

**New York State Department of Taxation and Finance
Office of Counsel**

TSB-A-15(51)S
Sales Tax
December 11, 2015

ADVISORY OPINION PETITION NO. S140606B

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner asks whether its receipts from software downloads and maintenance are subject to sales tax and, if these receipts are taxable, when it must collect New York sales tax from its customers. Petitioner also asks if the per-order charges vendors pay Petitioners for orders received through Petitioner’s website are subject to sales tax.

We conclude that Petitioner’s receipts for the downloading and maintaining of software are subject to sales tax as the sale of prewritten software and Petitioner must collect sales tax when the customer uses the software in New York. Petitioner’s receipts from vendors for the placement of orders for goods that they advertise on Petitioner’s web site are not subject to sales tax.

Facts

Petitioner has developed prewritten software used to place orders for goods sold by third parties that are advertised on a website operated by Petitioner. The goods sold through the website are parts and equipment for marine vessels. Petitioner provides owners of commercial vessels with the software so they can access Petitioner’s website and place purchase orders with the vendors advertising goods on the website.

Petitioner sends its software to vessel owners electronically. The software is downloaded at the vessel owner’s office; it is not installed on vessels. Petitioner charges the vessel owner a fee that it denominates as an “installation fee” for the use of the software. It also charges the vessel owner a monthly fee denominated as “usage /maintenance” that entitles the vessel owner to software updates, technology support and training. Each vessel owner receives one software license that allows an unlimited number of users to use the software.

Petitioner’s website lists marine products for sale by category, brand, and vendor. While Petitioner’s system enables the placement of purchase orders for the products listed for sale on the website, payment for the orders is not made through the system. That is, Petitioner does not receive the payment for the orders. The vendor pays Petitioner a fee for each order received from a customer through Petitioner’s system. The amount of the fee is set and does not vary with the dollar amount of the purchase.

Analysis

The sale of pre-written computer software, which is defined in Tax Law §1101(b)(14) as computer software (including pre-written upgrades thereof) that is not designed and developed by the author or other creator to the specifications of a specific purchaser, is subject to sales tax under Tax Law § 1105(a) as the sale of tangible personal property. Petitioner's receipts for the installation of its software are consideration for the lease or license to use or consume prewritten computer software. Therefore, the receipts for the installation of Petitioner’s software are subject

to New York State sales tax, regardless of the medium used to convey the software to the purchaser, if it is delivered in New York.

Tax Law § 1115(o) exempts from sales and use tax services otherwise taxable under Tax Law § 1105(c) or § 1110 (e.g., installation, maintenance, etc.) where performed on computer software of any nature. However, where services to software are provided to a customer in conjunction with the sale of tangible personal property, the charge for these services is exempt only when it is reasonable and separately stated on an invoice or other statement of the price given to the purchaser. Tax Law § 1115(o). A customer who pays Petitioner's usage/maintenance fee is entitled to software upgrades. These upgrades by themselves qualify as prewritten software. *See* TSB-M-93(3)S. Because Petitioner is providing services and tangible personal property in exchange for a single usage/maintenance fee, the entire fee is subject to sales tax. *See* TSB-A-96(27)S.

New York's sales tax regulations provide 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." 20 NYCRR § 526.7(e). This regulation 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 the right to use, or control or direct the use of tangible personal property." 20 NYCRR § 526.7(e)(4). "[C]onstructive possession" of software or "the right to use, or control" software is determined based on the location where the customer uses the software. *See* TSB-A-08(62)S. Accordingly, the situs of Petitioner's sales for purposes of determining the proper local tax rate and jurisdiction is the location where the customer or its employees use the software. If the software is only used in New York, Petitioner must collect sales tax on the entire receipt. If the customer's employees use the software at the customer's offices located both inside and outside New York, Petitioner should collect tax based on the number of the customer's employees using the software in New York over the total number of the customer's employees that use the software. *See* TSB-A-03(5)S. In calculating sales tax due, Petitioner may rely on written information received from its customer about the locations where the customer uses the software. *Id.* Petitioner should retain this information for at least three years after the date of the last sale to which the information relates.

Petitioner's charges to vendors for sales made through Petitioner's web site are not subject to sales tax. Petitioner is, in essence, providing Internet based advertising services for vendors of marine equipment. Charges for advertising on Internet websites are generally considered receipts from the sale of advertising in the media (media placement) and constitute nontaxable services. *See* TSB-A-09(44)S.

DATED: December 11, 2015

/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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.