

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-09(15)S
Sales Tax
April 15, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S080408A

Petitioner Electronic Mortgage Affiliates Inc., 4155 Hopyard Road, Suite 200, Pleasanton, California, 94588, requests an advisory opinion about whether its charges to its subscribers for access to its “Encompass Anywhere” loan origination and processing product are subject to New York State and local sales taxes. We conclude that Petitioner’s product is prewritten computer software and is subject to New York State and local sales taxes when sold to a subscriber located in New York.

Facts

Petitioner sells a product that assists subscribers in providing loan origination and processing services. Subscribers, who are mostly mortgage brokers, access Petitioner’s product via the Internet. The product allows the subscriber to do business with online mortgage lenders. One function of the product allows the subscriber to “prequalify” a potential borrower by entering information about the potential borrower. Petitioner incorporates certain data into the software, such as certain county dollar limits established by the Federal Housing Administration (FHA), and mortgage insurance pricing. This data helps the subscriber to search for loans for which a borrower qualifies and for the applicable insurance costs. Loan data (e.g., a credit rating score) are analyzed against data provided by third parties, who contract with Petitioner, to find the various loan products and pricing available to a specific borrower. Petitioner’s software also screens loans to determine if they meet certain criteria (e.g., low-income housing loans).

The potential borrower’s eligibility is rated using a database compiled by Petitioner that includes information provided by third parties. If the potential borrower is found to be eligible, the subscriber then uses Petitioner’s product to connect to third parties (e.g., banks, credit agencies, title companies) to obtain information about the availability of mortgage loan products from various lenders that would be suitable for the potential borrower and various information required to close the loan. Petitioner’s product also enables the subscriber to obtain and print certain required forms (e.g., disclosure forms). Petitioner also shares the loan information with document providers, including Petitioner’s own document service or third parties. The document providers compile the actual hard-copy documents required to close a particular loan. The document providers review the loan information to ensure completeness, accuracy, and compliance of the loan documents.

Petitioner’s product consists of software hosted on Petitioner’s servers located outside New York State. The “hosting” function performed by Petitioner includes loading and maintaining the software on Petitioner’s servers, storage of subscriber data, data backup, security, and software updates. The subscriber obtains from an unrelated third party freely downloadable software that enables the subscriber to access Petitioner’s software on the host server.

The agreement between Petitioner and a subscriber grants a “non-exclusive, non-transferrable, limited license to access and use the Services over the Internet for the sole purpose of performing loan origination or loan processing services for Subscriber’s customers.” Petitioner’s subscribers are charged an

initial set-up fee and a monthly fee based on the number of users. Petitioner installs and hosts the software on Petitioner's servers, which are located outside New York State. Petitioner states that the license does not allow the subscriber to "alter, change or control the Software." The license agreement states that the subscriber does not receive a copy of Petitioner's software in tangible or other form. Subscribers input their customers' information and data, which are stored on Petitioner's servers in its data center. Petitioner has tables built into its software that measure loan data against certain criteria (e.g., loan-to-value amounts, debt-to-income ratios) to determine eligibility.

Opinion

Petitioner's charges for use of the product described above are receipts from the sale of prewritten computer software. Prewritten computer software is included in the definition of tangible personal property, "regardless of the medium by means of which such software is conveyed to the purchaser." Tax Law §1101(b)(6). The sale of prewritten computer software is subject to tax as the sale of tangible personal property. See Tax Law §§1101 (b)(6); 1105(a). "Sale" is defined as "[a]ny transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including with respect to computer software, merely the right to reproduce) or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor." Tax Law §1101(b)(5). Sales and Use Tax Regulation section 526.7 provides generally that "a sale is taxable at the place where the tangible personal property or service is delivered or the point at which possession is transferred by the vendor to the purchaser or his designee." Regulation section 526.7(e)(4) further provides that a transfer of possession has occurred if there is actual or constructive possession, or if there has been a transfer of "the right to use, or control, or direct the use of tangible personal property." The location of the code embodying the software is irrelevant, because the software can be used just as effectively by the subscriber even though the subscriber never receives the code on a tangible medium or by download.

The accessing of Petitioner's software by Petitioner's subscribers constitutes a transfer of possession of the software, because the subscriber gains constructive possession of the software and gains the "right to use, control or direct the use" of the software. Although Petitioner's contract with its subscribers characterizes its product as a "service," and states that the subscriber does not have the right to "alter, change, or control" the software, this characterization is not controlling. Petitioner's subscribers have the right to access the software in order to determine loan eligibility, ascertain the availability of certain loan products, and generate forms. This is true even if no "copy" of the software is transferred to the subscriber. Accordingly, the sale of a license to use Petitioner's software to a subscriber in New York is subject to State and local sales tax. The situs of the sale for purposes of determining the proper local tax rate and jurisdiction is the location associated with the license to use (i.e., the location of the subscriber's employees that use the software). If the subscriber's employees who use the software are located both in and out of New York State, Petitioner should collect tax based on the portion of the receipt attributable to the employee users located in New York. See TSB-A-03(5)S.

Petitioner's product also has some aspects of an information service. Sales tax is imposed on certain enumerated services. Among these is the service of "furnishing information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the service 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." See Tax Law §1105(c)(1). It appears that Petitioner compiles and provides information from third parties in order to evaluate the potential borrower's eligibility, search for loan products, and ensure the completeness and accuracy of the loan documents. These activities may constitute a taxable information service. However, we need not resolve this question, because we conclude that Petitioner's product is

prewritten computer software, which is taxed at the same State and local rates, and the situs of the sale is determined in the same manner as it is for an information service (see, e.g., TSB-A- 03(5)S).

Finally, Petitioner asks whether the federal Internet Tax Freedom Act (47 USC § 151 (note section 1101, et seq.) (ITFA) prohibits the application of sales tax to the receipts from the sale of its product. We conclude that it does not. ITFA bars state and local taxation of Internet access service (generally, a service that provides a connection to the Internet) and discriminatory taxation of e-commerce. A “discriminatory” tax is one that is imposed on products sold in electronic commerce but not on similar products sold by other means, or a tax imposed on products sold in electronic commerce at a higher rate or on a different person than similar products sold by other means. Petitioner’s product is not Internet *access*; rather, it is prewritten computer software. Moreover, the State and local taxes on prewritten computer software are not discriminatory because they apply equally and at the same rates regardless of whether software is sold via electronic commerce or other means.

DATED: April 15, 2009

/S/

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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.