

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

TSB-A-13(37)S
Sales Tax
October 17, 2013

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S121105B

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] Petitioner asks whether hosted software and related services provided to its customers are subject to New York State and local sales and use taxes (sales and use taxes). We conclude that Petitioner's sale of software licenses and related services included within the lump sum price to its customers in New York State are subject to sales and use taxes. Petitioner's sale of additional services outside the lump sum charge for software and services may not be subject to applicable sales and use taxes.

Facts

Petitioner sells licenses to use its hosted software to customers in New York State. The software is hosted on Petitioner's servers located outside this State. The software is entirely web-based, accessed by customers through the Internet and requires no software downloads by its customers. The customers do not install any software of Petitioner on their computers. As long as the customers have an approved web browser, they are granted access to the software via a user name and password. The computer application stores the customer's current and historical safety and exercise drill information. The information stored can then be accessed and retrieved for use in safety reports and for related purposes.

Petitioner also provides related services to its customers. A certain number of hours of training, data loading and customer support via a help line are included with the price of the license. Additional services, such as initial configuration, data preparation, training, extensive data loading and consultation, are optional to the customer and may be purchased as a package of a certain number of hours or at an hourly rate. None of the services listed include any creation or modification to the software code.

Petitioner notes it is a non-profit organization under § 501(c)(3) of the Internal Revenue Code.

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). Sales Tax Regulation § 526.7(e) provides 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.” Sales Tax Regulation § 526.7(e)(4) further provides 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.” “[C]onstructive possession” of software or “the right to use, or control” software for purposes of Regulation § 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.

“Prewritten computer software” is software that is not designed to the specifications of a specific purchaser. *See* Tax Law § 1101(b)(14). Software that is designed to the specifications of a specific purchaser is prewritten computer software when it is sold to a person other than the person for whom it was designed. *See* Tax Law § 1101(b)(14). The facts submitted provide that this software is not designed for a specific purchaser and hence would be tangible personal property subject to sales and use tax.

Petitioner also asks whether related services provided to its customers (a certain number of hours of training, data loading and customer support via a help line are included with the price of the license) are subject to sales and use tax. Additional services, such as initial configuration, data preparation, training, extensive data loading and consultation, are optional to the customer and may be purchased as a package of a certain number of hours or at an hourly rate.

Some of Petitioner’s related services and optional services, such as training, consulting, and customer support, are not among the services subject to sales tax. Reasonable, separately stated charges for these services would not be subject to sales tax. However, if these services are included in the lump sum charge for the license, the entire charge for the license and services is subject to sales tax. *See* TSB-M-93(3)S; TSB-A-08(41)S.

In addition, services that would otherwise be taxable under § 1105(c) of the Tax Law (such as installation or maintenance) are exempt from tax under § 1115(o) of the Tax Law where performed on computer software. However, where such services to be performed on software are sold in conjunction with the sale of prewritten software or other tangible personal property, the charge for such services is exempt only if it is reasonable and separately stated on the invoice or billing statement given to the customer. *See* Tax Law § 1115(o). If any of Petitioner’s related services or optional services include the type of service that would otherwise be taxable under § 1105(c), these services would be exempt under § 1115(o) as long as the charge is reasonable and separately stated. However, if the services to computer software are included in the price of the license, they will be subject to sales and use taxes.

Tax Law § 1116(a)(4) exempts purchases, and some sales, by certain exempt organizations. Petitioner’s status as an Internal Revenue Code § 501(c)(3) not-for-profit entity does not automatically qualify it as an exempt organization for New York State sales tax purposes. A separate application (Form ST-119.2, *Application for an Exempt Organization Certificate*) must be submitted, along with a copy of the § 501(c)(3) determination letter.

However, an exempt organization's sales are not exempt if those sales are made by remote means, such as by telephone, mail order (including email), over the Internet, or by other similar methods, and are made with a degree of regularity, frequency, and continuity. *See* Tax Law § 1116(b)(1)(iii). These could include sales made from an exempt organization's online or virtual store, or through the organization's Web site. The fact that Petitioner does not operate a brick and mortar store or carry inventory is irrelevant. In this case, it appears that Petitioner's advertisement of its software and listing of sales contacts on its website would not allow it to avail itself of the exemption in Tax Law § 1116(a)(4).

DATED: October 17, 2013

/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.