

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

TSB-A-11(17)S
Sales Tax
June 1, 2011

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S110309A

Petitioner, [REDACTED], asks whether its hosted marketing service, which it performs through software, and its related services, are subject to New York State sales and use taxes. We conclude that the hosted marketing service constitutes the sale of prewritten software and its charges for that service are subject to sales and use tax, but that its charges for optional training and consulting services are not taxable.

Facts

Petitioner is a California-based company that provides marketing services to clients that use email, direct mail, and other marketing channels to reach their customer bases. Petitioner's branded software and related services help clients evaluate their potential and existing customers and then plan and implement marketing campaigns. Because Petitioner maintains the software that it uses to perform the service on its own servers, Petitioner can easily apply its software to different types of clients or adapt it to existing clients' changing needs. Petitioner's clients include airlines, hotels, retail sales stores, auto rental companies and a host of other commercial and retailing establishments.

Specifically, Petitioner has developed a proprietary program, called "Hosted Offering," that allows clients to create, manage and deliver email campaigns. Petitioner's software enables clients to take information that they accumulate about their customers or prospects (such as their email address, demographic data, web browsing history and any other data about the customer) and apply search criteria against that information to derive a list of targeted recipients to whom a message designed for those recipients is to be sent. Clients load their own content and data onto servers maintained by Petitioner in data centers. Using Petitioner's software, the client is able to match the content for each recipient based on the criteria that the client has entered into the software. The software then compiles the message and sends the message to the recipient. While the vast majority of messages are sent via email, they can also be sent to a mobile device (e.g. cell phone or smart phone) or posted to a social site that the client's customer maintains. Petitioner's software is able to track the history and activity of emails that clients send, including all of the events that happen to a message once it has been sent (open rates, bounce rates etc). That information is stored and made available to the client via web access.

Clients load their own content and data via the Internet and their data are kept separate from any data belonging to other clients of Petitioner. The data remains the property of the client. The messages are sent out of Petitioner's servers/data centers in California. The data

centers host all of the software developed by Petitioner and contain all of the electronic storage where the data belonging to clients is maintained.

Via the web access, clients are able to monitor activity on campaigns they have sent out, run reports on these campaigns, and plan future campaigns. A client's employees use the Hosted Offering via a website that they log into. These employees may be located in any location as long as they have an Internet connection.

Petitioner grants to its clients a right to use the software on its server for a designated number of interactive users. Title to the software and all its proprietary items remain with Petitioner and the proprietary program is not allowed to be downloaded to the client's computers. Petitioner does not charge any software license fee. Petitioner imposes two charges for this service. First, it imposes an initial set-up fee for establishing connectivity between the client's computers and its data centers to the data centers. The set-up process involves chiefly (a) configuring Petitioner's software to be compatible with the client's system, and (b) working with third parties to ensure that the client's e-mails are specifically identified as not being spam. Petitioner asserts a second charge that is based on the number of marketing messages that Petitioner's client requests to send to its customers via email, text messaging or on their mobile devices.

In addition to its Hosted Product, Petitioner sells related optional marketing services, for which it separately charges. These related services are only provided on-line or from Petitioner's offices and include (i) training on use of the Hosted Offering; (ii) consulting on best practices; (iii) creative services to design messages; and (iv) services to help execute campaigns by providing marketing advice using the expertise Petitioner has developed in conducting e-mail marketing campaigns. These optional services are not performed through software, but rather require Petitioner's staff to work intensively with the client's personnel. The latter three services all involve Petitioner sharing its marketing expertise to help the clients develop more effective marketing campaigns. Charges for these services are based on the type of service and are either hourly or for a fixed dollar amount. These services are primarily provided from Petitioner's offices in California, Washington, and Illinois and delivered via the Internet.

Petitioner does not provide any tangible deliverables in to any state and does not sell or provide marketing data. Invoices are based on the bill-to location of the client.

Analysis

Prewritten computer software is considered tangible personal property "regardless of the means by which it is conveyed to a purchaser" (Tax Law § 1101[b]6). Retail sales of tangible personal property are subject to sales tax (*see* Tax Law § 1105[a]). A sale includes "[a]ny transfer of title or possession or both" and includes a "license to use" (Tax Law § 1101[b]5). Through its Hosted Product, Petitioner grants its clients a license to use the software on its servers in order to conduct marketing campaigns via email and messages to other communication devices. While Petitioner does not assert a charge for the use of the software denominated as

such, the set-up fee and the messaging charge appear to constitute consideration for the right to use the software. By providing its clients with these rights to use or control its Hosted Product for a consideration, Petitioner is making taxable sales of prewritten computer software (*see* TSB-A-09[44]S). Thus, the "set-up" and "messaging" charges are subject to sales tax as receipts from the retail sale of pre-written software.

The Sales Tax Regulations provide that, in general, "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" (20 NYCRR § 526.7[e]). The regulations further provide that, with respect to a "license to use," a transfer of possession has occurred if the customer obtains 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" (20 NYCRR § 526.7[e][4]). "[C]onstructive possession" of software or "the right to use, or control" software for purposes of Regulation section 526.7(e)(4) is determined based on the location where the client uses or directs the use of the software and not on the location of the code embodying the software (*see* TSB-A-08(62)S, November 24, 2008). Accordingly, the situs of Petitioner's sales for purposes of determining the proper local tax rate and jurisdiction is the location of the client's employees who use the software. If the client's employees who use the software are located both in and outside of New York State, Petitioner should collect tax based on the portion of the receipt attributable to the client's employee users located in New York. (*See* TSB-A-03[5]S). As described in that Advisory Opinion, Petitioner may rely on information received from its client to determine the location of its client's employee users (*see* Tax Law § 1142[4]).

Petitioner's separate charge for the optional service of providing training in the use of its prewritten computer software is not taxable (*see* Tax Law § 1115[o]; *State and Local Sales and Compensating Use Taxes Imposed on Certain Sales of Computer Software*, TSB-M-93(3)S, March 1, 1993). Petitioner's remaining optional services are in the nature of consulting services, which are not taxable under the Tax Law (*see* TSB-A-07(16)S).

DATED: June 1, 2011

/S/
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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.