New York State Department of Taxation and Finance
Office of Counsel

TSB-A-20(65)S
Sales Tax
November 17, 2020

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance received a Petition for Advisory Opinion from [redacted] (Petitioner) requesting guidance on the implications of its product offering for sales tax purposes. We conclude that Petitioner is making sales of prewritten computer software. Accordingly, sales tax is imposed on Petitioner's sales receipts. However, sales tax is not imposed on receipts for software installation services and software modifications, if the corresponding charges are reasonable and separately-stated on invoices.

Facts

Petitioner owns proprietary computer software that it markets to customers seeking to better handle incoming phone calls to their customer service departments. The software resides solely on Petitioner's servers and, along with a historically diminishing level of human assistance, is used to determine the intent of callers.

Petitioner first consults with a customer to assess its call handling needs. In this phase, Petitioner designs and develops technical specifications and call flow scripts based on information provided by the customer with the objective of configuring its proprietary software to handle the customer's calls. Petitioner then configures its software to determine the intent of each caller. The customer is charged separately for these installation services and software modifications.

Next, the appropriate technology must be procured to enable Petitioner's services. In most cases, the customer is responsible for supplying and implementing all required telephony and network connectivity equipment, including a circuit to forward calls from the customer's call center to one of Petitioner's data center locations. However, in some instances, Petitioner procures the circuit on behalf of the customer. Petitioner pays all applicable sales tax to its vendors at the time of purchasing these circuits. The charges for the circuit then are generally passed through as separate "circuit fees" along with any additional administrative fee. In certain circumstances, though, the customer is not billed separately.

When a customer 's caller (an unrelated third party) contacts a customer, a circuit located on the customer's premises routes the call to one of Petitioner's data centers. Petitioner has data centers located in three states, which do not include New York. At the data center, the call is connected to software that has been configured for that specific customer. The caller's intent is then determined by a combination of Petitioner's proprietary, voice-recognition software and "Intent Analysts" who listen to small segments of the calls (call utterances) to determine the intent of the caller. Intent Analysts are live employees of the Petitioner who listen to the calls to determine the intent of the caller. Gathering the intent of the caller is achieved by listening to call utterances and entering the intent of the call into a desktop computer, which is hosted on Petitioner's platform and interfaces with Petitioner's software. Intent Analysts do not speak with the caller. Their job function is purely to listen to call utterances and to enter the caller's intent into Petitioner's software. Historically, Intent Analysts listened to small segments of every call and were necessary to determine a caller's intent. However, as Petitioner's software has developed and improved, the software is now capable of handling more and more calls start to finish without the intervention of Intent Analysts. Mostly, the caller's issue is resolved and the call is terminated at one of Petitioner's data centers. However, occasionally, Petitioner's system is unable to resolve the caller's issue and the call is routed back to the customer. Alternatively, the caller's intent is successfully determined and the call is routed back to the customer as predetermined by the call flow script. Petitioner generally bills its customers based on successful transactions, per completed call or necessary utterance second.

Additionally, the Company offers a web-based portal whereby a customer can view reports regarding the handling of its phone calls. Petitioner's software reports on call result information such as routing destinations, containment data, and terminations. Neither the software nor the data generated by the software can be manipulated or modified through this web-based portal.

Analysis

Sales tax is imposed on receipts from the sale of tangible personal property, including prewritten software, "regardless of the medium by means of which such software is conveyed to a purchaser." *See* Tax Law §§ 1105(a); 1101(b)(6); *but see* Tax Law § 1115(o). 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. *See* Tax Law § 1101(b)(14). Prewritten software remains prewritten software, even if modified or enhanced to the specifications of a specific purchaser, except to the extent that there is a reasonable, separately-stated charge for such modification or enhancement. *Id.*

"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), conditional 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(e)(4) provides that, with respect to a "license to use," a transfer of possession has occurred if there is a transfer of 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." 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. *See* 20 NYCRR 526.7(e)(1). The location of the code embodying the software is not relevant, because software can be used by a customer without transfer of the code on a tangible medium or by download. *See* TSB-A-08(62)S.

The essence of Petitioner's offering to customers is prewritten computer software designed to facilitate efficiency in the handling of phone calls. *See generally* TSB-A-17(9)S. This software either identifies and resolves the caller's issue, or directs the caller back to a customer to handle the call directly. Petitioner is making a sale of this software because its customers contract with Petitioner to connect their telephone systems with Petitioner's software to better route incoming calls. Thus, the customer is directing the use of Petitioner's software and thereby obtains constructive possession of the software. Despite Petitioner's suggestion that use of Intent Analysts makes this offering more of a service than software, the analysts only work to ensure the proper functioning of the software. The analysts do not interface with the caller or otherwise perform any function that makes this sale more akin to a service. Accordingly, we conclude that Petitioner's sales are sales of prewritten computer software, the receipts of which are subject to sales tax.

The situs of the sale of software for determining the proper tax rate and jurisdiction is the location from which a purchaser uses or directs the use of the software. *See generally* TB-ST-128. The location of the code embodying the software is not relevant. Because the customer directs the use of the software from a customer's call center, the proper tax rate is the combined state and local rate in effect in the local jurisdiction in which the customer's call center is located.

Additionally, sales tax is imposed on any separate charges for circuit fees or corresponding administrative fees. The transfer of circuits is an incidental element of the sale of software by Petitioner. *See generally* 20 NYCRR 527.2(d)(4). Accordingly, any charge for providing a circuit is an expense and must be included in the receipt for the sale of software because the amount of a receipt is determined "without any deduction for expenses." *See* Tax Law § 1101(b)(3).

However, Petitioner provides that its customers are billed separately for initial consultations, call-flow script design and development, and necessary software configurations. Where the corresponding charges are reasonable and separately stated on a customer's invoice, those receipts are either exempted from sales tax by Tax Law § 1115(o) as software installation services or excluded from sales tax by Tax Law § 1101(b)(14) as modifications to pre-written software. *See generally* TB-ST-128.

DATED: November 17, 2020

/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.