

**New York State Department of Taxation and Finance**  
**Office of Tax Policy Analysis**  
**Taxpayer Guidance Division**

TSB-A-07(28)S  
Sales Tax  
November 14, 2007

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S060615A

On June 15, 2006, the Department of Taxation and Finance received a Petition for Advisory Opinion from VIPCS, 1897 Southside Drive, Oneonta, New York 13820.

The issue raised by Petitioner, VIPCS, is whether its sales of computer hardware, software, and/or computer-related services as described in the scenarios below are subject to sales tax.

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

Petitioner is a computer sales and consulting firm which, among other computer-related services, provides professional design and consulting services and computer repairs, upgrades, and installations.

Scenario 1

A customer requests that Petitioner network the customer's computers together. Petitioner evaluates the location of the computers, designs the network architecture, recommends products to purchase, orders and delivers hardware, installs and configures the hardware ordered, and configures the computers so they can communicate with each other and the Internet.

Some hardware consists of stand-alone boxes or units that connect to computers via wires, cables, or radio waves (wireless networking); other hardware known as "computer boards" is installed internally within the computer. In some instances, the customer may purchase the hardware and software from another vendor and Petitioner only provides design, consulting, and installation service.

Scenario 2

A customer requests the ability to have remote access to its network in its main office from a branch office. Providing this capability generally requires no additional hardware or software; it merely requires configuration of existing capabilities in the Windows operating systems already installed on the computers and configuration of other existing network equipment, such as routers and firewalls. In some instances either Petitioner or customer may purchase software as part of the implementation.

### Scenario 3

A customer reports a problem with an existing PC and Petitioner troubleshoots the PC. Petitioner determines that the problem is caused by a misconfiguration in the system, which requires no additional hardware or software, and corrects the problem by reconfiguring the system (e.g., editing a settings file). In some instances, either Petitioner or the customer may purchase hardware or software upgrades to rectify the problem.

### Scenario 4

A customer asks Petitioner to assist with the selection, purchase, and installation of new computer systems. Petitioner researches current systems, identifies features of interest to the customer, compares prices, obtains the customer's permission to purchase systems, orders hardware and software for the customer (for which the customer pays or is billed directly), and installs hardware at the customer's site. Installation consists of physically connecting components together (such as a monitor to the computer), installing any additional software already owned or purchased separately, and performing various configuration actions (such as configuring screen savers, scheduling data backups, installing hardware drives, and configuring networking properties so computers can communicate on the Internet).

### Scenario 5

A customer requests that Petitioner recover or copy data from one system or media (e.g., a floppy drive or bad hard drive) to a CD-ROM. Petitioner does not repair the existing system; it only extracts data from it, and then provides the customer with a CD-ROM.

## **Applicable law and regulations**

Section 1101(b) of the Tax Law provides, 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.

(6) Tangible personal property. Corporeal personal property of any nature. However, except for purposes of the tax imposed by subdivision (b) of section eleven hundred five, such term shall not include gas, electricity, refrigeration and steam. *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 . . .* [Emphasis added]

\* \* \*

(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 . . . 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. On and after June first, nineteen hundred seventy-one, 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:

\* \* \*

(2) Producing, fabricating, processing, printing or imprinting tangible personal property, performed for a person who directly or indirectly furnishes the tangible personal property, not purchased by him for resale, upon which services are performed.

(3) Installing tangible personal property . . . or maintaining, servicing or repairing tangible personal property . . . not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin-operated equipment or by

any other means, and whether or not any tangible personal property is transferred in conjunction therewith . . .

Section 1115(o) of the Tax Law provides:

Services otherwise taxable under subdivision (c) of section eleven hundred five or under section eleven hundred ten shall be exempt from tax under this article where performed on computer software of any nature; provided, however, that where such services are provided to a customer in conjunction with the sale of tangible personal property any charge for such services shall be exempt only when such charge is reasonable and separately stated on an invoice or other statement of the price given to the purchaser.

Section 526.5 of the Sales and Use Tax Regulations provides, in part:

(a) Definition. The word *receipt* means the amount of the sale price of any property and the charge for any service taxable under articles 28 and 29 of the Tax Law, valued in money, whether received in money or otherwise. The following subdivisions of this section discuss elements of a receipt.

\* \* \*

(e) Expenses. All expenses, including telephone and telegraph and other service charges, incurred by a vendor in making a sale, regardless of their taxable status and regardless of whether they are billed to a customer are not deductible from the receipts.

Section 527.1 of the Sales and Use Tax Regulations provides, in part:

(a) *Imposition*. The sales tax is imposed on the receipts from every retail sale of tangible personal property delivered by the vendor to the purchaser or the purchaser's designee in this State, unless specifically exempt or excluded under the Tax Law.

(b) *Taxable and exempt items sold as a single unit*. 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.

Technical Services Bureau Memorandum, *State and Local Sales and Compensating Use Taxes Imposed on Certain Sales of Computer Software*, March 1, 1993, TSB-M-93(3)S, provides, in part:

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. Thus, a payment made by a customer . . . for a license to use, or for the rental or lease of prewritten software is subject to sales or use tax. . . .

Software that was originally designed and developed to the specifications of a specific purchaser (i.e., "custom" software) loses its identity as such and becomes prewritten software, subject to tax, if and when it is sold to someone other than the person for whom it was specifically designed and developed. . . .

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. However, if a charge for the custom modification or enhancement is reasonable and separately stated on the invoice or billing statement, then the separately stated charge for the custom modification or enhancement is not subject to tax.

\* \* \*

#### Customer Support and Related Services

Services taxable under section 1105(c) of the Tax Law are exempt from tax under section 1115(o) of the Tax Law where performed on any computer software. However, where such services to be performed on software are sold in conjunction with the sale of tangible personal property, such as prewritten software, the charge for such services is exempt only if it is reasonable and separately stated on the invoice or billing statement given to the customer.

Thus, charges for customer (user) support or for information services provided by a vendor to a customer, either in person or by some type of telecommunications arrangement (e.g., telephone, modem, facsimile machine, etc.), in the nature of training, consulting, instructing or other diagnostic or troubleshooting services related to prewritten software are exempt from sales and use taxes where the charges are reasonable and separately stated. Charges for the service of installing, repairing, maintaining or servicing prewritten software are also exempt from sales and use taxes where the charges are reasonable and separately stated on the invoice. Of course, any charges for the above described services sold in connection with custom software are exempt from tax.

Programming and systems analysis are also exempt services. However, where these services are rendered in conjunction with the sale of prewritten software, the charge for the service is exempt from tax only when the charge for the service is reasonable and separately stated on the invoice or billing statement given to the customer.

## **Opinion**

Petitioner provides computer services, which include design and consulting services and computer repairs, upgrades, and installations, focusing on meeting the specific needs of each customer. Petitioner's scenarios describe sales of services and tangible personal property in different combinations. In general, the transactions can be described as sales of computer hardware and software, installation of computer hardware and software (provided by either Petitioner or customer), consulting services (including research, evaluation, design, and troubleshooting), customization of computer software, and data conversion.

Section 1105(a) of the Tax Law imposes a tax on the receipts from every retail sale of tangible personal property, including the sale of prewritten software. See sections 1101(b)(6) and (14) of the Tax Law. Thus, Petitioner's sales of computer hardware and prewritten software are subject to sales tax.

Petitioner sells both taxable and nontaxable services to its customers. Only those services enumerated by section 1105(c) of the Tax Law are subject to sales tax. Petitioner's separately stated and billed consulting services for researching, evaluating, comparative pricing, and designing computer systems to be networked are not subject to sales tax provided the services are separately sold. Thus, if the customer has the option to purchase the recommended computer hardware, software, and services (installation, modification, etc.) from either Petitioner or any other vendor; the customer may purchase computer hardware, software and services from Petitioner without purchasing consulting services from Petitioner; the customer separately contracts for the purchase of consulting services; and such services are not merely an expense of Petitioner in making sales of hardware or software, separately stated and reasonable charges for the sale of consulting services are not subject to sales tax. To the extent that such services are only provided in conjunction with the sale of tangible personal property (computer hardware, software, etc.), they are considered part of the sale of such property and are taxable whether or not the charges for such services are separately stated. See section 1101(b)(3) of the Tax Law and *Pricewaterhouse Coopers LLP*, Adv Op Comm T&F, March 25, 2003, TSB-A-03(11)S.

Among the taxable services enumerated by section 1105(c) of the Tax Law are installing, maintaining, servicing, and repairing tangible personal property whether or not any tangible personal property is transferred in conjunction with such service. Therefore, Petitioner's charges for installing, troubleshooting, reconfiguring, or repairing computer hardware are subject to sales tax under section 1105(c)(3), whether Petitioner sells the computer hardware or it is provided by the customer. Section 1115(o) of the Tax Law exempts charges for installing, maintaining, servicing, or repairing computer software from sales and use taxes provided such charges are

reasonable and separately stated on an invoice or other statement of the price given to the purchaser. Thus, Petitioner's charges for installing, troubleshooting, reconfiguring, or repairing computer software are not subject to tax when reasonable and separately stated on the customer's invoice. In addition, Petitioner's charge for the custom modification or enhancement of software is not subject to tax provided such charge is reasonable and separately stated from any charge for prewritten software or other tangible personal property provided to the customer. See section 1101(b)(14) of the Tax Law and TSB-M-93(3)S, *supra*.

In Scenario 1, Petitioner's charges for design and consulting services are not subject to sales tax if such services and the hardware and the software can be purchased separately, and such services are separately contracted, provided that the charges for design and consulting and for hardware and software are separately stated and reasonable. Petitioner's charges for the sale, installation, and configuration of hardware are subject to tax under sections 1105(a) and 1105(c)(3) of the Tax Law. If Petitioner does not charge separately for these items, the entire charge to the customer is subject to tax. See section 527.1(b) of the Sales and Use Tax Regulations.

In Scenario 2, Petitioner's charges to reconfigure the customer's software to provide remote access to the customer's network are not subject to sales tax. Such charges are for servicing software and are exempt from tax pursuant to section 1115(o) of the Tax Law. Sales of prewritten software to the customer are subject to tax under section 1105(a) of the Tax Law. If Petitioner does not charge separately for the software servicing and the prewritten software, the entire charge is subject to tax. See section 1115(o) of the Tax Law and section 527.1(b) of the Sales and Use Tax Regulations.

In Scenario 3, Petitioner is performing a repair service, which involves troubleshooting the problem and then making the necessary repair. If the repair is limited to troubleshooting and fixing or reconfiguring a customer's software, the service is exempt from sales tax under section 1115(o) of the Tax Law. If the repair involves diagnosing, repairing, or installing hardware, whether sold by Petitioner or provided by the customer, the service is subject to sales tax under section 1105(c)(3) of the Tax Law. If Petitioner provides troubleshooting or repair services involving both software and hardware or if Petitioner provides troubleshooting or repair services in conjunction with the sale of hardware or prewritten software, the entire charge will be subject to sales tax except that reasonable and separately stated charges made for troubleshooting or repair services to the software are not subject to sales tax.

In Scenario 4, Petitioner's services include identifying the customer's current system features, researching features of interest to the customer, price comparisons, ordering new hardware and software for the customer, installing hardware and software, and configuring the new system. In this scenario, the customer is directly billed by and pays another vendor for the hardware and software. Thus, Petitioner is not selling hardware or software to the customer. Petitioner's reasonable and separately stated charges for identifying the customer's current system features, researching price comparisons and features of interest to the customer, installing

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software, configuring screen savers and networking properties, and scheduling data backups are for services that are not subject to sales tax. However, Petitioner's charges for installing hardware are subject to tax under section 1105(c)(3) of the Tax Law.

In Scenario 5, Petitioner extracts a customer's existing data from a computer, copies the data onto a CD-ROM, and furnishes the CD-ROM to the customer. The provision of the CD-ROM to the customer is subject to sales tax pursuant to section 1105(a) of the Tax Law as a sale of tangible personal property. See *Moore Business Forms, Inc.*, Adv Op Comm T&F, February 15, 1995, TSB-A-95(6)S.

DATED: November 14, 2007

/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.