

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

TSB-A-11(32)S
Sales Tax
December 7, 2011

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S090921B

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether two fees that it bills in conjunction with the sale of laser surgery equipment are subject to sales tax. The first is a ten dollar fee for a plastic treatment card, which must be inserted into the laser surgery equipment in order to operate the equipment. The second is a \$100 per-procedure fee that must be paid by the purchaser of the laser surgery equipment every time the equipment is used, which Petitioner claims is a royalty for the use of a patented surgical procedure. The two fees are invoiced as a single amount on the customer's invoice. We conclude that the ten dollar fee for a plastic card is a receipt from the sale of tangible personal property because the card is always sold in conjunction with the laser surgery equipment and is itself tangible personal property that has utility. The per procedure fee is also subject to sales tax. This fee is taxable because it is either an expense pertaining to the sale of tangible personal property or it is a component of an integrated transaction for the sale of tangible personal property.

Facts

Petitioner sells medical laser surgery equipment and software for cataract and other ophthalmic surgery. Petitioner bills an up-front charge for the sale of laser surgery equipment. Petitioner also bills two additional charges when it sells the equipment. The first is a ten dollar fee for a plastic treatment card, which must be inserted into the laser surgery equipment in order to operate the equipment. A new card must be inserted each time the equipment is used. The second is a \$100 per-procedure fee, which the customer must pay every time the laser equipment is used to perform eye surgery. Petitioner claims this fee represents a royalty for the licensing to the customer of patented surgical procedures. The Petitioner invoices the two fees as a single amount on the customer's invoice.

Petitioner has an agreement with Visx Inc. (Visx) whereby Petitioner pays a per procedure surgery license fee to Visx for every laser correction surgery performed in the United States using Petitioner's laser system and software. That is, Petitioner has the right to sublicense patented surgical procedures.

Petitioner's standard contract for the sale of laser surgery equipment states in part:

Section 1.15 - "Refractive Per Procedure Fee" shall mean, except as otherwise provided in this Agreement, One Hundred Dollars (\$100.00) for each Procedure performed using a laser purchased from or provided by [Petitioner] or leased from a third party leasing company approved by [Petitioner].

Section 3.4 - Monitoring Mechanisms. Customer shall at all times allow [Petitioner] to install in or attach to, any laser and modify and/or enhance a recording, memory or other system or mechanism...which monitors and measures the number of procedures performed.

Section 4.1 - Refractive Per Procedure Fee. At all times, the Customer owns or leases a Laser ... such Customer shall pay [Petitioner] a Refractive Per Procedure Fee for each procedure performed using such Laser.

Section 4.12 - Treatment Cards. During the term [Petitioner] shall sell and customer shall purchase each treatment card for one hundred and ten (\$110.00), which shall include the Refractive Per- Procedure Fee payable by Customer under section 4.1 hereof.

Section 8.9 - Grant of Sublicense. Subject to customer on-going compliance with the covenants contained in this agreement, Petitioner hereby grants to each Customer purchasing a Laser hereunder a non-exclusive sublicense under the Visx Patents (the "Sublicense") to perform Procedures utilizing such Laser.

It is unclear from the facts provided whether Visx's patented surgical procedures are incorporated in whole or in part in the design of the Petitioner's hardware or are incorporated in whole or in part as elements of programs in the software component of Petitioner's laser surgery equipment. It is also unclear from the facts provided whether the laser surgery equipment can physically be used for medical procedures other than the patented procedures that are licensed by Visx.

Analysis

Tax Law Section 1105(a) imposes sales tax on the receipts from the sale of tangible personal property. Tangible personal property is defined in Tax Law section 1101(b)(6) as including prewritten computer software. Prewritten computer software is any computer software that is not designed and developed by the author or other creator to the specifications of a specific purchaser. Tax Law § 1101(b)(14). The sale of prewritten software includes any transfer of title or possession or license to use for consideration. See Tax Law § 1101(b)(5).

Tax Law section 1101(b)(3) defines "receipt" as:

The amount of the sale price of any property and the charge for any service taxable under this article ... valued in money, whether received in money or otherwise, including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses or early payment discounts.

Section 526.5(e) of the Sales and Use Tax Regulations elaborates on this definition:

(e) Expenses. All expenses, including telephone and telegraph and other service charges, incurred by a vendor in making a sale, regardless of their taxable status and regardless of whether they are billed to a customer are not deductible from the receipts.

Petitioner's sale of plastic treatment cards constitutes the sale of tangible personal property subject to sales tax. These cards have utility: they activate Petitioner's laser surgery equipment. Stated negatively, the cards are not merely tokens or symbols that confer legal rights. The reason why the card is used to activate the equipment has no bearing on the sales and use tax status of Petitioner's receipts for the cards.

If the patent is incorporated in whole or in part in the software of the laser equipment (e.g., the software contains program instructions on how to perform the entire patented procedure or a part of the procedure), the fee is merely an expense pertaining to the sale of software that is prewritten computer software subject to sales tax as tangible personal property. If the design of the hardware component of the laser surgery equipment incorporates in whole or in part the patented medical surgical procedure, the same conclusion would hold: the license fee would be an itemized expense pertaining to the sale of tangible personal property. Because itemized expenses pertaining to the sale of tangible personal property are part of the receipts from the sale of the tangible personal property, the license fee would be subject to sales tax as a receipt for sale of tangible personal property if the Visx patent is incorporated in whole or in part in the software or hardware of the laser surgery equipment. This conclusion would remain valid even if the license fee confers on the customer the right to perform the patented procedure.

Because it appears that the Petitioner's laser surgery equipment that is in question can be used only to perform the medical procedure patented by Visx, it is highly probable that Visx's patented medical surgical procedure is incorporated in whole or in part in the design of the hardware component of laser surgery equipment or is incorporated in whole or in part in the software component of the laser surgery equipment. However, Petitioner's application for an advisory opinion offers no clear guidance as to whether the patent is in fact incorporated into the hardware or software of the laser; therefore, no definitive conclusion on the question of incorporation is possible based on the facts presented.

Petitioner has the burden to establish that the license fee in question is for a patent that is not incorporated in whole or in part in Petitioner's laser. Until Petitioner can establish that no incorporation of the patent into the laser surgery equipment has occurred, the fee will be presumed subject to sales tax. Tax Law § 1132(c).

Tax Law section 1115(a)(3) exempts from sales and use tax the sale of medical equipment and supplies except when the equipment or supplies are purchased by a person performing medical or similar services for compensation. Consequently, Petitioner's receipts from the sale of laser surgery equipment and cards to medical practitioners who will use the property to provide medical services for compensation are subject to sales and use tax.

DATED: December 7, 2011

/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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.