

**New York State Department of Taxation and Finance
Office of Counsel**

TSB-A-16(30)S
Sales Tax
November 18, 2016

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S130506B

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner asks whether any of four services that it sells (e-mail, fax, meeting, and file management) are subject to New York sales tax. We conclude that (1) the receipts from Petitioner’s fax service are taxable as telephony or telegraphy; and that (2) Petitioner’s remaining services are not taxable, except that Petitioner’s e-mail service and meeting service are taxable when Petitioner sells those services along with certain taxable prewritten software for one price.

Facts

Petitioner is headquartered in California, and has an office in New York. Petitioner provides separate e-mail, fax, Internet meeting, and file management services, which are hosted on Petitioner’s website. The subscribers to the four services must provide their own telecommunication connections to Petitioner’s website.

Each e-mail subscriber is assigned an online mailbox. Petitioner houses its online mailboxes on a server located outside New York. All e-mail messages sent to a subscriber are routed to and stored in the subscriber’s mailbox. Petitioner requires that its e-mail subscribers have specified e-mail software. The e-mail software can be purchased either from a third party or Petitioner. If Petitioner provides the software, the subscriber downloads the software directly to the subscriber’s server. An appendix to Petitioner’s standard contract grants the subscriber the right to use the specified e-mail software in connection with the services provided by Petitioner. The specified e-mail software functions identically, whether purchased from Petitioner or from a third party. Although used mainly as an e-mail application, the specified e-mail software also includes a calendar, note taking, journal, and web browsing functionality, along with task manager and contact manager features. The specified e-mail software can be used with instant-messaging and VoIP calling capability. A subscriber can use the specified e-mail software to adjust the appearance of its mailbox. When the subscriber obtains the software from Petitioner, Petitioner bills the subscriber a single charge for e-mail service and the specified e-mail software (per user/per month), which allows unlimited usage. This monthly charge is higher than the charge imposed by Petitioner for e-mail service without the provision of the software.

Petitioner's fax service allows subscribers to send and receive faxes. Each subscriber receives a telephone number that can be associated with the subscriber's specified e-mail program mailbox or with a fax device. Incoming faxes received by a subscriber can be routed directly to the subscriber's specified e-mail program mail box and appear as an attachment to an e-mail. For outgoing faxes, the service allows subscribers to send a fax directly from the subscriber's specified e-mail program mail box as an attachment to an e-mail. The "fax e-mail" goes to Petitioner's server, which faxes it to the recipient's traditional fax machine or routes it to the recipient's electronic mailbox (if the recipient also has a similar fax service subscription). Faxes addressed to a subscriber of Petitioner's fax service are stored in the subscriber's online mailbox as a file attachment to an e-mail. The fax service uses a server located in Petitioner's New York office. The subscriber is able to access the attachment by opening the e-mail. The subscriber accesses the on-line mailbox through its own telecommunication connections. Petitioner charges its subscribers a monthly subscription amount (per user/per month) for a specified level of usage, with additional charges for overages. The fax service is most useful in exchanging faxes with persons who want to send and receive information via the traditional fax machine, thereby allowing subscribers to virtually access faxes from anywhere they are sent, while enabling them to send faxes to those recipients that still prefer receipt of messages by fax.

Petitioner's meeting services require the subscriber to have a specified prewritten conferencing software. Subscribers can buy the specified conferencing software from Petitioner or a third-party vendor. Petitioner does not sell the specified conferencing software except in connection with its meeting services. Petitioner offers two types of meeting services: same-time instant messaging and video conferencing. These services allow multiple users to participate in the same messaging or call conversation from different locations. The specified conferencing software allows a subscriber to add up to 250 people to online meetings, gives the subscriber enterprise-grade security for its conferences, allows the subscriber to manage employee accounts, and is integrated into certain of the subscriber's desktop applications, such as a spreadsheet application. Thus, for example, when using the desktop spreadsheet program, the subscriber has the ability to send the spreadsheet to another subscriber using the prewritten conferencing software. Subscribers can use the meeting service to communicate with persons who are not subscribers to Petitioner's service, although the non-subscriber must have a license to use the specified e-mail software, which includes instant-messaging and VoIP calling capability. To communicate with a non-subscriber, the subscriber sends a link to the non-subscriber, that, when opened, connects the non-subscriber's specified e-mail software program to Petitioner's server. The non-subscriber then will be able to participate in a web conference hosted by the subscriber or send the subscriber instant messages. This connection is made on Petitioner's server and is not a direct connection between users' computers (i.e., peer to peer).

Petitioner charges its meeting service subscribers a monthly subscription amount (per user/per month) for a specified level of usage, with additional charges for overages.

Where the subscriber purchases the specified conferencing software from Petitioner in addition to the service, Petitioner imposes a single monthly charge to the subscriber, which charge is higher than when Petitioner provides only the service.

Petitioner's file management services include file backup, and data storage and sharing. Subscribers transfer data files to Petitioner's servers, where the files are stored. Subscribers can retrieve the documents by accessing Petitioner's portal on the Internet, which is password protected. Subscribers can also use the data sharing function to extend access to a subset of their files to an external party (users outside of their organization) for the purpose of collaborating. Petitioner does not manipulate the stored data or otherwise process it in any way. For these services, Petitioner charges a monthly subscription amount (per user/per month) for a specified level of data transfers, with an additional charge once that data limit is exceeded.

Analysis

Sales tax is imposed on all retail sales of tangible personal property and sales, except for resale, of certain enumerated services. *See* Tax Law § 1105(a), (b), and (c). Among the taxable services are telephony or telegraphy. *See* Tax Law § 1105(b)(1)(B).

E-mail service qualifies as telephony or telegraphy service for purposes of Tax Law § 1105(b)(1). *See Easylink Services International, Inc., v. Tax Appeals Tribunal*, 101 AD3d 1180 (3d Dep't., 2012). However, the Internet Tax Freedom Act and amendments thereto (ITFA) preclude States from taxing Internet access. *See* 47 USC § 151 (note 1101 et. seq., made permanent by Public Law 114-125). Electronic mail and instant messaging services are included in the definition of Internet access, even if such e-mail and messaging services are provided independently of any service that allows a subscriber to connect to the Internet. *See* 47 USC § 151 (note 1105); TSB-M-08(2)S. Thus, under ITFA, Petitioner's charge for its e-mail service is not subject to New York sales and use tax.

Petitioner requires that subscribers have specified e-mail software. With regard to some subscribers, Petitioner provides the specified e-mail software with its e-mail service for one price. Other subscribers purchase the specified e-mail software from a third-party. The specified e-mail software qualifies as pre-written computer software. *See* Tax Law § 1101(b)(14). The definition of "tangible personal property" includes prewritten computer software "whether sold as a part of a package, as a separate component, or otherwise." Tax Law § 1101(b)(6). When Petitioner transfers the right to use the specified e-mail software in conjunction with the sale of its service for one price, Petitioner is selling prewritten software. *See* Tax Law § 1105(a). The sale of the software is a discrete transaction for purposes of sales tax because the subscriber has the option of purchasing the software from a third party and because the subscriber can use the software for functions unrelated to Petitioner's e-mail service. *See Galileo International Partnership et al. v. Tax Appeals Tribunal*, 31 AD3d 1072 (3d Dep't, 2006); TSB-A-10(32)S.

While the State cannot subject the sales of Petitioner's e-mail service by itself to sales tax, ITFA allows sales tax to be imposed if charges for Internet access are aggregated with other charges subject to taxation. Thus, if Petitioner bills a single charge for a bundle that includes both a nontaxable service and taxable tangible personal property, i.e., e-mail service and the specified e-mail software, the entire charge is subject to taxation unless Petitioner can reasonably identify the charges for e-mail service and the specified e-mail software from its books and records kept in the regular course of business. *See* ITFA, 47 USC § 151 n. 151, at § 1106. If Petitioner cannot make that showing, it must collect sales tax on the full amount of its charges for the e-mail service and the specified e-mail software.

Petitioner's fax service allows a subscriber to both receive and send faxes to or from other subscribers of Petitioner's service or non-subscribers. Subscribers do not need Petitioner's fax service to send documents to other subscribers, as they already can do so using Petitioner's e-mail service. Thus, the primary function of Petitioner's service is to be able to exchange documents with non-subscribers still using fax machines to send and receive documents. To send documents to a non-subscriber, the subscriber essentially emails the document to Petitioner, who then faxes it to the subscriber's intended recipient, using its own telecommunication connections. This faxing service constitutes a telegraphy service under Tax Law § 1105(b)(1)(B). *See Matter of EasyLink Services International, Inc.* Tax Appeals Tribunal, July 27, 2009 ("The acceptance and delivery of data resembles the role of a traditional telephone or telegraph company and, thus, such services are taxable as telephony or telegraphy"), *conf'd Matter of Easylink Intl., Inc. v. New York State Tax Appeals Trib.*, 101 AD3d 1180, *supra*; 20 NYCRR § 527.1(b). Although the service can be used for either intra-state or inter-state transmissions, the entire charge is subject to tax because Petitioner imposes only a single charge for the service. *See* Tax Law § 1132(c); 20 NYCRR § 527.1(b); TSB-A-88(8)S. Finally, the fax service does not qualify as email service for purposes of ITFA because its purpose is to allow a subscriber to communicate with a party that lacks an email service, such that at least part of every communication using the service goes by fax, rather than email. *See j2 Glob. Commc'ns, Inc. v. City of Los Angeles*, 218 Cal. App. 4th 328, 335 (Court of Appeal, Second District, Division 4 2013).

Petitioner's meeting services are not taxable services. *See* NYT-G-06(1)C, (3)S; TSB-A-99(35)S, (20)C. In some instances, Petitioner transfers the specified conferencing software, with its meeting services, to subscribers for one price. This conferencing software constitutes prewritten computer software taxable as tangible personal property. *See* Tax Law §§ 1101(b)(6), 1101(b)(14); 1105(a). When taxable tangible personal property is sold in conjunction with a nontaxable service for one price, the entire charge is taxable. *See* Tax Law § 1132(c); 20 NYCRR § 527.1(b). Thus, in those instances where Petitioner provides both the conferencing software and meeting services for one price, the entire charge is taxable. However, if Petitioner breaks out a separate price for the meeting services, which is reasonable as a proportion of the total charges, the separate charge for the services will not be subject to tax. *See, e.g.,* TSB-A-04(23)S.

