

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] (“Petitioner”). Petitioner asks whether its e-mail and consulting services are subject to State and local sales taxes.

We conclude that Petitioner’s e-mailing and consulting services are not subject to New York sales tax.

Facts

Petitioner provides e-mailing services to its customers, which includes the ability to send large volumes of e-mails using Petitioner’s infrastructure. Petitioner charges its customers based upon the number of e-mail credits they purchase per month. Petitioner has a free plan that allows customers to send up to 12,000 e-mails/month, and paid plans that allow up to 30,000, 120,000, 350,000, 750,000, or 2,500,000 e-mails/month. Petitioner offers custom plans for customers who wish to send more than 2.5 million e-mails/month. If customers exceed their monthly limit, they are charged an overage fee per each additional e-mail sent. There are additional optional features for which a customer will pay an additional charge (e.g., multiple dedicated IP addresses, campaign comparison tools), but the core product being sold is the ability to send large quantities of e-mails and receive data back regarding such transmissions. Petitioner’s customers are solely responsible for the content of the e-mails.

Customers utilize Petitioner’s e-mailing services in 4 different ways:

1. Marketing E-mails:

Marketing E-mails is a cloud-based service and no downloaded software is installed on a customer’s machine. Customers sign up via Petitioner’s website and set up an account there. Customers create a contact list either by electronically uploading their relevant data to the website or by adding contacts to their account using an application program interface (API). Then, customers can either use one of Petitioner’s HTML templates or upload HTML code of their own, select which recipients they want to send e-mails to, and then instruct Petitioner’s servers to send the desired e-mails. Petitioner’s servers, which are based outside the United States, process the e-mails and then send e-mails to the desired recipients.

2. SMTP (simple mail transfer protocol) E-mails:

Similar to the Marketing E-mails, Petitioner’s customers can sign up for Petitioner’s services via Petitioner’s website and set up an account there. After a customer has created an

account, Petitioner provides the customer a username and password and then the customer can take certain credentials and put them into their own website's code. The customer defines what the e-mails will look like (e.g., a forgotten password or e-mail for a purchase receipt e-mail) and sends that data to Petitioner, and then Petitioner sends the e-mails to designated recipients.

3. API (application programming interface) E-mails:

Petitioner's customers sign up for an account via Petitioner's website. After customers create an account, Petitioner provides the customers with API credentials, which operate similarly to a username and password. Petitioner explains that an API effectively allows customers to communicate with Petitioner's technology without having to go to Petitioner's website (i.e., customers can create code on their own system that tells Petitioner's system to add a contact or send an e-mail rather than going to Petitioner's website itself to instruct Petitioner's system). To use an API, a customer needs what Petitioner calls a "wrapper" in order for the customer to be able to communicate with Petitioner's technology. Petitioner creates wrappers that can be downloaded, free of charge, by customers to accommodate the different programming languages customers use.

4. Plug-In E-mails:

Some customers use non-typical content management systems (e.g., Joomla or Wordpress) for their websites. For these systems, Petitioner created "plug-ins" that allow Petitioner's technology to be used by these customers to send e-mails via those platforms. Customers download Petitioner's plug-in, free of charge, and install it on their own sites. After inputting their credentials into the plug-in, the customer would then be able to send e-mails using Petitioner's servers.

Regardless of which method customers use to utilize Petitioner's e-mailing services, customers enter into a Service Agreement with Petitioner. The Service Agreement indicates that customers remotely send e-mails using Petitioner's systems. The Agreement describes Petitioner's services as providing customers "emailing campaigns with real-time monitoring of sent e-mail deliverability" and "sending and managing, transactional e-mails." The Agreement also specifies that the Petitioner is to:

"ensure that emails sent by [customers] are properly routed to their recipients' electronic mailboxes. To this end, [Petitioner] shall provide [customers] with an online automatic monitoring service, enabling [customers] to update and modify [their] mailing lists and emailing campaigns in real time."

Petitioner's systems allow customers to see statistical results of what recipients did with the e-mails they sent (e.g., opened, clicked, undeliverable, etc.).

Consulting Services

Petitioner also provides certain consulting services to customers. Petitioner charges separately for these consulting services. Some of Petitioner's larger customers have greater

needs related to avoiding sent e-mails being designated as spam by recipients' systems. In this regard, Petitioner offers services that assist customers with setting up their accounts correctly, managing massive contact lists, and developing e-mail strategies. Petitioner has experts on staff that will engage with customers, typically over the phone or by video-conference, and help them with their specific needs. Petitioner's personnel that provide these services are located outside the United States.

Analysis

The Service Agreement between Petitioner and its customers emphasizes that Petitioner's service allows its customers to remotely send e-mails using Petitioner's platform. This is further reinforced by the fact that, aside from separate consulting services and access to multiple IP addresses, Petitioner bills its customers entirely based upon the quantity of e-mails sent.

The federal Internet Tax Freedom Act (PL 105-277, 114-125) ("ITFA") became permanent on February 24, 2016. ITFA expressly prevents states from taxing internet access services. *See* 47 USC § 151, note § 1101(a)(1). Internet access service is defined as "a service that enables users to access content, information, electronic mail, or other services offered over the Internet and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers." 47 USC § 151, note § 1101(a)(3)(D). ITFA also provides that non-taxable internet access includes "homepage, electronic mail and instant messaging . . . that are provided independently or not packaged with [other] Internet access." 47 USC § 151, note § 1105(5)(E).

Integrated services are to be taxed according to their primary function. *See Penfold v State Tax Commission*, 114 AD 2d 696 (3d Dep't 1985). Here, the primary function of Petitioner's service is to allow customers to remotely access its servers in order to send large quantities of e-mails in an effective manner. This service constitutes an e-mail service and, therefore, is not taxable pursuant to ITFA.

In some cases, Petitioner provides plug-ins or wrappers to its customers in order to allow the customer's websites and systems to communicate with Petitioner's e-mail platform. While plug-ins and wrappers may constitute prewritten computer software, here they are provided free of charge in order to allow the customers to effectively use Petitioner's e-mail service. Because we conclude that the primary function of Petitioner's service is e-mailing, and the plug-ins and wrappers are integral to the provision of that service, the plug-ins and wrappers provided free of charge do not affect the non-taxable nature of the e-mail service and are not subject to sales tax.

Petitioner's customers receive a written or online report of the e-mail campaign results, including the statistical results of the e-mails they sent. While these reports qualify as information services under Tax Law § 1105(c), the information provided is considered personal and individual in nature and will not be subject to sales tax, so long as that information is not substantially incorporated into reports furnished to other persons. *See* TSB-A-13(30)S; TSB-A-12(19)S; TSB-A-03(42)S.

Petitioner separately charges customers an additional fee for multiple dedicated IP addresses. These IP addresses can bifurcate from where a customer sends different e-mails and thus can provide an additional level of customization and potential analysis. Establishing one or more IP addresses to which e-mail can be directed is considered an internet access service exempt from sales tax under ITFA and Tax Law §1115(v).

Petitioner's Consulting Services consist of assisting customers with setting up their accounts correctly, managing large contact lists, and developing e-mail strategies. Such advice is provided orally by telephone or by video-conference. These services are not considered information services under Tax Law § 1105(c)(1) or (9), and, thus, are not subject to sales tax. *See* TSB-A-08(18)S.

DATED: July 14, 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.