

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

TSB-A-16(8)S
Sales Tax
March 15, 2016

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S140903A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (hereinafter “Petitioner”). Petitioner asks whether its fee for its tablet-based health monitoring product, and the health devices and tablets sold with the product, are subject to sales tax.

We conclude that (i) Petitioner’s fee for its tablet-based health monitoring product and sale of scales and tablets are subject to sales tax unless they are sold to an exempt organization, and (ii) Petitioner’s sale of blood pressure cuffs and transmitters for glucometers are not subject to sales tax.

Facts

Petitioner sells a tablet-based monitoring product (“product”) that helps people with chronic health conditions (“users”) live independently. The product involves a tablet that communicates with Petitioner’s web portal wirelessly through the internet and one or more wireless health monitoring devices (“equipment”), including a scale, blood pressure cuff, or transmitter for a glucometer. The transmitter will only work with a glucometer and cannot be used for any other purpose. Petitioner installs software on the tablet that causes the tablet to function solely as a monitoring device.

The product enables a caregiver to support a user remotely by monitoring the user’s health status and receiving alerts when problems arise. A caregiver, such as a family member, will set up a care plan on Petitioner’s web portal that will connect to the tablet Petitioner provides to the user. The care plan will provide support for medications, chronic health conditions and daily activities, such as doctor appointments. For example, the tablet can be programmed to prompt a diabetic to test his or her blood sugar at a certain time every day. The results will be sent wirelessly from the glucometer transmitter to the tablet and from the tablet to the caregiver, using Petitioner’s web portal. The caregiver will receive the information as a text message. The tablet can also be programmed to remind the user to take his or her medications.

Petitioner purchases the equipment and then sells it to each client. The equipment is sold directly to consumers, as well as to not-for-profit entities that assist developmentally disabled people. Petitioner also charges a monthly fee for access to the product, which includes usage of the system, technical support and caregiver access to Petitioner’s web portal. The monthly fee

for the product is charged separately from the charge for the equipment. When and if a customer terminates use of Petitioner's product, Petitioner remotely removes this software from the tablet, and the tablet becomes an ordinary tablet.

Analysis

The Tax Law imposes sales tax on retail sales of tangible personal property, including prewritten software, and enumerated services. *See* Tax Law §§ 1101(b)(6); 1105. "Sale" is defined as "[a]ny transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor." Tax Law § 1101(b)(5). Prewritten computer software is computer software that is not designed and developed by the creator to the specifications of a specific purchaser. Tax Law § 1101(b)(14). "Prewritten computer software is included within the definition of tangible personal property, 'regardless of the medium by means of which such software is conveyed to the purchaser.'" TSB-A-08(62)S; Tax Law § 1101(b)(6).

Giving a client access and the right to use prewritten software constitutes the sale of prewritten software, which is taxable under Tax Law § 1105(a). *See* TSB-A-15(25)S; TSB-A-15(1)S; TSB-A-08(62)S. "The accessing of Petitioner's software by Petitioner's customers' constitutes a transfer of possession of the software, because the customer gains constructive possession of the software, and gains the 'right to use, control or direct the use' of the software." TSB-A-08(62)S. Here, Petitioner's product allows caregivers access to its web portal where they remotely use Petitioner's software to create care plans for the users. Giving the caregivers access to and the right to use prewritten software constitutes the transfer of prewritten software. *See id.* Petitioner's monthly fee for the product constitutes the sale of prewritten software and, therefore, is subject to sales tax. *See id.*

Medical equipment, other than medical equipment purchased at retail for use in performing medical and similar services for compensation, is exempt from sales and use tax pursuant to Tax Law § 1115(a)(3). "*Medical equipment* means machinery, apparatus and other devices . . . which are intended for use in the cure, mitigation, treatment or prevention of illnesses or diseases or the correction or alleviation of physical incapacity in human beings." 20 NYCRR § 528.4(e)(1). Equipment will qualify as medical equipment only if it is "primarily and customarily used for medical purposes and [is] not [] generally useful in the absence of illness, injury or physical incapacity." 20 NYCRR § 528.4(e)(2).

Blood pressure cuffs previously have been determined to qualify as medical equipment. *See* Publication 822, *Taxable Status of Medical Equipment and Supplies, Prosthetic Devices, and Related Items*. Additionally, as the transmitters work only when used with glucometers, they are

primarily and customarily used for medical purposes and are not generally useful in the absence of illness, injury or physical incapacity. Therefore, the transmitters also are exempt from tax as medical equipment. *See* 20 NYCRR § 528.4(e).

However, “not every device employed to remedy or lessen physical infirmity and disability qualifies.” *Craftmatic Comfort Mfg. Corp. v. New York State Tax Com’n*, 118 AD2d 995, 998 (3d Dep’t 1986) (Yesawich, J., dissenting) *rev’d* 69 NY2d 755 (1987) (for reasons stated in dissent). The regulation requiring that equipment not be generally useful for nonmedical purposes prevents overextension of the exemption. *See id.* at 998.

Petitioner’s scales and tablets are generally useful in the absence of illness, injury or physical incapacity. Scales are regularly used by consumers who do not suffer from any incapacity to monitor their weight. Tablets are used for many purposes, including entertainment. Here, the tablet without the product is just a tablet. Because scales and tablets are generally useful for purposes other than treatment of illness, injury or physical incapacity, they do not qualify for the exemption for medical equipment and supplies, and sales to consumers are subject to tax. *See* TSB-A-12(15)S.

However, sales of equipment or prewritten software to an organization that is exempt pursuant to Tax Law § 1116(a) are not subject to tax. *See* TSB-A-14(16)S. Petitioner’s records for each sale to an exempt organization should include a copy of Petitioner’s invoice listing the exempt organization as the purchaser and a copy of Form ST-119.1, *Exempt Organization Exempt Purchase Certificate*, completed by the organization. *See id.*

DATED: March 15, 2016

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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.