

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

TSB-A-13(32)S
Sales Tax
September 10, 2013

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S121031B

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. (Petitioner). Petitioner asks whether the hosted software solutions system that it provides to its customers is subject to New York State sales and use taxes. We conclude that Petitioner's sale of its hosted software solutions system constitutes the sale of pre-written computer software that is subject to New York State sales and use tax.

Facts

Petitioner designs, creates and owns a software solutions system that assists law firms in the management and organization of their law offices. The software manages several aspects of the day to day operations of a law office including: maintaining and organizing client and case management files, tracking and processing client billing and credit management, handling e-mails and e-filing scanned documents, and handling attendance and personnel records internally. Access to the system is provided via the Internet to participating attorneys for a contractually agreed upon period of time and is billed on a monthly basis. All data is entered into the management software by participating attorney customers. Petitioner provides periodic upgrades and on-going technical support for the software.

Analysis

Tax Law § 1105(a) imposes sales tax on the receipts from the sale of tangible personal property. Tax Law § 1101(b)(6) defines tangible personal property to include pre-written computer software. Pre-written computer software is any computer software that is "not software designed and developed by the author or other creator to the specifications of a specific purchaser." Tax Law § 1101(b)(14). "Pre-written software or a pre-written portion thereof that is modified or enhanced to any degree, where such modification or enhancement is designed and developed to the specifications of a specific purchaser, remains pre-written software." *Id.* However, where there is a "reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for the modification or enhancement, such modification or enhancement shall not constitute pre-written computer software". *Id.* Also, pre-written computer software is considered tangible personal property regardless of the means by which it is conveyed to a purchaser. Tax Law § 1101(b)(6).

The sale of pre-written software includes any transfer of title or possession or license to use for consideration. 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 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 the tangible personal property.” Petitioner must collect sales tax on sale of licenses to use his software solutions system where delivery or access of the software will occur in New York.

Through its hosted solutions software system, Petitioner grants its customers a license to use its software. By providing customers with the rights to use its software, Petitioner is making taxable sales of pre-written computer software that are subject to New York State sales and use tax. This is true even if no “copy” of the software is downloaded or transferred to the customer. Pre-written software remains taxable even if it is enhanced or modified for a specific purchaser. However, if the charge for custom modification or enhancement is separately stated on the invoice or bill, the charge for custom modification is exempt.

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). If the customer’s employees that 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.

DATED: September 10, 2013

/s/

DEBORAH R. LIEBMAN
Deputy Counsel

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