

**STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE**

ADVISORY OPINION

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (hereinafter "Petitioner"). Petitioner asks whether its services of creating, operating and hosting websites and applications accessed on mobile devices are subject to State and local sales and use tax.

We conclude that Petitioner's services are not subject to State and local sales and use tax because they are not enumerated services subject to tax pursuant to Tax Law § 1105(c).

Facts

Petitioner creates and hosts websites and applications accessed on mobile devices. Its clients are retail sellers of consumer goods. The mobile websites are accessed by Petitioner's clients' customers to view and purchase clients' goods on mobile devices. Each mobile website is tailored to the unique specifications of Petitioner's client. The specific services associated with the development and maintenance of the mobile websites include website creation, hosting, maintenance, optimization/reporting and professional services. These services are performed at Petitioner's headquarters in Pennsylvania.

Website creation includes the design, development, and testing of the site. Petitioner creates the mobile website by first using the client's existing desktop website code and data and then tailoring the mobile website to each client's specifications to ensure that the look and feel of the client's mobile site is the client's desired user experience. Petitioner retains ownership of the mobile website it creates, but the URL is owned by the client: the link or address to the website is owned by the client, but the client does not have access to modify the website for any purpose because the process by which the mobile website is created and maintained is proprietary to Petitioner. Petitioner usually does not charge its clients for mobile website creation. Instead, Petitioner recovers the costs incurred for these services as part of a fixed monthly service fee.

Hosting involves hosting the website in the cloud on behalf of the client. Petitioner does not own the servers on which the websites are hosted. Petitioner retains a third party hosting company to provide this service. Petitioner leases space on the servers and does not lease specific/identifiable servers. The third party servers are physically located outside of New York.

Once the mobile website is launched, Petitioner does not separately charge the hosting fees to the client. The hosting fees are included in the fixed monthly service fee. The fixed monthly service fee is a graduated fee based on the number of page-views the mobile site receives each month.

Website maintenance includes daily manual error testing, automated scripts error testing and monthly reporting detailing certain performance diagnostics, marketing updates such as banner charges, and fixing bugs or fundamental changes/modifications to the website. Fees for these services are also included in the fixed monthly service fee.

The optimization/reporting service includes weekly reports based on third party information from Google Analytics, including confirming the page-views on which the fixed monthly service fee is based, and monthly recommendations made by Petitioner for improvements and optimization to the client's mobile site. The data in Google Analytics is private to each client. A client can see its own data but it will not see the data in another client's profile.

Petitioner embeds code into each client's mobile site code to enable Google Analytics. Clients may request and receive access to Google Analytics for the mobile site. Google Analytics does not charge Petitioner for this feature and Petitioner does not charge its clients. Petitioner will review the analytics provided by Google Analytics and create a report to recommend and market additional services to its clients. If the client would like to move forward with Petitioner's recommendations, the charge for these additional services may be included in the monthly service fee or charged separately as professional services.

Professional services, also referred to as "enhancement services," encompass add-on or out-of-scope services such as adding new features and functionality to the mobile website at the request of the client. As part of the initial contract, clients may pick and choose from numerous features and functionality options for their mobile site. After launch, Petitioner's account managers continue to discuss additional add-ons or modifications to optimize the mobile site in various ways. Additionally, updates to the mobile websites need to be performed regularly. Any change to a client's desktop website triggers an alert to Petitioner. Petitioner then makes the appropriate adjustment to the mobile site. Petitioner has developers who constantly ensure that adjustments are made and any "bugs" are immediately repaired. A fixed, minimal number of hours for these professional services are included in the fixed monthly service fee described above. If these hours are exceeded, Petitioner charges the client an agreed-upon hourly rate for the additional time.

Analysis

Tax Law § 1105(a) and (c) impose tax upon the receipts from every sale, except for resale, of tangible personal property and certain enumerated services. Website development services, including consulting, designing and website creation, are not enumerated services subject to New York State and local sales and compensating use taxes. *See* Tax Law § 1105(c); TSB-A-01(21)S. Moreover, where a developer maintains exclusive control over the website, the service of developing and operating the website also does not involve any transfer of prewritten computer software and thus is not subject to sales or use tax. *See* TSB-A-12(11)S.

Additionally, charges for a revision or upgrade of software is subject to tax as the sale of prewritten software. *See* Tax Law § 1101(b)(14); TSB-A-02(11)S. However, where the software upgrade is designed and developed to the specifications of a specific purchaser, its sale to that purchaser is exempt as custom software if the charge for such upgrade is reasonable and separately stated. *See id.*; TSB-A-02(11)S. Here, if the charge to add new features and functionality to the website through custom modifications to prewritten software for a specific client is reasonable and separately stated, it would be exempt from sales tax. *See id.*

Charges for servicing and repairing the software are also exempt from sales tax. *See* Tax Law § 1115(o); TSB-A-09(19)S; TSB-M-93(3)S. Petitioner's mobile website development services and "professional services" involve updates to the mobile website and, thus, are not subject to sales or use tax. Notably, however, any purchase by Petitioner of prewritten software for use in performing its mobile

website development service is subject to tax under Tax Law § 1105(a) as a purchase at retail of tangible personal property. *See TSB-A-01(21)S.*

Hosting fees charged by a third party that Petitioner pays and passes through to its clients also are not included in the enumerated services subject to sales or compensating use tax pursuant to Tax Law § 1105(c). *See id.; TSB-A-09(19)S.* Additionally, hosting fees are not fees for the rental of tangible personal property. *See id.*

Finally, Petitioner's optimization and reporting service that includes weekly reports based on third-party analytics of Petitioner's clients' mobile websites and monthly recommendations for improving optimization also is not subject to tax. Tax Law § 1105(c)(1) imposes tax upon the receipts from every sale, except for resale, of the following:

The furnishing of information . . . by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons, but excluding the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons

Here, because Petitioner is analyzing the information provided by sites such as Google Analytics and preparing reports, including recommendations, based on that information, Petitioner's optimization and reporting service is an information service. *See TSB-A-14(2)S.* However, because the information provided in the report is unique to each client, is not shared with other clients and pertains only to the features of that client's mobile site, such information is individual in nature and will not be incorporated in reports to other clients; therefore, the information service is not subject to tax. *See id.; Westwood Pharmaceuticals, Inc. v. Chu*, 164 AD2d 462, 466-467 (4th Dep't 1990).

DATED: November 24, 2020

/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.