

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-02(42)S
Sales Tax
July 26, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S010403A

On April 3, 2001, the Department of Taxation and Finance received a Petition for Advisory Opinion from Western New York Computing Systems, Inc., 1100 Pittsford Victor Rd., Pittsford, New York 14534-3801.

The issue raised by Petitioner, Western New York Computing Systems, Inc, is whether the transactions described below pertaining to Petitioner's on-site and telephone support services are subject to State and local sales and compensating use taxes.

Petitioner submits the following facts and scenarios as the basis for this Advisory Opinion.

Petitioner is a company that sells computer related hardware and software. Petitioner also sells support services to install, repair and/or maintain computer related hardware and software which the customer owns or has purchased from Petitioner.

Scenario 1

A customer calls Petitioner with a request that Petitioner provide service on a printer that keeps jamming. Petitioner logs the request and sends out one of its technicians to the customer's site. The technician logs time and the length of time spent diagnosing and repairing the problem. Petitioner bills the customer for diagnosis and repair of the printer and for labor and travel.

Scenario 2

A customer has a specific project that requires Petitioner to provide a technician/programmer on-site for an extended period of time. The technician/programmer is under the direction of the customer for the duration of the project. Petitioner bills the customer for the time the technician/programmer has spent on-site on a month by month basis. The technician/programmer remains the employee of Petitioner and Petitioner provides his/her salary and benefits.

Scenario 3

A customer has a project that requires the attention of one of Petitioner's technicians for an extended period of time. The technician works on the project independent from the customer. Petitioner bills customer for the labor of the technician. The technician remains the employee of Petitioner and Petitioner provides his/her salary and benefits.

Scenario 4

A customer decides that rather than paying on a use-by-use basis, it would like to buy a service agreement that will cover the cost of labor and materials for a specific term of years. Petitioner sells the customer a service contract for \$5,000.00.

Scenario 5

A customer calls Petitioner with a question about a problem that they are experiencing and requests to speak with a technician. The technician asks several questions as to the nature of the problems the customer is experiencing and offers probable causes and solutions to the customer. Petitioner bills the customer for the time the technician has spent on the problem.

Applicable Law and Regulations

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(3) Receipt. The amount of the sale price of any property and the charge for any service taxable under this article . . . valued in money, whether received in money or otherwise, including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses or early payment discounts and also including any charges by the vendor to the purchaser for shipping or delivery . . . regardless of whether such charges are separately stated in the written contract, if any, or on the bill rendered to such purchaser and regardless of whether such shipping or delivery . . . is provided by such vendor or a third party. . . .

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. . . .

(5) Sale, selling or purchase. Any 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), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

(6) Tangible personal property. Corporeal personal property of any nature . . . Such term shall also include 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. . . .

* * *

(14) Pre-written computer software. Computer software (including pre-written upgrades thereof) which is not software designed and developed by the author or other creator to the specifications of a specific purchaser. The combining of two or more pre-written computer software programs or pre-written portions thereof does not cause the combination to be other than pre-written computer software. Pre-written software also includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than such purchaser. Where a person modifies or enhances computer software of which such person is not the author or creator, such person shall be deemed to be the author or creator only of such person's modifications or enhancements. Pre-written software or a pre-written portion thereof that is modified or enhanced to any degree, where such modification or enhancement is designed and developed to the specifications of a specific purchaser, remains pre-written software; provided, however, that where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for such modification or enhancement, such modification or enhancement shall not constitute pre-written computer software.

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax.-- . . . there is hereby imposed and there shall be paid a tax of four percent upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

* * *

(c) The receipts from every sale, except for resale, of the following services:

* * *

(3) Installing tangible personal property . . . or maintaining, servicing or repairing tangible personal property . . . not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin-operated equipment or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith. . . .

Section 1110 (a) of the Tax Law provides, in part:

Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state on and after June first, nineteen hundred seventy-one except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail

Section 1115(o) of the Tax Law provides:

Services otherwise taxable under subdivision (c) of section eleven hundred five or under section eleven hundred ten shall be exempt from tax under this article where performed on computer software of any nature; provided, however, that where such services are provided to a customer in conjunction with the sale of tangible personal property any charge for such services shall be exempt only when such charge is reasonable and separately stated on an invoice or other statement of the price given to the purchaser.

Section 525.2(a)(2) of the Sales and Use Tax Regulations provides, in part:

Except as specifically provided otherwise, the sales tax is a "transactions tax," with the liability for the tax occurring at the time of the transaction. Generally, a taxed transaction is an act resulting in the receipt of consideration for the transfer of title to or possession of (or both) tangible personal property or for the rendition of an enumerated service. The time or method of payment is generally immaterial, since the tax becomes due at the time of transfer of title to or possession of (or both) the property or the rendition of such service

Section 526.5 (e) of the Sales and Use Tax Regulations provides, in part:

Expenses. All expenses . . . incurred by a vendor in making a sale, regardless of their taxable status and regardless of whether they are billed to a customer are not deductible from the receipts.

Example 1: A photographer contracts with a customer to furnish photographs at \$50 each in addition to expenses.

The customer is billed as follows:

Photographs (2)	\$100
Model fees	60
Meals	10
Travel	25
Props (Flowers)	<u>5</u>
Total due	\$200

Receipt subject to tax is \$200

Example 2: An appliance repairman charges \$10 per hour plus expenses when on a service call. The customer is billed as follows:

3 hrs. at \$10	\$ 30
Travel	15
Parts	20
Meals	<u>5</u>
Total due	\$ 70

Receipt subject to tax is \$70

Section 527.5 of the Sales and Use Tax Regulations provides, in part:

(a) *Imposition.* (1) The tax is imposed on receipts from every sale of the services of installing, maintaining, servicing or repairing tangible personal property

(2) Installing means setting up tangible personal property or putting it in place for use.

* * *

(3) Maintaining, servicing and repairing are terms used to cover all activities that relate to keeping tangible personal property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition.

* * *

(b) *Exemptions.*

* * *

(7) Wages, salaries and other compensation paid by an employer to his employee for installation, repair or maintenance service rendered by the employee under an employer-employee relationship are not receipts subject to the tax.

* * *

(c) *Maintenance and service contracts.* (1) The purchase of a maintenance or service contract is a taxable transaction.

Section 532.1(a) of the Sales and Use Tax Regulations provides, in part:

Time of collection. (1) Every person required to collect the tax shall collect the tax from the customer when collecting the price, amusement charge or rent to which it applies.

Technical Services Bureau Memorandum, TSB-M-93(3)S, dated March 1, 1993, entitled State and Local Sales and Compensating Use Taxes Imposed on Certain Sales of Computer Software, provides, in part:

Effective September 1, 1991, State and local sales and compensating use taxes are imposed on the sale or use of prewritten computer software and certain related services.

The effect of this change in the Tax Law is to broaden the types of computer software that are subject to sales and use taxes. . . . certain software previously considered "custom" may now be considered prewritten computer software and subject to such taxes. . . . The only software that is exempt from sales and use taxes under the new law is software designed and developed to the specifications of a specific purchaser.

Prewritten computer software is any computer software that is not designed and developed by the author or other creator to the specifications of a specific purchaser.

The sale of prewritten software includes any transfer of title or possession, any exchange, barter, rental, lease or license to use, including merely the right to reproduce, for consideration. . . .

* * *

Prewritten software is subject to tax whether sold as part of a package or separately. Software created by combining two or more prewritten programs or portions of prewritten programs is still prewritten software subject to tax. The medium by which the software is transferred to the purchaser has no effect on the software's taxability. Thus, prewritten software is taxable whether sold, for example, on a disk, tape or by electronic transmission over telephone lines.

Prewritten software, even though modified or enhanced to the specifications of a specific purchaser, remains prewritten software subject to tax. However, if a charge for the custom modification or enhancement is reasonable and separately stated on the invoice or billing statement, then the separately stated charge for the custom modification or enhancement is not subject to tax.

* * *

The incidental use of a development language (e.g., COBOL, BASIC, C, etc.) or of libraries of "prewritten" functions or routines in designing and developing a "custom" software program to the specifications of a specific purchaser will not, in and of itself, make the sale of an otherwise custom program taxable. The "custom" program must be examined as a whole to determine whether it is exempt from tax. If the prewritten components of a custom program are sold separately, their sale is subject to tax.

* * *

Customer Support and Related Services

Services taxable under section 1105(c) of the Tax Law are exempt from tax under section 1115(o) of the Tax Law where performed on any computer software. However, where such services to be performed on software are sold in conjunction with the sale of tangible personal property, such as prewritten software, the charge for such services is exempt only if it is reasonable and separately stated on the invoice or billing statement given to the customer.

Thus, charges for customer (user) support or for information services provided by a vendor to a customer, either in person or by some type of telecommunications arrangement (e.g., telephone, modem, facsimile machine, etc.), in the nature of training, consulting, instructing or other diagnostic or troubleshooting services related to prewritten software are exempt from sales and use taxes where the charges are reasonable and separately stated. Charges for the service

of installing, repairing, maintaining or servicing prewritten software are also exempt from sales and use taxes where the charges are reasonable and separately stated on the invoice. Of course, any charges for the above described services sold in connection with custom software are exempt from tax.

Programming and systems analysis are also exempt services. However, where these services are rendered in conjunction with the sale of prewritten software, the charge for the service is exempt from tax only when the charge for the service is reasonable and separately stated on the invoice or billing statement given to the customer.

Example 2: A computer vendor sells an “off-the-shelf” software program to a customer. The vendor charges additional fees for installing the software, on-site training, and diagnostic and trouble-shooting customer support. The sale of the software is taxable since it is pre-written. However, the charges for installation, on-site training and customer support services are not taxable if reasonable and separately stated on an invoice or billing statement given to the customer.

Software Maintenance Agreements

If a software maintenance agreement provides for the sale of both taxable elements (e.g., prewritten software upgrades) and nontaxable elements (e.g., training, consulting, diagnostic and troubleshooting support, etc.), the charge for the entire maintenance agreement is subject to tax unless the charge for the nontaxable elements is reasonable and separately stated in the maintenance agreement and separately billed on the invoice or other document of sale given to the purchaser.

Example 3: A vendor of computer systems sells a maintenance agreement to provide on-site training, repairs, software upgrades, and customer support by telephone for a customer’s computer system (hardware and prewritten software). The portion of the cost of the agreement allocated to prewritten software upgrades and for repair or maintenance of the computer system hardware is taxable. However, the portion of the cost allocated for on-site training, repairs and maintenance of the prewritten software and telephone support is exempt if the cost is reasonable and separately stated in the written agreement and the customer invoice.

Opinion

Scenario 1

A customer calls Petitioner with a request that Petitioner provide service on a printer that keeps jamming. Petitioner logs the request and sends out one of its technicians to the customer's site. The technician logs travel time and the length of time spent on diagnosing and repairing the problem. Petitioner bills the customer for diagnosis and repair of the printer and for labor and travel. All expenses including air fare, hotel and meals, incurred by Petitioner and included in the charges to its customers are included in the definition of "receipt" provided in Section 1101(b)(3) of the Tax Law and Section 526.5(e) of the Sales and Use Tax Regulations. Since the charges to repair the printer would be a taxable service under Section 1105(c)(3) of the Tax Law, the charge to a customer for all related expenses is subject to tax. When Petitioner makes a nontaxable sale of tangible personal property or services for which related expenses will be billed to the customer, the amount charged to its customers, including such reimbursed expenses, is not subject to tax (see Salomon & Leitgeb, CPA's, LLP, Adv Op Comm T&F, July 23, 1997, TSB-A-97(44)S).

Scenario 2

A customer has a specific project that requires Petitioner to provide a technician/programmer on-site for an extended period of time. The technician/programmer is under the direction of the customer for the duration of the project. Petitioner bills the customer for the time the technician/programmer has spent on-site on a month by month basis. The technician/programmer remains the employee of Petitioner and Petitioner provides his/her salary and benefits. When an independent contractor provides personnel to perform taxable services for its client, the fee paid by the client for these services constitutes a receipt subject to tax under Section 1105(c) of the Tax Law. See Pitney Bowes Management Services, Inc., Adv Op Comm T&F, January 25, 1993, TSB-A-93(10)S. Accordingly, if Petitioner under this scenario is providing a taxable service under Section 1105(c) of the Tax Law, such as repairing, or maintaining computer hardware, Petitioner is required to collect sales tax on the fee charged to the customer for such taxable services, regardless of how the charge is determined or how much Petitioner is required to pay its personnel. To the extent that the technician/programmer performs nontaxable services such as software maintenance, or provides custom software programming for the customer, no tax is required to be collected by Petitioner. For additional information on the taxability of sales of computer software and related services, Petitioner should refer to TSB-M-93(3)S, supra.

Scenario 3

A customer has a project that requires the attention of one of Petitioner's technicians for an extended period of time. The technician works on the project independent from the customer. Petitioner bills customer for the labor of the technician. The technician remains the employee of Petitioner and Petitioner provides the technician's salary and benefits. When Petitioner provides

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personnel to perform taxable services for its client, the fee paid by the client for these services constitutes a receipt subject to tax under Section 1105(c) of the Tax Law. Accordingly, if Petitioner under this scenario is providing a taxable service under Section 1105(c) of the Tax Law, Petitioner is required to collect sales tax on the fee charged to the customer for such taxable services, regardless of how the charge is determined or how much Petitioner is required to pay its personnel. For additional information on the taxability of sales of computer software and related services, Petitioner should refer to TSB-M-93(3)S, supra.

Scenario 4

A customer decides that rather than paying on a use-by-use basis, it would like to buy a service agreement that will cover the cost of labor and materials for a specific term of years. Petitioner sells the customer a service contract for \$5,000.00. Pursuant to Section 1105(c)(3) of the Tax Law and Section 527.5(c) of the Sales and Use Tax Regulations, the sale of a maintenance or service contract is a transaction subject to State and local sales and use taxes. In accordance with Sections 525.2(a) and 532.1(a) of the Sales and Use Tax Regulations, the sales tax is a transaction tax, with the liability for the tax occurring at the time of the transaction. Therefore, Petitioner must collect the applicable tax when it sells the customer the service agreement. Where a service agreement contains both taxable elements (e.g., service to hardware) and nontaxable elements (e.g., service to software), the entire agreement will be subject to tax unless the charges for the nontaxable elements are reasonable and separately stated in the agreement and on the customer billing. See TSB-M-93(3)S, supra.

Scenario 5

A customer calls Petitioner with a question about a problem that they are experiencing and requests to speak with a technician. The technician asks several questions as to the nature of the problems the customer is experiencing and offers probable causes and solutions to the customer. Petitioner bills the customer for the time the technician has spent on the problem. Technical support services involving assistance by telephone or otherwise in using software, problem resolution and special programming, if performed on computer software, and professional training services are exempt from sales tax. Charges for technical support services to computer hardware, including assistance by telephone, are taxable charges for the maintenance, service or repair of tangible personal property. See Section 527.5(a) of the Sales and Use Tax Regulations, also STS Systems, Ltd., Adv Op Comm T&F, November 5, 1998, TSB-A-98(73)S. If the service provided involves both taxable and non-taxable elements, the total charge for the service is subject to tax unless the charge for the non-taxable service is reasonable and separately stated. For additional information on the taxability of sales of computer software and related services, Petitioner should refer to TSB-M-93(3)S, supra.

It should be noted that this opinion only addresses the taxation of services to computer hardware and software in general. If Petitioner's customers were otherwise entitled to an exemption

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from tax under Article 28 of the Tax Law (e.g., an operator of an Internet data center, an exempt organization, etc.) and the customer provided Petitioner with the appropriate exemption documentation, the charges that would ordinarily be taxable might be exempt.

DATED: July 26, 2002

/s/
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NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.