

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

TSB-A-09(2)S  
Sales Tax  
January 21, 2009

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S080306A

Petitioner, MindLeaders, Inc., requests an advisory opinion about whether its sale of on-line e-learning courses and associated products as described below are subject to sales tax. We conclude that the on-line e-learning courses are taxable as sales of prewritten software, and that petitioner's additional charges for on-line access to library reference works are taxable as an information service, while its additional charge for a mentoring service is nontaxable because it is an unenumerated service.

Petitioner is an Ohio-based for-profit corporation that provides real-time, interactive, web-based training and educational services ("e-Learning") that enable its customers to earn educational certificates in various fields through online study. MindLeaders' courseware database is comprised of over two-thousand (2,000) e-Learning courses relating to the development of desktop, technical, professional and practical skills. A large number of the e-Learning courses are designed to meet specific technical and professional certification requirements and have been audited by third parties to ensure that the company's instructional design is sound and the courses support the specified learning objective. Students who complete the course receive a certification from petitioner. Students then can use this certification to apply for continuing education units through a select group of universities, for relicensure or recertification with state agencies and professional organizations, or as proof to employers of their professional development activities.

Customers enter into non-perpetual user agreements, typically one or three years in duration, in order to access the e-Learning courses. Petitioner sells directly (Direct Sales) to large organizations and indirectly through Internet Service Providers (ISPs). The agreements allow for free updates during the term. The e-Learning courseware contains embedded restrictions that prevent it from being used beyond the agreement expiration date. Petitioner's direct sale customers have the option of receiving the e-Learning courses either directly over the internet, or by receipt of a CD-ROM for use on a company-wide intranet or LAN or a stand-alone personal computer. Approximately 95% of the e-Learning courses are accessed over the internet. Petitioner has ceased offering e-Learning courses by CD-ROM.

Each e-Learning course is protected by a copyright and contains more than 60% original content. Petitioner uses a proprietary four-stage course development process to create the interactive Web-based courseware. More than fifty percent of the course screens are interactive and require the user to actively engage in the learning process. The courseware also provides immediate and supportive feedback to reinforce the learning. Each unit of a training course consists of the following:

- a well-defined set of learning objectives that are relevant, specific, and mapped to certification requirements;
- a series of interactions that teach the stated objectives through frequent opportunities for practice in the form of simulations and exercises; and
- a means of evaluating whether the learning objectives have been met through simulations and a range of questions.

The courseware includes embedded questions at regular intervals to keep interaction high. The embedded questions incorporate a thorough answer analysis that anticipates all possible responses from the learner. The courseware also includes writing hints and feedback that are supportive and reinforce what the student just learned.

Customers have the option of taking a skill assessment test before or at any time from within the training course. The results of the test are used to create a custom learning path for each student so that students need not review material they have already mastered. Also, although the courseware is primarily designed as linear instruction, a topics list and index using advanced search technology is always available to give the learner “just-in-time” access to the course contents. The e-Learning courses contain intelligent client technology enabling students to stop at any time and resume the course at a later time, without losing any information and without having to start the course over from the beginning. In addition, students have unlimited access to the completed course any time during the license agreement period for further study and consultation.

In addition to the e-Learning courses, Petitioner’s customers can access two additional on-line services: On-line Instant Mentoring and Reference Library. The On-line Instant Mentoring service offers real time access to certified subject-matter mentors 24 hours a day. Mentors provide comprehensive knowledge to assist students at all stages of learning. On-line Instant Mentoring allows students to clarify concepts, fine-tune solutions, or seek guidance with regard to certain applications. There is a separate charge for the On-line Mentoring service. Reference Library contains 1,000 electronic book titles to offer Petitioner’s customers additional blended learning tools. The Reference Library provides searchable, full-text copies of reference books from major publishers to clarify questions or provide additional in-depth information on questions arising from the e-learning courses. The charge for this service is for access to the library and is not based on the number of books accessed. The student is able to access the books on petitioner’s website but is not given any downloading rights.

Petitioner has recently developed another line of course study related to Food Safety. These courses are delivered to the customer via download directly to the customers’ own computers. This method of delivery differs from Petitioner’s other training courses, which are accessed by customers through Petitioner’s website.

Petitioner also charges its customers for professional services related to providing training needs analysis and course sequencing services to match petitioner’s course offerings with the customer’s training needs. This service does not involve the development or transfer of software.

## **Analysis**

Issue 1: Is the sale of access to e-Learning courses offered via the internet subject to New York sales tax?

Yes. Petitioner’s e-learning courses are educational courses taught through software, with a mentoring service available only for a separate charge. The software is highly interactive in order to keep the student engaged in learning. The software includes embedded questions and an answer analysis that anticipates all possible responses from the learner. The software is designed to allow it to offer linear instruction or to allow the customer to learn about specific topics by accessing a topics list or an advanced search mechanism. Furthermore, the customer can re-start the software from the point at which the user last used it.

This makes the courses taxable. A sale of prewritten software is taxable as the sale of tangible personal property “regardless of the medium by means of which [ it] is conveyed” (Tax Law sections 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 Tax Regulation section 526.7(e) provides that, in general, “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.” Sales Tax Regulation section 526.7(e)(4) further provides that, with respect to a “license to use,” 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.” “[C]onstructive possession” of software or “the right to use or control” software for purposes of Regulation section 526.7(e)(4) is determined based on the location where the software is used and not on the location of the code embodying the software (Adobe Systems, Inc., TSB-A-08(62)S, November 24, 2008). Thus, on-line use of petitioner’s educational software in New York constitutes a transfer of possession of the software to the customer and petitioner should collect tax from its customers based on where the software is being used.

For this purpose, petitioner may rely on information received from its customer as described in the KPMG, LLC, Advisory Opinion, TSB-A-03(5)S, January 31, 2003 (Tax Law sections 1132(c)(1); 1142(4)). 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 receipt attributable to the employee users located in New York (Adobe Systems, Inc., TSB-A-08(62)S, supra).

This service is distinguishable from the on-line learning program found to be nontaxable in TSB-A-06(5)S (February 2, 2006) because that service included, at no extra charge, significant non-automated academic support.

Issue 2: Is the sale of access to the On-line Mentoring Service subject to New York sales tax?

Only the services enumerated in Tax Law section 1105(c) are subject to sales and use tax. Petitioner’s mentoring service is in the nature of an educational service that is not included in the services made taxable by Tax Law section 1105(c).

Issue 3: Is the sale of access to the Reference Library via the internet subject to New York sales tax?

Petitioner’s fee for the right to access petitioner’s Reference Library gives a student access to full-text copies of reference books from major publishers to provide additional in-depth information on topics covered by the e-learning courses. Access to the on-line books is in the nature of an information service and is subject to sales tax pursuant to Tax Law section 1105(c)(1) (see, TSB-A-06(5)S, supra).

Issue 4: Is the sale of the Food Safety courses downloaded to the customer’s computer taxable?

Petitioner’s sale of its Food Safety course that is delivered to the customer via download to the customer’s computer is taxable as a sale of prewritten software delivered to New York (see Tax Law section 1105[a]; Sales Tax Regulation 526.7[e]).

Issue 5: Is petitioner’s charge for professional services related to providing training needs analysis and course sequencing services as described above taxable?

Assuming this service is distinct from the provision of the e-learning courses, it appears to be an unenumerated service and thus is not subject to tax (Tax Law section 1105[c]). This service will be considered distinct from the e-learning courses if the e-learning courses can be purchased without the purchase of this

service, and the charge for the e-learning courses does not vary based on whether the customer is also buying this service.

DATED: January 21, 2009

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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.