

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

TSB-A-17(15)S  
Sales Tax  
August 1, 2017

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION      PETITION NO. S140320A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (hereinafter “Petitioner”). Petitioner asks whether New York State and local sales tax apply to charges to customer-retailers (hereinafter “Retailers”) located both in and outside New York for: (i) training software that is customized to each Retailer and distributed electronically; (ii) license fees related to the creation of videos that are embedded in the software; (iii) software and video license fees when they are charged in a lump sum; and (iv) monthly or annual subscription fees.

We conclude that Petitioner’s sale of software, software and videos for one lump sum, and its subscription fees will be subject to New York State and local sales tax when they are used by Retailers’ employees in New York State, but they will not be subject to tax when sold for use by Retailer’s employees outside New York State.

**Facts**

Petitioner’s primary product, [REDACTED] (“the Product”), is software that delivers interactive training programs to Retailers located both in and outside of New York State. The Product helps Retailers train their employees to become knowledgeable about their goods and culture to drive better performance.

The Product consists of basic code that is “skinned” for Retailers. “Skinning” involves customizing Petitioner’s core code to reflect a retailer’s logo, name or other individual attributes. The code is also modified to work with each Retailer’s operating system.

Where a Retailer wants videos included in the Product, the videos are filmed by Petitioner after Petitioner learns about a Retailer’s culture and brand attributes. Petitioner does this in four phases: creation, production, post-production and testing and release.

Retailers and their employees access Petitioner’s Product through its software application (hereinafter “app”). The Product is not available for personal devices. Retailers download the training content from the app to their corporate devices, including desktop computers, laptops, tablets or cash registers. The training content in the Product incorporates interactive quizzes,

exercises, assessments and videos. Trainings that include videos have a video link embedded in the software and can be played only by the software. The video link is triggered automatically once the employee gets to a particular section. Petitioner does not provide the videos or any other tangible items to Retailers and maintains ownership of the video.

Retailers' managers also can use the Product to review reports of their employees' quiz scores and determine whether employees have completed the required training. This data is stored online and managers access it through a link in the app.

Each Retailer is charged as follows: (i) for the prewritten software and to have Petitioner's prewritten software "skinned" to that Retailer, (ii) to have media programs created, and (iii) a subscription fee. Sometimes the software and media programming is billed as one charge. The frequency of the subscription fee varies by Retailer and may be on a monthly, quarterly or annual basis. The fee is based on the number of users who log into the software. Both managers and employees are users and the charge is the same for both.

## **Analysis**

The Tax Law imposes sales tax on retail sales of tangible personal property, including prewritten software, and enumerated services. *See* Tax Law §§ 1101(b)(6); 1105. "Sale" is defined as "[a]ny transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor." Tax Law § 1101(b)(5).

Prewritten computer software is computer software that is not designed and developed by the creator to the specifications of a specific purchaser. Tax Law § 1101(b)(14). "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.'" TSB-A-08(62)S; Tax Law § 1101(b)(6). Selling a client access and the right to use or consume prewritten software constitutes the sale of prewritten software, which is taxable under Tax Law § 1105(a). *See* TSB-A-15(25)S; TSB-A-15(1)S; TSB-A-08(62)S.

"Prewritten software, even though modified or enhanced to the specifications of a specific purchaser, remains prewritten software subject to tax." TSB-M-93(3)S. Additionally, software that is created by combining multiple prewritten programs is still prewritten software subject to tax. *See* TSB-A-07(16)S. However, if the charge for the custom modification is reasonable and separately stated on the invoice, the separately stated charge is not subject to tax. TSB-M-93(3)S.

Here, Retailers use Petitioner's app to access and download Petitioner's training software for use in training their employees. Petitioner's charge for its training software constitutes receipts from the lease or license to use or consume prewritten computer software. *See* TSB-M-93(3)S. The charge for Petitioner's software includes the charge for the prewritten software used for all Retailers before it is "skinned" to a specific Retailer plus the charges for skinning. Therefore, here, where the charge for the custom modification is not separately stated from the charge for the prewritten software, the entire charge is subject to sales tax. *See* TSB-A-15(51)S; TSB-M-93(3)S.

Additionally, Petitioner's monthly, quarterly or annual subscription fee allows employees and managers to use and/or access the software for training purposes. Charges for providing employees and management access to and the right to use or consume prewritten software constitutes the transfer of prewritten software and, therefore, is subject to New York State and local sales tax. *See id.*

The charge for Petitioner's service of creating videos and other media can be billed either as a separate charge or in a lump sum with the charge for the software. Tax Law § 1105(a) imposes tax upon the receipts from every retail sale of tangible personal property unless otherwise exempt. Videos delivered electronically or online are not tangible personal property. *See* TSB-A-08(41)S; TSB-A-12(10)S. Therefore, the charge for creating the videos and other media content that is delivered electronically is not subject to New York State and local sales tax.

However, "when tangible personal property, composed of taxable and exempt items is sold as a single unit, the tax shall be collected on the total price." 20 NYCRR 527.1(b). Accordingly, when Petitioner charges a Retailer one price for both its sale of prewritten software and creation of its videos, the entire charge will be subject to New York State and local sales tax.

The location of the sale for purposes of determining the proper tax due is the location where the license is being used. *See* TSB-A-08(62)S; TSB-A-15(51)S. Sales tax is a "destination tax" and the point of delivery controls the tax incident and rate. *See* 20 NYCRR 525.2(a)(3); TSB-A-10(43)S. "[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." 20 NYCRR 526.7. Additionally, with a "license to use," a transfer of possession occurs if there is an 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." 20 NYCRR 526.7(e)(4).

Here, if the Retailer's employees and managers use the software at the Retailer's offices both inside and outside New York, Petitioner should determine the total number of Retailer employees and management using the software, and collect tax for only the portion of users that are in New York. *See* TSB-A-15(51)S; TSB-A-03(5)S. To determine the sales tax due, Petitioner may rely on



