New York State Department of Taxation and Finance

Office of Tax Policy Analysis
Technical Services Division

TSB-A-09(3)S
Sales Tax
January 29, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION   PETITION NO. S070626B

On June 26, 2007, the Department of Taxation and Finance received a Petition for Advisory Opinion from SkillSoft Corporation, 107 Northeastern Blvd., Nashua, NH 03062. Petitioner, SkillSoft Corporation, furnished additional information with respect to the Petition on January 3, 2008.

The issues raised by Petitioner are:

1. Whether Petitioner's online computer-based training materials ("products") provided to customers in New York are subject to New York State sales tax.

2. Whether Petitioner's products used by customer's employees from locations outside New York State are subject to New York State sales tax.

3. Whether there would be an appropriate method of allocation, and if so, what documentation should be maintained by Petitioner for products accessed by customers' employees who are located outside New York State.

4. Whether Petitioner's Referenceware® product, as described below, is subject to New York State sales tax.

5. Whether Petitioner's video-based training programs, as described below, are subject to New York State sales tax.

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

Petitioner's corporate headquarters are located in Nashua, New Hampshire. Petitioner has no business location in the state of New York. Petitioner is a provider of e-learning content and technology products for business and information technology (IT) professionals. Petitioner's IT skills courses give end-users the ability to gain the technical knowledge needed to perform their jobs and prepare for IT professional certifications. Petitioner provides more than 1,600 course titles encompassing software development, operating systems, and server technologies. Petitioner's IT courses also provide preparation for more than 75 current IT professional certification exams, although the exams are not included as part of Petitioner's courses. Petitioner's IT courses feature visual design, interactivity, and reinforcement of learning transfer via frequent practice questions, simulations, mentored (Mentoring Service) and self-assessed exercises. Mentoring Service enables a user to ask questions relating to specific IT courses or the general subject matter of those courses and receive responses from experts in the field of information technology.

Petitioner's business skills courses focus on the skills and knowledge that are relevant to various general competencies and functional responsibilities in a business organization setting. Petitioner provides more than 2,200 course titles and simulations encompassing professional effectiveness, management/leadership, project management, business strategy/operations, finance, and human resources. The business skills courses feature visual design, interactivity, reinforcement of learning transfer via case studies and role play exercises, and online job and learning aids.

In addition to the above referenced products, Petitioner offers a core of unabridged Referenceware® documentation that provides online subscribers with the ability to perform searches and pinpoint information needed for on-the-job performance support and problem solving. Referenceware® is delivered via a Web-based platform that enables subscribers to search, browse, and read.

In some cases Petitioner may also provide both live and asynchronous video-based training that includes interactive programs (Virtual Classroom) with CEOs and thought leaders. Petitioner does this by providing interactive and live training sessions with business authors, experts, and CEOs. Virtual Classroom may deliver a class to a live virtual audience, interacting with participants through chat, polling, audio, desktop sharing, and quizzes.

Petitioner's product offers a Web-based training module platform that develops and markets a library of technological based education products. The Web-based platform is provided by means of Extranet Hosting Services. This is a method of delivering access to courses whereby Petitioner hosts the course on its server and customers obtain access to the courses on Petitioner's servers through an Internet connection. In addition to the delivery of courses, a proprietary Web-based e-learning application software platform is provided through Extranet Hosting Services. This application is designed to improve the processes for business learning as well as to track, launch, and report usage of Petitioner's courseware delivered to customers. Petitioner also offers course customization allowing the customer to combine topics from more than one course and to import a customer's proprietary information into its course.

Petitioner's products are made available to customers through a Master License Agreement ("the Agreement"). Terms of the Agreement provide the following pertinent details:

1. License terms provide for the granting to customers of a nonexclusive, nontransferable library license (without rights to sublicense), for a set license term, to use and to allow the applicable authorized audience to access and use Petitioner's products/courseware (as described in the business description) for internal training purposes only. Authorized audience means the number of customer employees and affiliate employees ("licensed users") for which the customer has designated and paid the required license fees. Authorized audience members are assigned log-in identifications to access Petitioner's products.

2. All of Petitioner's products are the property of Petitioner and/or its third party publishers and/or licensors and are protected by copyright and other laws relating to proprietary rights. The terms of the agreement do not convey any ownership rights of any kind in or to Petitioner's property to Petitioner's customers. Petitioner and its publishers and licensors have and retain all right, title and interest in and to Petitioner's property.

3. Customers may make copies of Petitioner's products licensed by the customer in CD-ROM format for deployment and backup purposes as reasonably necessary, provided that customers reproduce all copyright and other proprietary notices. Upon expiration or termination of the Agreement or any exchange or update of Petitioner's products, customers must delete any copies of Petitioner's products from its computers or servers and destroy all hard copies of the same.

4. Customers may not: (a) publish, display, distribute, sell, sublicense, transfer, rent, lease, broadcast, loan, disclose or otherwise make available Petitioner's property, or any part thereof, to any third party; (b) reverse engineer, disassemble or otherwise attempt to derive source code from Petitioner's product; (c) modify, translate, adapt, alter or create derivative works based on Petitioner's product or any part thereof; (d) remove any proprietary notice labels, or trademarks or service marks from Petitioner's property; (e) merge Petitioner's property, or any component thereof, with another program; (f) have any right to any source code for Petitioner's product; (g) permit any party not specifically licensed herein to use Petitioner's property; (h) use download functionality enhancement tools for purposes contrary to those authorized in the Agreement.

5. The Agreement term may consist of a one year term, with provisions for renewal at expiration, or a multi-year license term. Either the customer or Petitioner may terminate the Agreement by written notice to the other party if either party commits a material breach which it fails to cure within thirty days of written notice of such breach or which by its nature cannot be cured within the thirty day period.

6. Customers agree to maintain during the license term and for one year after termination of the Agreement, records of all use and copying of Petitioner's product and assignment of all log-in identifications used to access Petitioner's product if distributed by the customer.

7. If Petitioner's products licensed pursuant to the Agreement are deployed outside of Petitioner's learner management systems, the customer agrees to submit a monthly report to Petitioner at the end of each calendar month (monthly usage report).

Petitioner is registered to collect and remit sales tax in New York State.

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. (Emphasis added)

(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 1105 of the Tax Law provides, in part:

Imposition of sales tax. On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax . . . upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

* * *

(c) The receipts from every sale, except for resale, of the following services:

(1) 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, but excluding the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons, . . .

* * *

(9)(i) The furnishing or provision of an entertainment service or of an information service (but not an information service subject to tax under paragraph one of this subdivision), which is furnished, provided, or delivered by means of telephony or telegraphy or telephone or telegraph service (whether intrastate or interstate) of whatever nature, such as entertainment or information services provided through 800 or 900 numbers or mass announcement services or interactive information network services. Provided, however, that in no event (i) shall the furnishing or provision of an information service be taxed under this paragraph unless it would otherwise be subject to taxation under paragraph one of this subdivision if it were furnished by printed . . . matter or by duplicating written or printed matter in any other manner. . . .

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 the purchaser.

Section 526.7 of the Sales and Use Tax Regulations provides, in part:

(a) *Definition*. (1) The words *sale, selling* or *purchase* mean any transaction in which there is a transfer of title or possession, or both, of tangible personal property for a consideration.

(2) Among the transactions included in the words *sale, selling* or *purchase* are exchanges, barters, rentals, leases or licenses to use or consume tangible personal property.

* * *

(b) *Consideration*. The term *consideration* includes monetary consideration, exchange, barter, the rendering of any service, or any agreement therefor. *Monetary consideration* includes assumption of liabilities, fees, rentals, royalties or any other charge that a purchaser, lessee or licensee is required to pay.

(c) *Rentals, leases, licenses to use*. (1) The terms *rental, lease and license to use* refer to all transactions in which there is a transfer for a consideration of possession of tangible personal property without a transfer of title to the property. Whether a transaction is a "sale" or a "rental, lease or license to use" shall be determined in accordance with the provisions of the agreement. . . .

* * *

(e) *Transfer of possession.* (1) Except as otherwise provided in paragraph (3) of this subdivision, 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.

* * *

(4) Transfer of possession with respect to a rental, lease or license to use, means that one of the following attributes of property ownership has been transferred:

(i) custody or possession of the tangible personal property, actual or constructive;

(ii) the right to custody or possession of the tangible personal property;

(iii) the right to use, or control or direct the use of, tangible personal property.

Technical Services Bureau Memorandum, *State and Local Sales and Compensating Use Taxes Imposed on Certain Sales of Computer Software*, TSB-M-93(3)S, March 1, 1993, pertaining to the taxability of computer software and certain related services 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.

*   *   *

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. . . .

*   *   *

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.

*   *   *

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.

*   *   *

Programming and systems analysis are also exempt services. However, where these services are rendered in conjunction with the sale of *prewritten* software, the charge for the service is exempt from tax only when the charge for the service is reasonable and separately stated on the invoice or billing statement given to the customer.

Opinion

Issue 1

Petitioner's Web-based training module provided by means of Extranet Hosting Services provides e-learning content and technology products for business and information technology professionals. Pursuant to a Master Lease Agreement (Agreement) for a set license fee and term, a customer may access Petitioner's products on Petitioner's server via the Internet. Petitioner's application is designed to improve the processes for business learning as well as to track, launch and report usage of Petitioner's courses delivered to customers.

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) of the Sales and Use Tax Regulations 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.

The accessing of Petitioner's software 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. Petitioner provides training materials and the ability to track the customer's use of the materials. All tasks relating to the use of the training materials and tracking are provided through the customer's use of Petitioner's software modules. This is true even if no "copy" of the software is transferred to the customer. Accordingly, the license fee received by Petitioner in this instance for the use of its Web-based training module by a customer in New York is subject to State and local sales tax, provided that the training module is prewritten software.

Prewritten software is software that is not designed and developed by the author or other creator to the specifications of a specific purchaser. See section 1101(b)(14) of the Tax Law. Since Petitioner's software products in this case are designed for sale to more than one customer, Petitioner's software is prewritten software. Therefore, Petitioner's sales of licenses to use its software are subject to sales and use tax under section 1105(a) of the Tax Law. The lease or license of such prewritten software will not be subject to tax if the purchaser is an exempt entity under section 1116(a) of the Tax Law.

While certain of Petitioner's e-learning courses give students the option to contact experts in the field (Mentoring Service), this access to technical information does not appear sufficient to transform Petitioner's sale of software into the provision of an educational service.

Petitioner also offers course customization services which allow the customer to combine topics from more than one course as well as import the customer's proprietary information into the course. The combining of two or more prewritten software programs or prewritten portions of such programs does not cause the combination to be other than prewritten software. See section 1101(b)(14) of the Tax Law. Petitioner's receipts, therefore, for the prewritten course modules remain subject to sales tax. However, Petitioner's charges to customers for providing custom course development, presumably include Petitioner's cost to modify its prewritten software. Where there is a reasonable, separately stated charge for custom modification of the modules, such modification would not constitute prewritten software and would not be subject to tax when performed for and sold to the customer who initially requested and purchased such modification. See section 1101(b)(14) of the Tax Law and Technical Services Bureau Memorandum, *State and Local Sales and Compensating Use Taxes Imposed on Certain Sales of Computer Software*, March 1, 1993, TSB-M-93(3)S.

Issues 2,3

The situs of the sale of software for purposes of determining the proper incidence of tax is the location associated with the license to use (i.e., the location of the customer's employees that use the software). If the customer'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. The portion of Petitioner's receipts from licensing its software, attributable to licenses used by the purchaser outside 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 for a sale of software is also based on the location associated with the license to use the software.

A seller's bill of lading or other shipping document that shows the out of state delivery of goods and services is usually considered sufficient documentation of the nontaxablity of the sales. In the present case it appears Petitioner's Agreement requires the customer to maintain records of the use of Petitioner's software and assignments of all log-in identifications used to access the software, and to submit a monthly usage report. Petitioner may require the customer

to report all of the customer locations where the software is used. These reports are relevant evidence in regard to the question of how Petitioner should allocate its receipts for the sale of its software between in-state and out-of-state sales. Such a report by the customer providing Petitioner the specific locations where the customer uses the software would, absent a showing of fraud or knowledge on the part of Petitioner that the contents of the report are untrue, form an acceptable basis for Petitioner to allocate its charges for the use of its software between New York use and out-of-state uses. The report must contain a statement by the customer specifying the locations including street addresses for any New York locations. The report should acknowledge that it is being furnished for the purpose of allowing Petitioner to determine the appropriate amount of New York State and local sales and use taxes imposed and to be collected from the customer.

Issue 4

Petitioner offers a core of unabridged Referenceware® documentation that provides online subscribers the ability to perform searches to pinpoint information needed for on-the-job performance support and problem solving. Referenceware® is delivered via a Web-based platform that enables subscribers to browse, read and search with an Internet connection. Section 1105(c)(1) of the Tax Law imposes sales tax on the furnishing of information by printed, mimeographed matter or by duplicating written or printed matter in any other manner, including collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons. Section 1105(c)(9) of the Tax Law imposes sales tax on the furnishing of information by means of telephony and telegraphy. However, tax is not due on the receipts from the sale of information that is personal and individual in nature and is not or may not be substantially incorporated into reports furnished to others.

Where the data provided in Petitioner's digitized collections (Referenceware®) is gleaned from general sources, and data that is available to any one customer is available to others, the information is not personal or individual and does not qualify for the exclusion in section 1105(c)(1) of the Tax Law. See *Matter of Twin Coast Newspapers, Inc. v State Tax Commn*, 101 AD2d 977, appeal dismissed 64 NY2d 874; *Matter of Towne-Oller and Associates, Inc. v State Tax Commn.*, 120 AD2d 873. Accordingly, it appears that receipts from Petitioner's sales of Referenceware® over the Internet are subject to sales tax when delivered to locations within New York State. See *Tower Innovative Learning Solutions, Inc.*, Adv Op Comm T&F, February 2, 2006, TSB-A-06(5)S.

Issue 5

In some instances Petitioner provides both live and asynchronous video-based training that includes a Virtual Classroom with interactive and live training sessions delivered by business authors, experts and CEOs to a live virtual audience, interacting with participants through chat, polling, audio, desktop sharing, and quizzes. Under these circumstances it appears that Petitioner may be providing a training class led by an instructor. Such training services are

considered to be educational services, and are not included among the enumerated services subject to sales and use tax under section 1105(c) of the Tax Law. Reasonable separately stated charges for such an educational service are not subject to sales tax.

DATED: January 29, 2009   /s/
                                                                  Jonathan Pessen
                                                                  Tax Regulations Specialist IV
                                                                  Taxpayer Guidance Division

        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.