

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 seeks guidance regarding the imposition of sales tax on receipts from sales related to a web-based, electronic trading system used to trade currencies on the foreign exchange market. We conclude that the Petitioner's receipts are subject to sales tax, including those receipts for Annual License Fees, Transaction Charges, and Other Charges relating to the use of its software. Petitioner's receipts for User/Transaction Support Charges and a single Other Charge for integrating outside components into the software are not subject to sales tax if those charges are reasonable and separately-stated.

**Facts**

Petitioner's product offering is a web-based, electronic trading system used to trade currencies on the foreign exchange market. Petitioner's primary customers are active traders, asset managers, corporate treasurers, market makers, banks, broker-dealers and prime brokers. Each user is provided log-in access (a username and password) and can be categorized as either a Liquidity Provider (typically a maker of liquidity, and herein "Maker") or a Customer (taker of the liquidity, and herein "Taker"). The trading system allows a Taker to establish credit lines with Makers to execute trades, and for a Maker to review and approve trade proposals. Various fees are charged for trading on the system, including: Annual License Fees, User/Transaction Support Charges, Transaction Charges, and Other Charges.

**Annual License Fee**

An Annual License Fee is charged to Makers and Takers to access the system. The license fee is a flat-fee regardless of the number of individual users. Currently, Petitioner collects sales tax on the annual license fee and sources the fee to the address contained in the contract.

**User/Transaction Support Charges**

A monthly User/Transaction Support Charge based on the number of individual users is charged to Makers and Takers for customer support and training services. Currently, Petitioner collects sales tax on this charge and sources it to the user's location, which is provided by the system and may be different than the address set forth in the contract.

**Transaction Charges**

There are several transaction charges billed to Makers and Takers based on usage. The charges include those for:

Request for Streaming (RFS) - This product offering allows Maker and Takers with a prior trading relationship to continuously and privately stream real-time trade quotes. These quotes are not available to the public. The trading system allows Makers to electronically distribute offers to Takers, for which the Maker is charged a fee for executed transactions. The system also allows Takers to request quotes from Makers, for which there is no additional fee. Makers can use the trading system to price such requested trades automatically or can purchase system functionality enabling the manual pricing of trades.

Central Limit Order Book (CLOB) - This product offering provides an anonymous trading venue where Makers and Takers trade with each other without having a known relationship. There is a charge to both Makers and Takers for executed trades on the system.

### **Other Charges**

Petitioner charges a fee for Secure ID Tokens necessary to access the system. Petitioner also charges additional amounts for other system enhancements and capabilities, including the ability to: (1) handle all confirming, matching and settlement tasks to streamline post-trade execution; (2) allow Takers to communicate with Makers through a single point of contact through a file upload/download mechanism, which makes initiation of a trade faster and more cost-effective; (3) provide a monthly report prepared for Makers to compare it against others on the system; (4) integrate a rate engine with the trading system which allows a Maker to link its own computer system to the rate engine within the trading system for pricing trades; and (5) utilize dynamic, rule-based routing within the system to route executed trades.

### **Analysis**

Tax Law § 1105(a) imposes sales tax on receipts from every retail sale of tangible personal property. Tangible personal property includes prewritten computer software “regardless of the medium by means of which such software is conveyed to a purchaser.” *See* Tax Law § 1101(b)(6). A sale includes a “right to use.” *See* Tax Law § 1101(b)(5); 20 NYCRR 526.7(e)(4).

Here, Petitioner’s customers purchase access to web-based, electronic trading software. Each user is provided log-in access (a username and password) to make trades using the software. The software enables Takers to establish credit lines and to request trade quotes. The software enables Makers to distribute offers and to review any incoming trade offers. Makers can use the trading system to price such requested trades automatically or purchase system functionality enabling it to be done manually. Software upgrades purchased by Petitioner’s customers enable the software to handle all confirming, matching, and settlement tasks to streamline post-trade execution. Software upgrades allow Takers to communicate with Makers through a single point of contact by a file upload/download mechanism and provide monthly reports for self-comparison against other traders. Software upgrades also enable the use of dynamic, rule-based routing within the system to route executed trades. Accordingly, Petitioner is making a sale of software and sales tax is imposed on its receipts for Annual License Fees, Transaction Charges, and the Other Charges relating to use of software (including confirming, matching and settlement tasks, file upload/download, and

integration of another rate engine with the standing system). Regarding the receipts associated with obtaining Secure ID Tokens, those tokens are tangible personal property and those receipts also are subject to tax.

The situs of the sale of software for determining the proper local tax rate and jurisdiction is the location of the customer's employees that use the software. If the customer's employees who use the software are located both in and out of New York State, Petitioner should collect tax based on the portion of the receipts attributable to the customer's users located in New York State. *See* TB-ST-128; TSB-A-15(51)S.

Regarding the User/transaction Support Charges, receipts for support services are exempt from sales tax if the charges are reasonable and separately stated on an invoice provided to the customer. *See* Tax Law § 1115(o); TB-ST-128; TSB-M-93(3)S. Petitioner asserts that the charge is separately-stated and based on the number of individual users to cover customer support and training services, which would not be subject to sales tax if the charge is reasonable.

Finally, the Other Charge for providing a monthly report to Makers to show how they compare to other Makers on the system is an information service, because it compiles in-depth information about, among other things, the Maker's own statistics on volumes and market share, quote quality compared to other banks, and statistics on the deals it did not receive. This information service would be exempt from sales tax if it is "personal or individual in nature" and "is not or may not be substantially incorporated in reports furnished to other persons," provided that the charge for the service is separately stated on an invoice provided to the customer and is reasonable in relation to the overall charge. Petitioner's monthly report includes a customer's own statistics, but also compares the customer's statistics and performance to others (i.e., "benchmarking"). A comparison of a particular Maker to its competitors necessarily requires the use of information compiled about the competitors. If that information is sufficiently anonymized and a *de minimis* part of an information service, the benchmarking will not change the conclusion that the service is exempt, as long as the underlying data on which the report is based is not shared. *See, e.g.,* TSB-A-16(3)S; TSB-A-12(24)S. If the benchmarking data is not sufficiently anonymized or a *de minimis* part of the information service, or the underlying data is provided to customers, the entire charge for the information service would be subject to tax. However, whether the benchmarking is a sufficiently *de minimis* part of these monthly reports is a question of fact that cannot be determined in the context of an Advisory Opinion.

DATED: July 30, 2024

/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.