

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

TSB-A-13(22)S
Sales Tax
July 25, 2013

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S130102B

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether New York State and local sales taxes are imposed on the receipts from sales of access to forms via software stored on Petitioner's web site.

We conclude that, under the facts below, Petitioner's product is prewritten software that is subject to State and local sales taxes when accessed by a customer located in this State.

Facts

Petitioner is developing software to allow its customers to access forms templates on its web site. Petitioner will sell only access to the digital files stored on Petitioner's server; the customer will not receive a copy of the software in tangible or other form. By connecting to Petitioner's web site, a customer will be able to pull up a form and populate the form with the customer's own data. If, and only if, the customer has entered some data on the form, the form can then be downloaded to the customer's computer and printed at the customer's own location. The customer will be billed for each form that is downloaded. Petitioner expects to have customers within and without New York State.

Analysis

Petitioner's product allows its customers to access templates of forms on Petitioner's web site, populate the forms with the customer's own data, and download populated forms onto the customer's own computer from which the forms can be printed out. In line with previous Advisory Opinions discussed below, we view Petitioner's business as selling access to prewritten computer software, which is included within the definition of "tangible personal property" subject to New York State and local sales tax. *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." *See* Tax Law § 1101(b)(5). Sales and Use Tax Regulation § 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 § 526.7(e)(4) further provides that, with respect to a "license to use," 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 customer even though the customer never receives the code on a tangible medium or by download.

We conclude that the accessing of Petitioner's software by Petitioner's customers for consideration constitutes the sale of prewritten computer software. *See, e.g.*, TSB-A-09(15)S (charges for online access to "loan origination and processing services," which, among other things, allowed customer to complete and print certain loan processing documents, constituted receipts from the sale of prewritten computer software); TSB-A-08(62)S (license to use software product that allowed customer to upload an image to a web site and manipulate the image to show various colors and views, constituted the sale of prewritten computer software). Although Petitioner's customers do not have the right to "alter, change, or control" the underlying code of the software itself, they gain constructive possession of the software and the "right to use, control or direct the use" of the software, because they have the right to alter the content by filling in the form, without which the form is unavailable. 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 customer's employees that use the software.¹ If the customer'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 receipts attributable to the customer's users located in NYS.

DATED: July 25, 2013

/S/

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Deputy Counsel

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.

¹ *See* 20 NYCRR §526.7(e)(1) and (4) and TSB-A-03(5)S.