

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance received a Petition for an Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner asks about the sales tax consequences of its contract with Company X under which Petitioner receives a license to use Company X’s mobile point of sale devices at Petitioner’s New York restaurant locations, along with the right to give its restaurant customers access to online content Company X makes available through those Devices. We conclude that the payments Petitioner makes under its contract with Company X are taxable as receipts from the sale of tangible personal property. We further conclude that the receipts Petitioner receives from charging its patrons for access to such online content are taxable as an “other charge” under Tax Law § 1105(d).

Facts

Petitioner is a casual dining company with restaurant locations nationwide including in New York. It has entered into a contract with Company X, under which Company X promises to provide Petitioner with mobile point of sale devices (“Devices”) in its New York locations. The Devices are Android tablets with a touch screen interface that will be placed at each table. Petitioner estimates that each location will contain approximately 50 Devices. The Devices provide pictures and detailed descriptions of the menu items. They allow customers to place drink, appetizer, and entrée orders, and to pay their check directly by credit card, debit card, or gift card. Alternatively, the check can be paid through their server/wait staff if preferred.

Petitioner states that the primary purpose of the Device is to facilitate ordering, check-out/payment, and customer satisfaction surveys. The Devices also provide restaurants the option to allow Petitioner’s patrons to access premium content, which may be located on the Devices or may be online content accessible through the Devices. This premium content may include news, sports, social media accounts, music, and interactive games. The customer would be charged separate fees for premium content. The premium content fee would be included as a line item on the customer’s food and beverage bill and would be collected by Petitioner.

Company X charges Petitioner a monthly fee for a license to possess and use the Devices, and access the premium content on the Devices. Per the contract between Petitioner and Company X, Petitioner is responsible for collecting the revenue generated by accessing the premium content. The agreement also requires Petitioner to collect and remit any State and local sales and use tax imposed on the transactions. Company X may also charge monthly commissions to Petitioner as a percentage of the premium content fee income.

Petitioner states that it and Company X may agree to an alternative fee arrangement. Under this alternative, Company X would not charge Petitioner a monthly service fee for use of the Device. Instead, Company X would receive from Petitioner all of the premium content fees up to a set amount per month, and the fees in excess of such amount would be shared with Petitioner.

Analysis

Sales and use tax is imposed on retail sales of tangible personal property. *See* Tax Law §§ 1105(a) and 1110. Tax Law § 1101(b)(5) defines “sale” as “any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume . . . conditional or otherwise, in any manner or by any means whatsoever for a consideration” Therefore, the term “sale” for purposes of the Tax Law includes a rental or license to use. The terms “selling” and “purchase” also include rentals. *See* 20 NYCRR 526.7. Petitioner’s payments under the contract constitute consideration for the license to actually possess and use the Devices. Consequently, the monthly charges to Petitioner for the use of the Devices are considered to be receipts from the license or rental of tangible personal property and are subject to sales tax. *See* Tax Law §§ 1101(b)(5) and 1105(a). The point at which possession of tangible personal property is transferred by the vendor to the purchaser, or the purchaser's designee, controls both the tax incidence and the tax rate. *See* 20 NYCRR 525.2(a)(3). Thus, when the Devices are delivered within New York State, the point of delivery (i.e., the shipping address) dictates the tax rate used to compute the appropriate state and local sales tax on the monthly charge.

Petitioner also asks about an alternative fee arrangement, whereby Petitioner would not pay a monthly charge for use of the Devices, but instead would pay over all or a portion of the premium content fees to Company X. Payments made by Petitioner to Company X as measured by the amount of the content fee collected for the premium services also would be taxable. Even though measured by the premium content fee, such amounts still would constitute consideration by Petitioner in return for the right to use the Devices and would be taxable as a sale of tangible personal property. *See* Tax Law §§ 1101(b)(5) and 1105(a).

Turning to the taxability of the charges to customers to access the premium content services, Tax Law § 1105(d)(i) imposes sales tax on the receipts from every sale of food and drink sold in or by restaurants, taverns or other establishments in New York State. Included in the receipts subject to sales tax under Tax Law § 1105(d)(i) is “any cover, minimum, entertainment or other charge made to patrons.” As part of the food service offered at Petitioner’s restaurant, the patrons can pay to access the Devices’ premium services. The premium content fee would be included as a line item on the customer’s food and beverage bill and would be collected by Petitioner. The charge for the access to premium content constitutes an “other charge” within the meaning of Tax Law § 1105(d)(i) and thus is taxable.

