

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner asks whether sales receipts of its products that provide mobile and web analytics of user online behavior are subject to New York State and local sales tax.

We conclude that Petitioner’s services of gathering and storing its customers’ data, and using the data to prepare customized reports for its customers, as described below, are taxable information services.

Facts

Petitioner is a mobile and web analytics service provider that helps businesses ("customers") understand their customers' ("users") online behavior. Petitioner currently provides mobile and web analytics for over 500,000 mobile apps, projects, and websites for nearly 20,000 customers worldwide. Petitioner breaks down analytics into two types of data: “Events” and “People.” Petitioner’s web analytics product (“product”) is offered and sold in tiered service levels for the two types of plans or data categories: Event and People plans. These reflect the two types of data that customers can manage in the Petitioner's Dashboard -- Event data and People data. “Events” are any actions performed by a user on the customer's website or app that can be tracked in real time. “People data” encompasses all the information stored on a user profile such as a user’s name and email. Customers may customize their plan to store additional information for each user

Upon entering into a service agreement with Petitioner, a customer is granted a limited, non-exclusive, non-transferable license to access and use exclusively, through Petitioner’s websites, Petitioner’s “Application Services,” which is defined as Petitioner’s online, web-based and mobile based applications ordered by the customer. To use Petitioner’s application services, customers must install one of Petitioner's “client-side libraries” within their mobile or web application or send data to Petitioner's tracking interface using a server-side library or formatted HTTP request. The client-side library allows the customer to send data to Petitioner via JavaScript. JavaScript is triggered from the user’s computer, as opposed to a server-side implementation, which is sent directly from the customer’s servers. With client-side implementation, many features of Petitioner’s offerings are built right into the JavaScript library

To start tracking events, customers must first define the specific events and properties they want to track. An event may be any action that occurs within the customer's mobile or web

application, such as uploading a picture, making a purchase, or playing a song. Additional tracking codes, which the customer customizes to fit the desired queries, must be embedded within the customer's mobile or web application in order to set up individual events and properties for tracking. The tracking codes allow Petitioner to collect various data related to visitors' use of the customer's website and/or mobile application. The collected data is streamed to Petitioner's servers, where they are then reported to the customers through a password protected, hosted dashboard website (the "Dashboard") provided by Petitioner. While a limited number of users within Petitioner's customer base have the knowledge or ability to modify reports or run their own analysis, most of Petitioner's customers receive their data through pre-formed reports provided by Petitioner. A customer's reports are only made available to, and viewable to, that customer because of the confidential nature of the customer's data. Petitioner states that it does not provide any data or report of one customer to any other customer and neither the customer nor Petitioner may sell or market the data reports Petitioner's service provides to its customer.

The pricing for the People plan is based on the total number of user profiles that a customer tracks at any given point in time. Customers may choose to pay on a monthly or annual basis for Petitioner's People plan subscription service. Petitioner also offers its customers the ability to communicate to their users via notifications and messaging. "Notifications and Messaging" are features that allow Petitioner's customers to interact with their users via push or short message service (SMS) messages in order to "drive" users back to their product. All notifications are sent from Petitioner's People platform, so customers must purchase the People plan in order to receive the notifications feature.

Event plans are offered and sold to customers in one of three distinct service packages: Startup, Business, and Enterprise.

1. Startup Subscription Service Plan

Petitioner's Startup plan provides access to Petitioner's full analytics platform. Two categories of data are reported through the Dashboard: live and historical. Live data are provided in real-time. Historical data are a summary of what users were doing over periods spanning the past day, week or month, with up to 12 months of data history.

Once the client-side library is installed within the customer's mobile or web applications, Petitioner captures some data automatically for customers that are reported in the Dashboard (see "Reporting & Analytics" below). The specific data included by default vary for each client-side library, but may include the following:

- Location - geolocation of visitors according to users' IP addresses (the IP addresses themselves are discarded for security purposes);
- Browsers - the browser and browser version that Users access the website from most frequently;
- Devices - the name of the Event sender's device, if it's on mobile web;
- Top Pages - the most active pages on the customer's website;
- Referral Sources - the links from other websites that most frequently result in visits to

- the customer's website;
- Operating System - OS of the Event sender
- Top Search Engine - search engine a user used when they arrived at the Customer's domain;
- Top Search Keywords - the words or other terms that most frequently result in visits to the customer's website;
- Traffic Sources and UTM Sources - real-time traffic data regarding how users arrived to the website (e.g., direct, links, social media); and
- Prior to February 2018, customers also had the option of enabling a feature that automatically collects all interactions on the customer's website.

The starting point for the pricing of the Startup service is a monthly base rate. Included under the monthly base rate are a set of 1 million data points (events), and unlimited Dashboard access by the customer and up to 10 team members to use the application service. Customers may purchase additional Startup packages as data volume increases, up to a maximum of 10 million monthly data points. Alternatively, customers may purchase, on an annual basis, a set number of data points per month with a maximum number of data points allowed per month or year. When a customer exceeds the number of data points they have purchased for that month, Petitioner separately charges overage fees to the customer's credit card on file or via invoice if no credit card has been provided. However, whether a customer purchases data points at a monthly rate or at an annual rate, once a customer exceeds the maximum monthly or annual data point allocation threshold allowed within the Startup service plan, the customer must then upgrade its Startup plan subscription to either the Business plan or Enterprise plan. Petitioner's Dashboard allows the customer, among other things, to run volume trends of the top 12 events over a given time period, review engagement, conversion and retention data, and view user events in real time.

2. Business Subscription Service Plan

Petitioner's Business subscription plan is similar to its Startup plan, with two significant differences: (1) there are no monthly data point limits; and (2) it allows an unlimited number of team members to access the Dashboard. Business plans are charged on an annual base rate. The starting annual base rate includes 10 million data points or Events, and unlimited Dashboard access by the customer and teammates. Like the Startup plan described above, customers may purchase an upgraded Business plan package depending on data volume, up to a maximum of 100 million data points. The Business plan includes all the features provided in the Startup plan's service, plus the following additional features:

- Customers may define an unlimited number of custom events using existing Events and Properties.
- Customers may store up to 15 applications where the customer can customize the visualizations of Petitioner's Dashboard portal when viewing data.
- Customers may access up to 5 years of data history in the Dashboard.
- Customers may export data into formats such as comma-separated values ("CSV") from the Dashboard, which may then be easily imported into a spreadsheet or database.

- Roles & permissions.
- Two-factor authentication.
- Security Assertion Markup Language (“SAML”) based single sign-on (“SSO”).
- Customers have unlimited access to Live Chat Support.

3. Enterprise Subscription Service Plan

Petitioner's Enterprise subscription plan is similar to its Business plan, with three significant differences: (1) unlimited data history; (2) premium support; and (3) added security features. The pricing for the Enterprise plan varies depending on the needs of the customer and is based on a pre-determined fee (monthly or annual). The Enterprise plan includes all the features provided in the Business plan's service, plus the following additional features:

- Customers may invite an unlimited number of team members to access the Dashboard.
- Customers have the ability to “hide” events or properties from the Dashboard.
- Customers have access to Standard Support on Weekdays between 12am – 5pm PT.

To use any of Petitioner's products and/or services, customers must agree to the terms of Petitioner's Terms of Use document (The "TOU") or agree to a unique Master Services Agreement ("MSA"). In addition, the customer must complete an Order Form, which identifies the subscription plan services the customer is purchasing from Petitioner. The Order Form also incorporates the terms of the MSA. Under those agreements, Petitioner grants the customer a limited, non-exclusive, non-transferrable license to access and use Petitioner's “Application Services” defined by Petitioner as their "online, web-based and mobile-based applications ordered by the customer.”

Furthermore, under the terms of the service agreement, customers agree to allow Petitioner to collect, store, use and access customer data to maintain, improve and support Petitioner's Products, and to offer aggregated and anonymized data on Petitioner's website free of charge to the public. Petitioner asserts that these aggregated and anonymized data do not contain any of the raw underlying customer data and are offered in the form of statistical benchmark reports that focus on four core areas: usage, retention, engagement and conversion.

Analysis

The Tax Law imposes sales and use tax on retail sales of tangible personal property, including prewritten computer software, and the sale, except for resale, of certain services. *See* Tax Law § 1105(a) and (c). Among the enumerated services subject to tax is 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. A sale includes “[a]ny transfer of title or possession or both” and includes a “license to use” (Tax Law § 1101[b][5]).

Petitioner's charges its customers for its People subscription service plan based on the total number of user profiles a customer wishes to store. The components of Petitioner's Event subscription plans, with limited exceptions, are offered and sold together through three separate pricing models based primarily on the number of data points the customer wishes to capture and analyze. For either the Event or People plan subscription service packages, Petitioner embeds software on the customer's website and uses it to gather information about visitors/users on the customer's website, such as how the users come to the website, what type of device they are using, and what they do while on the customer's site. Petitioner then makes this information available to the customer through password protected Dashboard portal provided by Petitioner through its online servers.

The collecting, compiling or analyzing information of any kind or nature and the furnishing reports thereof to other persons is an information service. *See* Sales NYCRR 527.3(a)(2). Whether a service qualifies as an information service depends on its primary function. If a customer's chief purpose in paying for a service is to receive information from that service, the service as a whole qualifies as an information service even if the customer receives other benefits as part of the service. *See* TSB-M-10(7)S *Sales and Compensating Use Tax Treatment of Certain Information Services*. Here, Petitioner is in the business of collecting and compiling information and furnishing reports to its customers. To perform these services, Petitioner embeds software into the customer's website in order to obtain and track data specific to each customer, and for the customer to utilize the Dashboard features Petitioner provides with its subscription plans. However, this specific utilization of the software is a single aspect of a more comprehensive information service, which appears to be the primary function of both the Event and People subscription service plans offered by Petitioner. Therefore, we conclude that Petitioner's services constitute the sale of an information service within the meaning of Tax Law § 1105(c)(1), and not the sale of prewritten computer software. *See Matter of DZ Bank*, Tax Appeals Tribunal, May 11, 2009.

The tax on information services does not apply to the furnishing of information that is personal or individual in nature and that is not or may not be substantially incorporated into reports furnished to other persons. *See* Tax Law § 1105(c)(1) and (9); *See also* NYCRR § 527.3(b)(2). The tracking data Petitioner collects and provides to its customers is uniquely specific to each customer: the data are based solely on the actions taken and profiles created by users within the customer's mobile or web application, rather than from a public or common data source. However, Petitioner also uses the data it collects from each of its customers to generate benchmark reports that are offered to the public through its website. Because customer data are the underlying source of information upon which the benchmark reports are generated, and such reports are furnished to the public, Petitioner's information service does not qualify for exclusion from the tax imposed by Tax Law § 1105(c)(1).

Petitioner also offers its customers the ability to turn more users into active loyal customers through email, push, SMS messaging and in-app notifications. Email, push, SMS messaging and in-app notifications are digital mechanisms commonly used by companies to market their products. Petitioner's notification and messaging service is accomplished through Petitioner's application services platform and is only available to customers that purchase the

People plan, as it targets only those users who performed (or did not perform) an event that triggered such notification/message. The People plan subscription is sold as single bulk service based on the amount of data or user profiles its customers seek to capture. The messaging and notification service is not taxable as an information service under Tax Law § 1105(c)(1) because the service qualifies for the advertising exclusion in that section. Advertising services consist of consultation and development of advertising campaigns, and placement of advertisements with the media without the transfer of tangible personal property. *See* NYCRR 527.3(b)(5). Here, because the messaging and notifications service allows Petitioner’s customers to interact with their users via push or SMS messaging in order to drive them back to their product without the transfer of tangible personal property, such service constitutes an advertising service. However, because the message and notification service is only available to customers that purchase the People plan subscription service and is not sold as a stand-alone service, the message and notification feature represents a single component of the larger taxable information service Petitioner offers, and does not affect the taxability of Petitioner’s information service.

DATED: July 15, 2024

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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.