

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

TSB-A-10(60)S
Sales Tax
November 24, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S100726A

On July 26, 2010, the Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (Petitioner), [REDACTED]. Petitioner asks whether it owes sales tax on its receipts from litigation support and e-discovery services. Some of Petitioner's receipts are subject to State and local sales tax. Petitioner is selling a license to use prewritten computer software when it provides a customer with the capabilities to capture, review, or manage data. The receipts from the sale of these products are subject to State and local sales tax when the software is used by the customer in New York. Petitioner is not selling a license to use software if it provides a customer only with "data viewer" access to documents and data stored on Petitioner's computer system. Petitioner's management, consulting, manual data capture, and training services are not subject to sales tax if they are sold for a reasonable, separately-stated charge.

Facts

Petitioner provides a variety of litigation support and e-discovery services to its customers. Petitioner's customers upload electronic information in the form of electronic documents and data files to Petitioner's servers. At upload, a unique record identifier is added to each document/file and text, and metadata is extracted from the electronic data to make it searchable by key word and metadata entity. Customers are then able to use Petitioner's proprietary software, accessed via Petitioner's secure email portal, as an on-line review tool to classify like documents, organize, batch, and index the uploaded data.

These actions add to the intelligence contained in the original documents in preparation for litigation. Classification, review, and organization of the documents for production are done solely by the customer. When document metadata is not available for automatic extraction at time of upload, the customer may request Petitioner to manually capture the viewable document data. These capture fields would include document type, author, recipient, CC, BCC, title, document date, and time. (These tasks are performed by a subcontractor.)

After documents are uploaded, a customer can print or download original data/documents. In addition, a customer may also electronically paginate PDF versions of the uploaded documents at no additional cost.

Petitioner offers customers four levels of access to its proprietary software:

1. Data Viewer – the holder of this login credential may view documents, document classifications tags, and document metadata on Petitioner's servers, as well as print and download documents in their native (original) format. PDF production and download, pagination, and indexing are not available to this level of user.
2. Data Capturer – the holder of this login credential may view documents as well as capture document classification tags, authors, recipients, dates and notes and mark the documents as captured as well as

print and download documents in their native (original) format. PDF production and download, pagination, and indexing are not available to this level of user.

3. Data Reviewer – the holder of this login credential may view documents as well as capture document classifications tags, authors, recipients, dates and notes and mark the documents as reviewed as well as print and download documents in their native (original) format. PDF production and download, pagination and indexing are also available to this level of user.

4. Data Manager – the holder of this login credential has unlimited access to the documents and documents classification fields and can print and download the documents in their native (original) format. PDF production and download, pagination and indexing are also available to this level of user.

A customer can assign different levels of login access for the persons it designates as users. Ownership of the original documents remains at all times with the customer and the documents are not used by Petitioner for any purposes. Petitioner does not process and resell the electronic data; it merely acts as a host for the electronic information and provides a vehicle whereby the electronic information may be searched, reviewed, and organized for production. No added intelligence as a result of using the on-line review tool is included in the downloaded native (original) and /or PDF documents and no reports with this added intelligence can be produced for dissemination.

Petitioner offers four optional services:

1. project management – offering advice in defining the project scope and specifications;
2. customer training – instruction in the use of the online review tool;
3. data capture and document coding services - Petitioner manually captures the viewable document data that cannot be automatically captured; and
4. E-discovery consulting – providing E-discovery advice throughout the course of litigation.

Analysis

The critical element of Petitioner’s product is the software that resides on Petitioner's server. Customers use Petitioner’s proprietary software, accessed via the company’s secure email portal, as an on-line review tool to classify like documents, organize, batch, and index the uploaded data. These actions add to the intelligence contained in the original documents. Classification, review, and organization of the documents for production are done solely by the customer.

Prewritten computer software is included within the definition of tangible personal property, “regardless of the medium by means of which such software is conveyed to the purchaser.” Tax Law § 1101(b)(6). The sale of prewritten computer software is subject to tax as the sale of tangible personal property. See Tax Law §§ 1101 (b)(6); 1105(a).

“Sale” is defined as “[a]ny transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including with respect to computer software, merely the right to reproduce) conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor.” Tax Law § 1101(b)(5). Sales and Use Tax Regulation section 526.7 provides generally that “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.” Regulation section 526.7(e)(4) further provides that a transfer of possession has occurred if there is actual or constructive possession, or if there has been a transfer of “the right to use, or control or direct the use of,

tangible personal property.” 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.

Petitioner’s customers are accessing its software when they classify and organize documents and data for litigation purposes, i.e., when a customer pays for data reviewer, data capturer, or data manager access status. The accessing of Petitioner’s software by customers with any of these access statuses constitutes a transfer of possession of the software, because the customers gain constructive possession of the software, and gain the “right to use, or control or direct the use” of the software. *See Adv Op Comm T&F, August 13, 2009, TSB-A-09(33)S.* Although Petitioner characterizes its product as a “service,” this characterization is not controlling as to data reviewer, data capturer, or data manager access status. Petitioner’s customers obtain the right to access the software and to classify and organize documents and data for litigation purposes. This is true even if no “copy” of the software is transferred to the customer. Accordingly, the sale of a license to use Petitioner’s software to a New York customer with data reviewer, data capturer, or data manager access status is subject to State and local sales tax.

The conclusion that Petitioner is licensing software is not inconsistent with the conclusions reached in *Adv Op Comm T&F, May 6, 2010, TSB-A-10(20)S.* The vendor of the litigation support services addressed in the May 2010 advisory opinion did not transfer the software to the customer or allow the customer to access the software by remote means, nor did the customer have the ability to enter data, manipulate data or run reports using the software. The vendor’s technicians used proprietary software to index and sort the data to make it searchable by the customer, according to the customer’s specifications. In contrast, Petitioner’s customers access software when they sort, batch or otherwise organize documents.

The situs of the software license for purposes of determining the proper local tax rate and jurisdiction is the location associated with the license to use (i.e., the location of the subscriber’s employees that use the software). If the subscriber’s employees that use the software are located both in and out of New York State, Petitioner should collect tax based on the portion of the receipt attributable to the employee users located in New York. *See KPMG, Adv Op Comm T&F, January 31, 2003, TSB-A-03(5)S.*

A fee paid by a customer merely for Data Viewer status is not subject to sales tax. The fee does not represent a charge for the license of software because a customer with Data Viewer status does not access Petitioner’s software or otherwise employ it. Data Viewer status does not constitute the provision of an information service because Petitioner is merely providing the customer with access to the customer’s data that has been converted into a different medium. *Finserv Computer Corp. v. Tully, 463 N.Y.S.2d 924 (1983), affd 61 N.Y.2d 947 (1984); see also CyCare Systems, Inc., Adv Op Comm T&F, March 22, 1993, TSB-A-93(18)S.* Petitioner is providing a data processing service when it permits a customer to access online versions of documents that Petitioner has uploaded and stored. Such a data processing service is not among the enumerated services subject to tax under 1105(c) of the Tax Law. *Elaine K. Hoiska, CPA, Adv OpComm T & F, August 25, 1997, TSB-A-97(53)S.*

Petitioner’s management, consulting, manual data capture, and training services, by themselves, are not among the enumerated services subject to sales tax. If these services are sold by Petitioner for a separately stated and reasonable charge, they are not subject to sales tax. However, if the charge for these services is not separately stated and reasonable in relation to the entire charge for Petitioner’s taxable software product, the charges for management, consulting, manual data capture, and training services are considered to be part of the receipt from the sale of prewritten computer software and are subject to sales

