

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

TSB-A-10(14)S
Sales Tax
April 8, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S081121A

On November 21, 2008 the Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether its receipts for providing managed information technology (IT) support services are subject to sales tax. Some of the services in question may be subject to New York sales tax; others are not subject to sales tax.

Facts

Under the product name, [REDACTED], Petitioner sells a number of IT support services involving IT asset monitoring, IT asset management, and offsite data backup management. All the [REDACTED] services in question are delivered through servers located at a data center in New Jersey. The services are administered by connecting to the customer location over the Internet.

The services employ software agents that are used by Petitioner to administer the services and installed at the customer's location on IT assets. The agents can be used to monitor a customer's IT assets, to apply software upgrades to the IT assets, or to change system settings or configurations. Only Petitioner uses the software agents.

Some of the [REDACTED] services in question are sold as standard packages: Basic, Standard, Enhanced, and Premium. Each of these packages has multiple IT support features and functions: automated systems management (e.g., scheduling the cleanup or defragmenting of computer disks or files); help desk systems (systems for routing internally or externally requests for assistance with IT problems and the tracking of how the requests for assistance are being handled); management and operational reporting (e.g., providing a customer with an inventory of its IT assets); PC remote control and remote technical support (remotely accessing customer IT assets to diagnose and fix problems); anti-virus/anti-spyware protection, performance monitoring, patch management, security management, software deployment (i.e., installing software or software upgrades); and security management (e.g., detecting new devices, blocking or controlling network access). Petitioner sells some of the components of the packages as discrete services and also sells optional IT monitoring and management services that are not part of the packages.

For offsite data backup, the customer installs on its server(s) a software agent that periodically backs up the customer's data over the Internet to Petitioner's data center. If a customer has a large volume of data to back up, Petitioner supplies a backup appliance, which looks like a small server. This appliance will back up all the servers at that location, and then transmit data via the Internet to Petitioner's data centers. Petitioner monitors all backup activities for the customer to make sure all backup jobs are working properly. When needed, Petitioner remotely assists the customer to recover lost files or data from the backup.

Analysis

Petitioner's packages of integrated IT monitoring and management services are not subject to sales tax. The sales tax status of an integrated service depends on the primary function of the service. The primary function of Petitioner's integrated IT monitoring and management service is to assist a customer in

the operation and management of its IT system. This activity is not among the enumerated services subject to sales or use tax.

If customers have the option to purchase separately goods and services offered under the rubric IT asset management and monitoring service, each item that is purchased discretely will have a distinct sales tax status, and sales tax will be due on the receipts for each taxable good or service. The following paragraphs address the taxability of products if sold separately.

Petitioner is not selling software when it installs software agents on its customers' IT assets. The software agents, which act for and report to Petitioner, are used by Petitioner to perform its services. If Petitioner installs a software agent at a customer location in New York State, Petitioner will owe sales or use tax on the software unless it was created specifically for Petitioner or Petitioner created the software and does not sell it. Tax Law section 1110(a). If the software was purchased by Petitioner from a third party and was not created specifically for Petitioner (i.e., the software was prewritten software as defined in Tax Law section 1101(b)(14)), Petitioner's tax is based on the consideration paid for the software. If Petitioner created the software and does sell it in the regular course of business, the use tax is based on the consideration paid for the blank medium, such as disks or tapes, used in conjunction with the software. Tax Law section 1110(g).

Petitioner's receipts for the sale of software upgrades are subject to sales tax under Tax Law section 1105(a) if the upgrades constitute prewritten computer software as defined in Tax Law section 1101(b)(14). If Petitioner is not furnishing prewritten computer software as part of a software upgrade, but rather is furnishing custom software designed and developed to the specifications of a specific purchaser, the software upgrade is not subject to sales tax. *See* TSB-M-93(3)S, *State and Local Sales and Compensating Use Taxes Imposed on Certain Sales of Computer Software*, March 1, 1993.

Petitioner's fees for installing software or software upgrades are not subject to sales tax even if the software constitutes tangible personal property for purposes of Tax Law section 1101(b)(14). Tax Law section 1115(o).

Any security services separately sold by Petitioner that are designed to prevent unauthorized access to or use of a customer's IT assets would be subject to sales tax under Tax Law section 1105(c)(8) as a protective service, if the IT assets are located in New York. Similarly, the service of monitoring for unauthorized access to or use of a customer's IT assets and issuing reports to the customer about those unauthorized activities would be taxable protective services if the IT assets are located in New York. Anti-virus/anti-spyware protection comes within the definition of a protective service and would be taxable under section 1105(c)(8) when the customer's IT assets are located in New York. Further, the service of monitoring a customer's IT assets just to notify the customer when an asset malfunctions would constitute a taxable protective service. However, the monitoring of IT assets in order to provide a customer with operational information as to the functioning of IT assets that goes beyond just notice of IT malfunctions, such as efficiency reports, is not a protective service even if the monitoring covers security features such as fire walls. An example of a nontaxable monitoring/reporting service would be keeping the customer posted on unused data storage capacity.

Services otherwise taxable under Tax Law section 1105(c) are exempt from tax when performed on computer software. Accordingly, any protective services performed by Petitioner on a customer's software are exempt from tax if the charges for these services are reasonable and separately stated on the customer invoice or other statement of price.

When Petitioner acts on IT assets by remotely changing system settings or configurations to fix malfunctions and customer software is not modified by these changes (i.e., only customer hardware is adjusted), Petitioner is maintaining or servicing tangible personal property. That is a service subject to sales tax under Tax Law section 1105(c)(3). *VIPCS*, Adv Op Comm T&F, November 14, 2007, TSB-A-07(28)S; *Western New York Computing Systems, Inc.*, Adv Op Comm T&F, July 26, 2002, TSB-A-02(42)S.

Petitioner's offsite data backup management is an unenumerated service for purposes of sales tax. Therefore, the receipts for that service are not subject to sales tax. *See Immediate Medical Records, Inc.*, Adv Op Comm T&F, January 31, 1992, TSB-A-92(7)S.

Petitioner's help desk support services to a customer's IT assets are not subject to sales tax. *See TSB-M-93(3)S, supra.*

Petitioner does not provide any computer applications as part of the services in question. If it were to provide such applications, these transactions may constitute the sale of software, the taxability of which would depend on the type of software provided. The provision of applications that constitute prewritten computer software would be subject to sales and use tax as the sale of tangible personal property.

If Petitioner provides both taxable and nontaxable products to a customer, but does not separately bill for the taxable items, Petitioner's entire charge to the customer will be subject to sales tax. *See Tax Law section 1101(b)(3); Penfold v State Tax Commission*, 114 AD 2d 696; *Hodgson, Russ, Andrews, Woods and Goodyear*, Adv Op Comm T&F, April 2, 1992, TSB-A-92(31)S; *PricewaterhouseCoopers LLP*, Adv Op Comm T&F, March 25, 2003, TSB-A-03(11)S.

DATED: April 8, 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.