

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-10(4)C
Corporation Tax
TSB-A-10(23)S
Sales Tax
May 27, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z071015A

On October 15, 2007, the Department of Taxation and Finance received a petition from PaySource Direct Inc. and LiveXchange Corporation, 12 Blyth Street, Richmond Hill, Ontario, Canada L4E2X7, requesting an advisory opinion about whether their business activities are subject to the business corporation franchise tax imposed by Article 9-A of the Tax Law, and whether their services are subject to New York State and local sales taxes. We conclude that: (1) the petition provides insufficient facts to determine whether Petitioners are required to register for sales tax purposes or are subject to the business corporation franchise tax imposed by Tax Law Article 9-A; (2) LiveXchange's charges to its customers and Certified Independent Agents for use of its network are receipts from the sale of prewritten computer software subject to New York State and local sales and use taxes; (3) PaySource's charges for billing and collection services are not subject to sales tax; (4) charges to customers for the call-center-like services of Certified Independent Agents may be subject to sales tax if their duties are in the nature of a telephone answering service.

Facts

Petitioner LiveXchange Corporation ("LiveXchange"), based in Canada, does not have facilities or assets in New York, but intends to open a data center in the United States in the future. LiveXchange operates a network that is designed to allow customers to establish a telephone "call center" with off-site personnel. LiveXchange owns software installed on its servers which are co-located in a telecommunications central office in Ontario, Canada. The software and equipment allow LiveXchange to establish secure networks required to operate a call center (e.g., providing off-site personnel with access to a customer's computer system). LiveXchange manages the software and equipment and ensures network security. Customers and CIAs connect to LiveXchange's central office either by a dedicated T1 line, or by the Internet, which they purchase independently. LiveXchange does not provide the dedicated lines or Internet access.

LiveXchange recruits and screens "Certified Independent Agents" ("CIAs") to work in one or more customers' off-site call centers. LiveXchange also developed a website (ContractXchange) to facilitate the contact between CIAs and customers. Customers can post, and applicants can search, available call center jobs on the website. Applicants can respond to customer postings or leave their contact information for future reference. Applicants who are selected by the customer are invited to audition and complete training. After training is completed, the customer decides whether to certify the applicant and offer a work contract. There is no fee charged to post jobs or search on ContractXchange.

CIAs execute contracts with LiveXchange for access to and use of LiveXchange's network. The CIA must also provide the following at his or her own expense: (1) a home office from which work will be performed; (2) the computer equipment necessary to handle telephone calls; and (3) a high-speed Internet connection, with either Internet phone service or a dedicated telecommunications line. The CIA must also pay certain fees and charges to LiveXchange including: (1) fees for network application

training and client-specific training; (2) charges for security or law enforcement background checks; (3) invoicing and distribution fees; and (4) a monthly fee to access LiveXchange's network for each customer with whom the CIA contracts.

Each customer posts a blank schedule, which the CIAs use to select their work hours in half-hour increments. CIAs can work as many hours as they choose, but can only sign up to work for customers for which they have been trained and certified. A CIA uses a thumbprint recognition feature to log on to the network. Once logged on, the network directs telephone calls to a CIA and gives the CIA access to the customer's computer database for work-related purposes. CIAs receive software on a tangible disc that enables the thumbprint recognition and security features. The CIA's duties vary by customer and may include order taking, documenting information from callers to a customer service line, or roadside assistance service.

Each customer executes a contract with LiveXchange for use of LiveXchange's network. The network allows the CIA to access the customer's computer system, and allows a customer to monitor and supervise CIAs. The customer pays a monthly fee for the use of the network, based on the amount of time the CIA is logged on. Customers are sometimes charged an initial fee for special software or hardware used to integrate the customer's computer system with LiveXchange's network. LiveXchange may also develop and provide training materials for the customer. The training materials may consist of live "webcast" instruction or software-driven training modules.

Each CIA executes a contract with Petitioner PaySource Direct, Inc. ("PaySource ") that allows PaySource to invoice each customer for the CIA's services. PaySource compiles information about the number and time of a CIA's calls for each time period and invoices the customer for the CIA's services. PaySource collects payment from customers, deducts fees owed by the CIA and pays the CIA.

Petitioners ask the following questions:

1. Are Petitioners required to register for sales tax purposes, and collect and remit New York State and local sales taxes?
2. Are Petitioners subject to the business corporation franchise tax imposed by Tax Law Article 9-A?
3. Are the fees charged by LiveXchange to its customers and CIAs to access its network subject to New York State and local sales taxes?
4. Are the fees charged by LiveXchange to customers and CIAs for network application training and client specific training subject to State and local sales taxes?
5. Are the fees charged by LiveXchange for security or law enforcement background checks subject to State and local sales taxes?
6. Are the fees charged by PaySource to a CIA for providing billing and collection services subject to State and local sales taxes?
7. Are the fees charged by a CIA to customers for performance of call center duties subject to State and local sales taxes?

Analysis

Based on the information provided, we cannot determine whether Petitioners are required to register for sales tax purposes and collect and remit sales tax. A state can require an out-of-state seller to collect the state's sales or use tax if the seller has sufficient nexus with the taxing state; i.e., some physical presence as required by the Commerce Clause of the United States Constitution. See *Quill Corp. v North Dakota*, 504 US 298 (1992); *National Geographic Society v California Board of Equalization*, 430 US 561 (1977). Petitioners assert that they have no facilities or assets in New York State. However in *Orvis Company, Inc. v Tax Appeals Tribunal*, 86 NY2d 165, 178, the court stated that, "[w]hile a physical presence of the vendor is required, it need not be substantial. Rather, it must be demonstrably more than a 'slightest presence' . . . and it may be manifested by the presence in the taxing State of the vendor's property or the conduct of economic activities in the taxing State performed by the vendor's personnel or on its behalf." Nexus may also be based on the presence of sales representatives in the State or on the presence of employees, independent contractors, agents, or representatives in the State. See *Scripto v Carson*, 362 US 207 (1960); Sales and Use Tax Regulations § 526.10(a)(4)(ii). We cannot determine whether Petitioners have nexus for purposes of sales tax on the basis of the information provided. The location of a data center or the presence of Petitioners' employees, agents or representatives in New York would be sufficient to establish nexus.

Similarly, we cannot opine on the basis of the facts provided whether Petitioners are subject to the business corporation franchise tax imposed by Article 9-A of the Tax Law. The franchise tax is imposed on every domestic and foreign corporation for the privilege of exercising its corporate franchise in this State. That exercise includes doing business, employing capital, owning or leasing property, or maintaining an office in the state. See Tax Law § 209.1. A foreign corporation's use of independent contractors in New York does not constitute "doing business" in the State for purposes of Tax Law § 209, unless there is an agency relationship between the corporation and the contractors. See Corporation Tax Regulations § 1-3.2(b)(2); *Jayco Corp.*, TSB-A-10(2)C; *Tower Cleaning Systems, Inc.*, TSB-A-02(6)C. Petitioners say that, at present, they do not do business, employ capital, own or lease property, or maintain an office in New York State. Thus, whether Petitioners are subject to tax under Article 9-A turns on whether Petitioners employ agents, officers, or employees in New York State. For example, if the CIAs conduct Petitioners' business in New York as agents or employees of Petitioners, Petitioners would be subject to tax under Article 9-A. However, the determination of whether an individual is an employee or agent is a complex and intensely fact-dependent exercise. The petition does not provide us with sufficient information to make this determination. If Petitioners open a data center in New York State in the future, the data center would constitute property in New York for purposes of the business corporation franchise tax.

We conclude that LiveXchange's charges to its customers and CIAs to access its network are not receipts from the sale of telephony or telegraphy or telephone or telegraph service for purposes of the State and local sales taxes. Sales tax is imposed on receipts from the sale of "telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service" Tax Law § 1105(b)(1)(B). "The words 'of whatever nature' indicate that a broad construction is to be given the terms describing the items taxed." Sales and Use Tax Regulation § 527.2(a)(2). Tax is imposed on receipts from "intrastate communication by means of devices employing the principles of telephony and telegraphy." Sales and Use Tax Regulation § 527.2(d)(1). The terms "telephony and telegraphy" include the "use or operation of any apparatus for transmission of sound, sound reproduction or coded or other signals." Sales and Use Tax Regulation § 527.2(d)(2). LiveXchange does not provide transmission of sound or data, nor is it charging

the CIAs for the use of telecommunications equipment. Rather, LiveXchange requires the CIAs to obtain Internet access and telecommunication services independently. Thus, LiveXchange is not selling telephony subject to State and local sales tax.

Providers of telecommunication services may also be subject to the excise tax imposed by Tax Law section 186-e. That section defines “telecommunication services” as “telephony or telegraphy, or telephone or telegraph service, including, but not limited to, any transmission of voice, image, data, information and paging, through the use of wire, cable, fiber-optic, laser, microwave, radio wave, satellite or similar media or any combination thereof.” However, because we conclude that LiveXchange does not provide transmission of voice or data, it is not a provider of telecommunications service subject to the telecommunications excise tax.

Nevertheless, we conclude that LiveXchange’s charges to CIAs and customers for access to their network are subject to State and local sales and use tax as receipts from the sale of prewritten computer software. The network consists of software that is accessed by CIAs and customers over the Internet or by using dedicated telecommunications circuits. This software allows the CIAs to select work times and to manage and answer calls on behalf of customers. The software also allows the CIA to securely access the customer’s computer system to process orders, etc. Customers also use the software to post work schedules and to monitor and supervise CIAs.

Prewritten computer software is included within the definition of tangible personal property, “regardless of the medium by means of which such software is conveyed to the purchaser.” Tax Law §1101(b)(6). The sale of prewritten computer software is subject to tax as the sale of tangible personal property. *See* Tax Law §§1101 (b)(6); 1105(a). “Sale” is defined as “[a]ny transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including with respect to computer software, merely the right to reproduce) or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor.” Tax Law §1101(b)(5). Sales and Use Tax Regulation section 526.7 provides generally that “a sale is taxable at the place where the tangible personal property or service is delivered or the point at which possession is transferred by the vendor to the purchaser or his designee.” Regulation section 526.7(e)(4) further provides that a transfer of possession has occurred if there is actual or constructive possession, or if there has been a transfer of “the right to use, or control, or direct the use of tangible personal property.” The location of the code embodying the software is irrelevant, because the software can be used just as effectively by the customer even though the customer never receives the code on a tangible medium or by download.

The CIA’s and customers’ accessing of LiveXchange’s software constitutes a transfer of possession of the software, because the CIA and the customer gain constructive possession of the software, and gain the “right to use, control or direct the use” of the software. The CIA obtains the right to access the software in order to manage their call center duties and select work times; the customer obtains the right to access the software in order to post work schedules and monitor and supervise the CIAs. This is true even if (with the exception of the security software) no “copy” of the software is transferred to the CIA. Accordingly, LiveXchange’s charges for the use of its software to a CIA or customer located in New York are subject to State and local sales tax. The situs of the sale for purposes of determining the proper local tax rate and jurisdiction is the location of the CIAs or customers’ employees who use the software. If the CIAs or customers’ employees who use the software are located both in and out of New York State, sales tax is due based on the portion of the receipt attributable to the CIAs or customers’ employees using the software who are located in New York. *See KPMG, LLP, TSB-A-03(5)S.*

LiveXchange's charges to customers and CIAs for network application training and client-specific training may be subject to tax. Petitioners state that the training materials may consist of a webcast or software-driven training modules. Generally, training services are not among the enumerated services subject to tax. *See* TSB-A-09(33)S. Thus, LiveXchange's separately-stated charges to customers and CIAs for training are not subject to sales and use tax if they are conducted via webcast. However, charges for training that consists of the use of software-driven modules may be subject to tax if the modules are prewritten computer software. *See Tower Innovative Learning Solutions*, TSB-A-06(5)S; *Markum & Kliegman*, TSB-A-06(6)S. "Prewritten computer software" is software that is not designed to the specifications of a specific purchaser. *See* Tax Law § 1101(b)(14). Combining two or more prewritten programs or modules does not cause the combination to be exempt "custom" software. Moreover, software that is designed to the specifications of a specific purchaser is prewritten computer software when it is sold to a person other than the person for whom it was designed. *See* Tax Law § 1101(b)(14). LiveXchange's charges to customers for training materials that consist of software modules are exempt from sales and use tax only to the extent that they are designed to a specific customer's specifications. If some or all of the software modules are used in training materials for more than one customer, those modules are considered prewritten software subject to sales and use taxes. Only modules that are used in training materials for the customer to whose specifications they are designed are exempt. Modules designed for a specific customer are custom software when sold to that customer, but they are taxable prewritten software when sold to other customers or to a CIA.

LiveXchange's charges to CIAs for security or law enforcement background checks are not subject to tax. Generally, charges for background checks are protective and detective services subject to State and local sales taxes under Tax Law section 1105(c)(8). *See Hotchkiss, Stone & Longtin, LLC*, TSB-A-99(3)S; *Resume Verification Services*, TSB-A-97(14)S. If LiveXchange purchases these services, they are subject to tax if they are delivered in New York. However, LiveXchange's charges to CIAs are merely a recoupment of its cost of obtaining background checks. Accordingly, they are not protective and detective services subject to tax under Tax Law section 1105(c)(8).

PaySource's fees charged to CIAs for billing and collection services are not subject to State and local sales taxes. Sales tax is imposed on only certain enumerated services. *See* Tax Law § 1105(c). The billing and collection services are not among the enumerated services that are subject to sales tax. *See Datamedic Corp.*, TSB-A-91(58)S.

The fees for call center-like services, for which PaySource bills customers on behalf of the CIAs, may be subject to sales tax, depending on the nature of the work performed by the CIA. Tax Law section 1105(b)(1)(C) imposes sales tax on telephone answering service. Telephone answering service is a service that consists of taking messages by telephone and transmitting the message to the customer or the customer's designee. *See* TSB-M-91(13)S. The tax on telephone answering services does not include the physical act of answering a telephone if that act is merely an incidental element of a different service being provided to the customer. *See id.* The call center-like services may not be taxable, depending on the nature of the services provided. However, if the CIA is providing a telephone answering service, the charge for that service is subject to tax if the service is provided to a customer in New York. The physical location of the customer determines the situs of the transaction and which local jurisdiction's tax rate applies.

If Petitioners have nexus with New York, they are required to register for sales tax purposes and collect and remit the State and local sales taxes on their sales of the software and taxable services. *See* Tax Law §§ 1101(b)(8), 1131(1). If Petitioners do not have nexus, they are not required to register for

