

**New York State Department of Taxation and Finance
Office of Counsel**

TSB-A-16(3)S
Sales Tax
February 22, 2016

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S140318A

The Department of Taxation and Finance received a Petition for Advisory Opinion from Petitioner, [REDACTED]. Petitioner asks whether the sale of Product A, which delivers real-time web analytics data regarding website performance to owners of websites, is subject to sales and use tax. We conclude that the product is a nontaxable information service.

Facts

Petitioner sells a web analytics product that allows its customers to monitor web traffic ("visits") to the customer's website in real-time. To use Petitioner's product, customers must embed Petitioner's JavaScript code (the "Code") within the customer's website. The customer cannot alter, reverse engineer, turn on or off, or even access the Code. Customers can remove the Code from their computers, but this would destroy its functionality. Rather, the Code runs seamlessly in the background on a customer's website. Once the Code is embedded, Petitioner sends tracking beacons between its servers and the browsers of visitors to the customers' website ("visitors"). The Code allows Petitioner to collect various metrics ("data") related to visitors' use of the customer's website. The collected data is streamed to Petitioner's servers, where it is analyzed and then reported to the customers through a passwordprotected, hosted dashboard website (the "Dashboard") provided by Petitioner. The customer cannot accomplish anything using the dashboard other than to view the information provided by Product A, as it has no executable functions in and of itself.

The data reported through the Dashboard pertains to activity on the customer's website. Petitioner does not collect personally identifiable information from visitors. Petitioner collects visitors' internet protocol ("IP") addresses to show geographic information, but stores only anonymized IP addresses with the final octet blurred. With this data, customers are able to make informed decisions regarding their websites to achieve their traffic goals with respect to visitors and usage of their websites. In order to protect the confidentiality of a customer's data, each customer's Dashboard is available and viewable only to that customer. One customer's data is not provided to other customers, though for certain products discussed more thoroughly below, Petitioner does collect and use data from its customers to create anonymized benchmarks that are made available to other customers.

Product A is offered and sold to customers in one of three distinct service packages.

1) Basic Service

Product A's Basic service provides traffic data for the top 20 pages of the customer's website. Two categories of data are reported through the Dashboard: live and historical. Live data is updated every three seconds and is provided in real-time. Historical data is a summary of what visitors were doing over periods spanning the past day, week or month.

Under the Basic service, the following is reported through the Dashboard:

- Concurrent Visits - the total number of active page views of currently open tabs (the term "concurrent" refers to the number of simultaneous visits to a webpage – e.g., if a webpage has 10 "concurrents," the webpage is concurrently open on 10 different computers);
- Access - how visitors access the website (e.g., desktop or mobile device);
- Social Media - the number of social media links to the customer's website;
- Engaged Time - the aggregate amount of time visitors are actively using the customer's website on a given day, as compared with the website's historical data;
- Load Time - the load time for both the visitors and the customer's server;
- Top Search Terms - the words or other terms that most frequently result in visits to the customer's website;
- Top Links - the links from other websites that most frequently result in visits to the customer's website;
- Traffic Sources - how visitors arrived to the website (e.g., direct, links, social media, search or internal), as compared to Traffic Sources for other similar websites; and
- Top Pages - the most active pages on the customer's website.

The traffic data provided to a customer of the Basic service pertains only to the customer's own website, except to the limited extent that data for "Traffic Sources" is compared to the anonymized data of other websites being tracked by Petitioner for other customers. The Traffic Sources data that is compared to other websites is a de minimis portion of the data provided to each customer and consists solely of anonymized benchmark statistics prepared by Petitioner. None of the supporting or background data underlying the Traffic Sources data is ever provided to or otherwise made available to other customers. In fact, Petitioner is contractually prohibited from "us[ing] or distribut[ing] compiled Traffic Data in a manner that reveals the [customer's] identifiable Traffic Data, the identity of the [customer] or the [customer] Website." Moreover, customers cannot choose, and are not told, which websites are included in the anonymized data. That decision is made exclusively by Petitioner. There is no additional charge to customers for this anonymized data.

The starting point for the pricing of Basic service is a monthly base rate. Included under the monthly base rate are a set number of concurrent visits to the customer's web pages and websites to be tracked and unlimited Dashboard access by the customer. Additional fees are charged to customers exceeding the base-level number of concurrent visits and websites tracked. There are no additional fees that apply to the remaining portions of the Dashboard (i.e., Access,

Social Media, Engaged Time, Load Time, Top Search Terms, Top Links, Traffic Sources or Top Pages).

2) Publishing Service

Petitioner's Publishing Service is similar to its Basic Service with two significant exceptions: (1) it adds additional features, and (2) it does not utilize any anonymized data. Publishing service customers receive only their own data. The Publishing service is intended for use by major media websites to allow them to better understand how users are interacting with their websites and which articles are attracting new readers to the Customer's site. Publishing service includes Product A's Basic service (minus the anonymized data), plus the following additional features:

- Recirculation Data – the percentage of visitors who remain on the customer's website after reading one page;
- Concurrents by Traffic Source - concurrent visits sorted by largest traffic source;
- Top Pages by Concurrents - top pages sorted in order of greatest concurrent visits;
- Twitter Traffic - the webpages generating the most Twitter traffic;
- Referrers – real-time traffic data regarding referral sources for all pages of major media;
- Recirculation Data – the percentage of visitors who remain on the customer's website;
- Acquiring and Retaining – which articles are retaining and acquiring new readers to the customer's site;
- Location - geolocation of visitors according to visitors' IP addresses;
- Visitor Frequency - whether visitors to the customer's website are new, returning or loyal (i.e., frequent visitors); and
- Acceleration Indicators – the pages on the customer's website that are gaining (green arrow) or losing (red arrow) active visits.

Again, the traffic data provided to the customers under the foregoing additional features of the Publishing service pertains only to the customer's own website. No anonymized data has ever been provided with this product.

Petitioner's Video service is available only to purchasers of the Publishing service and at an additional charge. The Video service allows customers to understand how consumers are using their video content compared to their written content. Using proprietary software that runs in the background, Petitioner provides customers with the following real time information:

- How many website users are currently watching the video that is posted on the customer's website.
- How the video is performing compared to the webpage in general. For example, the software can tell the customer that 10 users are currently on the website while only three of them are watching the video.

- How effective the video is. This is determined by analyzing the number of users playing the video and the duration of time the video actually plays (e.g., a website user watches 3 minutes of a 5 minute long video).

The pricing for Publishing varies depending on the needs of the customer and is based on a pre-determined monthly fee per set number of concurrent visits. The monthly fee increases when Video is added.

3) Ad Sales Service

Petitioner's Ad Sales service measures the "true engagement" of a website's audience, meaning how long and where on the website the visitors are actively consuming content with advertisements in view. This data measures the amount of time that visitors are exposed to advertisements on the customer's website, which translates into how well advertisements are resonating with the visitors. Customers utilize this data to package and sell space on their websites to advertisers.

The data provided to Petitioner's Ad Sales customers pertains only to the customer's own website, with one exception. The Ad Sales service allows customers to generate a report consisting of a four-slide PowerPoint presentation that details the performance of the advertising space on the customer's website. Slide three of the PowerPoint compares the customer's website advertising to an aggregated, anonymized average of other websites. The customer never receives any of the individual competitor website data. In this way, the Ad Sales service uses anonymized data in the same way the Basic service uses anonymized data. This anonymized data is once again an extremely small percentage of the overall information provided to Ad Sales customers. The pricing for Ad Sales varies, but there is no separate charge for the anonymized data.

4) Rights and Restrictions

To use any of Petitioner's products, customers must agree to the terms of Petitioner's Master Service Agreement (the "MSA") or Term of Service (The "TOS") and submit a Work Order, which is the means of implementing the MSA. Under those agreements, Petitioner grants the customer a non-sublicenseable, nonexclusive, nontransferable, revocable, limited license to access and use Petitioner's application programming interface ("API") solely in connection with using Petitioner's services. The API is "the [Product A] application programming interface, scripts and other tools that allow [the customer] to publish and share Traffic Data." Use of the Dashboard and the Code by the customer is governed by the API Terms of Use. The API is licensed to customers for "personal non-commercial use only" at no cost to the customer. Customers have no ability to change, sublicense, rent, sell or distribute the software associated with Product A.

For the term of the agreement, the customer grants Petitioner "all necessary rights to access and track Traffic Data concerning the [customer's] Website, solely in connection with providing [Product A]." Customers also authorize Petitioner to compile their own traffic data with the traffic data of other customers and to provide this data to third parties. However, the data must be anonymized and Petitioner is precluded from using or distributing the compiled traffic data in a manner that reveals the identity of the customer or its website.

The proprietary rights to the compilation of customers' aggregated Traffic Data are owned exclusively by Petitioner. However, the proprietary rights to the customer's Traffic Data are owned by the customer.

Analysis

The Tax Law imposes sales and use tax on retail sales of tangible personal property and the sale, except for resale, of certain services. *See* Tax Law § 1105(a), (c). Among the enumerated services subject to tax is the furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons. Excluded from that tax is the furnishing of information that is personal or individual in nature and that is not or may not be substantially incorporated in reports furnished to other persons (an "information service"). 20 NYCRR § 527.3(a)(2). Excluded from that tax is the furnishing of information that is personal or individual in nature and that is not or may not be substantially incorporated in reports furnished to other persons. *See* Tax Law § 1105(c)(1); *see also* Tax Law § 1105(c)(9).

Here, for all three of its Product A service packages, Petitioner embeds software on the customer's website and uses it to gather information about visitors to the website -- how the customers come to the website, what type of device they are using, and what they do while on the site. Petitioner then makes this information available to customers on Petitioner's Dashboard portal on the Internet. In addition to the information that relates to the customer's website, two of the service packages also provide the customer with aggregated anonymized data gathered from various websites to use as benchmark information. In all cases, the benchmark information represents only a small portion of the information provided to the customer. All three service packages constitute an information service. However, because the information provided by all three service packages is personal or individual in nature and may not be substantially incorporated in reports furnished to other persons, the three service packages qualify for the "personal or individual" exclusion from tax in Tax Law § 1105(c)(1).

The fact that Petitioner makes available incidental benchmarking statistics to its customer for two of the packages, at no additional charge, does not make Petitioner's information service taxable because the benchmark information is a *de minimis* part of the overall information

provided to the customer and Petitioner does not provide customers with the raw data underlying the bench-marking information. *See* TSB-A-12(24)S. Moreover, the Dashboard software that Petitioner makes available to its customers to view the information provided by Petitioner is incidental to Petitioner's information service and thus is not taxable. *See Matter of DZ Bank*, Tax Appeals Tribunal, May 11, 2009; TSB-A-12(24)S.

DATED: February 22, 2016

/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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.