

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

TSB-A-15(34)S
Sales Tax
August 17, 2015

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S110728A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] "Petitioner". Petitioner operates a facility within New York State where its customers may "co-locate" their own computer servers and equipment. Petitioner asked various questions with respect to certain charges to its customers.

Facts

Petitioner operates a facility in New York State that provides its customers reliable, fail-safe information technology (IT) operations for the operation of its customers' computer servers located at its facility. Pursuant to a service agreement, customers of the facility locate their own computer system hardware, including servers, routers, and other ancillary equipment at Petitioner's location in order to manage their primary IT infrastructure, data storage, data backup, business continuity and data recovery needs. Space is provided within Petitioner's facility, along with reliable power and telecommunications accessibility. Petitioner's facility provides a secure environment, including fire control, fire suppression equipment and alarms, and internal security video surveillance cameras. Aside from a small amount of incidental services, Petitioner is not involved with the computer applications that run on its customers' servers.

Petitioner asked whether its charges are subject to sales tax when the charge is for a mix of services and whether the taxability of the charges would change if the sales price of each charge is separately itemized on the customer invoice. Petitioner also requested an opinion with respect to the following categories of charges to its customers:

(1) Petitioner bills its customers for the space provided to maintain their computer hardware. Petitioner's facility is configured so as to provide its customers with a number of space options that range from individual "rack" space, to "cabinet space", to secure and demarcated private "cage" space, to private "suites." This space is made available to a customer's own employees, who have 24 hour access to the facility 7 days a week so that they may access the customer's computer equipment. Due to security measures, the customer's employees must present proper identification to access the facility.

(2) Because an appropriate climate controlled environment is needed for its customers' equipment, Petitioner incurs utility costs related to its operation of air filtration and air conditioning equipment. Some circuits within the facility are dedicated to individual customers, and the customers are billed for their utility charges, while some customers are charged on a "breakerred" basis (a flat charge for unlimited use of power). Value-added services include provisions for redundancy and conditioning of power. Petitioner's facility provides fully-

conditioned electrical power from two separate power grid feeds. Backup power is furnished by Petitioner's own diesel generators. Cooling is provided by redundant chilled water-based systems that are used in conjunction with room air-conditioning units to deliver a minimum of 120 BTUs of cooling per square foot and a maximum humidity of 48%.

(3) The customers' equipment needs to be fully accessible via on-line telecommunications or fiber optic access. Accordingly, Petitioner's facility is "carrier neutral" and its customers can contract with their own carrier outside of the facility. Petitioner is not a telecommunications carrier, does not own or maintain a telecommunications network, and is not an Internet Service Provider (ISP). Petitioner bills its customers for various high-speed interconnectivity configurations ("bandwidth" charges and "cabling" charges that include furnishing Ethernet circuits, private lines, cross-connecting cabling, and the like) representing the communications link to the customers' equipment inside the facility to the connection point for its chosen carrier. In some instances, to achieve connectivity, Petitioner's customers enter into a direct relationship with an ISP. In other instances, Petitioner enters into a contract with an ISP, purchases the ISP's services (denominated in Megabytes of bandwidth), and Petitioner subdivides the bandwidth, thus furnishing lit fiber to some of its customers. This connectivity provides access for the customer to an ISP.

(4) Petitioner also offers a limited degree of technical support. For example, if a customer's server is "down," the Petitioner charges the customer for "remote hands" to investigate the issue and, potentially, to re-boot the server to clear any software related issues. This avoids the need for the customer to personally visit the facility. In the event the re-boot fails to remedy the issue, the customer's technicians must access the location to solve the issue. In most instances, these services are not complex and are only intended to reduce the need for the customer to have its employees travel to the facility to address minor technical issues. In addition, Petitioner may charge its customers for making tape or disk-based backups.

Analysis

If Petitioner charges a single amount for both taxable and nontaxable services, the entire amount is subject to sales tax. However, if Petitioner bills a separate charge for any taxable service that is reasonable in amount and the service may be purchased separately from the nontaxable services, only that service would be subject to sales tax. *See* TSB-A-15(13) S and TSB-A-97(11) S.

Our analysis of the various categories of charges follows:

Q. 1. Are Petitioner's charges to its customers for space to locate their servers and other computer equipment subject to tax?

A. Petitioner's charges to customers for the use of space within its facility are not receipts subject to sales tax. Because a customer is charged for the amount of space it rents (whether "rack", "cabinet", "cage" or "suite" space), is allowed to supply its own racks, equipment and cabinets, and it and its employees have 24/7 access to the customer's equipment placed in this space, we conclude that reasonable, separately stated charges for space within the facility are not subject to sales tax because they are charges for the lease of real property. A customer or its

employees having to present identification for security purposes does not hinder the customer's access so as to prevent the charge from being considered a lease or rental. *Compare* 20 NYCRR § 527.6 (b) (2).

Q. 2-A. Are Petitioner's charges to its customers for their use of power on an estimated or pro rata basis subject to tax?

A. Generally, § 1105(b) of the Tax Law authorizes a tax on utility services only when furnished in an identifiable sale transaction as a commodity or article of commerce. *See Debevoise and Plimpton v. NYS Dept. of Tax and Finance*, 80 NY2d 657 (1993). In Petitioner's situation, the customers are renting space at Petitioner's facility to locate their computers and related equipment. A charge for electricity usage by a customer based on an estimate or other measure that does not accurately reflect the customer's consumption (such as a charge based on the amount of servers or space used by the customer), whether bundled with other charges or separately stated, would be considered part of the charge for rental of the space and would not be subject to tax. *See Empire State Building Co. v New York State Dept. of Taxation and Finance*, 81 NY2d 1002 (1993). However, if the separately stated charge for a customer's electricity consumption is based on an accurate measurement of the customer's consumption of electricity (such as through the use of a submeter), that charge would be considered a separate sale of electricity for sales tax purposes. In that instance, Petitioner must collect and remit sales tax. *See Mutual Redevelopment Houses, Inc. v. Roth*, 307 AD2d 422 (3^d Dep't 2003); TSB-A-05(10) S. This would be true even if the Petitioner were to mark-up the separate electricity charge to reflect the availability of redundant power or for its conditioning of the electricity provided.

Q.2-B. Petitioner asks whether, if any charges to its customers for power are subject to sales tax, it may make the underlying purchase of electricity exempt from sales and use tax as a purchase for resale under Tax Law § 1101(b)(4)?

A. Petitioner cannot properly issue a resale certificate to a utility company unless its purchase of power is exclusively for resale. The electricity is not exclusively purchased for resale by Petitioner if a portion of the purchased electricity is consumed by the Petitioner in the operation of common areas within its facility. Petitioner may, however, apply for a refund or take a credit on its own sales and use tax return for any electricity Petitioner resells to its customers that is separately sold as discussed above. *See* Tax Law § 1139(a); TSB-A-07(8)S.

Q. 3. Are itemized charges to Petitioner's customers for cabling and bandwidth subject to sales and use tax?

A. Petitioner's charges to customers for cabling and bandwidth relate to the connection within the facility, such as furnishing Ethernet circuits, private lines, and cross-connecting cabling. In some cases, Petitioner provides simple "cabling," i.e., a hard wire connection linking the customer's server to a port whereby the customer is connected to its own ISP ("dark fiber"). In other cases, Petitioner purchases services itself from an ISP, denominated in megabytes of bandwidth, and subdivides the bandwidth, thus furnishing "lit fiber" to its customers.

Tax Law § 1105(b) (1) (B) of the Tax Law imposes sales tax on receipts from every sale, other than sales for resale, of "telephony and telegraphy and telephone and telegraph service of

whatever nature.” Generally, the words “of whatever nature” indicate that a broad construction is to be given to the terms describing the items taxed. It does not matter that the provider of such services is not subject to regulation as a utility company. *See* 20 NYCRR § 527.2(a) (2). Tax Law § 1105(b) further imposes tax on receipts from “intrastate communication by means of devices employing the principles of telephony and telegraphy.” *See* 20 NYCRR § 527.2(d) (1). The terms “telephony and telegraphy” include the “use or operation of any apparatus for transmission of sound, sound reproduction or coded or other signals.” *See* 20 NYCRR § 527.2(d) (2). Services that provide a “conduit for the transmission of information” and “the acceptance and delivery of data” are subject to tax as telephony and telegraphy of whatever nature. *See Easylink Services Int’l, Inc.*, Tax Appeals Tribunal, July 27, 2009, *aff’d* 101 AD3d 1180 (3^d Dep’t 2012).

The Department has previously opined that charges to customers for their use of “dark fiber” are not charges for telephony and telegraphy subject to sales tax; the charges are more in the nature of a lease of real property. *See* TSB-A-05(32) S. However, charges to its customers for the use of “lit fiber” are charges for telephony and telegraphy subject to tax if it is considered to be intrastate telephony or telegraphy. Services connecting points within New York State are subject to sales tax. To the extent Petitioner can separate out interstate and international service, those charges would not be subject to sales tax. If Petitioner fails to distinguish between intrastate, interstate, and international service, the entire charge is subject to sales tax. *See*, TSB-A-05(32) S. However, if any of Petitioner’s purchases of “lit fiber” are solely for Internet access and not voice communications, those purchases would not be subject to sales tax. TSB-M-08(2) S.

Petitioner may claim the resale exclusion for any purchases of lit fiber that are subject to sales tax and resold to its customers.

Q. 4. Is the provision of certain technical support services such as rebooting a server to clear a software issue when a server is “down” or making tape or disk-based backups subject to tax?

A. The provision of Petitioner’s “remote hands” technical support service is an optional service and appears only as a separately stated charge on the invoices of those customers electing to receive it. To a great extent, it appears that this service is geared toward clearing software issues on a customer’s server by rebooting it for them to resolve the issue.

Tax Law § 1115(o) generally exempts from sales and use taxes services otherwise taxable under § 1105(c) or § 1110 when performed on either custom or pre-written software, provided the charge for such service is reasonable and separately stated. This would include rebooting a computer system to see if that clears a software failure. However, if Petitioner were to expand this service to include maintenance or servicing of the hardware itself, the charge to a customer to keep their computer in operation would be subject to tax as “maintaining, servicing, or repairing tangible personal property.” Tax Law § 1105(c)(3). The exemption in § 1115(y) for such services provided to equipment used in an “Internet data center” would not be applicable, because we conclude in Q.5 below that Petitioner is not an Internet data center operator as defined in Tax Law § 1115(a)(37) and the equipment is not owned by Petitioner.

The making of disk or tape backups for a customer is not subject to sales tax (TSB-A-05(40) S), but the purchase of the disks or tapes will be subject to sales or use tax.

Q. 5. Are Petitioner's purchases of machinery, equipment or other tangible personal property for its facility exempt from tax?

A. Tax Law § 1105(a) imposes sales tax on the receipts from every retail sale of tangible personal property, except as otherwise provided. Tax Law § 1115(a) (37) (i) exempts from tax: Machinery, equipment and other tangible personal property specified herein, sold to a person operating an internet data center located in this state for use in such a center, where such property: (a) will be located or installed in a facility or structure which is an internet data center and (b) is required for and directly related to the provision of internet website services for sale by the operator of the center.

In addition, Tax Law section 1115(a) (37) (i) defines the operator of an Internet data center as:

a person (a) operating a facility which consists of a data center specifically designed and constructed to provide a high security environment for the location of servers and similar equipment on which reside internet websites; and (b) providing at such facility the internet website services of: (i) uninterrupted internet access to its customers web pages in a secure environment and (ii) continuous internet traffic management for its customers' web pages.

Petitioner is not an operator of an Internet data center under §1115(a)(37)(i) because it does not provide uninterrupted Internet access to its customers' web pages and continuous management of Internet traffic for its customers' websites, i.e., Petitioner does not host websites. *See* TB-ST-405, Internet Data Centers, March 2, 2012; TSB-M-00(7) S. Therefore, Petitioner would not qualify for this sales and use tax exemption.

DATED: August 17, 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.