

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S131004A

The Department of Taxation and Finance received a petition for Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner asks whether the sale of its Internet-based document transfer subscription plans described below are subject to sales and use tax. We conclude that the plans constitute nontaxable services.

Facts

Overview of Petitioner’s Services

Petitioner provides solutions (“plans”) for sending, receiving and tracking large digital files via the Internet, including free and paid plans. Customers purchase the paid plans for a monthly or annual subscription, for which the sales price varies according to the features included in the plan package. Some features of the paid plans may be purchased on a pay-per-use basis.

To use any of Petitioner’s plans, the Customer wanting to send the file accesses Petitioner’s website and inputs the e-mail address of a designated recipient. The Customer then selects the file he or she wants to transfer from his or her computer hard drive and clicks a button on the webpage to initiate the file upload/send process. The plan sends an e-mail notification to the recipient from the e-mail address of the Customer, with a subject message reflecting that a file has been sent from the e-mail address of the Customer. The recipient follows links within the body of the notification e-mail that take the recipient to Petitioner’s webpage, where the recipient then clicks a button to download the file to his or her computer. The uploading and downloading of the file is through Petitioner’s servers located in California.

Petitioner stores the subscriber’s uploaded and sent files for a certain number of days after which time the files automatically expire and are deleted from Petitioner’s server. Petitioner performs encryption and virus scanning at the Server to ensure the safe transfer of the file. Recipients do not pay for downloading the file.

As part of its free and paid plans, Petitioner makes available "plug-ins" and applications at no charge as described below, which the Customer can download to his or her device. The plug-ins and applications are optional and available to all Customers, including customers using the free “Lite” plan. The applications and plug-ins are subject to the terms of a "click-through" software license that customers are required to accept by clicking on an "accept" button before downloading to his or her device. Only 2% of Pro-plan and ProPlus Plan paid users download these applications.

Web Plug-ins and Desktop Plug-ins

The web plug-ins are not stand-alone application software, but rather software that works in conjunction with other third party software that already exists on the Customer's computer, i.e., the Customer's webbrowser software. The webmail-based plug-ins do not alter client-side software for the webmail program; rather, the plug-ins enhance the Customer's web browser. The features of the webmail plug-in allow the Customer to upload documents to Petitioner's servers from webmail sites, or directly from the Customer's web browser toolbar. The webmail plug-ins only become available when the Customer logs into his or her web-based e-mail account.

Petitioner also offers desktop e-mail plug-ins, which are downloaded to the Customer's device and are a software code that attaches to the Customer's installed e-mail client software. The desktop e-mail plug-ins allow Customers to upload a document to Petitioner's servers directly from the Customer's desktop e-mail software rather than visiting Petitioner's website directly.

Desktop Portal Application

Petitioner's desktop portal is a standalone software application that allows a computer to continually synchronize with Petitioner's cloud-based servers. The Customer saves the current version of a digital file to a designated folder on his or her computer's hard-drive. The desktop portal then synchronizes the designated folders to Petitioner's servers periodically so that the most recent version of the file can be accessed from multiple devices. The Desktop Portal is offered free of charge to all Customers.

Mobile Applications

The mobile applications are available for download onto any Customer's smartphone or tablet at no charge. Because of the nature of mobile platforms, the mobile application is required in order for the Customer to access Petitioner's California server from his or her mobile device, and must be specifically launched before the Customer can access the Service. The mobile application allows the Customer to send, receive, track, and store digital files directly from his or her smartphone or tablet, but it does not add any features to the Service that are not also available from the Customer's computer.

Plan Descriptions

Petitioner's free Lite plan allows customers to transfer files of up to a maximum size of 50 MB at no charge. Lite customers receive up to 2GB of data storage. Petitioner maintains that the Lite plan requires no download of software to the customer's device in order to use the Service from a laptop or computer.

Petitioner has three paid plans. Customers of the first paid plan, the Pro-plan, receive three additional gigabytes (GBs) of storage, and the ability to send larger files of up to two GBs. Additionally, Pro-plan Customers receive a digital drop box. The digital drop box is a hosted data storage solution that allows the Pro-plan Customers to send files from and receive files at

the hosted drop box, rather than having to upload files from and download files to the Customer's device(s). The digital drop box allows Pro-plan Customers to switch between devices, without having to reload the file to the next device. The Pro-plan Customer can grant different authorization access levels to the senders and recipients who transfer files in and out of the Customer's digital drop box and the customer also can set file transfer expiration dates via the digital drop box.

Petitioner's second paid plan is its ProPlus Plan. In addition to receiving all the features of Lite and Pro, ProPlus Customers receive unlimited data storage. ProPlus Customers receive a notification e-mail that tracks when recipients have been notified of a file transfer and another notification e-mail that tracks when a recipient has downloaded the file. In addition, ProPlus Customers also have access to telephone support.

Petitioner's third paid plan is the Corporate Plan. This plan provides a hosted file sharing platform designed specifically for enterprises and large organizations. The Corporate Plan provides Customers with an online work space where they can store an unlimited amount of files in cloud folders, and share content with other authorized Customers. The Corporate Plan has all the features of Pro-plan, and ProPlus, and adds Enterprise-level controls. Additional features of the Corporate Plan include the following:

- **Send, Receive & Track:** Provides desktop and web plug-ins that allow the Administrator to identify, with regard to all the enterprise's users, in which folder the user has stored a particular file.
- Custom branding of emails and file share and storage environments.
- The enterprise management service function provides an administrator console from which the Customer's designated administrator can centrally provision new users, manage branding, and define security policies for the entire corporate environment across the desktop, web and mobile devices. The Administrator has access to reporting and analytics, including files sent, the sender, the recipient, and download information.
- Technical Support, including access to customer representatives by telephone, email, and "live chat," a form of web-based instant messaging.

The Corporate Plan operates by way of plug-ins, which must be downloaded to the Customer's desktop document-sharing or e-mail software programs and do not become available until the Customer launches the desktop sharing or e-mail programs. The plug-ins allow for the transfer of the file to the Corporate Plan Enterprise Management software, a hosted application by which the Corporate Plan administrator can supervise enterprise users and manage the organization's secure passwords and apply the organization's policy controls, specifically for mobile device users. For instance, the administrator can choose to enforce application passcodes on mobile devices or clear local data from devices after an established number of failed login attempts. The integration between the Corporate Plan and the customer's desktop e-mail and document sharing software allows Customer to share files directly from those programs without having to switch from the document-sharing or e-mail programs to transfer the files.

Analysis

Sales tax applies to the receipts from every retail sale of tangible personal property, except as otherwise provided for in the Tax Law, 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.” *See* 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).

Petitioner’s paid plans permit customers to send large files to recipients and then provide different levels of access for different recipients. The primary function of these plans appears to be the customer’s ability to send files over the Internet to specified recipients. Petitioner accomplishes this by allowing the customer to upload the file to its server and then providing the customer’s recipient with the means to access that file on Petitioner’s server. As part of the service, Petitioner ensures that the transferred files are virus-free. By providing its customers with the means by which to transfer files to a recipient through its web portal, without providing the customers with the telecommunication connections to the Internet site, Petitioner is providing a bridging service, which the Department has held is not one of the taxable services. *See* TSB-A-15(28)S. Petitioner accomplishes a part of this bridging service by giving its customers access to prewritten software, either via download, or over the Internet, which the customers use for the limited purpose of uploading a document to Petitioner’s website and providing an e-mail address for the recipient. But Petitioner accomplishes the rest of the bridging service by other means, including providing the server that functions as the bridge where the connection takes place, running an anti-virus program on the server that assures the recipient that the file will be safe to download, and giving the recipient the link necessary to access the document. Under these circumstances, through its paid plans, Petitioner is not selling its customers prewritten software, but rather is providing a nontaxable service.

Petitioner’s paid plans also provide the customer with the ability to specify levels of access for each recipient, as well as access to a digital dropbox. Moreover, the Corporate Plan product, in addition to providing an enterprise customer the file-transfer functionality discussed above, allows the customer’s administrator to control certain aspects of the authorized employees’ use of Petitioner’s file-sharing service. All of this functionality appears to be ancillary to the main function of those plans, which is providing a bridging service that allows a customer to transfer large files to recipients over the Internet. Accordingly, this additional functionality does not change the nontaxable nature of Petitioner’s paid plans.

DATED: February 25, 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.