

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

TSB-A-10(57)S
Sales Tax
November 16, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S100915A

Petitioner ██████████ requests an Advisory Opinion about whether its sales of IT support services are subject to New York State and local sales taxes.

We conclude that Petitioner's charges for services rendered under their ██████████ and ██████████ ██████████ Agreements are subject to sales tax, because the services provided under these agreements include both taxable and exempt services for a single charge. Petitioner's hourly charges for services rendered under their ██████████ Agreements are subject to tax if the services rendered include both taxable and exempt services, unless the charges for the non-taxable services are separately stated and reasonable in relation to the overall receipt.

Facts

Petitioner is a provider of computer network services and technology solutions consulting for small to medium-sized businesses. Petitioner provides professional Information Technology (IT) services, which are designed to be an efficient and economical replacement or temporary augmentation of a customer's staffing needs. Customers receive the benefits of a diverse array of IT expertise, rather than being limited to the knowledge of their in-house employees.

Petitioner's employees are IT professionals that typically possess a minimum of a Bachelor's Degree, as well as additional specialized certifications. Job titles vary by skill level and certifications. Entry level employees are "Support Specialists, followed by "Systems Engineers" and "Senior Systems Engineers."

Petitioner does not operate a retail store and has no "walk-in" type business. Petitioner has never owned or operated a retail sales facility for the purpose of selling or servicing tangible personal property to the general public. Furthermore, Petitioner does not warehouse or hold in inventory any purchases of tangible personal property for resale to current or potential customers or the general public.

Petitioner provides services to its customers under three types of agreements: (1) ██████████ (Agreement 1); (2) ██████████ (Agreement 2); and (3) ██████████ (Agreement 3). The primary objective of all three agreement types is to provide customers IT personnel to assist with the management and monitoring of their IT networks. Petitioner does not enter into agreements for the sole purposes of guaranteeing functionality of a customer's software or hardware components of the IT infrastructure. However, Petitioner's invoices indicate that the services provided include services to hardware and equipment. Each type of agreement has multiple IT support features as described below.

Agreement 1

Petitioner's Agreement 1 Service is designed to address the ongoing IT management and support needs of Petitioner's customers. This service primarily provides maintenance of the software that runs a customer's systems and networks. Proactive software monitoring and management reduces exposure to many common problems IT environments experience due to neglect or the security issues inherent in Internet use. Customers are billed in advance on a monthly fixed-fee basis. Agreement 1 services include:

- Proactive Management and Support – software maintenance services provided for a reliable and efficient IT environment with minimal downtime.
- Monitoring and Reactive Support – 24/7 server monitoring and outage escalations provide timely response and problem solving to active issues.
- End-user Support – provides day-to-day end-user troubleshooting and support through diagnostics and problem solving. This primarily consists of software setting changes, debugging, and problem solving.
- Technology planning and strategic business reviews.

The “Professional Services Schedule” of the sample Master Services Agreement between Petitioner and its customers covers the following components: workstations and laptops; Internet connectivity; network management; remote access and thin client computing; e-mail environment; backup/disaster recovery; internal security; external security; virus protection; software license compliance. Also included within the monthly fee is “e-mail protection service,” which includes “[s]pam, virus, and content filtering, including ‘spooling’ of messages when server is unavailable.” The e-mail protection and security services consist of software licensed directly to customers by the creator of the software and separately invoiced by Petitioner. As part of the IT management services provided under Agreement 1, Petitioner reviews reports on the effectiveness of the security software and makes recommendations to customers as needed.

Agreement 2

Petitioner’s Agreement 2 services include reactive troubleshooting and end-user support for customers who prefer to contract for “as needed” support, rather than the proactive and preventative solutions afforded by Agreement 1. Like Agreement 1 service, Agreement 2 service primarily consists of software setting changes, debugging, and problem solving. However, Petitioner’s invoices indicated that services to hardware and equipment are sometimes included. Customers are billed on an hourly basis after services are rendered.

Agreement 3

In the event a potential or existing customer seeks the creation, expansion, or relocation of their integrated IT network system, Petitioner’s engineers will provide assistance and guidance through the many stages of the project from planning through implementation. Customers are billed a single negotiated amount, based on the nature of the work to be performed.

Procurement of Hardware or Software

In January 2007, Petitioner began reselling hardware and software by drop shipment from manufacturers and distributors, as well as software licenses and warranties, and maintenance agreements for hardware and software. Procurement services are available under all three of the agreement types described above. Petitioner does not bundle the procurement purchases with the service fees. Petitioner does not use the sale of hardware to generate installation service sales. Procurement services are offered solely as a courtesy and for the convenience of the customer. Petitioner states that it bills separately for procurement and collects sales tax on all procurement sales when and if required.

Analysis

New York State and local sales and use taxes are imposed on all sales of tangible personal property, unless otherwise exempt, and on certain enumerated services. *See* Tax Law §1105(a), (c). Prewritten computer software is tangible personal property, “regardless of the medium by means of which such software is conveyed to the purchaser.” Tax Law §1101(b)(6). Among the services subject to tax are the services of installing,

maintaining, servicing, or repairing tangible personal property. *See* Tax Law §1105(c)(3). Services that are otherwise taxable under section 1105(c)(3) are exempt when performed on computer software. *See* Tax Law §1115(o). Installing, maintaining, monitoring, and debugging software, and adjusting software settings are among the services to software that are exempt from sales tax. However, if services to software are sold in conjunction with other tangible personal property, the services are exempt only if the charge for the services is reasonable and separately stated on an invoice or other statement of price given to the purchaser. *See id.*

If taxable property or services are combined with non-taxable property or services and sold to the customer for a single charge, the entire charge will be subject to sales tax unless the charge for the non-taxable property and services is reasonable and separately stated on the invoice or other statement of the price provided to the customer. *See* Tax Law § 1132(c); 20 NYCRR § 527.1.

Petitioner's services rendered under Agreements 1 and 3 include both services to software and services to hardware and equipment. Petitioner's invoices indicate that both types of services are performed. Petitioner does not separately state the charges for these services. Rather, under Agreement 1, Petitioner charges its customers a fixed monthly fee for all services rendered. Similarly under Agreement 3, Petitioner charges its customers a single negotiated amount based on the nature of the work to be performed. Because these charges include both exempt services to software and taxable services to hardware and equipment, the entire receipt is subject to sales tax. *See* Tax Law § 1132(c); 20 NYCRR § 527.1.

Petitioner's services rendered under Agreement 2 also appear to include both services to software and services to hardware and equipment. However, these services are provided on an as-needed basis for a hourly fee. If the services rendered by Petitioner constitute services to hardware and equipment, or some combination of services to software and services to hardware and equipment, the hourly charge for the services will be subject to tax unless the charge for the exempt services to software is separately stated and reasonable in relationship to the overall receipt. *See* Tax Law § 1132(c); 20 NYCRR § 527.1. If the services rendered constitute only services to software, the hourly charge for these services is exempt from sales tax. *See* Tax Law §1115(o).

Petitioner avers that it separately states the charges for sales of tangible personal property, which includes hardware, equipment, and prewritten computer software (e.g., anti-virus and e-mail protection software). These separately stated charges are subject to sales tax. *See* Tax Law §1105(a). If the separately stated charges for tangible personal property are reasonable in relation to the overall charges for the services, they will not affect the taxability of the services. However, if hardware, equipment, and prewritten software are sold with nontaxable services for a single charge, the entire amount will be subject to sales tax. *See* Tax Law § 1132(c); 20 NYCRR § 527.1.

DATED: November 16, 2010

/S/

DANIEL SMIRLOCK
Deputy Commissioner and 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.