

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

TSB-A-17(19)S
Sales Tax
August 4, 2017

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S140401A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner asks whether its receipts from two of the services it offers customers are subject to New York State and local sales tax.

We conclude that Petitioner’s sale of [REDACTED] (Product A) is subject to sales tax under Tax Law § 1105(c)(1) as a sale of a taxable information service, and the Petitioner’s sale of [REDACTED] (Product B) is excluded from sales tax because it is the sale of customized software.

Facts:

Petitioner offers at least two separate products to its clients. At issue are Petitioner’s [REDACTED] (Product A) and [REDACTED] (Product B).

1. Product A:

Petitioner describes its Product A as a “customized analytical service.” Petitioner offers Product A to customers that are financial institutions (the “Product A Participants”). The service allows each Product A Participant the ability to strategically review and analyze its portfolios, so that it can measure the performance of its credit cards, deposit accounts, etc. against the performances of an index of accounts that is customized for each product and financial institution.

Each Product A Participant forwards its individual customer and account data, which Petitioner analyzes and indexes. Each Product A Participant’s customer and account level information then is held as separate file tables within a central database (the “Product A Database”), but still indexed to each particular Product A customer. Petitioner uses the information collected in the Product A Database to construct an “analytical framework” for each Product A Participant. Each Product A Participant receives a customized financial analysis that is specific to that particular Product A Participant and is based upon certain information accumulated from the Product A Database. Any information gathered in the Product A Database that is associated with a particular Product A Participant is confidential and not disclosed to the other Product A Participants. Particular personal customer account information that Petitioner gathers for the Product A Database also is kept confidential and not shared with any other Product A Participants. The data utilized by Petitioner in preparing the customized financial

analysis for a Product A Participant is not available or used in any publicly published source or given to any other Product A Participant except as described herein.

When a Product A Participant requests a study, that Participant's data is reviewed to determine its makeup and characteristics. Then a review of the other Product A Participants' data is performed to create a customized synthetic portfolio (collection) of customer accounts from five or six Product A Participants that closely correspond to the makeup and structure of the customer account data belonging to the requesting Product A Participant. This is created because the Petitioner uses the information collected in the Product A Database to construct an "analytical framework" for each Product A Participant. Each Product A Participant receives a customized financial analysis that is specific to that particular Participant and is based upon certain information accumulated from select accounts and tables in the Product A Database.

The customized synthetic portfolio of customer accounts then is associated into a pseudo-entity representing averages based on the aggregation of information for certain Product A Participants. The Product A Participant requesting the study is then compared to the pseudo-entity analysis to evaluate the Product A Participant's performance. The study's findings are delivered in three ways. Each Product A Participant receives monthly or quarterly written reports comparing the participant's performance to the customized index of accounts and the pseudo-entity created by Petitioner. Petitioner's personnel also make semi-annual presentations to each Product A Participant to review the participant's performance. Lastly, Petitioner provides up to 160 hours of ad-hoc analytic support to respond to Product A Participant inquiries regarding the reports, performance, and other similar inquiries.

2. Product B:

In addition to Product A, Petitioner creates and sells Product B to retail financial institutions. Product B is designed to estimate which of a financial institution's existing or prospective customers demonstrate a desired set of behaviors, such as, for example, significant spender by category (e.g. travel and entertainment), recent balance transfer from one bank to another, or substantial revenues dollars generated through annual fee charges.

Petitioner does not sell any customer or other data in connection with Product B. Rather, Petitioner, based upon its expertise, creates a set of formulas designed to predict the likelihood that a particular individual with specified characteristics will respond to an offer, taking into account spending habits, account balances, Fair Credit Reporting Act credit bureau data, and other variables. Petitioner performs mathematical calculations to establish customized formulas for each requesting financial institution and then sells software with these formulas to the financial institution. The financial institution then runs the resulting formulas on its own customer account data that is owned and maintained by the financial institution. Petitioner does not take the client's raw customer data and run that data through the Product B formulas on its own computer system.

No common database exists for the Product B formulas because each client's coefficients represent something different. Thus, the formulas and data are different for each client.

The Product B formulas have a limited shelf-life as their effectiveness tends to deteriorate over time. Therefore, the formulas require regular tracking for continued effectiveness. Redevelopment of a client's Product B formula is typically performed once or twice every 12-24 months.

Analysis:

1. Product A:

Tax Law § 1105(c) imposes sales tax upon the receipts from every sale, except for resale, of certain specifically enumerated services. As is relevant to this matter, Tax Law § 1105(c)(1) imposes tax upon the service of:

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....

In performing the Product A service, Petitioner is accumulating information from the Product A Participants, organizing and analyzing such information and then presenting such information in a written report. Petitioner also provides additional presentations and answers questions relating to the report and its analysis. The information provided to customers includes a comparison to the performance of other customers' data. Petitioner's service adds intelligence to the customer's confidential information by comparing it to selected information maintained in a common database. Thus, Petitioner's Product A is a taxable information service under Tax Law § 1105(c).

Tax Law § 1105(c)(1) provides an exclusion from the tax on information services where the information provided is personal or individual in nature and is not or may not be substantially incorporated in reports furnished to other persons (*see* 20 NYCRR 527.3[b]). Here, the information provided using the Product A service is clearly not personal or individual in nature because portions of information provided by various Product A Participants is captured in the Product A Database and used to develop reports furnished to other Product A Participants.

Although certain Product A Participant financial information is deemed personal and is kept confidential, that does not change the fact that critical information from other Product A Participants is used to create each pseudo-entity against which each Product A Participant is compared. Accordingly, Petitioner's service does not satisfy the requirements of the "personal

or individual” exclusion, and is taxable under Tax Law § 1105(c). *Matter of Sungard Securities Finance, LLC*, Tax Appeals Tribunal, March 16, 2015.

In providing Product A, Petitioner provides services in addition to the preparation of the written report (e.g., presentations and answering questions with regard to the reports). These additional services are provided with the written report for a single charge. Accordingly, these services are integral component parts of the written report and the information provided therein, and are therefore taxable. *See Matter of SSOV ‘81 Ltd.*, Tax Appeals Tribunal, January 19, 1995.

2. Product B:

Typically, the sale of pre-written software is subject to sales tax. *See* Tax Law §§ 1101(b)(6), and 1105(a). However, Petitioner represents that it produces completely customized formulas for each separate client. No common database exists for the underlying Product B formula. Each client’s formula is different from Petitioner’s other clients’ formulas and there are no pre-written software modules or common formulas utilized. Accordingly, Product B is excluded from taxation because it constitutes “custom software”. *See PaySource Direct Inc. and LiveXchange Corporation*, TSB-A-10(4)C, TSB-A-10(23)S, May 27, 2010.

DATED: August 4, 2017

/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.