

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

TSB-A-15(25)S  
Sales Tax  
June 3, 2015

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S100920A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] "Petitioner". Petitioner asks if charges related to the sale of several categories of electronic products are subject to the sales and use tax. These sales include the sale of video game software that is downloaded to a customer's computer, the remote access of video game software and the sale of various point or subscription cards that are redeemed by the purchaser to obtain access to third-party computer games or to access in-game content.

We conclude that Petitioner's charges for the sale of pre-written game software are subject to tax irrespective of where that software is used or resides. Likewise, charges for subscription or point cards that provide access to pre-written game software are subject to tax. However, the sale of gift cards with a specific dollar amount or the sales of any access code unrelated to the access of pre-written software would not be subject to tax.

**Facts**

Petitioner sells various forms of digital entertainment content both at its retail locations throughout New York State and through its website. These products fall into the following general categories:

1. Downloadable software and digital game content -- this content consists of pre-written software games or related video game add-ons that are downloaded to the purchaser's computer, gaming console or mobile device. These products are often the same products offered for sale on a CD or DVD disk in boxes at Petitioner's retail stores. This category includes the download of additional content for such games, including, for example, new maps, levels of play, or other additions that improve the customer's playing experience and that are integrated into the pre-written software already installed on the purchaser's gaming device.

Petitioner also sells access codes that are printed on a paper receipt or plastic card provided to the purchaser. These codes allow the purchaser to access and download the pre-written software from a specific third-party server directly to the purchaser's computer, gaming console or mobile device. Petitioner may also sell the access code through its website on behalf of the third-party provider, for the customer to record and use. In either instance, the download will either provide a complete stand-alone game or will significantly modify the existing pre-written game software to extend or otherwise improve the game already owned by the purchaser.

2. Remotely accessed software and content – These products are purchased by the customer for use in playing an online video game. Many online video games offer a certain amount of content that players may access for free. Petitioner sells additional content on behalf of the third-party providers that may include access to pay-only portions of the game or digital aid. Examples of a digital aid would include additional gasoline for operating a virtual vehicle in a game or improved arms or equipment for use in a war game. As with the downloadable digital content discussed above, Petitioner sells access codes printed on a paper receipt or plastic card provided to the purchaser that allows access to additional content hosted on the third-party server.

3. Subscription and Point Cards -- Subscription cards are plastic cards that allow the customer to access online gaming networks for a specified period of time for game play, interaction with other game players on that network, access to pre-written gaming software, and the direct download of such software to a customer's computer gaming console or other device. Each card contains a redemption code that the purchaser inputs by logging on to the specific third-party gaming network. Point Cards are similar in that they contain point values that are used to access aspects of the on-line gaming software (such as additional levels or enhanced game play) or that may be redeemed to access a gaming application, related software or access to digital content on a specific third-party gaming network for a period of time. These include items available for assisting game play on the third-party gaming networks, downloadable game demonstrations, and extra game content (such as additional levels, new areas of game play, etc.).

4. Dollar Value Cards – These are plastic cards containing a specific face value dollar amount (such as for \$20.00) that will be used to purchase additional game content in a manner similar to the Points Cards listed above.

### **Analysis**

Petitioner asks if the sale of the various video game-related products described above are subject to the sales and use tax. Petitioner makes these sales at its New York retail locations and through its website to customers located in New York.

1. Software and game content -- Tax Law § 1105(a) imposes sales and use tax on retail sales of tangible personal property. Tax Law § 1101(b)(6) provides that prewritten computer software is tangible personal property for sales tax purposes “regardless of the medium by means of which such software is conveyed to the purchaser.” The fee paid for the lease or license to use or consume prewritten computer software is subject to New York State and local sales tax under Tax Law § 1105(a). The computer games offered by Petitioner to its customers are prewritten computer software products. Accordingly, Petitioner's sale of prewritten computer gaming software that the customer downloads to his or her own gaming device is subject to tax as the sale of tangible personal property. *See* Tax Law §§ 1101(b)(6), 1105(a); TSB-A-10(28)S.

It makes no difference if the download of this prewritten computer software is effected by the sale of an access code printed on a paper receipt or plastic card provided to the purchaser at the time of sale. Purchasers use the codes to download the pre-written software to their computers, gaming consoles or mobile devices from the third-party server. Because the codes effectuate the download of prewritten computer software, the sales of such access codes constitute sales of tangible personal property and are subject to sales tax. *See* Tax Law §1105(a); TSB-A-10(10)S.

Petitioner must collect tax from its customer based upon where the paper receipt or access card is delivered to its customer. Sales Tax Regulation § 526.7(e) provides 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.” 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.” In this instance, “constructive 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 customer receives the access code, whether printed on a paper receipt or plastic card. However, in those instances where the access code is delivered electronically to the purchaser to record and use, Petitioner would collect tax based upon where the access code is delivered to the purchaser, such as the billing address of the purchaser.

2. Remote access software and content -- As with the downloadable software and digital content discussed above, Petitioner’s sale of remotely accessed software constitutes the sale of prewritten computer software. *See* Tax Law §§1101(b)(6); 1105(a). In each instance, the customer is provided access to pre-written software that either extends or enhances the purchaser’s on-line gaming experience (such as accessing additional levels to explore or interact with). That is, the customer is charged for changes to pre-written software that either enable faster recharges or gameplay that otherwise is not available without payment. In either situation, the computer game or game content accessed by Petitioner’s customers constitutes prewritten computer software. Accordingly, Petitioner’s fees for customers to access such pre-written software are subject to tax. Petitioner must collect tax from its customer based upon where the software is delivered to its customer, such as the purchaser’s billing address if sold on-line. The location of the server hosting the software is irrelevant. *See* TSB-A-08(62)S.

3. Subscription and Point Cards -- These cards contain a redemption code or points that the purchaser uses by logging on to the third-party gaming network. The cards entitle the user to access a specific gaming network for a specified amount of time for the express purpose of accessing the pre-written gaming software offered by that network. Therefore, the charges for these cards are subject to sales tax. *See* Tax Law § 1105(a); TSB-A-10(10)S. Petitioner must collect tax from its customer based upon where the card is delivered to its customer.

4. Dollar Value Cards -- These cards are similar in nature to gift certificates for stated dollar amounts. The purchase of a gift certificate that may be used in full or part payment, up to the

stated dollar value, for the purchase of unspecified goods and services at some future date generally is not considered to be a taxable transaction under Tax Law § 1105 at the time the certificate itself is purchased. *See* TSB-A-07(21)S; TSB-A-99(13)S. The taxable sale occurs when the certificate is presented in exchange for the purchase of taxable property or services. Therefore, sales by Petitioner of dollar value cards for specific monetary amounts are not subject to sales tax. *See* TB-ST-806. However, sales tax is due on purchases of taxable tangible personal property or services when the cards are redeemed.

DATED: June 3, 2015

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DEBORAH R. LIEBMAN  
Deputy Counsel

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.