

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S140513A

The Department of Taxation and Finance received a Petition for Advisory Opinion from Petitioner [REDACTED]. Petitioner asks whether the sale of its online file-sharing applications for corporate boards of directors is subject to sales and use tax. We conclude that the application is taxable as a sale of prewritten software.

**Facts**

Petitioner provides on-line and on-premise applications that provide secure file sharing for corporate boards of directors. Petitioner inquires about the taxability of three of its on-line applications, described below. Petitioner sells all of these applications on a subscription basis, with the amount of the charge based solely on the number of the customer's authorized users.

Application 1

This application is a portal that provides secure access to boardroom documents to the directors on a company's board of directors and other authorized parties. Application 1 replaces the traditional paper boardroom documents. Traditionally, boardroom documents have been delivered to board members in a large paper document called a "board book." This document would be printed and physically delivered to each board member prior to a board of directors meeting. Any changes to the document would need to be printed and physically delivered to each board member. Application 1 uses digital technology to streamline the process for getting board books to board members, while also giving board members the benefit of other functionality, as discussed below.

Generally, the customer interface with the application is on-line through a user's standard web browser. More recently, data may also be accessed through an iPad application. Customers log in on-line to a unique URL, using a User Name, Password and other security features. Application 1 includes the following features:

- Repository – the repository stores the documents for the paperless boardroom. Documents can be saved in folders or as individual files. The documents are created outside the Repository and uploaded into the portal.
- Annotation – the application includes the ability to make notes on individual board member documents for the board member's own review in a number of methods. Annotations are viewed only by the individual who made the notes – they are not reflected on all copies of the documents in the repository.
- Current Meeting – access to documents for the current board meeting.

- Approvals – a tool for board consents or approvals during or between meetings.
- Team Spaces – documents can be segregated based upon the user of the data. For example, audit committee documents may be available only to those board members that are members of the audit committee.
- Doc Collaboration – an ability to collaborate with others on documents within the repository. While documents are edited in their native programs, the application can track versions and notify authorized users that there is a document update.
- Secure Email – an email exchange within the application to exchange confidential messages only between authorized users of the application associated with the same subscriber’s account (e.g., only directors of the same corporate subscriber could communicate with each other through Petitioner’s email functionality).
- Bookmarks – board members may make digital bookmarks in the distributed documents to make it easier to navigate through documents.
- Secure Briefcase – encrypted folder on device (laptop or iPad) for offline viewing of materials.
- Remote Purge – if the device is lost/stolen, the data that has been downloaded to the Secure Briefcase will be purged.
- Directory – contact information for board members.

## Application 2

Petitioner’s Application 2 includes all the features of Application 1, along with additional features to allow for document sharing and collaboration outside the typical board meeting process, as detailed below.

- Document Sharing at Meetings - allows for the sharing of documents within the portal only to the authorized viewers, or attendees, of a particular meeting, which can be other than the regularly scheduled board meeting.
- Document Presentation at Meetings - as the meeting occurs, documents can be placed in Presenter mode. This mode allows for the presenter of the material to control the view of the document so that all meeting participants (in the same location or remote) are viewing the same content.
- Signing Feature - allows directors to electronically sign documents, using a signature saved within the application and implemented with appropriate controls.
- Survey Feature - allows for the creation and response to highly confidential surveys of the board of directors.

### Application 3

This Application is similar to Application 2, with some reduced features. Application 3 is for sharing confidential documents within an organization, excluding some of the features needed for an organization's board of directors. The above described features that are not included in Application 3 are the following:

- Approvals
- Signing Feature
- Document Sharing at Meetings
- Document Presentation at Meetings
- Survey Feature

Applications 1 and 2 are also available as on-premise solutions, meaning the software for the application is downloaded on the customer's server. Some customers want their own internal personnel to control the highly confidential environment and choose to host their data in-house. Petitioner did not request a ruling about the on-premise solutions.

### **Analysis**

The Tax Law imposes sales and use tax on retail sales of tangible personal property. *See* Tax Law §§ 1101(b)(6); 1105(a). The definition of tangible personal property includes 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 the software is conveyed to a purchaser. Tax Law § 1101(b)(6).

Here, Application 1 gives its corporate customers access to prewritten software on its portal. The customers use this software to upload board of director materials to the portal, with the ability to reserve access to specified materials to identified directors or other persons. Using Petitioner's software, the board members then can annotate, bookmark, approve, and share the materials with other members. Additionally, the board members can download the materials to an encrypted file on their laptops or tablet computers.

By giving its customers access to prewritten software for their use, Petitioner is making taxable sales of tangible personal property in New York to the extent that the customer's employees or board members are using the prewritten software in New York. *See* Tax Law §§ 1105(a); 1101(b)(6); 20 NYCRR § 526.7; TSB-A-08(62)S. Petitioner may accept a letter from the customer as to the proportion of its employees and board members authorized to use the software who are in New York, and collect tax based on that proportion of its subscription charge for the software. *See* TSB-A-08(62)S. Because Applications 2 and 3 give the customer more software-driven functionality, sales of these services also are subject to tax as prewritten software.

The Internet Tax Freedom Act and amendments thereto (ITFA) preclude States from taxing Internet access. *See* 47 USC §151 (note § 1101 et. seq.). E-mail is included in the definition of Internet access. *See* 47 USC § 151 (note § 1105); TSB-M-08(2)S. Here, Petitioner is not selling e-mail as a separate service, but rather includes it as part of its service, for which it makes a single charge. Under ITFA, “[i]f charges for Internet access are aggregated with and not separately stated from charges for telecommunications or other charges that are subject to taxation, then the charges for Internet access may be subject to taxation unless the Internet access provider can reasonably identify the charges for Internet access from its books and records kept in the regular course of business.” 47 USC § 151 n. 151, at § 1106. For charges to be “reasonably identifiable” as Internet access, the provider must be able to show that it used an objective and verifiable standard in determining those charges and the charges must be reasonable in relation to the total charge. *See* NYT-G-07(3)S. Accordingly, Petitioner may exclude from tax a portion of its charge for its applications that, based on its books and records, reasonably can be identified as attributable to its email service.

DATED: February 27, 2017

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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.



