

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

TSB-A-12(24)S
Sales Tax
September 27, 2012

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S101112B

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (Petitioner), [REDACTED]. Petitioner asks the following questions.

1. Do Petitioner's services of gathering and mapping data from a customer's data systems and public sources, storing it in a confidential online data warehouse, and using the data to create customizable reports for that customer constitute a taxable information service when the reports are based substantially on the customer's original data that is confidential and personal to each customer, and the reports are returned solely to the customer and not sold or marketed to third parties?
2. Does the availability of the incidental public- and private-source benchmarking statistics to the customer cause the entire online service to become a taxable information service when the primary purpose or function of the service is to provide its customers the ability to access and manipulate information that is personal or individual to the customer (i.e., the customer's own data that is mapped and imported into Petitioner's proprietary software database)?
3. Is the specialized software that Petitioner uses to pull, integrate, and analyze the data from a customer's various systems subject to New York sales tax when Petitioner uses that software in the provision of its service and does not sell or license the software to its customers?

We conclude that Petitioner's services of gathering and storing its customers' data, and using the data to prepare customized reports for its customers, as described below, are information services excluded from tax. The optional availability and inclusion, for no charge, of some publicly available data in those nontaxable reports does not make Petitioner's service taxable, so long as such data is de minimis and consists solely of benchmark statistics prepared by Petitioner and does not include any of the supporting or background data that Petitioner used to prepare the benchmarks and the customer does not have access to any of that supporting or background data. Petitioner's own use of its specialized software is not subject to tax, since it is not prewritten software. The customer's limited use of Petitioner's software to customize reports within Petitioner's parameters is integrally related to the overall information service provided by Petitioner, and does not constitute a separate sale of prewritten computer software.

Facts

Petitioner presented the following facts with its petition and in subsequent telephone calls on January 28, April 14, November 4, 2011, and August 9, 2012. Petitioner is a corporation based in

Australia. It has no offices in New York State. Some of Petitioner's employees come into New York for sales purposes.

Petitioner is in the business of providing business analytics services to its customers over the Internet by allowing each customer to access and view its own data through customizable reports via an online web portal. Petitioner is hired to gather data from a customer's systems (i.e., payroll, human resources, etc.) and then integrate the customer's data so that the customer can review and analyze the combined data through customizable reports. These reports are formatted based on the customer's requested criteria; consequently, a customer may, within Petitioner's parameters, customize a report to identify areas of improvement, view results of a business decision, or propose a strategic direction. Any customization by a customer is limited to predefined fields set by Petitioner. Petitioner itself wrote the specialized, proprietary software that it uses to pull, integrate, and analyze the data from a customer's various systems. Petitioner does not license or sell this proprietary software to anyone. Petitioner never transfers its proprietary software into New York. A customer cannot download Petitioner's software to the customer's servers. If the Internet is not working, a customer cannot access the customer's information or reports on Petitioner's servers.

In a typical transaction, Petitioner will map data from a customer's various accounting, finance, and human resource systems to certain fields within its proprietary software. For example, if the customer uses a traditional platform (e.g., Oracle), then Petitioner will map specified data fields to a pre-established template in Petitioner's proprietary software. If the customer uses a non-traditional platform, mapping may require additional professional services time to set up the data flow and connection. The customer's data is stored in an online data warehouse for that specific customer, from which the data can be accessed in order to create reports, models, or other analytics. Each customer has a unique online data warehouse that stores only its gathered data. A customer cannot access the data warehouse of another customer. Every month the customer requests Petitioner to refresh the data warehouse by "pulling" additional data feeds from the customer's systems. Petitioner's on-line data warehouse that stores its customers' data and reports is located in Australia or Canada. Customers cannot download the reports that Petitioner has created and made available for them on its servers. Rather, a customer can only download the data in the report, and such downloaded data may be viewable in a program such as Microsoft Excel if the customer has such software on its own computers.

As a relatively small part of its business, Petitioner also incorporates a de minimis amount of data from public sources (e.g., labor statistics) and average industry statistics to provide customers with the option of comparing their data to a benchmark. Petitioner creates these benchmarks itself from public source information, such as unemployment rates, or from data it obtains from its customers. A customer cannot see any of the raw data that Petitioner used to create any benchmark. Customers may choose to include this benchmark information within the customizable reports. Once Petitioner captures the public-source data (that is, a benchmark) and adds it to a customer's online data warehouse, the benchmark remains confidential to that customer. Moreover, the only value of such information to the customer is the individual comparison it provides against the customer's own data. Petitioner does not charge its customers for any of the benchmarks it provides them. That is, a customer that opts for benchmarks to be included in its reports pays the same fee to Petitioner that it would pay if it had not asked for any benchmarks to be included.

The customer itself is able to access its data warehouse to create reports, models, or other analytics. Petitioner provides pre-formed reports that the customer can use to view its data, but Petitioner also teaches the customer how to build reports so the customer can incorporate only the data fields it wants. A customer's reports are only made available to, and viewable to, that customer because of the confidential nature of the customer's data. Petitioner does not provide any data or report of one customer to any other customer, though Petitioner does use data from its customers to create benchmarks that are made available to its customers. Neither the customer nor Petitioner sells or markets the original data or the reports.

Petitioner charges its customers for the training and consulting services of teaching them how to build customizable reports. Generally, all of Petitioner's customers purchase these training services, though they are not required to purchase them. Petitioner's charges for these training services are stated separately from its charges for its data gathering, mapping, and storage service.

Analysis

1. Petitioner's services of gathering data from its customer's data systems, mapping that data, and storing it in a confidential online data warehouse on Petitioner's servers, and using the data to create customizable reports based on its proprietary software and which the customer can access via the Internet, together constitute an information service under section 1105(c)(1) of the Tax Law, because Petitioner adds to the "intelligence" contained in the original data by mapping and organizing it in new ways and presenting the data in custom reports according to the parameters of Petitioner's software program. *See ADP Automotive Claims Services, Inc. v. Tax Appeals Tribunal*, 188 AD2d 245 (3d Dep't 1993).

By themselves, Petitioner's gathering, mapping, storing, and report generating services relate to an individual customer's own data. Together, Petitioner's activities constitute an information service that would be excluded from the sales tax imposed by Tax Law section 1105(c)(1), because the reports prepared by Petitioner (and customizable by its customer) consist of data obtained solely from that customer, and Petitioner makes those reports available solely to that customer, and Petitioners may not include that customer's data in reports furnished to other persons. Thus, Petitioner's information service is personal and individual to the customer and Petitioner does not, and cannot, under its agreement with its customer, furnish the information or reports to anyone else.

2. The facts that (1) Petitioner makes available incidental benchmarking statistics to its customer, and (2) the customer can elect to have, or not have, such statistics included in the reports that Petitioner prepares for its customer do not make Petitioner's charges to its customer for its information service taxable, because the amount of such benchmarking statistics included in a customer's reports is de minimis, the customer is not provided access to any of the raw data used to create a benchmark, and Petitioner does not charge its customer for those incidental benchmark statistics. If the amount of such information were not de minimis, or if Petitioner made the raw data used to create a benchmark available to the customer, Petitioner's entire charges for its information service would be taxable. In

addition, if Petitioner were to make a separate charge to its customer for a benchmark, that charge would be taxable.

3. Petitioner's own use of its specialized software that it uses to pull, integrate, and analyze data from its customer's various systems is not subject to New York sales or compensating use tax, because Petitioner did not purchase it; rather it wrote the software itself. *See*, Tax Law section 1110(a)(A). Although Petitioner asserts that it does not sell or transfer the software to its customers, the ability for its customer to customize the reports has some attributes of the use of Petitioner's software by the customer in New York, and thus could be considered a sale by Petitioner of its software to the customer. However, because the customer's use of the software is limited to parameters set by Petitioner and is a single aspect of a more comprehensive service, and this aspect is integrally related to the overall service provided by Petitioner, we conclude that Petitioner's transaction with its customers as described above constitutes the sale of an information service, and not the sale of prewritten computer software. Thus, Petitioner's charges to its customers for its data gathering, mapping, and storing service, as described above, will be treated solely as the sale of an information service that is excluded from tax, as described, and not as a sale of software.

DATED: September 27, 2012

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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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.