

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-06(5)S
Sales Tax
February 2, 2006

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S020312B

On March 12, 2002, the Department of Taxation and Finance received a Petition for Advisory Opinion from Tower Innovative Learning Solutions, Inc., 840 Hanshaw Rd., Ithaca, NY 14850. Petitioner, Tower Innovative Learning Solutions, Inc, provided additional information pertaining to the Petition on April 26, 2002, and December 8, 2005.

The issue raised by Petitioner is whether its education certificate programs and other products and services as described below are subject to New York State sales tax.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner is a for-profit distance learning subsidiary of Cornell University, focused on continuing and executive education certificate programs. Petitioner is not an institution of higher education recognized and approved by the Regents of the University of the State of New York. While Cornell University is accredited through the Middle States Commission on Higher Education and Petitioner's course content is driven by Cornell University's faculty and course content, Petitioner itself is not accredited by any nationally recognized accrediting agency or association. Petitioner provides many of the world's leading organizations with online, asynchronous professional and executive development training in the areas of strategy, leadership and management development, human resources, financial management, and hospitality management. Its course development model and instructor-led course delivery provide for an interactive learning experience.

Petitioner delivers its programs using the Internet or CD-ROM. The primary objective of Petitioner's programs is to provide distance learning that allows students to earn certificates in various fields through online study. A student who purchases Petitioner's program will access a course on numerous occasions via the Internet, and completing the course may take as long as several months, but is more likely to occur over a few weeks.

All purchases by students must be prepaid by check or credit card before a student can commence a course of study. A student may or may not complete a program purchased from Petitioner, but Petitioner will have collected the payment for the program and no refund will be given if the student stops study in the middle of the program. Peripheral materials, such as books and CD-ROMs that can be used at home or the office without the Internet, are not currently sold to students. Such sales of peripheral materials may, however, be made in the future.

Welcome packages may be sent to students who have committed to taking a course or have taken one of Petitioner's courses previously. This package includes a CD with information on computer hardware and software requirements, how to install the educational materials, other courses offered and registration procedures. Students are not charged for these packages.

In the future, Petitioner expects to provide digital imaging and document support for its programs, digitized special collections (course data stored and accessed in digitized format) available for sale on CD, digital library and student services available to online students, and programs for Asian audiences.

Petitioner also offers a wide variety of programs such as hotel management, human resources, and systems engineering to corporations for use in training their employees. Petitioner's target market includes the United States as well as foreign countries. The following programs are currently offered:

1. The School of Hotel Management Program focuses on hospitality management and marketing. This certificate program is comprised of six different courses, each consisting of approximately six modules. The market for the Hotel Certificate Program is divided into two primary segments: organizational customers and individual customers.

Organizational customers include hotel companies, industry associations, and schools and colleges teaching hospitality management. Marketing targets include hotel companies, industry associations, and schools and colleges with whom Cornell University's Hotel School already has relationships, and within geographical locations where middle management level Cornell programming is currently selling well. The individual customer target market includes individuals currently working in lodging properties and already holding or aspiring to functional management positions. These include director, assistant director, or manager positions in the food and beverage, rooms division, finance, sales and marketing, human resources, purchasing, and engineering areas. These individuals will be in a position to purchase modules themselves, or to persuade their employers to fund their learning.

2. The School of Industrial and Labor Relations Program focuses on human resources issues and is comprised of six courses, each with approximately six modules. Targets for this program are human resources professionals. In the future, Petitioner plans to make this program available in other languages, beginning with Spanish. The program will, on average, include an additional four to six workshops per year and discontinue approximately two because of the emerging needs of clients and the trends in American business and human resources practice. Petitioner is also considering, in the future, adding human resources certificate programs in staffing and employee relations and certificates in training, compensation and benefits.
3. The College of Engineering Program focuses on systems engineering and has four courses. The potential for this program is governed by the jobs

available in systems engineering. Corporations are the key market for the systems engineering certificate program.

4. The College of Engineering/Johnson School of Management Program includes instruction in project management and consists of nine courses.

Additionally there are approximately five certificate programs that are being developed by Petitioner. Each program is expected to consist of approximately four courses.

In an effort to market its online programs, Petitioner plans to develop brief demonstration modules for each program. These will be provided, at no charge, to corporations that are not familiar with the potential and quality of online executive education programs and/or are more comfortable with older forms of technology, such as videotapes of live courses.

Petitioner provides academic support to students enrolled in certificate programs, including answering students' e-mail, hosting online discussions, coordinating group projects, answering students' phone calls, and providing on-site support to corporate purchasers with a large number of students enrolled in a particular program. The students receive the academic support without any additional fees or charges, it is included in the price paid for the program.

Petitioner also will create derivative products that have commercial value in their own right. These products are stand-alone products developed in the process of producing a distance learning program, including such items as games, simulations, videotapes, case studies, interactive exercises, role playing scenarios, etc.

Applicable law and regulations

Section 1101(b) of the Tax Law states, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or *license to use or consume* (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor. (Emphasis added)

(6) Tangible personal property. Corporeal personal property of any nature. . . . Such term shall also include 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 such software is conveyed to a purchaser. . . .

* * *

(14) Pre-written computer software. Computer software (including pre-written upgrades thereof) which is not software designed and developed by the author or other creator to the specifications of a specific purchaser. The combining of two or more pre-written computer software programs or pre-written portions thereof does not cause the combination to be other than pre-written computer software. Pre-written software also includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than such purchaser. Where a person modifies or enhances computer software of which such person is not the author or creator, such person shall be deemed to be the author or creator only of such person's modifications or enhancements. Pre-written software or a pre-written portion thereof that is modified or enhanced to any degree, where such modification or enhancement is designed and developed to the specifications of a specific purchaser, remains pre-written software; provided, however, that where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for such modification or enhancement, such modification or enhancement shall not constitute pre-written computer software.

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax – . . . there is hereby imposed and there shall be paid a tax . . . upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

* * *

(c) The receipts from every sale, except for resale, of the following services:

(1) 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, . . .

* * *

(9)(i) The furnishing or provision of an entertainment service or of an information service (but not an information service subject to tax under paragraph one of this

subdivision), which is furnished, provided, or delivered by means of telephony or telegraphy or telephone or telegraph service (whether intrastate or interstate) of whatever nature, such as entertainment or information services provided through 800 or 900 numbers or mass announcement services or interactive information network services. Provided, however, that in no event (i) shall the furnishing or provision of an information service be taxed under this paragraph unless it would otherwise be subject to taxation under paragraph one of this subdivision if it were furnished by printed . . . matter or by duplicating written or printed matter in any other manner. . . .

Section 1115 of the Tax Law provides, in part:

(a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

* * *

(34) Textbooks purchased by full and part time college students for their courses; provided, however, that upon purchase such a student shall present a valid student identification card, and such a textbook shall be required for a course being taken by such student at an institution of higher education. For purposes of this subdivision the term:

(i) "Textbooks" includes only those books specifically written, designed or produced for educational, instructional or pedagogical purposes.

(ii) "Institution of higher education" shall mean any institution of higher education, recognized and approved by the regents of the university of the state of New York or accredited by a nationally recognized accrediting agency or association accepted as such by the regents of the university of the state of New York, which provides a course of study leading to the granting of a post-secondary degree, certificate or diploma.

Section 525.2(a)(3) of the Sales and Use Tax Regulations provides:

Except as specifically provided otherwise, the sales tax is a "destination tax." The point of delivery or point at which possession is transferred by the vendor to the purchaser, or the purchaser's designee, controls both the tax incidence and the tax rate.

Section 526.7 of the Sales and Use Tax Regulations provides, in part:

(a) *Definition.* (1) The words *sale*, *selling* or *purchase* mean any transaction in which there is a transfer of title or possession, or both, of tangible personal property for a consideration.

(2) Among the transactions included in the words *sale*, *selling* or *purchase* are exchanges, barter, rentals, leases or licenses to use or consume tangible personal property.

* * *

(b) *Consideration*. The term *consideration* includes monetary consideration, exchange, barter, the rendering of any service, or any agreement therefor. *Monetary consideration* includes assumption of liabilities, fees, rentals, royalties or any other charge that a purchaser, lessee or licensee is required to pay.

(c) *Rentals, leases, licenses to use*. (1) The terms *rental*, *lease* and *license to use* refer to all transactions in which there is a transfer for a consideration of possession of tangible personal property without a transfer of title to the property. Whether a transaction is a “sale” or a “rental, lease or license to use” shall be determined in accordance with the provisions of the agreement. . . .

* * *

(f) *Reproduction rights*. (1) The granting of a right to reproduce an original painting, illustration, photograph, sculpture, manuscript or other similar work is not a license to use or a sale, and is not taxable, where the payment made for such right is in the nature of a royalty to the grantor under the laws relating to artistic and literary property.

(2) Mere temporary possession or custody for the purpose of making the reproduction is not deemed to be a transfer of possession which would convert the reproduction right into a license to use. (See *Howitt v. Street and Smith Publications, Inc.*, 276 N.Y.345 and *Matter of Frissell v. McGoldrick*, 300 N.Y. 370.)

Technical Services Bureau Memorandum, *State and Local Sales and Compensating Use Taxes Imposed on Certain Sales of Computer Software*, TSB-M-93(3)S, March 1, 1993, pertaining to the taxability of computer software and certain related services provides, in part:

. . . State and local sales and compensating use taxes are imposed on the sale or use of prewritten computer software and certain related services.

* * *

Prewritten computer software is any computer software that is not designed and developed by the author or other creator to the specifications of a specific purchaser.

The sale of prewritten software includes any transfer of title or possession, any exchange, barter, rental, lease or license to use, including merely the right to reproduce, for consideration. . . .

* * *

Prewritten software is subject to tax whether sold as part of a package or separately. Software created by combining two or more prewritten programs or portions of prewritten programs is still prewritten software subject to tax. The medium by which the software is transferred to the purchaser has no effect on the software's taxability. Thus, prewritten software is taxable whether sold, for example, on a disk, tape or by electronic transmission over telephone lines.

Prewritten software, even though modified or enhanced to the specifications of a specific purchaser, remains prewritten software subject to tax. . . .

Example 1. A software developer creates an accounting system using prewritten software modules for general ledger, accounts receivable, accounts payable, payroll, inventory management, etc. The developer may also sell the modules separately or bundled in other packages. Even though the modules may be modified to the specific requirements of the client's business, *the sale of the modules is subject to sales or use tax as prewritten software. . . .* [Emphasis added]

Opinion

Petitioner is a for-profit entity focused on providing continuing and executive education certificate programs. For example, Petitioner's Hotel Certificate Program is comprised of six different courses, with approximately six modules in each course, and focuses on hospitality management and marketing. The program provides training to develop an individual's skills for management positions in hospitality areas such as food and beverage, rooms division, finance, sales and marketing, human resources, purchasing and engineering.

Petitioner delivers its programs using the Internet or CD-ROMs. Students enrolled in these certificate programs also receive academic support including e-mail and telephone assistance, hosted online discussions and coordination of group projects. On-site support is provided to corporate purchasers with a large number of students enrolled in a particular program. The students receive the academic support without any additional fees or charges.

The following are Petitioner's questions concerning the sale of its products and the answers describing the appropriate application of the New York State sales and use tax. It should be noted that if any of Petitioner's products or services is delivered outside New York State for use outside of the State no New York State sales tax is due.

1. Is an educational program offered only through the Internet, with or without the welcome package shipped to the student at no additional charge, subject to sales tax?

The Internet link to Petitioner's online provision of the course material allows the student to study the course curriculum independently via computer whether from home, work or elsewhere. The Internet linkage is designed to allow the student to complete the modules of a course on the student's schedule. Students have access to telephone and e-mail academic support, online discussions and coordinated group projects. Although Petitioner is conveying the course material to the students electronically via a software platform, the student's primary objective is to acquire credit toward a certificate for having completed and mastered the course material. Students are not purchasing software from Petitioner, but rather paying Petitioner to attend a course of study. Petitioner is not selling software to students. Presumably, Petitioner's primary function is to provide its students with a course of study. The educational services provided by Petitioner are services that are not included among the enumerated services subject to sales tax under section 1105(c) of the Tax Law. Accordingly, Petitioner is not required to collect tax on sales of educational programs which are only offered through the Internet.

2. Is a program that is offered through the Internet with course materials provided on CD-ROM, either for a fee to the customer or at no additional charge, subject to sales tax?

In general, course materials provided in written format or electronically, by CD-ROM or otherwise, to students at no additional charge do not affect the nontaxability of Petitioner's educational services. (See *Marcum and Kliegman*, Adv Op Comm T&F, January 19, 2006, TSB-A-06(4)S)

With respect to course materials provided for a fee, sales of written material or CD-ROMs by Petitioner to customers in New York are subject to sales tax as sales of tangible personal property under section 1105(a) of the Tax Law. See *O'Keefe & Company*, Adv Op Comm T&F, May 19, 1998, TSB-A-98(36)S.

Section 1115(a)(34) of the Tax Law provides an exemption from sales tax for purchases of college textbooks by students enrolled at courses given at institutions of higher education. The exemption applies whether the textbooks are printed, are on computer floppy disk, or are on CD-ROM. See Technical Services Bureau Memorandum, *Sales and Use Tax Exemption for College Textbooks*, June 5, 1998, TSB-M-98(4)S. However, for purposes of section 1115(a)(34), in order to be an "institution of higher education" the institution must be recognized as such and approved by the Regents of the University of the State of New York, or accredited by a nationally recognized accrediting agency or association accepted as such by the Regents, and provide a course of study leading to the granting of a post-secondary degree, certificate or diploma. Petitioner has indicated that it is not recognized by the Regents of the University of the State of New York or accredited by any nationally recognized accrediting agency or association. Therefore, textbooks sold to students for use in Petitioner's courses do not qualify for the

exemption from sales tax for college textbooks under section 1115(a)(34) of the Tax Law (see *Capital Region Chapter, American Institute of Banking, Inc.*, Adv Op Comm T&F, March 1, 1999, TSB-A-99(14)S). Thus, sales of course materials on CD-ROM delivered to locations in New York State are subject to sales tax.

3. Is a program offered through the Internet with course materials provided in a textbook or manual either for a fee to the customer or at no additional charge subject to sales tax?

As explained above, course materials incidentally provided to students and included in the fees paid for educational services do not affect the nontaxability of Petitioner's educational services. Any additional fees for textbooks or manuals sold by Petitioner are subject to sales tax when delivered to locations in New York State.

4. Is an educational program that is offered either on CD-ROM, by textbook or manual, or by a CD-ROM and textbook or manual combination at no additional fee or for a minimal fee (premium) for the materials above and beyond the fee that would be charged for the program presented via the Internet subject to sales tax?

Except to the extent that the provision of a CD-ROM, textbook or manual is incidental to Petitioner's provision of educational services, the sale of Petitioner's educational program in CD-ROM, textbook or manual format, or any combination thereof, constitutes the sale of tangible personal property in accordance with the meaning and intent of sections 1101(b)(5) and (6) of the Tax Law. Thus receipts from such sales are subject to the sales tax imposed by section 1105(a) of the Tax Law when delivered to locations in New York State.

5. Will Petitioner's digitized collections offered on the Internet be subject to sales tax?

Petitioner expects to digitally capture and store course documents and make them accessible via the Internet rather than in paper format. Section 1105(c)(1) of the Tax Law imposes sales tax on the service of furnishing information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any manner including tapes, discs, electronic readouts or displays. See *Murphy Heating Service, Inc. v Chu*, 124 AD2d 907. Section 1105(c)(9) of the tax law imposes sales tax on the furnishing of information by means of telephony and telegraphy. The collecting, compiling or analyzing of information of any kind or nature and the furnishing of reports thereof to other persons is an information service. However, tax is not due on the receipts from the sale of information that is personal and individual in nature and is not or may not be substantially incorporated into reports furnished to others.

Where the data provided in Petitioner's digitized collections (digital library) is gleaned from general sources and data that is available to any one customer is available to others, the information is not personal or individual and does not qualify for the exclusion in section 1105(c)(1) of the Tax Law. See *Matter of Twin Coast Newspapers, Inc. v State Tax Commn*,

101 AD2d 977, appeal dismissed 64 NY2d 874; *Matter of Towne-Oller and Associates, Inc. v State Tax Commn.*, 120 AD2d 873. Accordingly, except to the extent that the provision of Petitioner's digitized collections is incidental to Petitioner's provision of educational services, it appears that receipts from Petitioner's sales of digitized collections over the Internet may be subject to sales tax when delivered to locations within New York State.

6. Are the the digitized collections offered on CD-ROM subject to sales tax?

Receipts from sales of digitized collections on CD-ROM delivered to locations in New York State are taxable under section 1105(a) or section 1105(c)(1) of the Tax Law. See *Alan Drey Co. v State Tax Commn.*, 67 AD2d 1055; *Matter of Harold E. Mertz et al., Copartners d/b/a Publishers Clearing House v State Tax Commn.*, 89 AD2d 396.

7. Are the demonstration modules offered on videotape and shipped on request with or without a fee subject to sales and use tax?

The sale (for a fee) of demonstration modules, whether in the form of CD-ROM or videotape, constitutes the sale of tangible personal property and is subject to the sales tax imposed by section 1105(a) of the Tax Law when delivered to locations in New York State. When no fee or other consideration is given for a demonstration module transferred to a customer, no New York sales tax is due. However, Petitioner may owe use tax on its use of such tangible personal property.

8. Are the teaching support services provided to students enrolled in Petitioner's program subject to sales tax?

Educational services are not subject to tax. (See question 1.)

9. Are the sales of derivative products such as games, simulations, videotapes, case studies, interactive exercises, role playing scenarios, etc., subject to sales tax?

Sales of tangible personal property are subject to tax under section 1105(a) of the Tax Law. Accordingly, sales of Petitioner's derivative products in a tangible format, such as videotape or CD-ROM, are subject to sales tax when delivered to locations in New York State. To the extent that Petitioner's derivative products are considered to be software, such software constitutes prewritten software. Sales of prewritten software are subject to sales tax as sales of tangible personal property. See section 1101(b)(6) of the Tax Law. The method of delivery of software does not change its taxability. See section 1101(b)(6) of the Tax Law. Accordingly, receipts from the retail sales of software delivered on CD-ROMs or other media are subject to sales tax under section 1105(a) of the Tax Law when delivered to locations in New York State. To the extent derivative products such as games and interactive exercises offered online to the customer are not subject to tax under section 1105(a) as sales of tangible personal property, such games and interactive exercises may be subject to tax under section 1105(c)(9) of the Tax Law as sales of information or entertainment services delivered electronically.

10. Is permission to reproduce the program materials either for a fee or at no additional charge subject to sales tax?

Fees paid for use of copyrighted material in the nature of a royalty are not subject to sales tax. See section 526.7(f) of the Sales and Use Tax Regulations. The transfer of temporary possession or custody of the copyrighted materials to a customer for the sole purpose of reproducing the material is not considered to be a transfer of possession that would convert the royalty right into a taxable use. Thus, a fee paid for the right to incorporate Petitioner's teaching materials in some other textbook or course materials would not be subject to sales tax. See *Alan/Anthony, Inc.*, Adv Op Comm T & F, July 30, 1992, TSB-A-92(60)S; and section 526.7(f)(2) of the Sales and Use Tax Regulations. However, fees paid by a customer for the use of Petitioner's program materials in order to enable the customer to provide a course of study are not fees paid merely for reproduction rights. Such fees may be considered to be for the sale of tangible personal property and subject to sales tax under section 1105(a) of the Tax Law, as discussed in the preceding questions.

11. Would any answers change if the programs or materials are licensed instead of sold?

To the extent that Petitioner is considered engaged in the sale of tangible personal property (including sales of prewritten software), the sale, lease or license to use tangible personal property each constitutes a sale within the meaning of section 1101(b)(5) of the Tax Law. See section 526.7(c)(1) of the Sales and Use Tax Regulations. Accordingly, the previous answers would not change if the programs or materials are licensed or leased to customers instead of being sold.

DATED: February 2, 2006

/s/
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