

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

TSB-A-15(36)S
Sales Tax
September 18, 2015

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S131125A

The Department of Taxation and Finance received a Petition for Advisory Opinion from Petitioner [REDACTED]. Petitioner asks whether its information technology service is subject to sales and use tax in New York. We conclude that, to the extent that Petitioner sells its Line-Item IT Billing service with its three remaining products for one price, Petitioner's total charge for the bundle is taxable. However, because the Line-Item IT Billing service may be purchased without buying Petitioner's additional products, if it sells the Line-Item IT Billing service with the remaining services, but separately states a reasonable charge for the Line-Item IT Billing service, that charge will not be taxable.

Facts

Petitioner delivers a group of related services that helps its customers better analyze, manage and communicate the cost, quality and value of the information technology (IT) services used by different units within the customer's organization. Using Petitioner's services, customers can allocate the cost of various IT business units within their organization.

Petitioner's hosted platform is integrated with the customer's systems in order to collect system utilization and consumption data from the customer's underlying storage systems, telecom systems, and other IT systems of record. Through Petitioner's proprietary data acquisition process, all collected data are mapped, normalized, and verified by Petitioner for subsequent importing, processing, and reporting.

Following an implementation process described in more detail below, Petitioner's services are delivered through four key offerings: (1) Line-Item IT billing, (2) budgeting and financial reporting, (3) service costing, and (4) business unit planning.

Petitioner involves the client in the implementation process, which generally takes 60 to 90 days. By interviewing the customer on-site, Petitioner reviews its use of IT resources, including desktops, servers, storage, and cloud-computing resources. Petitioner also gathers information about the customer's existing corporate and financial information software. Subsequent analysis and set-up occurs off-site. This process determines the set-up of Petitioner's platform for gathering data to meet the customer's objectives as well as the solutions to meet those objectives. The platform is not customized, but is configured to meet the client's data objectives.

Line-Item IT Billing

After the product implementation process, a typical monthly IT billing process is one in which Petitioner's employees are fully engaged with the customer to collect data and ensure accuracy of the IT usage data. Petitioner uses the configured software platform to obtain the appropriate data from customer systems. Petitioner establishes and manages the information gathering and reporting process in accordance with the customer's financial calendar.

The process begins when the customer's software uploads usage data via a Secure File Transfer Protocol to Petitioner's platform. Petitioner is then responsible for processing the data using its platform. As part of this service, Petitioner then performs the following tasks:

- Validates all customer data received to ensure accuracy and quality of the source data;
- Updates the data if applicable or appropriate;
- Applies customer specific business rules to the data to ensure results are consistent with customer objectives;
- Generates a "pre-bill" of all processed data for review and approval by customer before finalizing the results of the monthly production;
- Re-processes the data, if required, after review with the customer;
- Obtains final approval of the pre-bill from the customer;
- Loads all processed data onto Petitioner's web-based bill or IT reporting platform for access by the pre-defined customer specific users; and
- Generates and delivers a general ledger file of the processed data in a format pre-defined by the client for posting to the customer's corporate general ledger system.

This service provides IT managers with information about the cost of each function performed by the IT department (e.g., the cost of different applications, servers, and storage solutions), and helps customers establish rules for billing. After Petitioner has loaded the processed data onto its platform and delivered a general ledger file to the customer, specified users have access to the data through Petitioner's web-based application. Access to the data also allows the data to be uploaded to the general ledger. The customer controls which of its employees have access to the reports on Petitioner's platform. Each month, Petitioner performs a "post production" review with the customer to identify any issues with the monthly production process and determine if any improvements can be made the following month.

Petitioner stores the raw data originally gathered from the customer, as well as the final processed data. Only the specific customer on whose behalf the data was processed has access to the data. Petitioner is forbidden by its contract with each customer to share the data with other customers, or sell or use the information for any purpose other than making it available to the customer.

Budgeting and Financial Reporting Product

Petitioner's product allows customers to utilize Petitioner's platform for IT budgeting and financial reporting. IT costs are input by customers or the customer's IT system. The customer then uses the application to access and summarize costs for corporate submission or reporting in the corporate-level general ledger. Examples of some of the costs that are summarized for a

customer could include equipment, maintenance, software, software amortization, hardware depreciation, etc. IT costs may also be presented at the product level. This service does not require additional information other than that produced by Petitioner's line-item billing product.

Service Costing Product

Petitioner's service costing solution enables customers to assign the costs captured from its systems to the IT products and services in the customer's service catalog. The application calculates customers' costs per unit of IT services, compares customers' IT costs to industry peers, identifies customers' most expensive and least used IT services, benchmarks customers' IT service costs against third-party alternatives, and breaks down fixed and variable IT costs. This information is provided to the customer through the application. This service does not require additional information other than that produced by the line-item IT billing.

Business Unit Planning Product

Petitioner's business unit planning product gives the customer access to a forecast engine on Petitioner's platform that analyzes various "what-if" scenarios at the product, service, application, and business unit levels. The application's interface allows a customer to obtain comparisons between forecasted and prior expenses. The application also predicts future effects on IT costs for each business unit if alternative IT system technologies were adopted, if IT services were outsourced, or if IT usage levels were changed. For example, if a customer were planning to grow a certain aspect of its business, the service could estimate the cost to the various areas of the company. Conversely, if a customer was planning to downsize, the business unit planning product would be able to estimate the cost results of that option for the various business units within the organization.

How Petitioner Bills for its Services

Petitioner generates two types of fees. The first is upfront implementation fees and the second is monthly subscription fees. Implementation fees are earned for the work performed with customers prior to the utilization of any of Petitioner's service offerings. Monthly subscription fees are paid to Petitioner to host the system and manage data. These fees vary based upon the size of the customer's IT budget, the number of solutions being used and the number of data source files. The subscription fees cover the activities performed for customers through Petitioner's configured hosted platform, including the acquisition of data from customers' systems, processing of the acquired data, and client-established deliverables using the processed data. Generally, if the fees for each type of solution (IT billing, budgeting and financial reporting, service costing, and business unit planning) are separately stated in the service agreement, they are separately stated on the invoices. In situations where the fees for a comprehensive solution are not separately stated in the service agreement, they are not separately stated on the invoice.

Analysis

Tax Law § 1105(a) imposes sales tax on the retail sale of tangible personal property, including prewritten software. *See* Tax Law §§ 1101(b)(6); 1105(a). Tax Law § 1105(c)

imposes sales and use tax on certain enumerated services, including the service of “[t]he 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.” That section excludes from tax the sale 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.”

We conclude that Petitioner’s Line-Item IT Billing product is an information service. However, the exclusion for information that is personal or individual in nature and that is not or may not be substantially incorporated in reports furnished to other persons applies to this service. The first criterion (information that is personal or individual in nature) is satisfied because the information used is supplied by the customer and relates only to the customer. *Matter of Allstate Ins. Co. v. Tax Commn. of the State of New York*, 115 AD2d 831 (1985), *aff’d* 67 NY2d 999 (1986); *Twin Coast Newspapers, Inc. v., State Tax Commission*, 101 AD2d 977(3d Dep’t 1978). It is the source of the information that controls whether the reports prepared will meet the criteria of “personal and individual.” *Matter of ADP Automotive Claims Service Inc.*, Tax Appeals Tribunal, August 8, 1991. Information is not uniquely personal or individual in nature if it comes from a common, widely-accessible, source, regardless of whether the information is customized in some manner to respond to the raw data submitted by the customer. *See Rich Products Corporation v Chu*, 132 AD2d 175 (3d Dep’t 1987); *Towne-Oller & Assoc. v State Tax Comm*, 120 AD2d 873 (3d Dep’t 1986); *Alan/Anthony, Inc.*, TSB-A-92(51)S. Here, the information Petitioner provides to its customer is obtained exclusively from that customer and not from a common source.

Nor is the customer data that the Petitioner aggregates and then makes available to the customer incorporated in reports furnished to other persons. It is available only to that customer and, in fact, the Petitioner is barred from reselling or otherwise sharing it with others. (*See Matter of New York Life Ins. Co. v. State Tax Comm’n*, 80 AD2d 675 (3d Dep’t 1980), *aff’d sub nom. Matter of Metropolitan Life Inc. Co. v. State Tax Comm’n*, 55 NY2d 758 (1981)). The fact that the customer can elect to have, or not have, such statistics included in the reports that Petitioner prepares for its customer does not make Petitioner’s charges to its customer for its information service taxable.

As part of its Line-Item IT Billing service, Petitioner provides its customers with access to prewritten software by allowing the customer to customize reports on its platform. Although Petitioner asserts that it does not sell or transfer the software to its customers, the ability for its customer to customize the reports has some attributes of the use of Petitioner’s software by the customer in New York, and, thus, could be considered a sale by Petitioner of its software to the customer. However, because the customer’s use of the software is a single aspect of a more comprehensive information service, which appears to be the primary function of the Line-Item IT Billing service, we conclude that Petitioner’s Line-Item IT Billing service constitutes the sale of an information service, and not the sale of prewritten computer software. *See Matter of DZ Bank*, Tax Appeals Tribunal, May 11, 2009; TSB-A-13(1)S.

Petitioner’s three remaining products all appear to provide its customers with additional software tools to analyze on Petitioner’s platform the information produced as part of Petitioner’s Line-Item IT-Billing service. Thus, while Petitioner’s Line-Item IT Billing service

appears to be a nontaxable information service, these additional optional products appear to constitute prewritten software. *See* TSB-A-15(1)S. The accessing of these software tools by Petitioner's customers for consideration constitutes the sale of prewritten computer software, which is taxable under Tax Law § 1105(a). Sales and Use Tax Regulation § 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 § 526.7(e)(4) further provides that, with respect to a "license to use," 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." Thus, the situs of the sale of the remaining three services for purposes of determining the proper local tax rate and jurisdiction is the location of the client's employees that use the software. *See* 20 NYCRR § 526.7(e)(1) and (4); TSB-A-15(1); TSB-A-03(5)S. If the customer's employees who 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 customer's users located in New York. *See Id.*

To the extent that Petitioner sells its Line-Item IT Billing service with its three remaining products discussed above for one price, Petitioner's total charge for the bundle would be taxable (*See* Tax Law § 1132(c); Sales Tax Reg. § 527.1(b)). However, because the Line-Item IT Billing service may be purchased without buying Petitioner's additional products, if it sells the Line-Item IT-Billing service with the remaining services described above, but separately states a reasonable charge for the Line-Item IT-Billing service, that charge will not be taxable.

DATED: September 18, 2015

/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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.