

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

TSB-A-12(3)S
Sales Tax
February 27, 2012

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S110523A

The Department of Taxation and Finance received a Petition for Advisory Opinion from Petitioner, [REDACTED]. Petitioner asks whether the sale of its product, which facilitates information transfers between businesses and their customers, as described below, is subject to sales tax. We conclude that the product is taxable as the sale of prewritten software.

Facts

Petitioner operates a data pool, which is certified as compliant with the Global Data Synchronization Network ("GDSN"). Petitioner's certified data pool (CDP) captures information in a hosted, on-line application about products in the supply chain for suppliers, distributors, and retailers (all referred to as "trading partners"). Petitioner is one of many CDPs around the world. These CDPs are electronic catalogues of standardized item data. They serve as a source and/or a recipient of master data. A customer (supplier or retailer) may only connect (subscribe) to one data pool.

Petitioner charges its customers (trading partners) a standard annual subscription fee for accessing the GDSN, a network that connects participating Data Pools around the world to the GS1 Global Registry™ for the purpose of enabling trading partners to exchange accurate, GS1 System standards-compliant data. The overall goal is to allow the trading partners an information sharing tool to improve supply chain efficiencies. Subscription fees are based on the number of products registered within the CDP.

Petitioner's software runs the CDP and resides on a server located outside of New York. Trading partners have access to the CDP anywhere there is an Internet connection. Petitioner does not provide any telecommunication service or Internet access service in regard to its service. Trading partners must, at their sole expense, obtain all the equipment and communications connections to allow access to the CDP. Petitioner's contract with the customer "grants [the customer] * * * a limited use, non-exclusive, world-wide, non-transferable, limited license to access the [Petitioner] System and to access and use those portions of the [Petitioner] Proprietary Information required for [the customer's] use of the [Petitioner] System and participation in the GDSN." Included within this right to access and use the system is a "limited sublicense to all third party software and applications employed or otherwise embedded in the [Petitioner] System or Service." The customer must be able to use the software that runs the CDP in order to access the information contained within the database.

In order to use the system, a customer must first obtain an annual subscription from Petitioner. A subscriber may use the system in one of two ways:

- Supply side partners enter their product information into the CDP using a spreadsheet load tool or the Item Management Online User Interface. The Spreadsheet Load Tool is a Microsoft Excel spreadsheet that can be downloaded from the Petitioner's website to facilitate a batch upload from the supplier. Petitioner does not provide the software required to use this tool. The customers access the CDP via the internet using their own hardware and the customers are responsible for both the content and accuracy of the information they enter into the CDP.
- Sell-side/retail partners access the information contained within the CDP to make purchasing, inventory, logistics, and other supply chain decisions.

A supply side partner first enters product information into the CDP. Each entry in the CDP is unique, which allows the supplier to effectively communicate information on their products with their trading partners. The CDP then registers this information with the Global Registry. A sell-side/retail partner will send a subscription request to the CDP which it subscribes to and requests to receive product information. This can be done on a vendor level, a granular (item) level, or a combination thereof. The majority of users request information based on the vendor level, which means that they will receive information on all products registered by a specific vendor. In order to obtain the information on an item level, the sell-side/retail partner would have to know the Global Trade Item Number (GTIN) for the specific product for which they are requesting information, which the partner would have through some prior contact with the vendor of that specific product, such as an established buy/sell relationship outside of this network.

A subscriber does not have the capability of accessing the Global Registry, nor does any subscriber have the ability to search the database for vendors or products. A supply side partner can only view information it has entered or subscribed to and a sell-side/retail partner may only access information related to products or vendors which have been requested and approved. Once the sell-side/retail partner submits the request to their CDP, that CDP will forward the request to the Global Registry. The Global Registry will identify the data pool that the vendor subscribes and forward the subscription request to the vendor's CDP. The supply side partner will confirm the request and identify that retail partner as approved to share product information. Once approved, the information will be published from the seller's CDP to the buyer's CDP and the retail partner will have access to the information requested. A message (recipient confirmation) will be sent back from the retailer through the CDP to the supply side partner indicating the information was received. The data received will match the intent of the request only. If additional information or further communication is required, a second request must be made.

Supply-side partners can generate online reports in connection with the uploading of information to the CDP. In addition, both supply-side partners and retail partners can run the

“Sync Status Report.” The Sync Status Report provides the publisher (supply-side partner) with the current status and response for each GTIN hierarchy to which a retailer has responded.

A given subscriber could use the system as both a supply-side partner and a sell-side/retail partner. For example, a distributor could participate as a sell-side/retail side partner when accessing information from the manufacturer, but also participate as a supply side partner by uploading information for its retailer customers to access regarding the products they are selling.

Petitioner provides trading partners the ability to synchronize content (all product related information) with other trading partners. The data pools directly communicate/distribute information. This direct distribution of new, updated, or changed information between data pools allows all users to have the same information at all times. The CDPs facilitate the availability of the information between users.

Analysis

Pre-written computer software is defined as tangible personal property subject to State and local sales tax, “regardless of the medium by means of which the software is conveyed to a purchaser.” Tax Law § 1101(b)(6). The sale of pre-written computer software is subject to tax as the sale of tangible personal property. *See* Tax Law §§ 1101(b)(6); 1105(a). “Sale” is defined as “[a]ny 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) or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor.” Tax Law § 1101(b)(5). Sales and Use Tax Regulation, 20 NYCRR section 526.7(e)(1), 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.” Regulation section 526.7(e)(4) further provides that a transfer of possession has occurred if there is 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.

Here, all subscribers have the right to use Petitioner’s software to upload information to the CDP and to view information on the CDP. They can all use Petitioner’s software to send a subscription request to a trading partner in order to get access to that trading partner’s product information. Subscribers also have the right to use the software to run reports to view their product information in the CDP. Accordingly, Petitioner’s subscription charge represents a sale of prewritten software and is thus taxable (*see, e.g.*, TSB-A-09[25]S: TSB-A-09[15]S). The situs of the sales for purposes of determining the proper local tax rate and jurisdiction is the location of the subscriber or its agents or employees who use the software. If the subscriber’s employees who use the software are located both in and out of New York State, Petitioner must collect tax based on the portion of the receipt attributable to the users located in New York (*see*

TSB-A-03[5]S). For this purpose, Petitioner may rely on information received from its customer as described in 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* TSB-A-08(62)S, *supra*).

DATED: February 27, 2012

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