STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION   PETITION NO. S140708B

The Department of Taxation and Finance received a Petition for Advisory Opinion from ████████████ ("Petitioner"). Petitioner asks whether its customers can claim an exemption from sales tax on the purchase of its software as tangible personal property used directly and predominantly in the manufacturing of tangible personal property, or as tangible personal property used directly and predominantly in research and development.

We conclude that the Petitioner's software is not used directly and predominantly in manufacturing or in research and development. Therefore, Petitioner must collect tax on the sale of its software product.

Facts

Petitioner is a Limited Liability Company with headquarters in Ohio, and frequently sells to customers in New York. Its business includes producing software that enables manufacturing companies to track and control production and costs through every stage of a production process. Users can choose from over 35 fully integrated core and expansion modules that cover the full range of manufacturing and accounting requirements. After installation, the software is used to quote pricing, process the order, schedule the job, control materials, track labor, and ship the order.

The software coordinates different stages of manufacturing in a way that streamlines the process and allows more control over monitoring the jobs. The software allows businesses to have more information on the status of each order or project and identify ways that costs can be reduced.

Analysis

Tax Law § 1105(a) imposes sales tax on "[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article." The definition of 'tangible personal property" includes prewritten computer software. *See* Tax Law § 1101(b)(6).

Tax Law § 1115(a)(12) provides an exemption from sales tax for "[m]achinery or equipment for use or consumption directly and predominantly in the production of tangible personal property, . . . for sale, by manufacturing, processing, generating, assembling, refining,

mining or extracting . . . ." Sales and Use Tax Regulation § 528.13(c) defines "directly" as follows:

> (1) *Directly* means the machinery or equipment must, during the production phase of a process:
> > (i) act upon or effect a change in material to form the product to be sold, or
> > (ii) have an active causal relationship in the production of the product to be sold, or
> > (iii) be used in the handling, storage, or conveyance of materials or the product to be sold, or
> > (iv) be used to place the product to be sold in the package in which it will enter the stream of commerce.
>
> (2) Usage in activities collateral to the actual production process is not deemed to be used directly in production.

Machinery or equipment is used "predominantly" if more than 50% of its use is directly in the production phase of a process. *See* 20 NYCRR § 528.13(c)(4).

Petitioner's software cannot meet the definition of directly and predominantly used in production. Petitioner's software does not directly interact with the item being produced. Rather, it provides information about tracking, scheduling, costs, and shipping. These activities are administrative and distribution activities, not production activities. *See* 20 NYCRR § 528.13 (b)(1). Thus, the software is not used directly in the production process. Accordingly, the software does not qualify for the exemption under Tax Law § 1115(a)(12).

Similarly, Petitioner's software would not qualify for exemption as tangible personal property used in research and development. *See* Tax Law § 1115(a)(10). This exemption applies to development in the experimental or laboratory sense. Research and development in the laboratory sense includes activities that are aimed at advancing science and technology, developing new products, or improving or developing new uses for existing products. *See* 20 NYCRR § 528.11(b). Petitioner's software does not perform these types of functions. Rather, it performs administrative tasks such as processing and shipping orders, controlling materials and tracking labor. Accordingly, the software does not qualify for the research and development exemption.

Because Petitioner's software does not qualify for either the production or research and development exemptions, Petitioner cannot accept in good faith a claim for exemption on either

basis. Therefore, Petitioner must collect sales tax on its sales of software to its customers. *See* 20 NYCRR § 532.4(b)(2).

DATED: November 13, 2015   /S/
                                                          _____
                                                          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.