

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

TSB-A-17(3)S
Sales Tax
February 28, 2017

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S150728A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner asks whether sales tax would be due if he provides a free software application to smartphone users that would allow the users access to bathrooms at participating locations for a fee.

We conclude that Petitioner’s provision of the software application would not be subject to tax since the application is provided free of charge. We also conclude that there is no tax due on the charge for the use of the bathrooms since this is not among the enumerated services subject to tax.

Facts

Petitioner is developing a software application for Apple and Android smartphones and will provide this application free of charge to smartphone users. Once downloaded, the application will allow users to purchase a ticket for a fee of \$1.00 or \$2.00 to use a bathroom in a participating restaurant, café or bar. Petitioner will collect the fee from patrons and pay a portion of that fee to participating locations after the ticket is used. As the administrator of the application, Petitioner would be able to track each use of the application and would make payments to participating locations based on such uses. Fees will not be shared among the participating locations.

Analysis

Tax Law § 1105(a) imposes a tax on every retail sale of tangible personal property. Tax Law § 1101(b)(5) defines sale as the transfer of title or possession or both for a consideration.

Tax Law § 1101(b)(6) defines tangible personal property as “corporeal personal property of any nature.” That term also includes pre-written computer software, whether sold as part of a package, as a separate component, or otherwise, and regardless of the medium by means of which such software is conveyed to a purchaser.

Tax Law § 1105(c)(1) imposes sales tax on the receipts of every sale, except for resale, of certain enumerated services.

Tax Law § 1105(f)(1) provides that a sales tax shall be imposed on:

"Any admission charge where such admission charge is in excess of ten cents to or for the use of any place of amusement in the state, except charges for admission to race tracks, boxing, sparring, or wrestling matches or exhibitions which charges are taxed under any other law of this state, or dramatic or musical arts performances, or live circus performances, or motion picture theaters, and except charges to a patron for admission to, or use of, facilities for sporting activities in which such patron is to be a participant, such as bowling alleys and swimming pools."

Petitioner's proposed business idea does not fall within the reach of any of the above statutes.

Petitioner's provision of the software application to smartphone users is not a sale since Petitioner will not charge smartphone users to download the application. While the smartphone application is computer software that falls within the definition of tangible personal property, this software will be given to users free of charge. Thus, there is no consideration and no tax is due. If Petitioner were to sell the software application to users, then a tax would be due on such sale since the software is tangible personal property.

In addition, the service provided through the use of the smartphone application to purchase the use of bathrooms is not one of the services enumerated under Tax Law § 1105(c). Finally, the admission charge to use a bathroom at a restaurant, café or bar is not a taxable charge under Tax Law § 1105(f)(1).

DATED: February 28, 2017

/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.