

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

TSB-A-08(62)S
Sales Tax
November 24, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S080724A

A petition dated July 17, 2008, requests an advisory opinion about whether Petitioner Adobe Systems Inc.'s charges to its customers for access to its "OnDemand ASP Software" are subject to New York State and local sales taxes. We conclude that the product sold by Petitioner is prewritten computer software that is subject to State and local sales taxes when accessed by a customer located in New York.

Facts

Petitioner sells a computer software product that allows a customer to upload an image onto Petitioner's servers and manipulate the image to show various colors and views. For example, a customer may upload the image of a clothing item. The software enables the customer to manipulate the image of the item to show it in different views (e.g., front, back, zoom) or to show its appearance in selected colors. The customer may then provide a link to this image when offering the clothing item for sale on the customer's website. Potential purchasers would be able to view the clothing item from various views and in the available colors.

The agreement between Petitioner and its customer grants a license to use Petitioner's software. Customers are charged an annual fee for use of the software. The software resides on Petitioner's servers located outside New York. Petitioner's customers, some of which are located in New York, access the software using an e-mail address and password provided by Petitioner. The images uploaded by Petitioner's customers remain on Petitioner's servers. Petitioner states that the customer does not receive a copy of the software in tangible or other form.

Analysis

Petitioner's charges for use of its software 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 section 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 section 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.

The accessing of Petitioner's software by Petitioner's customers' constitutes a transfer of possession of the software, because the customer gains constructive possession of the software, and gains the "right to use, control or direct the use" of the software. Petitioner's customers have the right to use the software to upload images of their products and to manipulate those images to display various colors and views of the products. This is true even if no "copy" of the software is transferred to the customer. Accordingly, the sale of a license to use Petitioner's "OnDemand ASP Software" to a customer in New York is subject to State and local sales tax. 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: November 24, 2008

/S/

Jonathan Pessen
Director of Advisory Opinions
Office of 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.