

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

TSB-A-10(52)S
Sales Tax
October 18, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S090707B

Petitioner, [REDACTED], asks whether (1) its products, as described below, are taxable, and (2) if so, how to source the sales of those products. We conclude that some of the products constitute the sale of a taxable information service, some constitute nontaxable information services, and the remaining are sales of prewritten software. We further hold that the sales of the prewritten software and taxable information service products should be sourced based on the location of Petitioner's customers' employees who access the software or services.

Facts

Petitioner is a provider of information technology management services to the railroad industry in North America. Its customers include railroads, rail shippers, and railcar leasing companies. The overall goal of Petitioner's service offerings is to provide automated solutions to operational and administrative processes such as tracking and accounting for the use and location of railroad company equipment and shipments. Petitioner develops, maintains, and delivers all computer services through and from its Data Centers in Atlanta, Georgia.

Petitioner's services include systems that:

- improve rail fleet utilization and control inventory flow;
- allow customers to manage and control daily operations; and
- provide tracking and accounting control for rail equipment and shipments.

Customers access all of Petitioner's services from the customers' own locations via the Internet or other network connection. Petitioner does not provide any telecommunication service or Internet access service. Customers must, at their sole expense, obtain all the equipment and communications connections to allow access to Petitioner's services. Customers do not download or otherwise obtain copies of any of Petitioner's software. According to Petitioner, its customers are not licensed to use Petitioner's software.

Petitioner's suite of information management services is modular and transaction-based, which allows its customers to use and pay for only the services they choose. The services are not billed on a flat fee or per-user method; rather each service has its own unique pricing. The software Petitioner uses to provide its services resides on computer servers located and managed in two secure data centers in Atlanta, Georgia.

Many of Petitioner's customers having New York billing addresses own multiple railroad businesses that operate both within and without New York. Some customers may have businesses that operate wholly outside New York. Thus, Petitioner's customers typically have multiple employees accessing Petitioner's services from multiple locations both inside and outside New York.

Except as described below, data acquired by Petitioner from each customer and third party are unique to the specific customer and are not, and cannot by agreement be, shared with any other customer

since they are confidential information. Processed data are also unique and specific to each customer and allow each customer to manage its own specific railroad and operations.

Petitioner generally bills its customers on a transaction-by-transaction basis and invoices the customer based on the total number of transactions at the end of each month. If data are acquired from a third party at the request of the customer, the cost of acquiring these data is captured and re-billed to the customer on a pass-through basis. Where a single customer owns multiple railroads, Petitioner will either send the customer a separate invoice for each railroad or a single invoice for all railroads, at the customer's request.

Petitioner's principal place of business is in Atlanta, Georgia. No software or hardware owned by Petitioner is located in the State of New York. All services provided by Petitioner to its customers (including data processing and telephone support services) are conducted in the State of Georgia, except for some customer training services that are provided at the location of the customer. Petitioner's only contacts with New York involve customer sales contacts by phone or Internet and occasional visits to customers for training and/or implementation.

Analysis

Tax Law section 1105 imposes sales and use tax on retail sales of tangible personal property and enumerated services. 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). The situs of a sale of tangible personal property 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 subscriber's employees that use the software) (*See* TSB-A-03(5)S). If the subscriber'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. (*Id.*)

Tax Law section 1105(c)(1) imposes sales tax on the "furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons." Tax Law section 1105(c)(9) imposes sales tax on information and entertainment services provided via telephony or telegraphy or telephone or telegraph service of whatever nature. Section 1105(c)(1) excludes from tax the sale of "information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons" (hereafter referred to as the "personal or individual exclusion"). If the information conveyed relates exclusively to the customer in question and the service provider is prohibited from selling the same information to third-parties, the information service will qualify for this exclusion (*Matter of New York Life Ins. Co. v. State Tax Comm'n*, 80 A.D.2d 675, *aff'd sub nom. Matter of Metropolitan Life Inc. Co. v. State Tax Comm'n*, 55 N.Y.2d 758 [1981]). Information gleaned from a common database that could be substantially incorporated into reports furnished to others does not qualify for this exclusion (*Matter of Towne-Oller and Assocs. v. State Tax Comm'n.*, 120 A.D.2d 873 [Third Dept 1986]).

Another enumerated service subject to tax is the repair, maintenance, or servicing of tangible personal property. Section 1115(o) of the Tax Law, however, exempts charges for installing, maintaining, servicing, or repairing prewritten software from sales tax, provided that, if such services are sold in conjunction with the sale of prewritten software, the charges must be reasonable and separately stated on an invoice or other statement of the price given to the purchaser.

Below we apply these provisions to Petitioner's various services.

Product 1: Car Hire Payables and Car Hire Receivables

Railroads must pay each other when they borrow each other's railcars to complete a shipment. The industry has created a third-party intermediary entity ("Intermediary") to operate and control the Car Hire Data Exchange settlement process. Petitioner works with the Intermediary to help customers determine the amount of revenue they are entitled to receive based on the number of railcars that are being used by another railroad (Car Hire Receivables) and the amount that they must pay to another railroad for the use of its railcars (Car Hire Payables). For both services, Petitioner acquires and processes the data; no data are provided or entered by the customer. In the case of Car Hire Payables service, Petitioner collects data from its customers, processes the data to put them in the necessary format and provides the information to the Intermediary. The Intermediary then processes the information through the Car Hire Data Exchange settlement system and distributes the resulting payables to participating rail companies. In the case of the Car Hire Receivables service, Petitioner must obtain the authorization of its railroad customer to get information from the Intermediary about other railroads' use of the customer railroad's cars. Petitioner pays the Intermediary for the receivables data. Petitioner then processes each customer's unique data into a format that is compatible with the customer's system and provides the information to the customer, which is then able to issue bills. The customer pays Petitioner on a per-transaction basis for each payable and receivable transaction processed through Petitioner.

The Intermediary provides only the information that specifically applies to the individual rail line to each rail line and is prohibited from sharing one rail line's information with another. While Petitioner incorporates the Car Hire receivables data into its Car Hire Marketplace service discussed below, otherwise Petitioner's contract with its customer requires it to keep the information confidential.

Answer: The Car Hire Payables part of this product involves processing and relaying information from the client to the Intermediary. Thus, it is a nontaxable data processing service. The Car Hire Receivable part of this product involves Petitioner's purchase of information from the Intermediary, changing its format to make it compatible with the customer's system, and conveying that information to the customer. The information that Petitioner purchases from the Intermediary and then re-sells to its customer relates only to that customer and can be provided to only that customer or its authorized representative. Accordingly, the information qualifies for the personal or individual exclusion from the section 1105(c)(1) tax. The fact that Petitioner aggregates that information into its Car Hire Marketplace service in order to provide customers with information about market rates for railroad cars does not destroy the applicability of that exclusion to the Car Hire Receivable information, assuming that the information is aggregated in such a way that information about individual transactions cannot be gleaned from the Car Hire Marketplace database (TSB-A-09(55)S).

Product 2: Car Hire Marketplace

This product provides customers with access to current railcar hire rate information, which Petitioner obtains from the customer as part of the car hire receivables service discussed above. Customers submit queries to Petitioner's system specifying the type of railcar equipment they require. The customer is then provided with information from Petitioner's database, including the current market rate applicable to hiring the specified equipment. This service also allows the customer to initiate, communicate and manage bids and offers electronically with other railroads and equipment owners, thus providing an efficient, automated platform for such transactions in place of less efficient, non-automated means traditionally used for bid and offer transactions.

Answer: It appears that the primary function of this product is to provide information to the purchaser. It does not qualify for the personal or individual exclusion because the product involves the conveyance of information from a common database (*Matter of Towne-Oller, supra*). Therefore, this product is a taxable information service.

Product 3: Revenue Management Services

This product allows a customer to determine the amount of revenue that the customer generates from the use of its rail lines, as well as the amount that it must pay to other railroads for the use of their lines. For example, if a car is traveling from point A to point B, it may travel across lines owned by three different railroads. There will be one charge to the shipper of the railcar by one of the rail line owners, but the receipts generated by that railcar's travel must be shared with the other line owners.

For this product, similar to the procedure for the Car Hire Payables and Receivables product, Petitioner collects rail usage data from its customers and provides them only to the Intermediary. The Intermediary processes the data through the Interline Settlement System ("ISS") and distributes the rail line usage payables to participating rail companies. Similarly, data that are processed by the Intermediary through the ISS are purchased by Petitioner. Petitioner then processes the rail line usage data and distributes the resulting freight revenue receivables to its customers. At no time does Petitioner share common data between customers involved in a common transaction. Petitioner charges a fee for this service based on the number of waybills that are settled for each customer. As with the Car Hire Payables and Receivables services, no data are provided or entered by the customer. All data is gathered and entered into Petitioner's system by Petitioner in Atlanta.

Answer: This product is not taxable. While the part of the product in which Petitioner transfers information from the Intermediary to the customer constitutes an information service, that part qualifies for the personal or individual exclusion and is thus not taxable because the Intermediary will only distribute the information to the railroads involved in a particular transaction (or their authorized representatives), and Petitioner will only forward the information it purchases to its customer.

Product 4: Transportation Management Services

This product provides purchasers with information to enable them to manage their railroad operations, including inventory and yard control, train operations, and management reporting. It allows customers to monitor each individual railcar and to produce reports and information needed to manage their business and for various reporting requirements. This product requires the purchaser to enter certain data into Petitioner's system. Alternatively, the data can be obtained from customers' systems by third party service providers and then downloaded to Petitioner's system. This product gives customers access to an automated system that allows the customer to monitor, query information, and generate reports with regard to status and location of rail cars, equipment, and shipments.

This product is generally billed to the headquarters of the railroad or railroad holding company. However, any manual data entry (if performed by the customer) and database access takes place from multiple customer locations throughout the country. The charge to the customer is based on the amount of data entered and processed.

Answer: This product provides a customer with access to prewritten software that allows it to more effectively manipulate information already in the customer's possession. Thus, this product constitutes the

sale of prewritten software and should be sourced based on information from the purchaser about the location of the purchaser's employees who are using the software, as described above (*see* TSB-A-09(33)S).

Product 5: Freight Management Services

This product allows customers to monitor their inventory and railcar fleet. Petitioner acquires, inputs, and processes data that enables Petitioner's system to trace the movement of railcars, predict times of arrival, and track shipment, activities that would otherwise be performed on a manual basis by or for Petitioner's customers. Customers receive status reports via email from Petitioner but can also access the status reports via Petitioner's website. The charge for this product is based on the number of cars monitored.

Answer: The primary function of this product is the provision of information. However, because the information being provided relates exclusively to the customer railroad, and assuming that Petitioner (or any intermediary that may be involved) at no time makes the information available to other parties, the product qualifies for the personal or individual exclusion and is thus not taxable.

Product 6: e-Repair and e-Bol

This product allows customers to generate repair cards generally accepted within the industry for repairs performed on cars owned by other railroads while traveling on their line. The customer accesses Petitioner's website and inputs the required data. A repair card (invoice) is generated that includes the required information in the proper format. The customer is charged based on the number of repairs entered.

Answer: This product constitutes the sale of prewritten software. Sales are to be situated in the same manner as described in the answer to Product 4 (*see* TSB-A-09(33)S).

Product 7: M-Crew

This is a monthly charge for support services for the prewritten software in use on the computers onboard the locomotives while they are in transit.

Answer: Section 1115(o) of the Tax Law exempts these charges, provided that if Petitioner is providing this service in conjunction with the sale of prewritten software, Petitioner is separately stating the charge for the maintenance service and that charge is reasonable in relation to the total amount of the invoice.

Product 8: Business Intelligence

This product allows a purchaser to access Petitioner's system through Petitioner's website to make inquiries related to the purchaser's railroad and to extract information and reports. Most of the information on Petitioner's system derives from the purchaser's own records and is either input by the customer or transferred by a third-party service provider. Petitioner charges a flat fee for access to the system and, typically, an additional flat fee for the extra bandwidth required for this query-intensive product.

Answer: This product constitutes the sale of prewritten software and should be sourced based on information from the purchaser about the location of the purchaser's employees who are using the software, as described in the answer to Product 4 (*see* TSB-A-09(33)S).

Product 9: Electronic Data

In order to provide some products such as Transportation Management Services, it is necessary for Petitioner to purchase data from third parties. The costs to do so are passed onto the customer in addition to any processing that Petitioner is required to do to the data, and these charges are itemized on the monthly invoice under the heading Electronic Data.

Answer: The taxability of these Electronic Data charges depends on whether they are provided in conjunction with a taxable service. When these Electronic Data charges are made in conjunction with a taxable information service, the charges are for expenses of providing that service, are included in the receipts for the taxable service, and are thus taxable (Tax Law section 1101[b][3]). When the charges are for data used by Petitioner in providing a nontaxable service, then the data charges are not subject to sales tax.

DATED: October 18, 2010

/S/

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Deputy Commissioner and 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.