

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

TSB-A-16(9)S
Sales Tax
March 18, 2016

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S140224B

The Department of Taxation and Finance (“the Department”) received a Petition for Advisory Opinion from [REDACTED] (hereinafter “Petitioner”). Petitioner asks whether the service contract it provides for new and used computer hardware and software products (the “Service Contract”) is subject to sales tax.

We conclude that Petitioner’s Service Contract is subject to sales tax in its entirety unless the charge for the exempt software services is reasonable and separately stated on an invoice or other statement of price given to the purchaser, in which case the charge for that portion of the service is tax exempt.

Facts

Petitioner offers services for the installation and repair of computer products. Petitioner offers the Service Contract for “new products” and “used products” as defined therein. Under the Service Contract, Petitioner is the Obligor and the Provider/Administrator is a third party. The Service Contract covers a customer’s eligible product for mechanical and electrical failures that occur during normal use and operation in accordance with the manufacturer’s written specifications.

To use the services provided by the Service Contract, a customer calls the toll free number listed on the Service Contract. The Administrator may perform a telephone diagnosis of the product failure. If the product is deemed defective, the Administrator advises the customer about the procedures for obtaining service for the product. The support services are performed at the customer’s location or by mailing the product to an authorized service center.

Hardware technical support is limited to the proper configuration and operation of the hardware components. Technical support for software is limited to the proper operation of the manufacturer approved and pre-installed operating system and application software. The Service Contract does not cover virus related issues, customer installed software, customized software applications and hardware components installed after the original purchase date.

Analysis

Tax Law § 1105(c) imposes tax upon the receipts from every sale, except for resale, of certain enumerated services. Included in these services are the installing, maintaining, servicing, and repairing of tangible personal property, whether or not any tangible personal property is transferred in conjunction with the service. *See* Tax Law § 1105(c)(3); 20 NYCRR § 527.5(a). “Maintaining, servicing and repairing” includes all activities involved in keeping tangible personal property fit, efficient, or ready or restoring it to such condition. *See* 20 NYCRR § 527.5(a)(3). “The purchase of a maintenance or service contract is a taxable transaction.” 20 NYCRR § 527.5(c)(1).

Pursuant to Tax Law § 1105(c)(3), charges for maintaining, servicing and repairing computer hardware are subject to sales tax. *See* TSB-A-98(27)S. Unlike services to computer hardware, Tax Law § 1115(o) provides a tax exemption for charges for installing, maintaining, servicing, or repairing computer software. *See* TSB-A-98(27)S. However, such services will be exempt when provided in conjunction with the sale of tangible personal property, such as prewritten software and/or hardware, only if the charges for services to the computer software are reasonable and separately stated on an invoice or other statement of the price given to the purchaser. Tax Law § 1115(o); *See* TSB-A-98(27)S. “When tangible personal property, composed of taxable and exempt items is sold as a single unit, the tax shall be collected on the total price.” 20 NYCRR § 527.1(b).

Where a computer systems vendor sells a maintenance agreement to provide, among other things, telephone support and on-site training and repairs to a customer’s computer hardware and prewritten software, the portion of the cost of the agreement allocated to repair or maintenance of the computer system hardware is taxable. *See* TSB-A-98(27)S; TSB-A-98(73)S. However, the portion of the cost attributed to repairs and maintenance of the prewritten software is exempt, if the cost is reasonable and separately stated in the written agreement and the customer invoice. *See id.* If the charge for the service of software is not separately stated on the maintenance agreement, the charge for the entire maintenance agreement is subject to tax. *See id.*

Here, where Petitioner provides a Service Contract for both hardware and software repairs, the charge for the Service Contract is subject to tax in its entirety unless the charge for the exempt software services is reasonable and separately stated on an invoice or other statement of the price given to the purchaser.

DATED: March 18, 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.