

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

TSB-A-10(10)S
Sales Tax
March 16, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S080430A

Petitioner, [REDACTED], asks whether its sales of its automated speech application programs are subject to New York State sales and use taxes. We conclude that petitioner's three deployment models for its speech application program constitute sales of prewritten software and are subject to sales and use tax.

Facts

Petitioner provides speech applications used by its clients to provide automated customer experiences via the telephone. The applications automate virtually any type of call, including natural language call-routing, self-service transactions and product support. The service does not involve taking or relaying of messages. One example of petitioner's service involves a client that wants to be able to verify warranty information to its customers, including the expiration date. The client gives the warranty expiration date information to petitioner. The client provides its customer with a toll-free number to call for warranty information. The toll-free calls are answered by petitioner's automated service, which is able to provide the necessary information through software speech applications and transfer in-warranty callers to a call center. While the voice application software is designed to resolve most caller inquiries, generally the voice application software gives callers the option of connecting with a representative at the purchaser's call center and in some cases even forwards information pertinent to the caller's inquiry to the call center.

The applications can be delivered in the three different models. In addition, petitioner may also provide professional services for a separate charge to its clients in certain deployment models.

1. LICENSED TO CLIENTS FOR INTERNAL USE. In this delivery model the client receives prewritten software that the client deploys on its own computer hardware equipment for use internally. The client has the option of purchasing additional software maintenance and support agreements, and typically will do so, and continue to renew such maintenance and support agreements for extended periods of time beyond the initial license period. All software (under both the original license and subsequent updates/upgrades) is delivered electronically over the Internet.

2. HOSTED. In this delivery model the software running petitioner's speech application is hosted by petitioner remotely in its leased network operations center ("NOC"), which is not located in New York. Petitioner manages the applications and related software and technology using its own computer software and hardware equipment. The client purchases a toll-free number which connects to petitioner's NOC. The client then gives out that number for customers to call for pertinent information. The client is given access to a website where it can view certain information about the calls being handled by the speech application service, including the volume and length. The website enables the client to print out a report exclusively regarding that information. The client has no control over the format of that report. Petitioner does not furnish that information to anyone other than the client. Clients only have limited control over how the speech application software runs; for example, through the website, clients

can perform minor predefined configuration changes to the application (e.g., enabling emergency messages or changing hours that their call center is open). Beyond this, the speech application software is controlled by petitioner.

3. MANAGED ON PREMISE. In this delivery model, clients are granted a license to use the service, and have remote access to the applications and related software and technology "managed" by petitioner residing on the hardware equipment owned by the client or a third-party partner of the client. The hardware equipment can be located either inside or outside of New York State. Under this deployment model, the clients have the same degree of control over how the speech application software runs as in the "hosted" model discussed above.

Under deployment models (2) and (3), petitioner may also obtain, at the client's request, telephony services to facilitate the service on behalf of the client. In these cases petitioner will charge back the client (at petitioner's cost) for these additional services with an added "convenience fee" charge.

In certain deployment models, clients have the option of purchasing certain computer-related services, such as assistance with software installation and configuration, user training, support, troubleshooting, design, development, testing, and project management. These services can be performed either on- or off-site.

Analysis

Prewritten software is considered tangible personal property "regardless of the means by which it is conveyed to a purchaser" (Tax Law section 1101[b]6). Retail sales of tangible personal property are subject to sales tax (Tax Law section 1105[a]). A sale includes "[a]ny transfer of title or possession or both" and includes a "license to use." Here, under all three deployment models, petitioner's clients have the ability to access the software to at least make minor predefined configuration changes to the application. Furthermore, depending on the particular voice application, the clients can use the software to interact with their customers (e.g., a voice application that forwards details of a caller's inquiry to a call center representative who is then able to use that information to help the customer). By providing its clients with these rights to use or control the voice application software, petitioner is making taxable sales of prewritten software.

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 the customer obtains actual or constructive possession, or if there has been a transfer of "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 client uses or directs the use of the software and not on the location of the code embodying the software (TSB-A-08(62)S, November 24, 2008). Accordingly, the situs of petitioner's sales for purposes of determining the proper local tax rate and jurisdiction is the location of the client's employees who use the software, including the employees who make the configuration changes, or who staff call centers to which voice application forwards inquiries, or any other employees who interact with the software. If the client's employees who use the software are located both in and outside of New York State, petitioner should collect tax based on the portion of the receipt attributable to the client's employee users located in New York. (See TSB-A-03[5]S). As described in that Advisory Opinion, petitioner may rely on information received from its client to determine the location of its clients' employee users (Tax

Law section 1142[4]). Given the general nature of the facts provided by petitioner and the multiple ways the voice application software is used by petitioner's clients, petitioner is cautioned that application of these sourcing principles is fact-dependent and requires that each transaction be analyzed separately.

Petitioner's additional charges for software maintenance and support services are not taxable to the extent those charges consist of training, consulting, diagnostic and troubleshooting support (Tax Law section 1115(o); Technical Services Bureau Memorandum, TSB-M-93(3)S, dated March 1, 1993). To the extent that the maintenance involves both the sale of prewritten software and the above services for a single charge, the whole charge would be taxable. Separately-stated and reasonable charges for the described maintenance and support services would not be taxable (*Id.*). Petitioner's additional charges for providing telephony, including its added convenience fee charge, would also be taxable to the extent that service is intrastate in nature (Tax Law section 1105[b][1][B]; Sales Tax Reg. section 527.2[d]). Moreover, by virtue of providing telephony, petitioner is subject to Tax Law section 186-e, which imposes an excise tax on intrastate and certain interstate and international telecommunication services. Petitioner's purchases of telecommunication services may qualify for the resale exclusion from both the sales and excise taxes if the telecommunication services are resold to its clients as such (Tax Law sections 186-e[2][b][1]; 1105[b][1]).

DATED: March 16, 2010

/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.