

**New York State Department of Taxation and Finance**  
**Office of Tax Policy Analysis**  
**Taxpayer Guidance Division**

TSB-A-09(37)S  
Sales Tax  
August 25, 2009

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S070730A

On July 30, 2007, the Department of Taxation and Finance received a Petition for Advisory Opinion from National Football League, 280 Park Avenue, New York, New York 10017

The issue raised by Petitioner, National Football League, is whether its purchases of payroll processing and related items described below are subject to sales tax.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner pays a provider (hereinafter "Provider") a monthly fee for processing payroll checks and tracking payroll data. Petitioner's personnel enter Petitioner's payroll data into Petitioner's computers in New York. This data is transferred via Provider's secure website to Provider's computers located in Michigan. Using this information, Provider prints Petitioner's employees' payroll checks, pay statements, and management reports and has them delivered to Petitioner's corporate office in New York. The checks are subsequently distributed by Petitioner's personnel to Petitioner's employees throughout the United States. Provider also uses this data to track Petitioner's payroll taxes, produce W-2's for distribution to Petitioner's employees, and file payroll tax returns for Petitioner.

Annex B of the agreement between Provider and Petitioner (the Agreement) states that Provider will perform payroll services for Petitioner. Annex Z of the Agreement specifies that the payroll services include payroll processing (including check stuffing and signing, direct deposit, and check reconciliation services); tax filing services; furnishing pay statements; and providing various payroll reports.

The Agreement also provides that Provider will furnish computer software ("Application Programs") to Petitioner in connection with the payroll services. Annex F of the Agreement refers to the software as "services," but defines these "services" as "(i) the grant to [Petitioner] of a license to the Application Programs listed in Annex Z . . . and (ii) operation of the System...." The "System" is defined as "the Application Programs as run on the [Provider] hardware using the operating system software." The Agreement grants to Petitioner a "right and license to use solely for [Petitioner's] internal business purposes the Application Programs listed in Annex Z." Annex Z of the agreement lists as Application Programs various software products used for human resource and payroll administration functions. The Agreement provides that Petitioner "will use the Application Programs only to process its own internal data and only in connection with its receipt of [Provider's] Payroll Services." The Application Programs are hosted on Provider's computers in Michigan.

A sample Provider invoice charges Petitioner a monthly license fee of \$6,000 for the "services" covered by Annex F of the Agreement. In addition to the monthly license fee, Provider also bills Petitioner separate charges for:

- (1) processing and printing checks and payroll statements based on the number of checks processed (@\$1.00 each) and statements printed (@\$ .19 each);
- (2) delivering checks and statements to Petitioner's corporate office (a flat fee [\$7.00]); and
- (3) providing copies of management reports (\$50.00 each) to Petitioner.

The filing of Petitioner's monthly payroll taxes is included in the above-stated fees.

**Applicable law and regulations**

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

\* \* \*

(5) Sale, selling or purchase. Any 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, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

(6) Tangible personal property. Corporeal personal property of any nature. However, except for purposes of the tax imposed by subdivision (b) of section eleven hundred five, such term shall not include gas, electricity, refrigeration and steam. Such term shall also include pre-written computer software, whether sold as part of a package, as a separate component, or otherwise, and regardless of the medium by means of which such software is conveyed to a purchaser. . . .

\* \* \*

(14) Pre-written computer software. Computer software (including pre-written upgrades thereof) which is not software designed and developed by the author or other creator to the specifications of a specific purchaser. The combining of two or more pre-written computer software programs or pre-written portions

thereof does not cause the combination to be other than pre-written computer software. Pre-written software also includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than such purchaser. Where a person modifies or enhances computer software of which such person is not the author or creator, such person shall be deemed to be the author or creator only of such person's modifications or enhancements. 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; provided, however, that where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for such modification or enhancement, such modification or enhancement shall not constitute pre-written computer software.

Section 1105(a) of the Tax Law provides, in part:

On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax . . . upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

Section 1105(c) of the Tax Law imposes sales tax upon the receipts from every sale, except for resale, of certain enumerated services.

Section 526.7 of the Sales and Use Tax Regulations provides, in part:

(a) Definition. (1) The words sale, selling or purchase mean any transaction in which there is a transfer of title or possession, or both, of tangible personal property for a consideration.

(2) Among the transactions included in the words sale, selling or purchase are exchanges, barter, rentals, leases or licenses to use or consume tangible personal property.

\* \* \*

(b) Consideration. The term consideration includes monetary consideration, exchange, barter, the rendering of any service, or any agreement therefor. Monetary consideration includes assumption of liabilities, fees, rentals, royalties or any other charge that a purchaser, lessee or licensee is required to pay.

\* \* \*

(e) Transfer of possession. (1) Except as otherwise provided in paragraph (3) of this subdivision, 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.

\* \* \*

(4) Transfer of possession with respect to a rental, lease or license to use, means that one of the following attributes of property ownership has been transferred:

- (i) custody or possession of the tangible personal property, actual or constructive;
- (ii) the right to custody or possession of the tangible personal property;
- (iii) the right to use, or control or direct the use of, tangible personal property.

## **Opinion**

Petitioner's personnel enter Petitioner's payroll data into Petitioner's computers in New York. This data is transferred via Provider's secure website to Provider's computers located in Michigan. Using this information Provider prepares and provides Petitioner with its employees' paychecks and pay statements which are delivered to Petitioner in New York, for fixed fees per check and statement. Petitioner then provides the payroll checks and statements to its employees both within and outside New York. Provider furnishes management reports to Petitioner and charges \$50.00 per copy. Provider also files Petitioner's payroll tax returns for no additional charge. Provider's monthly charges to Petitioner include a license fee of \$6,000 for "services" relating to Petitioner's use of Provider's Application Programs.

The Agreement between Provider and Petitioner makes clear that Provider's license fee is a charge for granting to Petitioner a license to use the Application Programs. The Application Programs are prewritten computer software. Accordingly, Provider's charges for the license to use the Application Programs 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 a purchaser." Section 1101(b)(6) of the Tax Law. The sale of prewritten computer software is subject to tax as the sale of tangible personal property. *See* sections 1101(b)(6) and 1105(a) of the Tax Law. *Sale* is defined as "Any 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." Section 1101(b)(5) of the Tax Law. Section 526.7(e) of the Sales and Use Tax Regulations 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." Section 526.7(e)(4) further 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.” 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.

Provider’s Application Programs perform a variety of automated payroll or other human resource and administrative functions, and the license to use the software gives Petitioner the right to access and use the software “for [Petitioner’s] internal business purposes” and “to process its own internal data.” The sale to Petitioner of the license to use the software constitutes a transfer of possession of the software. In such case, Petitioner has constructive possession of the software, and gains the “right to use or control or direct the use” of the software. Petitioner has the right to use the software to upload and manipulate its payroll information, and to perform other human resource and administrative functions. This would be true even if no “copy” of the software is transferred to Petitioner. Absent a showing that Provider’s software was created and designed specifically for Petitioner’s use, the monthly license fee of \$6,000 for the license to use Provider’s software constitutes receipts from the sale of prewritten computer software.

Accordingly, the sale of the license to use Provider’s Application Programs to Petitioner in New York, as described in the preceding paragraph, would be subject to State and local sales tax under section 1105(a) of the Tax Law. 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 Petitioner’s employees that use the software). If Petitioner’s employees used the software from locations both in and out of New York State, Petitioner would owe tax based on the portion of the receipt attributable to its use from locations in New York.

In addition to licensing to Petitioner the use of its software (“Application Programs”), it appears from the facts in this Opinion and terms of the Agreement that Provider may be performing other services for Petitioner. After Petitioner’s payroll has been processed by the software, Provider for additional fees will print the actual paychecks and pay statements, and for a separate charge physically deliver the checks and statements to Petitioner in New York. Petitioner then distributes the checks and pay statements to its employees. Using the information obtained via the software, Provider will file payroll tax returns with the appropriate authorities on Petitioner’s behalf and send management reports to Petitioner.

To the extent these additional services include components that might be considered to be an information service they may be exempt from tax under section 1105(c)(1) of the Tax Law as information services which are personal or individual in nature, provided that the information furnished to a client is not or may not be substantially incorporated in reports furnished to other persons. Provider’s accounting/bookkeeping service of filing Petitioner’s payroll tax returns is not an enumerated service of a kind subject to sales tax. Petitioner states that no separate charge for such service is noted on its customer invoices. However, if a reasonable and separate charge for such service were made, the amount for such service could be excluded from the taxable receipts. If, using the information compiled by the software, Provider sells additional book-keeping services

