

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 whether its digital marketing services provided to customers are subject to sales tax. We conclude that Petitioner’s digital marketing service, in which Petitioner provides clients with the ability to track the effectiveness of a marketing strategy, is an advertising service not generally subject to tax. If Petitioner bundles the advertising service with a third-party software license for a charge to its client, then the entire charge is taxable. Where charges for third-party software licenses are separately stated, only the separately stated charge is taxable.

Facts

Petitioner is a digital marketing services business. It provides consulting, managed services and technical services, and acts as a reseller of advertising- and marketing-related offerings. Petitioner’s services are built around certain third-party platform technologies and tools. In providing its services, Petitioner consults with and provides support and training to its clients about the use of those technologies and tools, and reports on the effectiveness of campaigns using those technologies and tools.

Petitioner’s customers generally are advertising agencies that provide ad serving, web search marketing, or email marketing services. Petitioner’s customers require access to certain tools offered by third-party platforms, but they often need training, support and guidance to properly use these tools to set up campaigns, measure performance and make appropriate adjustments. Petitioner provides these functions.

Petitioner provided sample contracts representing the services it offers. The contracts between Petitioner and its customers often include a license for third-party digital marketing software (the Software), the charge for which is separately stated on Petitioner’s invoices to its customers. Petitioner purchases licenses to the Software and resells the licenses to its customers. It also provides support to its customers for the use of the software.

Petitioner engages in digital consulting projects, which range from 1-month special projects to 12-month projects. Petitioner is retained on an hourly basis for its consulting services. Petitioner offers the following services in connection with the sale of the Software:

1) Consulting and professional services. Petitioner makes suggestions to its customers on how to track and improve the effectiveness of a customer's marketing strategy. Petitioner devises strategies for making its customer's current marketing tools more effective.

2) Digital search marketing support. Petitioner assists its clients in optimizing a search campaign by instructing a client how to use relevant key search words. To provide search services, Petitioner sells the license to the Software to its client and provides support for the Software. Petitioner tracks where its customer's digital marketing is being sent and thereafter targets where to send a customer's marketing piece. Petitioner answers its customers' questions on how to use the Software.

3) Auction management services. Petitioner manages auction buys, bid prices, placements and media spend levels and bills the client for expenses related to programmatic auction management. Petitioner sells the Software license to its customer and then supports the customer's use of the Software.

4) Campaign management support services. Petitioner sells the Software license to its customer and then offers training, campaign set-up support, campaign strategy and tracking strategy.

5) Email marketing services to clients. Petitioner sells the Software license to its customer and then provides tactical and strategic email marketing strategies, data management and data analysis.

Petitioner asks whether its receipts from the sale of its marketing services and the Software are subject to sales tax.

Analysis

State and local sales tax is imposed on the receipts from the retail sale of tangible personal property and specifically enumerated services, except as otherwise provided. See Tax Law §§ 1105(a) and 1110(a)(A). Advertising services are not subject to sales tax. See Tax Law Section 1105(c); TB-ST-10. Advertising services consist of consultation and development of advertising campaigns and the placement of advertisements with the media, 20NYCRR 527.3(b)(5). Petitioner's digital marketing services include consulting and technical services regarding a customer's own marketing tools. Petitioner consults, designs, provides access to, implements, and reports on the effectiveness of customer's existing campaigns. Petitioner's customers subscribe to Petitioner's service for the purpose of obtaining guidance, advice, input and direction with reference to the customer's own marketing tools. Petitioner does not promote other tools or software as part of this service. Petitioner's customers are purchasing an advertising service. Thus, the sale of this service is not subject to sales tax.

Petitioner also provides marketing services to its customers who request digital search marketing support in conjunction with the sale of the Software. These services generally include training the customer to use the Software, including ad placement and email deployment strategies. For example, Petitioner can use the Software to track where its customer's digital marketing is being sent and thereafter help its customer target where to send a marketing piece. Petitioner also answers its customers' questions

on how to use the Software. To provide search services, Petitioner purchases the third-party Software at a discounted price, and then resells the license to the Software to its client. Petitioner also provides support for the Software.

Tax Law §§ 1105(a) and 1110(a)(A) impose State sales and use tax on retail sales of tangible personal property. Section 1101(b)(6) defines “tangible personal property” to include 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 the software is conveyed to the purchaser. Tax Law § 1101(b)(14) defines “pre-written computer software” as software (including pre-written upgrades thereof) that is not software designed and developed by the author or other creator to the specifications of a specific purchaser. The resale by the Petitioner of the license to the third-party software to Petitioner’s customer’s is the sale of pre-written computer software and is subject to sales tax.

Where Petitioner’s advertising service is bundled with the sale of the Software for a single charge, the entire charge is subject to tax. If Petitioner’s charge for the Software is separately stated on an invoice and such charge is reasonable in relation to the overall charge, only the separately stated charge for the Software is subject to tax. *See, e.g.*, TSB-A-04(23)S.

DATED: June 30, 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.