

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner asks whether the fee it pays for an information technology (IT) support service, as described below, is subject to tax. We conclude that Petitioner does not owe State and local sales and use tax on that fee because the only taxable component of the IT support service is delivered to Petitioner outside the State of New York.

Facts

Petitioner provides investment advice to its customers. Some of Petitioner’s customers are located in New York. As part of its service, Petitioner conveys significant data to its customers. Petitioner conveys the data to its customers mostly by means of its website, although some information is also conveyed by emails and via telephone calls. To prepare its investment advice and to house its website, Petitioner uses IT assets, including servers, all of which are located outside New York.

To maintain those IT assets, Petitioner has hired a New York-based company, Company X, to provide it with “managed IT services.” All of Company X’s work is done remotely, i.e., over the Internet. All of Company X’s employees are located in New York. Company X’s managed IT services require it to manage Petitioner’s IT assets and the data on them in order to keep them secure and operational. This includes the following main tasks:

1. Support hardware covered by the manufacturer’s warranty, which involves communicating with Petitioner’s employees to identify the problem, communicating that information to the manufacturer of the hardware, following up with the manufacturer as necessary, and then communicating the manufacturer’s suggested resolution of the problem to Petitioner. Company X does not fix the hardware itself.
2. Support Petitioner’s standard business software, which involves communicating with Petitioner to identify the problem, sharing that information with the developer of the software, following up with the developer as necessary, and then communicating the developer’s suggested resolution of the problem to Petitioner. Company X does not fix the software problem itself.
3. Manage the backing up of Petitioner’s data, including reporting on success or failure of any attempted backups, and scheduling test restores.

4. Manage the security of Petitioner's IT system, including implementing best practices, reporting on any attempted breaches of the Petitioner's firewall, scheduling security audits, providing and deploying anti-virus and anti-malware software on location, routing all inbound email through an anti-spam platform, managing Petitioner's domain name system (DNS) to render the system less vulnerable to malware, and working with Petitioner to physically secure the network and connected devices.

Company X charges Petitioner a single monthly charge for its managed IT services, which is based on the number of Petitioner's devices (i.e., IT assets such as servers) covered by the service.

Analysis

The Tax Law imposes sales and use tax on retail sales of tangible personal property. *See* Tax Law § 1105(a). "Prewritten computer software" is included in the definition of tangible personal property. *See* Tax Law § 1101(b)(6). Among the services made taxable by the Tax Law is the service of repairing, maintaining, and servicing tangible personal property not held for sale in the regular course of business. *See* Tax Law § 1105(c)(3). The Tax Law exempts the service of repairing, maintaining, or servicing prewritten software. *See* Tax Law § 1115(o). Also subject to tax are "[p]rotective and detective services, including, but not limited to, all services provided by or through alarm or protective systems of every nature, including, but not limited to, protection against burglary, theft, fire, water damage or any malfunction of industrial processes or any other malfunction of or damage to property or injury to persons." Tax Law § 1105(c)(8).

The service Company X is selling to Petitioner has a number of components. The services of supporting Petitioner's hardware and software (i.e., items 1 and 2, above) fall short of being services to maintain, service or repair tangible personal property, or even to supervise such a service, and are thus not subject to tax. *See* TSB-A-15(13)S (service of supervising a taxable service performed by a third-party is not subject to tax). Similarly, Company X's back-up service (Item 3 above) also does not appear to be taxable. Because the service of providing backup and storage of data is not a taxable one (*see* TSB-A-16[19]S), management of that service also would not be taxable. Thus, those components, if analyzed on a standalone basis, would not be taxable. In contrast, the service described in Item 4 above, which Petitioner refers to as the service of managing the security of Petitioner's IT assets and data, standing alone, would constitute a protective service. *See* TSB-A-16(20)S; N-90-20. Here, because the computer assets and data being protected are located outside the State, this component of Petitioner's service also is not taxable. *See* TSB-A-16(20)S, *supra* (protective services are provided in New York if the property being protected is located in New York). Generally, taxability of an integrated service, such as the managed IT services being provided by Company X, is determined based on the service's primary function. *See Matter of SSOV '81 Ltd.*, Tax

Appeals Tribunal, January 19, 1995. However, it is not necessary to determine the primary function of Company X's managed IT services in this matter because the only taxable component of the managed IT Services is being delivered to Petitioner outside of New York. Under that circumstance, whether or not Company X's managed IT services as a whole would constitute a taxable imposition, the fee Petitioner pays for those services is not subject to sales and use tax.

DATED: October 27, 2020

/S/

DEBORAH R. LIEBMAN
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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.