



Advisory Opinion: TSB-A-24(42)S

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner asks whether the fees charged to its distributors for renewal of a distributor’s “Active” status, and fees to access Petitioner’s mobile application program, sold separately or as part of a bundle, are subject to New York State and local sales taxes.

We conclude that the renewal fee Petitioner charges its distributors is not subject to sales tax. Petitioner’s charges for access to its mobile application are receipts from the sale of prewritten computer software, which are subject to sales tax. When Petitioner charges a distributor one price for access to its mobile application software and other bundled offerings, the entire charge is subject to sales tax.

Facts

Petitioner is a multi-level marketing company that sells nutritional, dietary, and skin care products through its network of independent distributors, some of which are located in New York State. Distributors are required to pay Petitioner an annual \$25.00 renewal fee to remain an “active” distributor of Petitioner’s products and maintain their wholesale discount, which is earned based on the distributor’s purchase volume and the purchase volume of other distributors in their organization or “downline.” Active distributors also receive certain support services from Petitioner, including the ability to place and receive phone orders, order tracking, assistance with online services and explanation of Petitioner’s policies and procedures.

Petitioner offers distributors the option to obtain Petitioner’s mobile application software. Use of this software is free for the first 30 days, after which Petitioner charges a monthly fee of \$4.00. A distributor accesses the mobile application by using a password and log-in that remain valid for as long as the distributor pays the monthly fee. The mobile application enables the use of a dashboard and order management on a mobile device.

Petitioner also offers its distributors a “bundle” of products for a \$15.00 monthly fee. The bundle includes the mobile application software, access to Petitioner’s dashboard, and a unique personal website for the distributor. The dashboard gives distributors immediate access to online tools to track, manage and grow their business. More specifically, the dashboard allows the distributor to view data about sales and sponsoring volume of distributors in their downline, such as whether a distributor is close to advancing to a higher level. The personal website enables a distributor to give presentations using a mobile device and add customers and downline distributors to their own shopping cart and online sponsoring. The personal website software can be accessed using a computer, but cannot be downloaded.

Analysis

Renewal Fee

The \$25.00 fee Petitioner charges its distributors to renew their active status in Petitioner's program is not a charge for property or services on which sales tax is imposed. Instead, it is a charge for the right to continue distributing Petitioner's products, to maintain their earned discount on products purchased for resale, and to receive certain support services from Petitioner. Thus, Petitioner's renewal fee is not subject to sales tax.

Mobile Application & Bundled Products

Sales tax is imposed on the receipts from every retail sale of tangible personal property and the receipts from every sale (excluding sales for resale) of certain services. See Tax Law §§ 1105(a) and (c). "Tangible personal property" includes [c]orporeal personal property of any nature" and also includes "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 such software is conveyed to a purchaser." Tax Law § 1101(b)(6). Prewritten computer software is computer software that is not designed and developed by the creator to the specifications of a specific purchaser. Tax Law § 1101(b)(14).

Here, Petitioner charges distributors a \$4.00 monthly fee for its mobile application. Petitioner describes the mobile application as software that allows a distributor to access its dashboard and order management tools. The mobile application is available to all distributors and is not designed to the specifications of each distributor. Accordingly, the mobile application is prewritten computer software and is subject to sales tax when sold to a distributor in New York. See TSB-M-93(3)S; TSB-A-08(62)S.

Petitioner's charge for its bundled products is also subject to sales tax. Petitioner charges \$15.00 per month for a bundle that includes the mobile application, a dashboard and a personal website. As discussed above, charges for the mobile application are receipts from the sale of prewritten computer software. We also conclude that charges for access to Petitioner's dashboard constitute the sale of prewritten computer software, because the dashboard provides online tools to view, track and manage all of the data about the distributorship and its downline.

The personal website is also software, because it enables distributors to give presentations using a mobile device and to manage their shopping cart and online sponsoring. It is not clear from the petition whether the website software is customized to the specifications of a particular distributor. However, “when tangible personal property, composed of taxable and exempt items is sold as a single unit, the tax shall be collected on the total price.” 20 NYCRR 527.1(b); See *Matter of Strata Skin Sciences*, Tax Appeals Tribunal, May 5, 2022. Accordingly, when Petitioner charges a distributor one price for the use of the mobile application software, dashboard and personal website, the entire charge is subject to New York State and local sales tax if the distributor is located in New York.

DATED: October 8, 2024

/s/

MARY ELLEN LADOUCEUR
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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.