

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

TSB-A-15(9)S
Sales Tax
March 19, 2015

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S111020B

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] "Petitioner". Petitioner asks whether its receipts from a software maintenance and support contract are subject to sales tax when the contract entitles the customer to updated versions of software.

We conclude that, if the updated software being provided is prewritten computer software as defined in Tax Law § 1101(b)(14), the receipts from the contract are subject to sales tax as the receipts from the sale of tangible personal property.

Facts

Petitioner develops and sells software. The software has pre-written components and is also customized to work with the customer's specific needs. In addition, Petitioner offers maintenance and support services to customers that purchase its software.

Petitioner's software maintenance and support contract includes technical support and troubleshooting over the telephone. On-site support is provided when necessary, but the need for on-site service is rare.

The maintenance and support contract is optional; a customer does not have to purchase the service contract if it purchases software from Petitioner.

The service contract is for a one year term, i.e., customers are billed annually.

Customers who continuously maintain a service contract from Petitioner after the purchase of software from Petitioner are entitled for no additional charge to upgraded versions of the software if the upgraded version becomes available for sale while the service contract is in effect. However, Petitioner does not issue upgrades annually; new versions of its software are typically rolled out every three to five years.

Analysis

Pre-written computer software is defined in Tax Law § 1101(b)(14) as computer software (including pre-written upgrades thereof) that is not designed and developed by the author or other creator to the specifications of a specific purchaser. The sale of prewritten computer software is subject to sales tax under Tax Law § 1105(a) as the sale of tangible personal property. Tax Law § 1115(o) exempts from sales and use tax services otherwise taxable under Tax Law §§ 1105(c) or 1110 where performed on computer software of any nature. However, where these services are provided to a customer in conjunction with the sale of tangible personal property, any charge for these services shall be exempt only when the charge for the service is reasonable and separately stated on an invoice or other statement of the price given to the purchaser.

A standardized modification of prewritten software is itself prewritten software. Thus, the provision of such a software modification is subject to sales tax as the sale of tangible personal property even if the modification is sold under the rubric of “software maintenance.” *See* TSB-A-96(27)S. The contractual commitment to provide a new version of prewritten software when available, also qualifies as a license of software, which is subject to sales tax at the time the receipts for the commitment are paid. Because Petitioner does not separately state the charges for the modification of the software purchased by the customer or for the provision to the customer of an upgraded version of the software when available, its entire receipt for software maintenance is subject to sales tax. *See* TSB-A-91(70)S; TSB-A-96(27)S, TSB-A-10(10)S. If Petitioner were to charge a separate fee or fees for the modification of the existing version of the software and for the provision of an upgraded version of the software, any reasonable fee for software maintenance service (e.g. technical support) would not be subject to sales tax and only the fee or fees for the license of the updated or upgraded software would be taxable.

DATED: March 19, 2015

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