

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

TSB-A-10(2)S
Sales Tax
January 20, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S090921C

Petitioner [REDACTED], asks whether the fees charged to its customers for playing computer video games, as described below, are subject to New York State sales tax.

We conclude that the play fees charged by Petitioner are subject to sales tax under Tax Law §1105(a).

Facts

Petitioner operates a business where individuals pay a fee to play video games on a computer. Petitioner's facility provides workstation desks, chairs, and computers for the customers. Petitioner's website indicates that the main reason for customers to use Petitioner's facility is to play group-oriented computer games on high end equipment in a social atmosphere. Most of the games that are played by Petitioner's customers at its facility are stored on Petitioner's server. Petitioner may have to obtain licenses to use the games which enable Petitioner to have multiple users of the games. Customers cannot edit the games. Customers may play against each other or use Petitioner's facility to participate in Internet game competitions. In these cases, customers may have to access the games at third-party websites.

Petitioner's fees for playing the games are set on an hourly basis. Customers pay at the front desk when they come in. A customer will pay for a set amount of time to play, and a computer is then accessed for the customer at that time. When the time lapses, the customer will be shut out of the computer. Customers may pay an annual membership fee in order to receive discounts on normal play fees. Petitioner also has separate fee schedules for tournaments and parties at its facility. Petitioner does not charge an entrance fee to its facility. Individuals may occupy the facility without paying to use the workstations.

Petitioner sells food and drink at its facility. No third party vendors sell food or drink at Petitioner's facility. Generally, customers purchase food and drink separately from their purchase of time at Petitioner's workstations. There are no cover fees, minimum purchase requirements, or requirements that customers purchase food or beverages. Food or drink may be included in Petitioner's fees for tournaments and parties. For example, the fee to participate in a tournament may be \$15, or the fee may be \$20 if it includes pizza.

Analysis

Section 1105(a) of the Tax Law imposes sales tax on receipts from the sale or rental of tangible personal property. Sales or rentals of computer hardware are subject to sales tax under Tax Law §1105(a). Section 1101(b)(6) of the Tax Law provides that prewritten software is deemed to be tangible personal property for sales tax purposes. The fee paid for the lease or license to use or consume prewritten computer software, regardless of the medium by means of which such software is conveyed to

the purchaser, is subject to New York State sales tax under Tax Law §1105(a). The location of the code embodying the software is irrelevant, because the software can be used just as effectively by the customer, even though the customer never receives the code on a tangible medium or by download. *See Adobe Systems, Inc Adv Op Comm T & F*, November 24, 2008, TSB-A-08(62)S. The computer games offered by Petitioner to its customers are prewritten software products. Accordingly, based on the facts presented in this Opinion, Petitioner's fees for customers to use Petitioner's computer equipment and play computer games at its facility are subject to sales tax under Tax Law §1105(a) as charges for the use of tangible personal property. Annual fees paid by Petitioner's customers in order to receive discounts on normal fees are also subject to tax. These fees are, in substance, prepayments for the normal fees that are taxable under Tax Law §1105(a). *See Costco Wholesale Corporation, Adv Op Comm Tx & Fin*, September 17, 1992, TSB-A-92(66)S; *John L. Buono, Adv Op Comm Tx & Fin*, March 17, 1994, TSB-A-94(10)S.)

Petitioner's sales of food and drink are subject to sales tax under Tax Law §1105(d). If food or drink is included in Petitioner's charges for tournaments or parties, the entire charge is subject to sales tax under Tax Law §1105(d). *See UM Enterprises Ltd., Adv Op Comm T & F*, March 24, 1998, TSB-A-98(21)S; *Billmar Amusements NY Party Works, Inc., Adv Op Comm T & F*, February 8, 2007, TSB-A-07(2)S. If food or drink is not included in the charge for a tournament or party, but must be separately purchased, the charge for the tournament or party is subject to tax under §1105(a).

DATED: January 20, 2010

/S/

Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

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.