

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-02(13)S
Sales Tax
June 25, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S000406A

On April 6, 2000, the Department of Taxation and Finance received a Petition for Advisory Opinion from Pegasus Internet, Inc., 333 Seventh Avenue, New York, NY 10001.

The issue raised by Petitioner, Pegasus Internet, Inc., is whether its charges for Web site design and development services are subject to New York State sales tax.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner is located in New York and provides Web site design and development services to customers located both within and outside New York. Delivery of the finished Web site is accomplished by placing the site on a hosted server. On occasion, Petitioner will send its customer a copy of the Web site on a Compact Disk.

Applicable Law and Regulations

Section 1105(a) of the Tax Law imposes sales tax on the “receipts from every retail sale of tangible personal property, except as otherwise provided in this article.”

Section 1105(c) of the Tax Law imposes sales tax upon receipts from the sales, except sales for resale, of certain enumerated services.

Section 1115 of the Tax Law provides, in part:

(a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

* * *

(35) Computer system hardware used or consumed directly and predominantly in designing and developing computer software for sale or in providing the service, for sale, of designing and developing internet websites.

Section 526.6(c)(7) of the Sales and Use Tax Regulations provides:

Tangible personal property purchased for use in performing a service not subject to tax is not purchased for resale.

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Petitioner designs and develops Web sites which are placed on a hosted server. On occasion, Petitioner will send its customer a copy of the Web site on a compact disk. The Web site development provided by Petitioner to its clients, which involves designing and the actual creation of a Web site, does not constitute the sale of tangible personal property and is not included among the enumerated services that are subject to New York State and local sales and compensating use taxes. See Alan J. Goldstein/The Computer Studio, Adv Op Comm T & F, July 31, 2001, TSB-A-01(21)S. This is so, regardless of whether the Web sites are created for purposes of advertising or promotion, Internet commerce, intranets or other communications and support functions (see David H. Posmantier, Adv Op Comm T&F, June 7, 1999, TSB-A-99(31)S; K2 Design Incorporated, Adv Op Comm T&F, July 23, 1997, TSB-A-97(43)S; Pat Rolland, Adv Op Comm T&F, July 23, 1997, TSB-A-97(41)S; Ski Soft, Inc., d/b/a Ski Areas of New York Internet Publishing Services, Adv Op Comm T&F, June 25, 1997, TSB-A-97(35)S). Accordingly, Petitioner's charges to its clients for such services are not subject to sales or compensating use tax. Petitioner's charges for Web site development are not taxable whether the Web site is uploaded electronically to the World Wide Web or delivered to a client in the form of a CD-ROM or other media. When a client purchases Web site development from Petitioner and receives the Web site in the form of a CD-ROM or other media, the transfer of the medium such as a disk or tape to the client as an incident to the Web site development is not subject to tax under Section 1105(a) of the Tax Law. See EMCON, Adv Op Comm T&F, December 16, 1996, TSB-A-96(79)S respecting the transfer of items as an incident to nontaxable engineering services. CD-ROMs or other media such as disks or tapes purchased by Petitioner for use in delivering the non-taxable Web site development services to customers are not eligible for the resale exemption and are subject to sales and compensating use tax if purchased or used by Petitioner in New York. See Section 526.6(c)(7) of the Sales and Use Tax Regulations.

In the event Petitioner supplies its client with a CD-ROM pursuant to a separate contract or agreement apart from the contract or agreement for the sale of the Web site design and development service, then the charge for the CD-ROM would be taxable under Section 1105(a) of the Tax Law. See EMCON, *supra*.

The purchase by Petitioner of pre-written software for use in performing its Web site development services is subject to tax under Section 1105(a) of the Tax Law as a purchase at retail of tangible personal property. See Section 1101(b)(6) of the Tax Law. The purchase by Petitioner of custom software designed and developed to Petitioner's specifications is not taxable. Pre-written software, even though modified or enhanced to the specifications of a specific purchaser, remains pre-written software subject to tax. However, if a charge for the customization or enhancement is reasonable and separately stated on the invoice or billing statement, then the separately stated charge for the customization or enhancement is not subject to tax. See Technical Services Bureau Memorandum TSB-M-93(3)S, dated March 1, 1993, entitled State and Local Sales and Compensating Use Taxes Imposed on Certain Sales of Computer Software.

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Also, it should be noted that Section 1115(a)(35) of the Tax Law was amended, effective March 1, 2001 to provide an exemption for hardware used directly and predominantly in providing the service, for sale, of designing and developing Internet Web sites.

DATED: June 25, 2002

/s/
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NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.