

**New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division**

TSB-A-09(25)S
Sales Tax
June 18, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S080122D

On January 22, 2008, the Department of Taxation and Finance received a Petition for Advisory Opinion from Homecare Software Solutions LLC, 2000 Coney Island Avenue, Brooklyn, New York 11223. Petitioner, Homecare Software Solutions LLC, provided additional information pertaining to the Petition on May 23, 2008 and February 2, 2009.

The issues raised by Petitioner are:

1. Whether Petitioner's charges for the use of its HHA Exchange system are subject to sales tax.
2. Whether Petitioner's charges for the use of its HHA Exchange time and attendance system are subject to sales tax.

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

Petitioner has developed software specifically for use by the homecare industry. The software application, HHA Exchange, is an Internet platform providing a process management solution for contractual work in the homecare industry.

Homecare agencies that are unable to fulfill all of their contractual obligations with their clients/patients may wish to subcontract the nursing, rehab, or home health aide visits to some other homecare subcontractor agencies.

HHA Exchange provides a platform for the homecare agency to find subcontractors. Petitioner provides a centralized place for communication of patient condition between the homecare agency and subcontractor; and provides the means for the subcontractor to bill the homecare agency electronically for subcontracted homecare services.

The New York State Department of Health regulates who may provide services to patients. Petitioner's Web-based platform is a means by which certified homecare agencies and licensed subcontractor agencies can get together to provide patient services. The agencies must be certified and/or licensed by the Department of Health before being granted access to Petitioner's platform.

HHA Exchange provides a secure platform where the homecare agency can enter confidential patient information relative to the patient's prescribed therapy and care. The homecare agency can note prescribed care, scheduling, changes in care, etc. Using the system, a

homecare agency can query subcontractor agencies to see if a subcontractor agency is willing and available to provide care to the homecare agency's patient. For example the homecare agency may broadcast that it requires the services of a physical therapist to perform services for a patient for 5 days starting on Wednesday. The homecare agency can then provide the subcontractor agency that has accepted the assignment with the password code that allows the subcontractor access to the patient's confidential data. The subcontractor agency can then add its own notes to the patient's file about the care it provided and how the patient is responding to the therapy. Changes in prescribed therapy, scheduling, etc. may be noted by the homecare agency and the subcontractor agency is alerted to check the file for such changes.

Every homecare agency and subcontractor agency that wants to have access to HHA Exchange signs a license agreement with Petitioner. Petitioner provides the agencies with a username and password to access the specific areas of the HHA Exchange Web site to which their individual agreements pertain. Petitioner does not install software on the homecare agencies' computers. If an agency cancels its license agreement, Petitioner removes its user rights for the Web site. The list of subcontractors is provided to HHA Exchange by the homecare agency which does business with those subcontractors. Therefore, each homecare agency provides HHA Exchange with its own unique list of subcontractors. The subcontractors may be selected by the homecare agency on the basis of specific personnel employed by the subcontractor, a particular language in which the subcontractor's personnel are proficient, or any one of a number of other criteria in which the particular homecare agency is interested. The homecare agency may use HHA Exchange to contact a specific subcontractor; a specific group of subcontractors who possess the qualifications needed for a particular patient; or may broadcast its request for a subcontractor to its entire list.

Confidential medical information shared on the Web site can only be shared between the particular homecare agency and subcontractors with which it has an agreement to share such information. The medical information and therapy notes are entered into the system by the homecare agency and the subcontractor agency. Petitioner neither data enters nor looks at any of the medical information transferred between the homecare agency and the subcontractor agencies.

HHA Exchange is also used by subcontractors to bill the homecare agencies electronically for the homecare services performed by the subcontractor. While the information as to the services provided by the subcontractor to the homecare agency forms a basis for charges ultimately billed by the homecare agency to the patient, Petitioner's system does not provide for billing to the patient or the patient's insurer. As between the subcontractor and the homecare agency, Petitioner's system facilitates the submission of an invoice for the visit provided by the subcontractor to the homecare agency's patient. Petitioner itself does not invoice or bill the homecare agency for the healthcare services performed by the subcontractor and Petitioner neither collects nor remits payments in respect of the performance of such service.

Per the licensing agreements with Petitioner, subcontractors are required to use an electronic time and attendance system. Petitioner has a system available for use by subcontractors, although a subcontractor may use a third party's time and attendance solution, if it chooses. Petitioner's time and attendance program is a telephone based system. Each time that the subcontractor's caregiver arrives at the patient's location, the caregiver must call an electronic voice system and enter a pin number. That call indicates that the caregiver has arrived at the patient's location. When the caregiver has completed the visit and before leaving, the caregiver must call the electronic voice system again to indicate that the visit is completed. A code is also entered to verify the therapy provided. Both the homecare agency and the subcontractor agency can access the time and attendance data to verify that the prescribed therapy was performed and to verify billing for such therapy. Petitioner does not verify the accuracy of the information. The 800 phone number the caregiver uses to access the time and attendance system may belong to the subcontractor (and the call is forwarded to Petitioner's system) or an 800 phone number may be obtained by Petitioner and provided for the customer's use. Petitioner recoups its phone costs as part of the fees it charges.

Petitioner charges the homecare agency or subcontractor a fixed transaction fee for each visit that is billed through HHA Exchange without regard to the number of hours or types of services rendered during the visit. Petitioner generally charges the subcontractor for this but, where a specific agreement calls for it, may charge the homecare agency. Petitioner also charges the homecare agency a fixed fee per transaction for the homecare agency's use of HHA Exchange.

Petitioner also charges subcontractors a fixed fee for each visit where the HHA Exchange time and attendance system is used. The fee is fixed for the visit and not based on the duration or the number of calls for that visit.

Training provided by Petitioner to its customers relating to the use of the system and any modifications made to the system pursuant to an agency's request are separately charged and billed.

Applicable law and regulations

Section 1101(b) of the Tax Law provides in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(5) Sale, selling or purchase. Any 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, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

(6) Tangible personal property. Corporeal personal property of any nature...Such term shall also include pre-written computer software, whether sold as part of a package, as a separate component, or otherwise, and regardless of the medium by means of which such software is conveyed to a purchaser....

* * *

(14) Pre-written computer software. Computer software (including pre-written upgrades thereof) which is not software designed and developed by the author or other creator to the specifications of a specific purchaser. The combining of two or more pre-written computer software programs or pre-written portions thereof does not cause the combination to be other than pre-written computer software. Pre-written software also includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than such purchaser. Where a person modifies or enhances computer software of which such person is not the author or creator, such person shall be deemed to be the author or creator only of such person's modifications or enhancements. Pre-written software or a pre-written portion thereof that is modified or enhanced to any degree, where such modification or enhancement is designed and developed to the specifications of a specific purchaser, remains pre-written software; provided, however, that where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for such modification or enhancement, such modification or enhancement shall not constitute pre-written computer software.

Section 1115(o) of the Tax Law provides:

Services otherwise taxable under subdivision (c) of section eleven hundred five or under section eleven hundred ten shall be exempt from tax under this article where performed on computer software of any nature; provided, however, that where such services are provided to a customer in conjunction with the sale of tangible personal property any charge for such services shall be exempt only when such charge is reasonable and separately stated on an invoice or other statement of the price given to the purchaser.

Technical Services Bureau Memorandum entitled *State and Local Sales and Compensating Use Taxes Imposed on Certain Sales of Computer Software* dated March 1, 1993, TSB-M-93(3)S, provides, in part:

Effective September 1, 1991, State and local sales and compensating use taxes are imposed on the sale or use of prewritten computer software and certain related services.

The effect of this change in the Tax Law is to broaden the types of computer software that are subject to sales and use taxes. . . . certain software previously considered “custom” may now be considered prewritten computer software and subject to such taxes. . . .

Prewritten computer software is any computer software that is not designed and developed by the author or other creator to the specifications of a specific purchaser.

The sale of prewritten software includes any transfer of title or possession, any exchange, barter, rental, lease or license to use, including merely the right to reproduce, for consideration. Thus, a payment made by a customer on or after September 1, 1991, for a license to use, or for the rental or lease of prewritten software is subject to sales or use tax....

* * *

Prewritten software is subject to tax whether sold as part of a package or separately. Software created by combining two or more prewritten programs or portions of prewritten programs is still prewritten software subject to tax. The medium by which the software is transferred to the purchaser has no effect on the software's taxability. Thus, prewritten software is taxable whether sold, for example, on a disk, tape or by electronic transmission over telephone lines.

Prewritten software, even though modified or enhanced to the specifications of a specific purchaser, remains prewritten software subject to tax. However, if a charge for the custom modification or enhancement is reasonable and separately stated on the invoice or billing statement, then the separately stated charge for the custom modification or enhancement is not subject to tax.

Example 1. A software developer creates an accounting system using prewritten software modules for general ledger, accounts receivable, accounts payable, payroll, inventory management, etc. The developer may also sell the modules separately or bundled in other packages. Even though the modules may be modified to the specific requirements of the client's business, the sale of the modules is subject to sales or use tax as prewritten software. An additional charge for modification or “custom” programming

by the developer would not be subject to sales or use tax if the developer's charge for the modification is reasonable and is separately stated on the billing statement.

* * *

Customer Support and Related Services

Services taxable under section 1105(c) of the Tax Law are exempt from tax under section 1115(o) of the Tax Law where performed on any computer software. However, where such services to be performed on software are sold in conjunction with the sale of tangible personal property, such as prewritten software, the charge for such services is exempt only if it is reasonable and separately stated on the invoice or billing statement given to the customer.

Thus, charges for customer (user) support or for information services provided by a vendor to a customer, either in person or by some type of telecommunications arrangement (e.g., telephone, modem, facsimile machine, etc.), in the nature of training, consulting, instructing or other diagnostic or troubleshooting services related to prewritten software are exempt from sales and use taxes where the charges are reasonable and separately stated. Charges for the service of installing, repairing, maintaining or servicing prewritten software are also exempt from sales and use taxes where the charges are reasonable and separately stated on the invoice. Of course, any charges for the above described services sold in connection with custom software are exempt from tax.

Opinion

Petitioner has developed software specifically for use by home health care agencies and specified health care providers/subcontractors of such agencies. Using HHA Exchange, a homecare agency can solicit the agency's designated subcontractors to provide services on behalf of the homecare agency to the agency's patients (clients). All of the information as to the specific scheduling needs of the homecare agency (e.g., it needs a Spanish speaking physical therapist for 5 weeks duration in the Bronx commencing on a particular date) is managed by the homecare agency. The confidential medical information regarding the patient's diagnosis, prescribed therapy, observations of the care provider, etc. is managed by the homecare agency and the subcontractor. Petitioner does not enter or manage any of the information exchanged between the homecare agency and the subcontractor. Rather, Petitioner merely provides the secure platform and software that allow the homecare agency and subcontractor to schedule and manage the prescribed care provided to the homecare agency's patient. If the homecare agency and the subcontractor do not have their own time and attendance program, the subcontractors may contract to utilize Petitioner's program. All the information within both HHA Exchange and the time and attendance system is entered, managed, and extracted by Petitioner's clients. Petitioner does not provide, manage, correct, or verify any of the information entered and managed by the homecare agencies and the subcontractors. Though HHA Exchange may be used

by subcontractors to create the invoices for services rendered to the homecare agencies, Petitioner itself performs no billing or collection activities.

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 a purchaser.” Section 1101(b)(6) of the Tax Law. The sale of prewritten computer software is subject to tax as the sale of tangible personal property. See sections 1101(b)(6) and 1105(a) of the Tax Law. *Sale* is defined as “Any 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.” Section 1101(b)(5) of the Tax Law. Section 526.7(e) of the Sales and Use Tax Regulations 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.” Section 526.7(e)(4) further provides that, with respect to a “license to use,” a transfer of possession has occurred if there is a transfer of 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. HHA Exchange and the time and attendance system are Web based software applications. The accessing of HHA Exchange and the time and attendance system by Petitioner’s customers constitutes a transfer of possession of the software, because the customer gains constructive possession of the software, and gains the “right to use, or control or direct the use of,” the software. The transfer of Petitioner's software to its customers in New York is subject to sales tax. See *Adobe Systems, Inc* Adv Op Comm T&F November 24, 2008, TSB-A-08(62)S and *Josh Rosoff*, Adv Op Comm T&F, February 2, 2009, TSB-A-09(8)S.

The situs of the sale for purposes of determining the proper incidence of tax is the location associated with the license to use (i.e., the locations of the customers that use the software). If the locations where the customers (the homecare agencies and subcontractors) will use the software are located both in and out of New York State, Petitioner should collect tax based on the portion of the receipts attributable to the locations in New York. The portion of Petitioner’s receipts from sales of software that are used by the purchaser outside of New York are not subject to New York State and local sales and use taxes. The determination of the proper local tax rate and jurisdiction is also based on the location associated with the license to use.

Petitioner’s separate charges for training and for custom modifications to its software, where the charges for the training and modifications are reasonable and separately stated on the invoice or other statement given to the purchaser, are not subject to sales tax. See section 1101(b)(14) of the Tax Law, and TSB-M-93(3)S, *supra*.

TSB-A-09(25)S
Sales Tax
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These conclusions represent the current position of the Department. To the extent *Dataline, Inc.*, Adv Op Comm T & F, June 30, 2004, TSB-A-04(17)S, or any other advice from the Department suggests a contrary conclusion, it does not represent current policy.

DATED: June 18, 2009

/s/
Jonathan Pessen
Director of Advisory Opinions
Office of 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.