOR, OR FOR THE USE OF, THE SERVICE WILL BE DEEMED NOT TO EXCEED THE CAP AMOUNT ONLY IF THE LISTED SELLING PRICE FOR AN INDIVIDUAL SUBSCRIPTION ON THE DAY THE CONTRACT COMMENCES DOES NOT EXCEED THE CAP AMOUNT.

(2) RECEIPTS FROM THE SALE OF AN ELECTRONIC PERIODICAL AND CONSIDERATION GIVEN, OR CONTRACTED TO BE GIVEN FOR, OR FOR THE USE OF, AN ELECTRONIC PERIODICAL SHALL BE EXEMPT FROM THE TAXES IMPOSED BY PARAGRAPH ONE OR NINE OF SUBDIVISION (C) OF SECTION ELEVEN HUNDRED FIVE AND CLAUSE (C) OF SUBDIVISION (A) OF SECTION ELEVEN HUNDRED TEN OF THIS ARTICLE.

(3) IF AN ELECTRONIC PERIODICAL IS SOLD TOGETHER WITH ANY OTHER COMPONENTS THAT ARE TAXABLE UNDER THIS ARTICLE (OTHER THAN AN ELECTRONIC NEWS SERVICE) FOR A SINGLE PRICE, THE EXEMPTION IN PARAGRAPH TWO OF THIS SUBDIVISION SHALL NOT APPLY TO THE RECEIPTS FROM THE SALE OF, OR CONSIDERATION GIVEN, OR CONTRACTED TO BE GIVE FOR, OR FOR THE USE OF, THE ELECTRONIC PERIODICAL AND SUCH OTHER COMPONENTS UNLESS THE VENDOR SELLS SUCH ELECTRONIC PERIODICAL AND SUCH OTHER COMPONENTS SEPARATELY IN THE REGULAR COURSE OF BUSINESS. IF THE REQUIREMENT IN THE PRECEDING SENTENCE IS SATISFIED, THEN THE EXEMPTION WILL APPLY TO AN AMOUNT EQUAL TO THE BUNDLED PRICE MULTIPLIED BY A FRACTION, THE NUMERATOR OF WHICH IS THE PRICE OF THE ELECTRONIC PERIODICAL WHEN SOLD SEPARATELY AND THE DENOMINATOR OF WHICH IS THE SUM OF THE PRICE OF THE ELECTRONIC PERIODICAL WHEN

SOLD SEPARATELY AND THE PRICE OF THE OTHER COMPONENTS OF THE TRANSACTION WHEN SOLD SEPARATELY.

(4) IF AN ELECTRONIC NEWS SERVICE IS SOLD TOGETHER WITH OTHER COMPONENTS FOR A SINGLE PRICE, THE EXEMPTION IN PARAGRAPH ONE OF THIS SUBDIVISION SHALL NOT APPLY TO THE RECEIPTS FROM THE SALE OF, OR CONSIDERATION GIVEN, OR CONTRACTED TO BE GIVEN, FOR, OR FOR THE USE OF, THE ELECTRONIC NEWS SERVICE AND THE OTHER COMPONENTS IN THE TRANSACTION UNLESS ONE OF THE FOLLOWING EXCEPTIONS APPLIES AND ONLY TO THE EXTENT INDICATED:

(I) THE PROVIDER OF THE ELECTRONIC NEWS SERVICE DOES NOT SEPARATELY SELL THE ELECTRONIC NEWS SERVICE IN THE REGULAR COURSE OF BUSINESS, THE OTHER COMPONENTS ARE NOT TAXABLE UNDER THIS ARTICLE, AND THE BUNDLED PRICE IS LESS THAN THE CAP AMOUNT, IN WHICH CASE THE EXEMPTION APPLIES TO THE FULL BUNDLED PRICE; OR

(II) THE PROVIDER OF THE ELECTRONIC NEWS SERVICE SELLS THE ELECTRONIC NEWS SERVICE AND EACH OF THE OTHER COMPONENTS OF THE TRANSACTION SEPARATELY IN THE REGULAR COURSE OF BUSINESS, WHETHER OR NOT THE COMPONENTS ARE TAXABLE UNDER THIS ARTICLE, AND THE SEPARATE PRICE OF THE ELECTRONIC NEWS SERVICE DOES NOT EXCEED THE CAP AMOUNT. IF THE CONDITIONS IN THIS SUBPARAGRAPH ARE MET, THE EXEMPTION PROVIDED BY PARAGRAPH ONE OF THIS SUBDIVISION WILL APPLY ONLY TO AN AMOUNT EQUAL TO THE BUNDLED PRICE MULTIPLIED BY A FRACTION, THE NUMERATOR OF WHICH IS THE PRICE OF THE ELECTRONIC NEWS SERVICE WHEN SOLD SEPARATELY IN THE REGULAR COURSE OF BUSINESS, AND THE DENOMINATOR OF WHICH IS THE SUM OF THE PRICE OF THE ELECTRONIC NEWS SERVICE WHEN SOLD SEPARATELY IN THE REGULAR COURSE OF BUSINESS AND THE PRICES OF THE OTHER COMPONENTS WHEN SOLD SEPARATELY IN THE REGULAR COURSE OF BUSINESS; PROVIDED, HOWEVER, THAT IN NO CASE SHALL THE EXEMPT AMOUNT BE GREATER THAN THE AMOUNT OF THE CHARGE FOR THE ELECTRONIC NEWS SERVICE WHEN SOLD SEPARATELY IN THE REGULAR COURSE OF BUSINESS.

(5) FOR THE PURPOSES OF THIS SUBDIVISION "BUNDLED PRICE" MEANS THE PRICE AT WHICH AN ELECTRONIC NEWS SERVICE OR AN ELECTRONIC PERIODICAL IS SOLD TOGETHER WITH ANY OTHER COMPONENTS FOR ONE PRICE; AND "COMPONENT" MEANS ANY PROPERTY, SERVICE, OR OTHER ITEM OF WHATEVER NATURE THAT IS SOLD TOGETHER WITH AN ELECTRONIC NEWS SERVICE OR ELECTRONIC PERIODICAL FOR ONE PRICE.

(6) NOTHING IN THIS SUBDIVISION SHALL EXEMPT, OR BE CONSTRUED TO EXEMPT, ANY SEPARATE CHARGE BY THE VENDOR OF AN ELECTRONIC NEWS SERVICE OR ELECTRONIC PERIODICAL FOR OTHER INFORMATION SERVICES, OR ANY OTHER PROPERTY OR SERVICE SUBJECT TO TAX UNDER THIS ARTICLE, THAT DOES NOT CONSTITUTE AN ELECTRONIC NEWS SERVICE OR ELECTRONIC PERIODICAL.

S 6. Severability clause. If any clause, sentence, paragraph, subdivision, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, this act shall be null, void, and without effect in its entirety and thus prior law shall be reinstated. It is hereby declared to be the intent of the legislature that this act would not have been enacted if such invalid provisions had not been included herein.

S 7. This act shall take effect on the first day of a sales tax quarterly period, as described in subdivision (b) of section 1136 of the tax law, next commencing at least 90 days after this act shall have become a law and shall apply in accordance with the applicable transitional provisions in sections 1106 and 1217 of the tax law; provided, however, that the commissioner of taxation and finance shall compute the cap amount under subparagraph (ii) of paragraph 37 of subdivision (b) of section 1101 of the tax law, as added by section one of this act, based

on prices in effect during the first seven days of the first calendar month next commencing after this act shall have become a law, and the commissioner of taxation and finance shall publish that cap amount at least one month prior to the date this act takes effect and such cap amount shall apply to sales made, services rendered, or uses occurring from the date this act takes effect through the next succeeding May thirty-first.