

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S140708A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner asks whether its charges for its data storage service are subject to New York State and local sales and use taxes. We conclude that Petitioner’s service is not subject to sales or use tax.

Facts

Petitioner provides a web-based data-hosting service that uses "cloud" based technology and storage to enable subscriber users to: (i) securely store and back-up data files; (ii) share data files with others (including non-subscribers) across the Internet; and (iii) synchronize files across multiple user devices (collectively the "Service").

Petitioner provides its customers with three types of subscription offerings: (i) Free; (ii) Pro; and (iii) Business. All subscription offerings allow users to access the Service. The Free service provides users with two gigabytes of storage space, in addition to various opportunities to earn more free storage capacity through a variety of actions, including referring friends who in turn become users. The Free service represents more than 95 percent of the current user base. The Pro subscriptions are offered at a flat price per month or per year, based on the amount of storage capacity provided to the customer.

In addition, Petitioner sells, as an optional add-on offering to the Pro subscription, a service that provides the customer the ability to retrieve prior versions of files at a separately-stated additional per month or per year charge (“Add-on feature”).

The Business subscription is targeted at businesses, organizations, and groups that require greater storage and sharing capacity across multiple users. The base package for a Business subscription provides unlimited storage for five users at a flat fee per user, per month or per year and additional users may be added at an additional per user, per month or per year charge. Petitioner's Add-on feature is also included as part of the Business subscription.

All subscriptions allow users the ability to access their data and information stored by Petitioner via any web browser. In addition, users have the option to download a software application (“Software”) to each device from which a user desires to access the Service. It is not necessary to download the software to use Petitioner’s Service, which is fully functional using any web browser. However, if downloaded, the Software can be used on various platforms, including desktop and laptop computers as well as mobile operating devices such as smart phones and tablets. Petitioner does not charge for the Software. Petitioner's terms and conditions specify that the user is granted a limited, nonexclusive, nontransferable, revocable license to use the Software download solely to access the Service.

Users may access the Service through a web browser or the Software, and it is via the web browser, the Software, or both, that the user uploads files to Petitioner's server.

All aspects of the Service can be accessed using only a web browser. Further, only by using a web browser can a customer send referrals and invite new users, share folders, and use the Add-on feature. For users downloading the Software, the sole purpose of the software is to establish a link between the customer's computers and Petitioner's servers where the customer's data is stored. All processing of the data (i.e., storage, synchronization, and sharing) takes place on the Petitioner's servers. The Software on the user's device merely enables the user to upload and access its own files stored on Petitioner's servers. The Software has no greater functionality than what a customer can do through the customer's browser.

The Petitioner's Service is performed and managed by proprietary software (hereinafter "Server Software") that resides entirely on Petitioner's remote servers, which are not located in New York. The individual customer has no access to the Server Software and does not interact with the Server Software in terms of entering data into the Server Software, providing instructions to the Server Software, or otherwise manipulating or configuring the Server Software.

Analysis

Sales tax applies to the receipts from every retail sale of tangible personal property, unless a specific exemption applies, and the receipts from every sale, except sales for resale, of certain enumerated services. *See* Tax Law §§ 1105(a),(c). "Sale" is defined, in pertinent part, as "[a]ny transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume . . . for a consideration, or any agreement therefor." Tax Law § 1101(b)(5). "Tangible personal property" is defined to include pre-written software, regardless of the medium by means of which such software is conveyed to a purchaser. *See* Tax Law § 1101(b)(6). Among the taxable services is the furnishing of information, which includes the service of collecting, compiling or analyzing information and furnishing reports thereof to other persons, and the service of storing tangible personal property not held for sale in the regular course of business. *See* Tax Law §§ 1105(c)(1), (4), (9).

First, we conclude that Petitioner's charges for its service are not receipts from the sale of software. The Software is available to all users, including users of the Free subscription, without charge. Furthermore, the Software is not required to utilize the full functionality of Petitioner's service, because users can access the service through any web browser.

Second, Petitioner is not providing an information service. Petitioner is not providing customers with the service of collecting, compiling or analyzing information of any kind, nor does it "furnish[] reports" of any of the information that its users store to "other persons." Tax Law §1105(c)(1). Users can access only their own information, which they have stored using Petitioner's service.

Finally, Petitioner's Service is not taxable under Tax Law § 1105(c)(4), because Petitioner is not storing tangible personal property. Moreover, data storage service is not one of the enumerated services and thus is not subject to sales tax. *See* TSB-A-05(40)S. Petitioner's

Add-on feature gives a customer the right to store and retrieve multiple versions of the same document. Thus, it too is an electronic data storage service that is not subject to sales tax.

In sum, Petitioner's charges for its paid services are not subject to sales and use tax.

DATED: May 20, 2016

/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.