

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance (“the Department”) received a Petition for Advisory Opinion from [REDACTED] (hereinafter “Petitioner”). Petitioner asks generally, for purposes of sales tax, whether the trade-in credit exclusion applies to its acquisition of its customers’ computer equipment or whether its acquisitions are exempt purchases for resale, and requests specific guidance about four scenarios. We conclude that the trade-in credit and resale exclusions may apply where equipment is transferred to Petitioner in part payment for taxable services and intended for resale as such. However, those exclusions do not apply where Petitioner acts as consignee of a customer’s equipment.

Facts

Petitioner is a national computer liquidator and the provider of computer data destruction services. Petitioner is hired by businesses and individuals wishing to safely and permanently delete data stored on their computers. Petitioner either erases (“wipes”) the data from the hard drive or physically destroys the hard drive. Customers also can trade in their old computers and related equipment, such as hard drives, tape recorders, cellular phones, DVDs, CD Rom drives and USB sticks. Petitioner either picks up or arranges for the shipping of the computer and/or related equipment from the customer’s location, which may or may not be in New York, to its facility in New York. The cost to pick up the equipment is charged to the customer. Once the equipment is at Petitioner’s facility, Petitioner evaluates it to determine whether it can be resold as computer equipment, recycled, or sold as scrap. Petitioner also evaluates and tests the equipment to determine the cost to wipe and/or destroy the hard drives. If Petitioner decides to acquire the equipment, it offers a trade-in credit to the customer, for a negotiated amount, to offset the data destruction cost. When this happens, title to the equipment is transferred to Petitioner. Petitioner then seeks to resell the equipment to distributors or other markets. If, after acquiring the equipment, Petitioner determines that it cannot sell the equipment, the equipment is commingled with other similar elements and sold as scrap.

Petitioner also enters into consignment contracts with its customers where it liquidates a customer’s computers over time. The contract usually provides that Petitioner will pick up or arrange shipping of its customer’s computer equipment to its facility, provide data destruction services, and then sell the computer equipment to a third party. In this scenario, Petitioner does not purchase or take title to the computer equipment and instead sells the equipment and shares the net proceeds with its customer, after the deduction of charges for specific costs. This

consignment arrangement between Petitioner and its customer generally is set forth in a consignment agreement, which consigns numerous computers over an extended period of time. The netting, sharing and distribution of proceeds under the consignment agreements are “settled up” either monthly or quarterly over the term of the agreement. Generally, over the term of the consignment agreement, the net proceeds to the customer from the sale of its consigned computers will be greater than the costs related to data destruction and other services performed, which results in Petitioner paying its customer.

Petitioner poses the following scenarios and requests guidance about the sales tax treatment of each:

Scenario 1: In a non-consignment transaction, if the cost of services to erase or destroy the hard drives is more than the amount Petitioner is willing to provide as a trade-in credit to its customer for the computer or related equipment, then Petitioner’s customer pays Petitioner the net amount of the cost of data destruction minus any trade-in amount. For example, Petitioner may provide data destruction services for \$12,000 and may provide a credit for the trade-in of equipment or components from its customer worth \$5000. Therefore, the customer pays Petitioner the net amount of \$7,000. Petitioner asks whether it should collect sales tax on the net selling price (i.e. \$7,000) after providing a trade-in credit.

Scenario 2: In a non-consignment transaction, if the cost to erase or destroy a hard drive is less than the amount Petitioner is willing to provide as a credit for the equipment being traded in, Petitioner will pay its customer the net amount of the trade-in minus the cost of Petitioner’s service for data destruction. For example, Petitioner may provide data destruction services for \$3,000, and may offer a trade-in credit of \$8,000 for the equipment or components from its customer. Therefore, Petitioner pays the customer the net amount of \$5,000. Petitioner asks whether the net amount paid by Petitioner to its customer is exempt from sales tax as a purchase for resale.

Scenario 3: In a consignment transaction, Petitioner sells consigned computers and related equipment to a third party. After application of specific costs, such as shipping a customer’s computer to Petitioner’s facility, Petitioner allocates the proceeds from the sale of the computer to a third party between itself and its customer in accordance with the sharing percentage set forth in the consignment agreement. Petitioner then reduces the customer’s share of the proceeds for the data destruction services Petitioner provided. Petitioner asks whether the fee charged for the services of data destruction is excluded from sales tax as the service to property that is held for resale and whether the amount paid by Petitioner to its customer as payment for the computer is excluded from sales tax as a purchase for resale.

Scenario 4: In a consignment scenario similar to Scenario 3, the net cost to Petitioner’s customer exceeds its share of the proceeds. The customer must pay Petitioner the net cost.

Petitioner asks whether the fee charged for the services of data destruction is excluded from sales tax as the service to property that is held for resale and whether the amount paid by Petitioner to its customer is excluded from sales tax as a purchase for resale.

Analysis

Tax Law § 1105(c)(3) imposes sales tax on the services of “maintaining, servicing or repairing tangible personal property ... not held for sale in the regular course of business” Petitioner’s data destruction qualifies as the servicing of tangible personal property, which is subject to tax, except where such equipment is acquired by Petitioner for resale as such in the regular course of its business. *See also*, Tax Law § 1101(b)(1); 20 NYCRR 527.5(b)(2).

We address Petitioner’s scenarios in turn:

Scenario 1: In a non-consignment transaction where the charge to the customer for data destruction exceeds the amount of the trade-in credit Petitioner offers for the customer’s relinquished equipment, Petitioner asks whether the amount subject to sales tax is the charge for its services after deduction of the trade-in credit. Tax Law § 1101(b)(3) defines the receipt subject to sales tax as the sale price of any property and the charge for any taxable service, including any charges by the vendor for transportation, but excluding “any credit for tangible personal property accepted in part payment and intended for resale.” Petitioner’s receipt for its service includes the data destruction charge, and any charges by Petitioner for pickup or delivery to Petitioner’s location, regardless of whether those services are provided by a third party or the charge for the services is separately stated. The receipt for the taxable service is reduced by the amount of credit Petitioner offers for equipment accepted in part payment for its service and intended for resale. However, “resale” in this context means the property is acquired exclusively for resale “as such.” *See* Tax Law § 1101(b)(4)(i)(A). Thus, the trade-in credit is excluded from the receipt subject to sales tax only if the equipment is intended for resale in the form in which it was purchased, and Petitioner does not intend to make any use of the property, other than holding it in inventory, before it is sold. *See, e.g., Matter of Mendoza Fur Dyeing Works, Inc., v. Taylor*, 272 NY 275 (1936).

Intent is generally determined at the time of the transaction. Later activities, while not determinative, may be relevant to ascertaining a purchaser’s intent at the time of sale. *See Matter of D.J.H. Construction v. Chu*, 145 AD2d 716 (3d Dep’t 1988); TSB-A-16(4)S. When Petitioner acquires equipment that it intends to resell in the form in which it was purchased and offers a trade-in credit for that equipment, the receipt subject to tax is the charge for the data destruction service and delivery charges, less the amount of the trade in-credit. The trade-in credit does not reduce the taxable receipt for data destruction services where Petitioner intends at the time of sale to recycle or sell the equipment as scrap, or to use the equipment for any purpose other than resale. If equipment is initially acquired for resale but later deemed unsuitable for that

purpose, a trade-in credit offered to the customer at the time of sale would still reduce the receipt subject to tax. However, the Department would be able to look to later events, such as the frequency of post-sale decisions to scrap rather than resell acquired equipment, to establish Petitioner's intent at the time of the transaction.

Scenario 2: In a non-consignment transaction where the charge to the customer for data destruction is less than the amount of the trade-in credit Petitioner offers for the customer's relinquished equipment, Petitioner asks whether its payment of the excess trade-in credit to the customer is exempt from sales tax as a purchase for resale. In this scenario, if Petitioner offers a trade-in credit that exceeds the amount owed by the customer for data destruction services and delivery charges, and intends exclusively to resell the equipment in the form in which it was purchased, the exclusion from sales tax for the trade-in credit reduces the receipt for the taxable data destruction service to zero, and the excess payment would be considered a purchase for resale. As with Scenario 1, the trade-in credit and resale exclusions would not apply where the relinquished equipment is intended to be recycled or sold as scrap at the time of sale, or used by Petitioner for any purpose other than resale as such.

Scenarios 3 & 4: In these scenarios, Petitioner sells its customers' consigned equipment to third parties. After first recouping certain costs, including shipping to its facility, Petitioner allocates the proceeds of sale of the equipment between itself and the customer in accordance with a consignment agreement, and applies the customer's allocated amount to the data destruction charges. In Scenario 3, the customer's allocated share is greater than the data destruction costs and Petitioner pays the balance to the customer, whereas in Scenario 4 the customer's allocated share is less than the data destruction costs and the customer pays the balance owed to Petitioner. Petitioner does not take title to the equipment in either scenario. Petitioner asks whether the fee paid by the customer for data destruction is exempt from sales tax as services to property held for sale under Tax Law § 1105(c)(3), and whether the portion of the net proceeds paid by Petitioner under the consignment agreement is exempt from tax because the property is for resale.

A consignment is not a sale of property from the consignor to the consignee, but is instead the "creation of an agency relationship wherein the consignee becomes the agent of the consignor for the purpose of making sales of the consignor's property, and is obligated to account to the consignor for the proceeds." TSB-H-81(27)S. Because Petitioner does not take title to the customer's equipment, the equipment is not "accepted in part payment" for the data destruction charges accrued by the customer for purposes of the trade-in credit exclusion. Moreover, because the consigned property is not sold to Petitioner, it is not intended for resale by Petitioner to the ultimate purchaser for purposes of the trade-in credit or resale exclusions under either scenario. Finally, because the data destruction services are performed on equipment that remains titled to the consignor, it is not property held in Petitioner's inventory for sale in the regular course of its business for purposes of the exclusion from tax under Tax Law §

1105(c)(3). Accordingly, sales tax is due on the entire charge to a customer for data destruction services on consigned equipment, including any charges by Petitioner for delivery to its location.

DATED: October 20, 2020

/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.