

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

TSB-A-09(44)S
Sales Tax
September 24, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S040628B

On June 28, 2004, the Department of Taxation and Finance received a Petition for Advisory Opinion from Jones Day, 2727 North Harwood Street, Dallas, Texas 75201-1515.

The issues raised by Petitioner, Jones Day, on behalf of an unnamed client are:

1. Whether fees charged for banner advertisements on a Web site are subject to sales tax.
2. Whether monthly and non-recurring, one time fees for advertising information carried on a Web site are subject to sales tax.
3. Whether monthly and non-recurring one time advertising fees charged to apartment, condominium, and community real estate leasing agents and owner lessors are subject to sales tax.
4. Whether non-recurring separately billed setup fees charged to create or change the customer's listing on the service provider's own Web site are subject to sales tax.
5. Whether fees charged to support customer's Web pages are subject to sales tax.
6. Whether fees charged by an application service provider for services that add functionality to a Web site owned by the customer and branded in the customer's name are subject to sales tax when provided and hosted by the application service provider on its servers located outside New York State.

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

Web listing fees

For a fee, Petitioner's client ("Client") offers a wide range of services over the Internet to its customers ("Advertisers"), each with its own benefits and levels of service that are described below. Client does not own or lease tangible personal property or real property in New York. All of Client's offices, equipment and computer servers are located outside of New York.

Advertiser, who is generally a retailer of tangible personal property, engages Client to place advertisements on Client's Web site that will direct a potential customer ("Buyer") to Advertiser. The advertisements are accomplished through banner ads, where Buyer clicks on the advertisement and is directed to the Advertiser's Web site, or Buyer can search through Client's

catalogue database of available inventory from all Advertisers to find the item Buyer is seeking. If a match is found, Buyer is given a link which either provides information for Buyer to contact Advertiser directly by email or telephone, or sends Buyer to Advertiser's Web site for further information.

Advertisers enter into their own computer system and process information about their inventory which is automatically transferred to Client's web server each night. Client parses the data so a Buyer can search Client's database. Different levels of service are offered by Client. Larger Advertisers pay a monthly fee that allows an Advertiser to add information to Client's database and web pages, including specific or generic pictures or specific details about as much inventory as the Advertiser desires. A second, less expensive option limits the maximum number of items that may be placed on Client's database and web pages. This reduced fee remains constant whether Advertiser uses all of its available advertising slots or not.

Client's web site contains solely the advertising message for the goods advertised and redirects Buyer to the appropriate web page maintained by Advertiser or provides Buyer with contact information to reach Advertiser directly. Client's web site does not have any purchase or shopping cart functionality. Client does not broker any sale of tangible personal property. Transactions between Buyer and Advertiser are handled by Buyer and Advertiser, either on Advertiser's Web site, or by telephone.

Client also allows individuals ("One Time or Private Party Advertisers") to place information about a single item of tangible personal property for sale on Client's web pages. This information is included in Client's database and can be searched by Buyer as described above. In most instances, rather than directing Buyer to a Web site, Buyer receives information to contact the seller directly.

In addition to retailers of tangible personal property, Client offers banner ads and a catalogue database to multiple residential property leasing agents and owner lessors ("Agents and Owners"). This database can be searched by a potential tenant ("Tenant") by type of property, location, and basic amenities. Tenant is given a list of matching properties and when each is selected Tenant receives contact information, property information, pictures, maps and sometimes a virtual tour of the property and amenities. There is usually an email link for Tenant to send an information request directly to Agent or Owner as well as links to Agent's or Owner's Web site or other properties managed by Agent or Owner.

The Agent or Owner dictates the content of the information presented about the properties. In most cases, but not all, Client sends a photographer to the property to take the pictures that will be used on the property listing. In some cases, there is no separate charge or increased fee to have Client take these pictures, although in other cases there will be a minor, separately stated setup fee.

The different service level fees are tied directly to how prominently the property appears on Client's web site after a search, the extent of information carried about the property, and the number of different properties advertised by the same Agent or Owner. Higher monthly fees entitle the Agent's or Owner's property to appear higher in the list of properties presented to the potential Tenant. Higher fees also entitle Agent or Owner to more pictures or additional functionality (such as virtual tours) on the advertised listing.

Individuals seeking to lease their property (and occasionally leasing agents who do not wish to place ongoing advertisements) may also place a one time advertisement on Client's web site for a non-recurring fee. Such advertisers provide their own pictures of the property. While the information provided about the property is the same as the information provided by Agents or Owners, certain aspects of these one time advertisements are not searchable and the advertisements are not as prominently listed on search results. Therefore, these advertisers pay a reduced fee.

Customer support fees

Client provides customers with access to services via the Internet such as a sales and contact database which is made accessible through a web browser. The database can be used by the customer to provide post-sale support and allows the customer to send further targeted advertising to consumers based on their purchase interest. In other cases, purchasers of customers' products are given access to a specialized web database containing specific information about their purchase, including warranty and service information, based on the specific serial number or other identification for the specific item. Client's customers pay Client to make this service available to their purchasers and may even subsequently charge purchasers for the use of the service. These databases contain proprietary information gathered by Client from its customers relating to the customer's sales. The information gathered from one of Client's customers is not made available to other customers.

ASP fees for web site functionality

For a quarterly fee, Client provides a product that adds functionality to a third-party advertiser's web site. This product is hosted on the Client's web servers through an Application Service Provider interface. All functionality is controlled and maintained on Client's servers; however, the third-party's web site may or may not be hosted on servers in New York.

The third-party advertiser's web site presents a searchable database of real estate listings, branded in the third-party's name, even though all program functions are actually performed on Client's servers. This enhanced functionality includes the ability for the third-party's customers to enter one time or private advertising information. The third-party's customer inputs a credit card to pay for the listing. The credit card is processed through Client's credit card service merchant account. However, all revenues are returned to the third party after subtracting Client's cost in processing the credit card transaction.

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. . . .

(7) Use. The exercise of any right or power over tangible personal property or over any of the services which are subject to tax under section eleven hundred ten of this article or pursuant to the authority of article twenty-nine of this chapter, by the purchaser thereof . . . or any consumption of such property or of any such service subject to tax under such section eleven hundred ten or pursuant to the authority of such article twenty-nine. . . .

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

Section 1105(c) of the Tax Law imposes tax on the receipts from every sale, except for resale, of certain enumerated services, including, in part, 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, and excluding the services of advertising or other agents, or other persons acting in a representative capacity, . . .

* * *

(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, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner nor (ii) shall the provision of cable television service to customers be taxed under this paragraph.

Section 525.2(a)(3) of the Sales and Use Tax Regulations provides:

Except as specifically provided otherwise, the sale tax is a “destination tax.” The point of delivery or point at which possession is transferred by the vendor to the purchaser, or the purchaser’s designee, controls both the tax incidence and the tax rate.

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, barter, rentals, leases or licenses to use or consume tangible personal property.

* * *

(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 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* provides, in part:

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 . . . for a license to use, or for the rental or lease of prewritten software is subject to sales or use tax

Software that was originally designed and developed to the specifications of a specific purchaser (i.e., "custom" software) loses its identity as such and becomes prewritten software, subject to tax, if and when it is sold to someone other than the person for whom it was specifically designed and developed. . . .

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.

* * *

Sale of Software Upgrades

Generally, the sale of a revision or upgrade of prewritten software is subject to tax as the sale of prewritten software. If, however, the software upgrade is designed and developed to the specifications of a specific purchaser, its sale to that specific purchaser would be exempt as custom software.

* * *

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.

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.

Example 2: A computer vendor sells an "off-the-shelf" software program to a customer. The vendor charges additional fees for installing the software, on-site training, and diagnostic and trouble-shooting customer support. The sale of the software is taxable since it is prewritten. However, the charges for installation,

on-site training and customer support services are not taxable if reasonable and separately stated on an invoice or billing statement given to the customer.

Software Maintenance Agreements

If a software maintenance agreement provides for the sale of both taxable elements (e.g., prewritten software upgrades) and nontaxable elements (e.g., training, consulting, diagnostic and troubleshooting support, etc.), the charge for the entire maintenance agreement is subject to tax unless the charge for the nontaxable elements is reasonable and separately stated in the maintenance agreement and separately billed on the invoice or other document of sale given to the purchaser.

Example 3: A vendor of computer systems sells a maintenance agreement to provide on-site training, repairs, software upgrades, and customer support by telephone for a customer's computer system (hardware and prewritten software). The portion of the cost of the agreement allocated to prewritten software upgrades and for repair or maintenance of the computer system hardware is taxable. However, the portion of the cost allocated for on-site training, repairs and maintenance of the prewritten software and telephone support is exempt if the cost is reasonable and separately stated in the written agreement and the customer invoice.

Opinion

Web listing fees

Petitioner's Client offers a wide range of advertising services over the Internet to its customers, each with its own benefits and levels of service. The advertisers who engage Client include: vendors of tangible personal property (Advertisers), leasing agents of multiple residential properties and lessors of residential properties (Agents and Owners), and individuals wishing to advertise items of tangible personal property for sale or residential properties available for rental or lease.

On Client's web site, a Buyer or Tenant clicks on banner advertisements and is directed to the Advertiser's web site, or Buyer or Tenant can search through Client's catalogue database of available inventory of tangible personal property or residential properties from all Advertisers to find what the Buyer or Tenant is seeking.

Client's web site contains solely the advertising message for the goods and properties advertised, and redirects Buyer to the appropriate web page maintained by Advertiser, Agent, Owner or individual. Client's web site also provides Buyer or Tenant with contact information to reach Advertiser, Agent, Owner or individual directly. Client's web site does not have any purchase or shopping cart functionality. Client does not broker any sales of tangible personal

property. Transactions between Buyer or Tenant and Advertiser, Agent, Owner or individual are handled by the parties, either on their web site, or by email or telephone.

Services are not subject to sales tax unless they are specifically enumerated under section 1105(c) of the Tax Law. Advertising services are not among the services subject to sales tax. Section 1105(c)(1) of the Tax Law specifically excludes advertising from sales tax. Therefore, with respect to Issues 1, 2, and 3 Client's charges to its Advertisers, Agents, Owners or individuals for advertising services are not subject to sales tax. With respect to Issue 4, the separately stated setup fee charged when Client sends a photographer to a property to take the pictures that will be used on the property listing is also not taxable. However, were copies of such photographs provided the customer, other than exclusively in electronic form, the setup charges for the photograph may be subject to tax under Tax Law §1105(a) as charges for the sale of tangible personal property.

Customer support fees

With respect to Issue 5, Client charges customer support fees when Client provides customers with access, via the Internet, to sales and contact databases which are used by the customer to provide post-sale support and allow the customer to send further targeted advertising to consumers based on their purchase interest. Client also charges customers for providing access for consumers to a specialized web database containing specific information about their purchases. These databases contain proprietary information gathered by Client from its customers relating to the customer's sales. The information gathered from one of Client's customers is not made available to other customers.

Sales tax is imposed on the service of furnishing information to purchasers, regardless of whether the information is furnished in a printed report or electronically. There is an exclusion from tax for 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. *See* Tax Law §§1105(c)(1) and 1105(c)(9). Client's database products have some aspects of an information service. Provided that the information furnished to a customer consists of proprietary sales information gathered by Client from the customer and is not made available to other customers, these services appear to be personal or individual in nature and not otherwise offered for sale and furnished to other persons. In that case, these database products would appear to constitute nontaxable information services. Alternatively, if Client adds information to a customer's data that is derived from a common database (e.g., warranty information from a third-party source for products sold at retail by the customer) Client's database product may be subject to the tax on information services pursuant to sections 1105(c)(1) and 1105(c)(9) of the Tax Law. Since the point of delivery determines taxability, only receipts attributable to Client's customers who receive the information from Client in New York State would be subject to sales tax. *See* Sales and Use Tax Regulation section 525.2(a)(3). When the information is delivered by electronic means to customers both within and without New York, sales tax should be allocated between

the two. *See KPMG LLP*, Adv Op Comm T&F, January 31, 2003, TSB-A-03(5)S; *Paul R. Comeau*, Adv Op Comm T&F, August 20, 1990, TSB-A-90(43)S.

In addition, Client's sales of information services to customers exclusively for resale are not subject to tax. Client would not be required to collect sales tax on any portion of the information services that were exempt, provided, the charges for the exempt portion were separately stated and reasonable from the charges for the taxable items. Otherwise, the entire receipts for the services would be subject to tax. *See Bernstein Law Firm, PLLC*, Adv Op Comm T&F, September 22, 2004, TSB-A-04(23)S.

Alternatively, some of Client's database products may constitute prewritten computer software. The sale or license of prewritten software to Client's customers may be subject to sales tax as discussed below.

ASP fees

With respect to Issue 6, Client charges ASP Fees for web site functionality to third-party web sites. This functionality is hosted on the Client's web servers through an Application Service Provider interface. All functionality is controlled and maintained on Client's servers; however, the third-party's Web site may or may not be hosted on servers in New York.

Client's ASP fees for web site functionality are receipts from the sale of prewritten computer software. Prewritten computer software is included in 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) 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 subscriber even though the subscriber never receives the code on a tangible medium or by download.

The accessing of Client's software by Client'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. Client's customers have the right to access the software in order to use the databases provided by Client, or in the case of third-party advertisers, to provide web advertising services. This is true even if no "copy" of the

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software is transferred to the customer. Accordingly, the sale of a license to use Petitioner's software to a customer 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 customer's employees that use the software). If the customer's employees who use the software are located both in and out of New York State, Client 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, supra.*

Client's charges for processing credit card payment transactions are similar to bank processing fees and are not subject to sales tax, provided, the charges are separately stated and reasonable.

DATED: September 24, 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.