

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

TSB-A-16(26)S
Sales Tax
August 31, 2016

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S140929A

The Department of Taxation and Finance received a Petition for an Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner, which provides Internet-based products to the hotel industry, essentially asks whether its products are subject to New York State sales and use tax. We conclude that all of Petitioner’s products are information services for purposes of the sales and use tax, but that two of them qualify for the “personal or individual” exclusion from the tax on information services.

Facts

Petitioner is in the business of selling products to hotels and hotel management groups (customers) that, according to Petitioner, “provide feedback and information to its hotel customers to facilitate the hotels’ marketing and sales to prospective customers.” Petitioner indicates that it sells four products, including one that it calls online reputation management services (Product A), another that it calls post-stay surveys (Product B), and a third that it refers to as on-site surveys (Product C). Petitioner also offers a product, which it calls “Guest Suite” (Product D), that integrates Products A, B and C.

Product A: Product A provides customers with online access to a database that is maintained by Petitioner, and that consists of hotel reviews from over 60 hotel review websites. Product A lets customers log in to Petitioner’s website and, in one place, see all of the reviews from these websites that pertain to them. Product A also provides customers with information that is derived from these reviews. For example, when a customer logs onto Petitioner’s website it may see a “dashboard” with information such as the number of new reviews about that customer, the average rating given by guests in these reviews, the percentage of reviews in which guests “recommend” the customer, and a breakdown of the websites that these reviews originated on. Product A also allows customers to compare their ratings to those of competitors, and offers information such as “trending topics” that appear in reviews and a “sentiment analysis,” which is an analysis using a language processing system that determines whether reviews are positive or negative and what subjects (i.e., rooms, service, cleanliness, facilities, etc.) are addressed. As part of this “sentiment analysis,” Petitioner assigns numeric ratings to each of these subjects using a rating system it designed. Product A further provides customers with reports containing information culled from reviews, and also provides them with tools that allow them to respond to individual reviews (with the response appearing on the review website where the review originated), to share reviews via e-mail or social media, or to assign the responsibility for responding to reviews to others (i.e., to create “service tickets”). In addition, Product A allows customers to save reviews or delete them from their viewing screen.

Product B: Like Product A, Product B provides customers with online access to a database maintained by Petitioner. However, unlike Product A, the information that Product B supplies to customers is derived from survey questions that are prepared by Petitioner and sent to guests after they have completed their stay with a customer. According to Petitioner, the survey questions that are sent to guests can be customized for each customer, and they ask questions like “how would you rate the service you received,” or “did any staff member provide exceptional service.” Once a survey is completed, the results are tabulated by Petitioner and made available to customers in much the same way as Product A. For example, customers that use Product B are able to log in to Petitioner’s website and read survey comments made by guests. In addition, Product B tabulates the results of surveys and provides customers with information, such as the number of surveys sent and the average rating the customer received. Product B also provides customers with a “sentiment analysis” of survey responses, offers reports that customers can customize, and provides some of the same tools that Product A offers, including the ability to share comments, create “tickets,” and save and delete comments. Petitioner indicates that Product B also allows customers to create or edit surveys, to edit e-mail content that is sent to guests, and to customize their use of Product B. In addition, literature provided by Petitioner reflects that customers can use Product B to submit survey responses to what Petitioner describes as the “world’s largest online review site.”

Product C: Product C is similar to Product B in that it essentially collects survey information from a customer’s guests and makes the results of these surveys available to customers via Petitioner’s website. The main difference between Product B and Product C, however, is that the surveys conducted for Product C are completed by hotel guests at the time of their hotel stay on iPads provided by the customer to the guest. When a guest answers the survey questions, the results are transmitted to Petitioner, which tabulates the results and makes them available to the customer “in a similar way as is done for [Product B].”

Product D: Lastly, Product D is a single product that integrates Product A, Product B and Product C. In other words, Product D appears to be a package that includes all of the products described above.

Analysis

The Tax Law imposes sales and use tax on retail sales of tangible personal property, including prewritten software, and the sale, except for resale, of certain services. *See* Tax Law §§ 1101(b)(6); 1105(a), (c). Among the services subject to tax is the furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons. *See* Tax Law § 1105(c)(1). *See also* Tax Law § 1105(c)(9) (furnishing information services provided by means of telephony or telegraphy or telephone or telegraph service of whatever nature subject to sales tax so long as such would be subject to sales tax pursuant to Tax Law § 1105(c)(1) if it were furnished by one of the means enumerated therein).

Each of Petitioner's products has a number of components. The provision of various tools to customers, such as the ability to respond to reviews posted on review websites (Product A), or the ability to create and/or edit surveys or share survey responses (Products B and C), has some attributes of the sale of prewritten software. However, when looked at as a whole, and based on the facts provided by Petitioner, the predominant element of Petitioner's products is the creation of a database of information that is pertinent to their customers' businesses. Petitioner accomplishes this by collecting information from review websites or directly from guests, processing it, and giving customers access to this information in various ways, including access to the raw data collected (i.e., the actual reviews or comments) or through reports and/or analysis of the data. This includes the "sentiment analysis" that Petitioner provides to its customers, which, as described above, is Petitioner's unique way of reviewing the data that it collects, analyzing it, and quantifying it for its customers. The process of collecting, compiling and analyzing information is the very essence of an information service. *See* NY Tax Law § 1105(c)(1); Sales Tax Reg. § 527.3(a)(2). *See also* TSB-A-15(1)S.

However, not every sale of an information service is subject to sales and use tax. Explicitly excluded from the tax on information services is, among other things, the furnishing of information that is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons. *See* Tax Law § 1105(c)(1); *see also* Tax Law § 1105(c)(9). Information is not "personal or individual in nature" for purposes of this exclusion if it comes from a common source or a data repository that itself is not confidential. *See Matter of ADP Automotive Claims Service Inc. v Tax Appeals Tribunal*, 188 AD2d 245 (3d Dep't 1993), *Allstate Insurance Company v. State Tax Commission*, 115 AD2d 831 (3d Dep't 1985), *aff'd*. 67 NY2d 999 (1986).

In this case, Products B and C may qualify for the "personal or individual" exclusion from sales tax on information services because the source of the information that they provide is not a common or non-confidential source. Rather, the information that is provided to customers in Products B and C is derived from surveys of the customer's hotel guests. Accordingly, so long as the information collected for Products B and C is not provided to other customers or compiled for later use by Petitioner in providing information to other customers, these two products would be excluded from sales and use tax. *See, e.g.*, TSB-A-10(40)S (provision of information derived solely from responses to customer's questions, that was not provided to other customers, and that was not compiled for later use by the petitioner in providing information to other customers, qualified for the "personal or individual" exclusion).

By contrast, however, Product A offers information to customers that is derived from review websites operated by third parties. This information does not appear to be unique to Petitioner and is presumably available to the general public (albeit spread out over 60 different websites). Such information, therefore, comes from a common and widely accessible source and is not "personal or individual," even though reports, screens, or displays of the information

provided to customers may be tailored to their needs or requests. *See, e.g., Matter of ADP Automotive Claims Service Inc.*, 188 AD2d at 248 (information services derived from a common source or a data repository that is not confidential and is widely accessible is not personal or individual in nature); *Rich Products Corp. v. Chu*, 132 AD2d 175, 177-78 (3d Dep't 1987) (reports that are customized to respond to needs of a particular customer not entitled to exclusion where information was derived from a repository that was not confidential and was widely accessible). *See also, e.g.*, TSB-A-10(50)S; TSB-A-10(19)S; TSB-A-09(55)S. Product A, therefore, is an information service that is not personal or individual in nature and is subject to sales and use tax.

We note that Petitioner attempts to analogize all of its products (including Product A) to the situation presented in *Westwood Pharmaceuticals, Inc. v. Chu*, 558 NYS 2d 444 (Sup.Ct., Erie Co. 1990), where the Court found that the information service at issue was "personal and individual in nature" and, thus, excluded from taxation. *See Id.* at 497. However, in *Westwood Pharmaceuticals*, most of the raw data that the vendor collected (and that was used to provide information to its customer) was derived from the customer itself. *See, Westwood Pharmaceuticals, Inc. v. Chu*, 164 AD2d 462, 464 (4th Dep't 1990). This is a material difference between the situation presented in that case and the one presented here.

Finally, and as noted above, Petitioner offers Product D, which is described as a package that includes all of the above-described products. Because Product D includes both taxable and nontaxable components, Petitioner must collect tax on its single charge for Product D. *See* 20 NYCRR § 527.1; TSB-A-10(57)S; TSB-A-03(11)S. However, because the components are available for sale separately, if the charges for each of the above-described **services** are separately stated on a customer's statement and are reasonable in relation to the entire charge, Petitioner may collect sales tax on the separately-stated charge for Product A. *See, e.g.*, TSB-A-3(11)S (noting that where sales of taxable and non-taxable items are sold for a single charge, the entire charge is subject to the tax unless charges for non-taxable items are separately stated, are reasonable in relation to the total charges, and the non-taxable items may be purchased separately).

DATED: August 31, 2016

/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

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