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

TSB-A-10(28)S
Sales Tax
July 2, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

<u>ADVISORY OPINION</u>   <u>PETITION NO. S090223B</u>

Petitioner, ▇▇▇▇▇▇. asks whether the transaction described below, involving the transfer of prewritten software, is subject to tax, and if so how the sale should be sourced. We conclude that the transaction is subject to tax and should be sourced based on where the software is used in New York.

Facts

Petitioner entered into an agreement entitled "Consulting Services Agreement ("CSA") with Client A to provide Client A with computer-related consultation. Petitioner asserts that the CSA involves the sale of prewritten software ("property"). Any property sold or created as part of the CSA was necessary for completion of the covenants in the CSA. Client A is headquartered in New York but has operations throughout the United States. Pursuant to the CSA, any property created globally was to be held in trust in New York for Client A's benefit. Moreover, Client A retained the sole right to transfer such property among its other affiliates globally. The property was installed on servers in Nashville, Tennessee at the direction of Client A, and invoices were provided to an agent of Client A in Hermitage, Tennessee. That property, since its implementation, is used by Client A in New York and at other locations in the United States. The property would include, for example, a travel expense recording system that Client A's employees' use as they travel to customer sites all over the United States.

Analysis

Tax Law section 1105 imposes sales and use tax on retail sales of tangible personal property and enumerated services. 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). Thus, petitioner's sale of prewritten computer software to Client A is subject to tax as the sale of tangible personal property. *See* Tax Law §§1101(b)(6), 1105(a). Prewritten software, even though modified or enhanced to the specifications of a specific purchaser, remains prewritten software subject to tax. However, if a charge for the custom modification or enhancement is reasonable and separately stated on the invoice or billing statement, then the separately stated charge for the custom modification or enhancement is not subject to tax. *See* Tax Law §1101(b)(6); *State and Local Sales and Compensating Use Taxes Imposed on Certain Sales of Computer Software,* TSB-M-93(3)S.

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."

Petitioner asserts that the CSA involves the sale of prewritten software. 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 Client A's employees constitutes a transfer of possession of the software, because Client A gains constructive possession of the software and gains the "right to use, or control or direct the use of" the software. Therefore, petitioner should collect tax from Client A based on where the software is being used. *See Adobe Systems, Inc.,* TSB-A-08(62)S.

For this purpose, petitioner may rely on information received from Client A as described in the *KPMG, LLC*, Advisory Opinion, TSB-A-03(5)S. *See* Tax Law §§ 1132(c)(1), 1142(4). If the customer's employees who 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 Adobe Systems, Inc., supra*.

To the extent that the CSA also involves custom modifications of software, separate charges for that service would not be subject to tax if the charges are reasonable in relation to the total charges. *See* TSB-M-93(3)S, *supra*.

DATED: July 2, 2010

_____/S/_____

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