

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

TSB-A-09(5)S
Sales Tax
January 29, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S080108B

On January 8, 2008, the Department of Taxation and Finance received a Petition for Advisory Opinion from KPMG LLP, 801 Second Avenue, Suite 900, Seattle, WA 98104. Petitioner, KPMG LLP, submitted additional information relating to the Petition on June 12, 2008 and November 10, 2008.

The issues raised by Petitioner on behalf of its client (Company) are:

1. Whether Company's receipts from the sale of its automated voice messages as described below are subject to New York State and local sales tax.
2. Whether the software used by Company is subject to New York State and local sales and use tax.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner's client, Company, is a corporation that is based in a state other than New York. Company is hired to provide automated voice messages to recipients designated by its customer, which messages are delivered through telephone and mobile devices. To accomplish this, the customer provides Company with an electronic call list containing proprietary and confidential information on each call recipient. The call list is sent by the customer over the Internet in a secure, encrypted file or the customer may provide Company access to its computer files to extract the required information. Company developed specialized software to make the actual calls and deliver an automated voice message, which replaces the typical live operator without sacrificing the functionality. The voice message may be provided by the customer or the customer may have Company provide assistance with scripting and creating the appropriate message. When customers wish to change or update their messages, the customer must contact a Company representative to make the appropriate changes. Company does not license or sell this proprietary software. No software is delivered or transferred to the customer for use and the customer is not given access to Company's system software.

When making the call, Company first authenticates the recipient using a piece of personal information contained in the electronic call list. Once the recipient is authenticated, Company delivers an automated, customized voice message to each person contained in the electronic call list. The voice message provides personalized options that prompt the recipient to take action. The recipient selects an option by pressing the corresponding number on a keypad. Depending on the option selected, Company's software will either provide additional information via an automated recording or forward the call to the customer or the customer's representative. The software program is designed to dial out to the customer or the customer's representative

telephone number when forwarding a call to the customer or the customer's representative. When the recipient has been connected to the customer or the customer's representative, the Company's computer system disconnects.

Company provides services to the following four industries.

Airlines

Company's services are used by the airlines to notify passengers of flight changes and cancellations. In providing this service to airlines, the passenger will be provided a primary message and may also be offered the option to access additional messages containing items of general information or to be connected to the airline's customer service.

Bill Pay Notification

Company provides automated courtesy calls regarding upcoming payment due dates and past due payments. The automated messages are made to the call recipients via telephone. In some cases, recipients can also be connected to a bank or other financial services company for further support by pressing an assigned key on their telephone keypad.

Emergency Voice Blast Service

Company provides an automated voice message to a select group of recipients (e.g., students, employees) to notify them of an emergency situation. This service allows a business, school, or government agency to broadcast an emergency message via personal telephone or mobile device. This service can be used to notify employees or students of a toxic gas leak, fire alarm, or terrorist attack.

Telemarketing

Company provides an interactive voice message to a list of call recipients designated by its customer. The recipient receiving the automated message may choose to act by pressing an assigned number on his or her telephone keypad. By pressing one of the assigned numbers, a call recipient can receive additional information (by automated message) or be connected to the support center of the customer.

The results of each call are captured in a Results File. The Results File is a report containing the original data sent by the customer and the results of each call made by Company. Primarily the Results File provides the customer with an itemized breakdown of the calls made by Company. The Results File does not contain any external data, except for the call results. This file is delivered to the customer electronically. Also, because of the confidential nature of the information, each customer's Results File is only made available to that specific customer. Company does not sell or market either the original data or the information contained in the Results File to any third party. Company may not incorporate the information contained in the Results File in reports it provides to others. In all cases, the data provided to the customer is proprietary and confidential to the customer.

Company charges new customers an initial set-up fee based on the hours incurred at a standard hourly rate. In addition to the initial set-up fees, Company applies a rate or flat charge to either the number of customer calls made or the minutes used to make the calls.

Applicable law and regulations

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax. On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax . . . 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:

(1) The furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons, but excluding the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons,...

Section 1110 of the Tax Law provides, in part:

(a) 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, (B) of any tangible personal property (other than computer software used by the author or other creator) manufactured, processed or assembled by the user, (i) if items of the same kind of tangible personal property are offered for sale by him in the regular course of business...(F) of any computer software written or otherwise created by the user if the user offers software of a similar kind for sale as such or as a component part of other property in the regular course of business,...

* * *

(g) For purposes of clause (F) of subdivision (a) of this section, the tax shall be at the rate of four percent of the consideration given or contracted to be given for the tangible personal property which constitutes the blank medium, such as disks or tapes,

used in conjunction with the software, or for the use of such property, and the mere storage, keeping, retention or withdrawal from storage of computer software described in such clause (F) by its author or other creator shall not be deemed a taxable use by such person.

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

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Use Tax Exemption

Use tax generally applies to taxable uses of prewritten computer software in the same manner that the use tax applies to uses of other tangible personal property, except that: (1) no use tax is imposed on software used by its author if the author does not offer similar software for sale in the regular course of business, and (2) where software is used by its author and the author does sell the same or similar software in the regular course of business, use tax applies and is computed on the cost of the medium (floppy disk, magnetic tape, etc.) that contains or is used in conjunction with the program.

Opinion

Company is hired to provide automated voice messages to recipients designated by its customers. To accomplish this, the customer provides Company with an electronic call list containing proprietary and confidential information on each call recipient. Company uses software to make the calls that deliver automated voice messages to the customer’s designated

recipients. The voice message delivered by Company may prompt the recipient to take an action and Company's software will either transfer the call to the customer or the customer's representative or provide additional information via an automated recording. Company also provides clients with reports compiling the results of each call.

Company has developed proprietary software whereby Company has automated the calling functions provided to its customers. It appears from the facts in this Opinion that the software is not delivered or transferred to Company's customers by download or in a tangible format, and that the software may not be accessed online by Company's customers for use. Therefore, it appears that Company does not license or sell this proprietary software. Rather, Company is providing automated calling service to its customers.

Services are not subject to sales tax unless they are specifically enumerated as being subject to tax under section 1105 of the Tax Law. Company's automated calling services as described in this Opinion do not constitute any of the enumerated services specified under section 1105 of the Tax Law. When forwarding the message recipient to the customer or the customer's representative, Company's software program is designed to dial out to the telephone number of the customer or representative. When the message recipient has been connected to the customer or the customer's representative, the Company's computer system disconnects. Thus phone service for the call between the message recipient and the customer or customer representative is not paid by Company. While Company's services include some elements that may appear similar to telephone services such as call forwarding services, these elements are not sufficient to transform Company's services when considered as a whole into telephone services subject to sales tax. Company may consume telephone services in the performance of the services it provides to customers, but Company is not engaged in providing telephone service to its customers. See *Matter of Holmes Electric Protective Co. v McGoldrick*, 262 App Div 514 (1st Dept 1941).

Company's customers also receive a written report of the call results. To the extent the report is deemed to be an information service, the information provided is personal and individual in nature relating to the customer call lists and call results, and that information is not substantially incorporated in reports furnished to other persons. Therefore, charges for such service were it considered to constitute an information service would qualify for the exclusion from sales tax for information services as provided in section 1105(c)(1) of the Tax Law. See *Deloitte & Touche LLP*, Adv Op Comm T&F, November 24, 2003, TSB-A-03(42)S.

Since Company's services as described in this Opinion do not constitute any of the enumerated services specified under section 1105 of the Tax Law, the receipts from the sale of Company's services are not subject to sales tax imposed by section 1105.

Section 1110 of the Tax Law provides that software used by its author is not subject to use tax if the author does not offer similar software for sale as such or as a component part of other property in the regular course of business. Therefore, the software Company develops and

uses to provide services to its customers is not subject to use tax provided that Company does not sell the software as such or as a component part of other property in the regular course of business.

DATED: January 29, 2009

/s/
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Taxpayer Guidance Division

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.