

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S120221A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether its receipts for providing various forms of Internet-based marketing products are subject to sales tax. We conclude that the Core Offering offered by Petitioner is not subject to New York sales tax but the Customer Intelligence product is subject to sales and local tax to the extent that the product is used in New York.

Facts

Petitioner provides an on-line marketing service to wholesalers and retailers. Petitioner's website describes the service as helping its retailer and wholesaler clients capture, display, share, and analyze online customer feedback. Petitioner has requested guidance on the sales tax treatment of its two main products: the Core Offering and Customer Intelligence.

1. The Core Offering

Petitioner's Core Offering enables its retail and wholesale clients to capture, display and analyze online customer feedback about a client's products, including customer-generated ratings and reviews, questions and answers, stories, recommendations, photographs, videos and other content (customer feedback) about the client's brands, products or services. The Core Offering is provided by collecting, managing and displaying customer feedback using software developed by Petitioner and embedded on clients' websites or social media environments, such as Facebook. The Core Offering is designed to increase clients' sales and lower product returns by capturing customer feedback, and allowing the clients to use that feedback to better inform their customers about their products. The services are designed to drive business to the client, advertise the brand and product offerings, and provide analytical information to the client on its customers and its target market.

As part of its Core Offering, Petitioner embeds software onto a client's website using a JavaScript-based injection. Embedding the software allows Petitioner's servers, and not the client's servers, to capture customer feedback left on those display pages. Clients may not sell, change, rent, sublicense, or distribute the software. The software enables Petitioner to capture customer feedback and route it to the client through a process that is opaque to the client's customers. Petitioner customizes the look and feel of its software to match the design of the client websites and other online offerings, while retaining complete control over the management of the software.

Petitioner's Core Offering captures three types of customer feedback: product ratings and reviews, product questions and answers, and stories pertaining to the client's products. After customer feedback is submitted to Petitioner's servers and before it is sent back to the client for display, the content is incorporated into Petitioner's content moderation software. This software is a dashboard

that puts all content into a queue and then distributes it to Petitioner's "Moderators" for review. Moderators are Petitioner's employees, who are trained and experienced professionals who can review customer feedback in 21 languages and multiple dialects. Moderators filter customer content for irrelevant, obscene or illegal material to ensure the client's brand is protected. Moderators also assist in attaching pre-defined labels, or meta-tags, to categorize the customer feedback, such as shipping complaints, liability concerns, inaccurate product descriptions and feedback that is "suitable for use as advertising copy." Moderators ensure that the content meets both Petitioner's standards and those agreed to with the client.

After the moderation process, the steps may vary, depending, in part, on the type of customer feedback. If the customer feedback is a customer's product-related question, it is e-mailed to the brand owner for response if the brand owner is a client. A customer question is also posted on social networks for input by other consumers. Any responses received will be posted after going through the moderation queue. In addition, Petitioner's service can generate an e-mail to the customer who posted the question to let him or her know that the question has been answered.

If the customer feedback is a product review or rating, and the Moderator deems it consistent with Petitioner's standards and its contract with the client, the feedback is transmitted to the client for display. Petitioner provides each client with additional design team members (discussed in more detail below) to ensure clients are using programs correctly and maximizing the potential benefits.

The location of the display of customer feedback depends upon the nature of the client. If the client is a retailer, feedback is displayed on only the retailer's site. If the client is a brand owner, the content is sent to the brand owner's website, and, through Petitioner's syndication function, to the web site of each retailer selling the product who is a client of Petitioner. For example, product reviews submitted through a laptop manufacturer's site can be syndicated to appear on the product pages of a retailer selling that laptop that also subscribes to the Core Offering.

Petitioner's Core Offering is valuable both for retail clients and brand owners, such as a manufacturer of a branded product. It allows brand owners to answer questions concerning products and share those answers with any retailers selling the product that are also clients of Petitioner. This is important from a marketing perspective because informed answers from a brand owner have been shown to generate more sales than answers made by non-brand owners. Moreover, the brand owner also can respond to criticisms made in written or video reviews of products, thereby protecting the brand image. Petitioner can brand each answer provided by the brand owner with the brand logo, thereby adding credibility to the answer and generating a more positive brand image. Finally, a brand owner can share customer feedback left by consumers at websites owned by the brand owner with its retailers, which can also generate more sales because such feedback tends to be more positive on average than customer feedback left with a retailer.

Importantly, the large size of Petitioner's network of clients is beneficial for both retailer and brand owner clients. For example, as Petitioner's website points out, the huge size of its "retailing network" means that a client brand owner can distribute a relevant product review or an answer to a common customer question to more of its customers. Similarly, the more brand owners that subscribe to Petitioner's service, the greater the number of the retailer's products that will have the benefit of the brand owner's answers to customer questions, and responses to customer reviews.

The Workbench component of Petitioner's Core Offering allows clients to better monitor customer feedback. The Workbench is an Internet portal through which a client can view the feedback as it is posted for display. Clients also can use the Workbench to review the questions that have been transmitted to them, although most customer questions are answered by other customers, frequently through social media environments. The Workbench also gives clients the ability to generate simple reports regarding the customer feedback stored in Petitioner's databases, allowing the client to manage the content collected in Petitioner's system. The software does not have the ability to generate sophisticated customer intelligence reports and most clients export the data to other business intelligence tools to properly analyze it. Petitioner's 2013 Annual Report describes the workbench component as follows: Provides basic analytics capabilities that allow our clients to generate reports highlighting simple ratings trends, text analysis and product and service issue identification. Workbench Analytics also allows clients to perform self-service administration."

As part of its Core Offering, Petitioner assigns a team of implementation designers to help the client implement the Core Offering. In addition, each client is assigned one or more "client success directors" who assist the client in maximizing the impact of customer feedback and consumer engagement. Client success directors typically have a marketing or business background and work with the client to set the client's social media marketing strategies, which are reassessed and reviewed on an ongoing basis. For example, the success directors might help a client conduct a campaign to generate more customer feedback by holding a contest to choose the best submission from clients for videos that show the utility of the client's products. Success directors also function as liaisons between the implementation team and client to ensure the implementation efforts complement the social media marketing strategies they have developed with the client. They also advise clients how to integrate online customer feedback into key business processes, such as business analytics, improving product design, targeting research and development, marketing and sales efforts and improving customer service issues.

In some instances, the Core Offering is not sold as described above. Some of the types of customer feedback are not utilized by every client; for example, some brand owner clients might choose not to use the syndication component to distribute the customer feedback to retailers selling their product. Although these differences in the brand owner Offering may result in a price variation, the Core Offering's basic features otherwise work the same: information is gathered, moderated, tagged and available for display with the assistance of the Moderators.

2. Customer Intelligence

Petitioner recently launched a new "Customer Intelligence" ("CI") application that allows Core Offering clients to perform sophisticated trend and pattern analysis on the content collected from customers and its associated meta-data as part of Petitioner's Core Offering. The CI application provided is Software as a Service (SaaS). It is available as an option to purchasers of the Core Offering and is always billed separately from the Core Offering.

The CI product allows the client to analyze customer information and view the information graphically by product line in order to identify trends and patterns. Most of the information that the CI product analyzes is derived from the customer feedback that is available to the client through the Core Offering. In addition, the CI product provides the client with page view information -- how many

times a particular product web page has been viewed by a customer and the average duration of a customer's view of the page. The CI product is able to show trends, such as whether the frequency with which a particular product is being reviewed by consumers is increasing or decreasing over time. Finally, the product is able to send out notifications to clients of trends that might warrant the client's attention, such as increases in customer complaints. The client can apply different filters to focus on the information relevant to a particular employee, i.e., one employee can use the product to examine trends in customer complaints about shipping problems, while another employee might use the product to examine average ratings, by product, for the client's products. In sum, a client can use the product to gain insight into customers' purchase motivations and to highlight product flaws and enhancement opportunities.

Analysis

The Tax Law imposes sales and use tax on retail sales of tangible personal property, including prewritten software, and the sale, except for resale, of certain services. *See* Tax Law §§ 1101(b)(6); 1105(a), (c). Among the services subject to tax is 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. Excluded from the tax on information services are advertising services and the furnishing 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. *See* Tax Law § 1105(c)(1); *see also* Tax Law § 1105(c)(9). Information is not "personal or individual in nature" for purposes of this exclusion if it comes from a common source or a data repository that itself is not confidential. *See Matter of ADP Automotive Claims Service Inc. v Tax Appeals Tribunal*, 188 AD2d 245 (1993), *lv. denied*, 82 NY2d 655 (1993); *Allstate Insurance Company v. State Tax Commission*, 115 AD2d 831 (3d Dept. 1985), *affd.* 67 N.Y.2d 999 (1986).

For purposes of the exclusion from the information service tax, "[a]dvertising services consist of consultation and development of advertising campaigns, and placement of advertisements with the media without the transfer of tangible personal property. The furnishing of a personal report containing information derived from information services, by an advertising agency, to its client for a fee is not a taxable information service." Sales Tax Reg. §527.3(b)(5). Advertisements have been defined in New York as "the action of making generally known; a calling to the attention of the public." *Matter of United Parcel Serv. Inc. v Tax Appeals Trib. of State of N.Y.*, 98 AD3d 796, 798 [2012]), *lv denied* 20 NY3d 860 (2013) (internal quotations omitted).

The Core Offering

With limited exceptions, the components of the Core Offering are sold for one price and no component is separately available for purchase. Thus, we consider the tax status of the Core Offering as a single transaction rather than a series of individual components. *See* Tax Law §1101(b)(3); *Penfold v. State Tax Commission*, 114 AD 2d 696 (3d Dept.1985).

The Core Offering has a number of components, including prewritten software and information services. Looked at as a whole, and based on all the facts discussed above, including the manner in which Petitioner described the product on its website and in its 2013 Annual Report, the predominant

benefit that clients receive from the Core Offering is the ability to educate their customers about their products and brands and thereby promote sales of those products and brands. The Core Offering does this by collecting feedback from across the Internet, screening it, and then transmitting that feedback to the Client and third parties selling the Client's brands. In addition, under the Core Offering, Petitioner consults with the Client to help it use the feedback to better effect and to accumulate more customer feedback over time.

This process of compiling customer feedback and transmitting it to the client or persons selling the client's products is an information service. *See* Sales Tax Reg. § 527.3(a)(2) ("The collecting, compiling or analyzing information of any kind or nature and the furnishing reports thereof to other persons is an information service.") In this case, however, the Core Offering product is not taxable as an information service under Tax Law § 1105(c)(1) because the product qualifies for the advertising exclusion in that section. Advertising services consist of consultation and development of advertising campaigns, and placement of advertisements with the media without the transfer of tangible personal property. *See* Sales Tax Reg. § 527.3(b)(5). Because traditional advertising services may include a range of transactions between advertisers and their clients, it is necessary to analyze and evaluate the facts and circumstances of each transaction in order to determine its taxable status. *See Matter of Hudson Sheraton Corporation*, Tax Appeals Tribunal, September 29, 1988. Here, by capturing the customer feedback, screening it, and transmitting it to the sites on the Internet where it will promote the client's products, the Core Offering is performing "the placement of advertisements with the media" since a website is a type of media. *See* TSB-A-97(43)S (selling space on websites for advertising purposes constitutes an advertising service.) Consistent with this view of Petitioner's service is the emphasis that Petitioner's website puts on the breadth of its network of clients that can display the customer feedback. Another important aspect of the Core Offering is Petitioner's consultations with each client to help the client properly display the feedback that Petitioner makes available and to develop more customer feedback, which is consistent with treating the Core Offering as an advertising service.

The Workbench component of the Core Offering gives a client access to an Internet portal through which a client can view in real time customer feedback as it is posted for display, answer customer questions and perform other administrative tasks. This aspect of the Core Offering is accomplished by giving the client remote access to prewritten software. By giving the client access to, and the right to use, prewritten software, this component constitutes the transfer of prewritten software. *See, e.g.,* TSB-A-08(62)S. The Workbench also allows clients to generate simple reports regarding the customer feedback gathered by Petitioner and stored in Petitioner's databases. This aspect of the Workbench would appear to be a taxable information service if the Workbench were a standalone product. Here, though, based on all the facts, including the description of Petitioner's products in its website and its 2013 Annual Report, the Workbench component, including its software and information service aspects, is not the predominant component of the Core Offering, and thus, does not change the overall nontaxable nature of that product. *See, e.g.,* TSB-A-13(1)S.

Customer Intelligence

The Customer Intelligence (CI) product is an optional software product that Petitioner offers to its Offering clients on a SaaS basis. This product provides some new information, such as page view information relating to a client's products by product line. But, most of the information that customers

are able to analyze through the product is information that the Core Offering product has already provided to the client. Using the CI product's software tools, the client is able to run reports providing various analyzes of the information obtained through the Core Offering, as well as the new information. Thus, while the CI product has some information services aspects to it, we think the primary aspect of the product, as reflected in the manner in which Petitioner advertises the product, is the software tools. The accessing of these software tools by Petitioner's customers for consideration constitutes the sale of prewritten computer software, which is taxable under Tax Law § 1105(a). Sales and Use Tax Regulation § 526.7 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 § 526.7(e)(4) further provides that, with respect to a "license to use," 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." Thus, the situs of the sale of the CI product for purposes of determining the proper local tax rate and jurisdiction is the location of the client's employees that use the software. *See* 20 NYCRR § 526.7(e)(1) and (4); TSB-A-03(5)S. 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 receipts attributable to the customer's users located in New York. *See Id.*

Accordingly, we conclude that the Core Offering product offered by Petitioner is not subject to New York sales tax, but the Customer Intelligence product is subject to New York state and local sales tax in New York to the extent that clients' employees using the product are located in New York.

DATED: January 15, 2015

/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.