

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

TSB-A-17(4)S  
Sales Tax  
March 1, 2017

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S141223B

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether charges for its “video generating services” are subject to sales tax. We conclude that Petitioner’s product is prewritten computer software and is subject to New York State and local sales taxes when sold to customers located in New York.

**Facts**

Petitioner is a California-based corporation with an office in New York City. Petitioner offers an on-line product that allows customers to “turn [their] photos and video clips into professional videos.” To create these videos, customers must create an on-line account with Petitioner that may, at the user’s option, be linked to other social media accounts. Thereafter, customers use a web-based interface (either on Petitioner’s website or through the use of an application downloaded from a third-party site) to upload photographs and videos from their computer or mobile devices, or from other cloud services or social media sites, to Petitioner’s server. This interface allows customers to select from a library of music to be used in a video, and to specify various “customization options,” such as text and logos. Customers are also able to choose the order in which images or text appears and a “style” for the video, and they may select multiple songs to be used within the same video.

When customers have finished using the interface to make their selections, proprietary software (“video-generating software”) that is hosted on Petitioner’s server, and that customers do not download or directly interact with, creates a video that incorporates all of the customer’s chosen selections. The video, in most cases, is then hosted on Petitioner’s servers and may be viewed online. However, depending on the type of account a user has (see below), videos may also be downloaded electronically to a computer or device. While Petitioner at one point sold copies of videos on DVD to customers, that option has since been discontinued, and videos are no longer sold by Petitioner on any tangible media. Due to the nature of the customer-selected media content and algorithms used in Petitioner’s video-generating software, each video created is unique in some way.

Petitioner identifies five types of accounts that it offers to customers, including three personal accounts (one of which is free of charge) and two business accounts. These accounts are described as follows:

- **Free Personal Account:** A free personal account allows for the creation of “web quality videos” that are up to 30 seconds long. This account provides users with a limited number of style choices, and offers access to over 300 audio tracks. Videos created with a free personal account are not downloadable; rather, they are hosted on Petitioner’s servers, where they can be accessed via a number of social networking websites.
- **Personal Plus Account:** A personal plus account costs \$5 per month or \$30 per year. Like a free account, a Personal Plus account allows for the creation of “web quality” videos, but these videos may be up to 10 minutes long. In addition, a personal plus account provides users with a choice of 53 video styles and the right to download videos and burn them to DVD.
- **Personal Pro Account:** A personal pro account is \$39 per month or \$249 per year. This account allows for the creation of “high definition quality” videos that are up to 20 minutes long and can be downloaded. In addition, a Personal Pro account offers users 77 video styles and 2000 commercially-licensed audio tracks. Unlike any of Petitioner’s other personal accounts, and as an added benefit, users of a personal pro account are given a choice of logos that can be used in a video.
- **Business Pro Account:** This account, which like a personal pro account is \$39 per month or \$249 per year, allows users to receive an unlimited number of 20-minute high definition videos that may be downloaded. In addition, this account allows for the creation of “white-label” videos, which are videos that do not contain any logos.
- **Pro Premium Account (Business):** This account, which is \$399 per year, offers everything the above business account offers, plus it allows users to use their own logos on videos. In addition, this account provides users with access to 3000 music tracks, phone support, and the option to host videos on a third-party site.

When creating any of the above accounts, customers are required to accept and agree to Terms of Service. These terms describe Petitioner’s product as one that provides customers with “the ability to have a video . . . automatically created by [Petitioner] using uploaded photographs, graphics, or video clips (‘Image Content’) set to a selected or uploaded music track (‘Musical Content’).” In addition, these terms provide that Petitioner’s “services,” which are defined to include its website and applications, are owned and operated by Petitioner, and that Petitioner retains all proprietary rights to its site. However, the terms also permit customers to use Petitioner’s “site and its content” as specifically authorized by it and, among other things, grants customers a “limited right to use” the “software and services” that are available on Petitioner’s site. Petitioner contends that this language refers only to the web interface that customers use, and not to its video-generating software.

## Analysis

Petitioner offers an on-line product that allows customers to have a video automatically created using uploaded Image Content that is set to music. These videos are created via the use of a web-based interface. While this interface does not itself create any videos, it gives customers the ability to control the video-generating software by selecting the content of a video, the order in which this content appears, and various other aspects of a video, including what music and logos are used, and the video's "style." In addition, this interface allows customers to create text that can be incorporated into a video. For the reasons discussed below, therefore, we conclude that Petitioner is selling access to prewritten computer software, which is included within the definition of "tangible personal property" subject to New York State and local sales tax. *See* Tax Law §§ 1101(b)(6); 1105(a).

A "sale" is defined as "[a]ny transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor." *See* Tax Law § 1101(b)(5). Sales and Use Tax Regulation § 526.7(e)(1) provides generally that "a sale is taxable at the place where the tangible personal property or service is delivered or the point at which possession is transferred by the vendor to the purchaser or his designee." The regulations further provide that, with respect to a "license to use," a transfer of possession has occurred if there is actual or constructive possession, or if there has been a transfer of "the right to use, or control, or direct the use of tangible personal property." 20 NYCRR § 526.7(e)(4). The location of the code embodying the software is irrelevant, because the software can be used just as effectively by the customer even though the customer never receives the code on a tangible medium or by download.

Initially, there is no indication that any aspect of Petitioner's product, including the web interface that customers use, was designed or developed to the specifications of a specific customer. Rather, it appears that regardless of who uses Petitioner's product, the same software is used to produce videos for all customers. All of this software, therefore, is properly considered pre-written computer software, the sale of which is subject to sales tax. *See* Tax Law §§ 1105(a); 1101(b)(6) (pre-written computer software included within the definition of "tangible personal property"); 1101(b)(14) (defining "pre-written computer software").

Further, while Petitioner's customers may not directly interact with the video generating software located on Petitioner's server, they have access to an online interface that gives them control over that software and what it does. Specifically, and as noted above, customers use Petitioner's interface to dictate the content of videos, to create text for videos, and to control other significant aspects of a video that gets automatically created, including the order in which content and text appear, the music and logos that are used, and the video's "style." This interface software, in other words, gives Petitioner's customers the ability to make the videos that they want. As such, Petitioner's customers are given constructive possession of Petitioner's video generating software in that they have the "right to use, or control or direct the use" of it. *See* 20

NYCRR § 526.7(e)(4)(iii); *see also* TSB-A-10(60)S; TSB-A-09(15)S. That all videos will be unique in some way due to the software's algorithms is irrelevant. Charges for Petitioner's product, therefore, are for the use of software, and are subject to State and local sales tax.

Finally, the situs of the sale for purposes of determining the proper local tax rate and jurisdiction is the location associated with the right to use Petitioner's software, *i.e.*, the location of the customer or its employees (if applicable). *See, e.g.*, TSB-A-13(22)S; TSB-A-09(15)S. If a customer has employees located both in and out of New York State who use Petitioner's software, Petitioner should collect tax based on the portion of the receipts attributable to the customer's users located in New York State. *See id.*

DATED: March 1, 2017

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