

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

TSB-A-09(33)S
Sales Tax
August 13, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S080930C

Petitioner [REDACTED], requests an Advisory Opinion about whether receipts from the sale of its logistics management products are subject to New York State and local sales taxes. We conclude Petitioner's On-Demand TMS System (TMS) is prewritten computer software, and that the receipts from the sale of this product are subject to State and local sales tax. Petitioner's managed services are not subject to sales tax. The implementation services and training services are not subject to tax if they are sold for a reasonable, separately-stated charge. Finally, reimbursements for travel expenses are subject to sales tax when the travel expenses are incurred in conjunction with the sale of a taxable product.

Facts

Petitioner offers the following logistics management support products to its customers:

- On-Demand TMS System (TMS) – TMS consists of software that resides on Petitioner's servers outside New York State and is accessed by customers over the Internet. The software is not installed on customers' computer systems, and customers are not required to purchase any computer hardware in order to access the software. Customers log in to TMS in order to manage their transportation functions. TMS provides customers with daily planning, execution, and settlement functions related to the management of customers' transportation and delivery operations. TMS also provides customers with the ability to view their complete supply chain and private transportation systems via the Internet. In order to provide these functions, Petitioner maintains a database of shared and updated information from customers. Although TMS is designed to function in an automated manner, customers have the ability to input data and make entries into the system. The information provided by the customer is not incorporated into any report delivered or provided to a third party.
- Implementation services – Petitioner's consultants provide technical advice and integration specifications to allow customers' computer systems to interface properly with Petitioner's computer systems. Implementation services are used for both TMS and Petitioner's Managed Services, described below, and are necessary to ensure proper communication between Petitioner's and customers' computer systems.
- Training Services – Petitioner's employees train customers' employees on the use of TMS either remotely or at the customer's location.
- Managed Services – Customers outsource selected logistics management functions to Petitioner. Customers submit data to Petitioner via the Internet. After receiving the data, all daily operational tasks of the selected logistics functions are performed by Petitioner's staff using Petitioner's resources.

Each of the services described above are separately accounted for in Petitioner's books and records and separately stated in contracts and invoices provided to its customers.

Petitioner asks the following questions:

1. Are Petitioner's products described above subject to New York State and local sales tax?
2. If the products are subject to sales tax, what is the situs of the transaction for sales tax purposes?
3. Are reimbursements paid to Petitioner by its customers for travel expenses subject to sales tax?

Analysis

Petitioner's charges for use of its "On-Demand TMS System" are receipts from the sale of prewritten computer software. TMS consists of software that resides on Petitioner's server, which its customers access via the Internet. Petitioner refers to itself as an "application service provider," which it describes as a business organization that offers software application capabilities from centralized data centers, usually through the Internet. 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.

The accessing of Petitioner's software by Petitioner's customers 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. Although Petitioner characterizes its product as a "service," and contends that it does not sell software to its customers, this characterization is not controlling. Petitioner's customers obtain the right to access the software and input data in order to manage their transportation functions. This is true even if no "copy" of the software is transferred to the subscriber. Accordingly, the sale of a license to use Petitioner's software to a subscriber in New York is subject to State and local sales tax. The situs of the sale 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* TSB-A-03(5)S.

We further conclude that Petitioner's Managed Services are not subject to sales tax. The Managed Services involve outsourcing selected portions of a customer's logistics management function to Petitioner. Petitioner uses its own personnel and resources to provide transportation management to its customers. Customers that purchase Managed Services have no ability to manipulate Petitioner's software. The customer does not obtain possession of the software, constructive or otherwise, and does not obtain the right

to control or direct the use of the software. Accordingly, the sale of Managed Services does not constitute the sale of prewritten computer software. Moreover, transportation management services are not among the enumerated services subject to sales tax. *See* Tax Law §1105(c).

Petitioner's implementation and training services, by themselves, are not among the enumerated services subject to sales tax. If these services are sold with Petitioner's TMS product 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 TMS product, the charges for implementation and training services are considered to be part of the receipt from the sale of prewritten computer software and are subject to sales tax. *See* Tax Law §1115(o); *State and Local Sales and Compensating Use Taxes Imposed on Certain Sales of Computer Software*, TSB-M-93(3)S. When the implementation services are provided with Managed Services, the charge is part of the receipt for an unenumerated service and is not subject to sales tax.

Petitioner's travel expense reimbursement may be subject to sales tax. "Receipt" for sales tax purposes is the sale price of any property and the charge for any taxable service, "without any deduction for expenses . . . regardless of whether such charges are separately stated." Tax Law §1101(b)(3). Petitioner's travel expenses are expenses it incurs in providing services to its customers. Therefore, they are within the definition of "receipt," and are subject to sales tax to the extent that the related services or property are subject to sales tax. *See Penfold v. State Tax Comm'n, supra*; Sales and Use Tax Regulations §526.5(e). If the services for which Petitioner's consultants are required to travel are not taxable, the reimbursement for the related travel expenses is not taxable. *See, e.g.,* TSB-A-01(13)S; TSB-A-97(44)S. For example, if Petitioner charges its customer for travel expenses incurred in connection with providing Managed Services, the travel expenses are part of the receipt for an unenumerated service and are not subject to sales tax. Similarly, if Petitioner charges customers for travel expenses incurred in connection with training or implementation services, and the charge for those services is separately stated and reasonable in relation to the overall charge, the travel expenses are not subject to sales tax. However, if Petitioner's charges for training or implementation services are not separately stated and reasonable in relation to the charges for prewritten computer software, the travel expenses incurred in connection with the training and implementation services are included in the receipt for the sale of prewritten computer software and are therefore subject to sales tax.

DATED: August 13, 2009

/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.