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

TSB-13(30)S
Sales Tax
September 10, 2013

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S120719A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [redacted]. Petitioner requests an Advisory Opinion about whether his online software assessment tool or the reports generated by that software tool are subject to sales and use taxes.

We conclude that Petitioner's software tool is prewritten computer software and is subject to sales tax when sold to third party consultants. Petitioner's use of the software tool is subject to use tax because he offers the software for sale in the regular course of business. The reports Petitioner prepares for customers constitute a personal or individual information service that is not subject to sales tax.

Facts

Petitioner has developed a software assessment tool that is available online. The tool uses a structured interview that is completed by a key representative of an employer-customer. The interview questions are designed to measure the characteristics of the employer-customer's workplace that support employee health (its policies, services, facilities, etc.). The software tool then analyzes the interview responses based upon predetermined standards and a scoring mechanism built into the software. The software does not use benchmarks derived from a common data source. A report is then generated, which the employer-customer can use to improve the health environment for its employees or to better manage employee health.

Petitioner sells his product in two ways: (1) Petitioner uses the software tool to evaluate interview responses and generate a report that he sells to the employer-customer; and (2) Petitioner sells single-use or multiple-use licenses to use the software tool and to access the online interview to a third-party consultant, who uses the tool and interview responses to generate a report that the consultant sells to an employer-customer. When the software tool is licensed to a third-party consultant, the consultant accesses the software tool over the Internet using a password that is provided by Petitioner via e-mail. No tangible personal property is transferred in conjunction with the software tool.

Petitioner's agreements with employer-customers provide "each party shall use the Confidential Information of the other party solely in the performance of its obligations under this Agreement and not disclose it, except to authorized employees of the receiving party or its affiliates." The agreements further provide that the employer-customer's data "may be useful in future research conducted by [Petitioner] with the Software. In the event that such a research

opportunity emerges, [Petitioner] will contact the [employer-customer] to obtain written authorization . . . to use [the data] for research purposes. Such data would be aggregated with the data of other [employer-customers], and the identity of the source of the data would not be revealed. [The employer-customer] may deny [Petitioner] authorization to use the [data] for such research purposes in [the employer-customer's] sole discretion." Results of Petitioner's past research projects have been published in health sciences literature. Petitioner asserts that the likelihood of conducting such research is low. However, if such research opportunities were pursued in the future with this product, it is anticipated that the results would be published in a similar manner.

Analysis

Petitioner's charges for use of his software tool by third-party consultants are receipts from the sale of prewritten computer software. Prewritten computer software is included within 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 § 1105(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." Petitioner must collect sales tax on the sale of licenses to use his software tool where access to the software will occur in New York. Because the third party consultants are not re-selling licenses to use Petitioner's software tool, the consultants should not offer and Petitioner may not accept a resale certificate for those purchases.

Computer software that is written or otherwise created by the user is subject to use tax if the user offers software of a similar kind for sale as such or as a component part of other property in the regular course of business. *See* Tax Law § 1110(a)(F). Petitioner sells his software tool to third party consultants. Therefore, Petitioner's own use of the software tool he designed is subject to use tax. The use tax is calculated on the consideration paid for tangible personal property which constitutes the blank medium, such as discs or tapes, used in conjunction with the software. *See* Tax Law § 1110(g). Because Petitioner does not reduce the software tool to tangible media, but rather makes it available online, the base on which the use tax would be calculated is zero.

Tax Law § 1105(c)(1) also imposes tax on receipts from the sale of certain information services. Petitioner's services of gathering data from its employer-customer and using that data to create reports generated by his proprietary software constitute an information service under § 1105(c)(1), because Petitioner adds to the "intelligence" contained in the original data by analyzing it and presenting it in the form of a report according to the parameters of Petitioner's software program. *See ADP Automotive Claims Services, Inc. v. Tax Appeals Tribunal*, 188 AD2d 245 (3d Dept 1993). However, because the information provided by Petitioner in these reports relates to an individual employer-customer's own data, and Petitioner does not and cannot, under its agreement with its customer, furnish the information or reports to anyone else, Petitioner's activities constitute an information service that is personal or individual in nature, and therefore is excluded from the sales tax imposed by Tax Law § 1105(c)(1). Accordingly, Petitioner is not required to collect sales tax when he sells reports to his employer-customers. The fact that Petitioner may seek and receive permission from an employer-customer to use its data for research purposes in the future does not alter this result.

DATED: September 10, 2013

/S/
DEBORAH R. LIEBMAN
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.