

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-09(8)S
Sales Tax
February 2, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S080403A

The petition asks whether various aspects of two of XYZ Corporation's products, which are accessed through an Internet-based financial transaction settlement platform, are subject to New York State and local sales and use taxes. We conclude that neither product provided by XYZ is an information service subject to State and local sales tax. However, we conclude that provision of the second product constitutes the sale of pre-written computer software subject to State and local sales taxes.

XYZ describes its products as services that facilitate the settlement of transactions in the primary and secondary syndicated bank loan market. The first product involves the sale of a financial instrument known as a primary syndication, which is the original issue of a bank loan to a corporate client. In this transaction, the seller (or group of sellers acting as one) offers all or part of a commercial loan to a buyer. Before contacting XYZ, the seller or sellers negotiate the terms of the sale with the buyer. The seller or group of sellers then provides XYZ with the identity of the buyer and the details of the sale. XYZ enters the information onto the platform to incorporate it into the necessary contracts and other documents. The seller (or, in the case of a group of sellers, the main designated seller or administrative agent) then approves and electronically "signs" the documents. Once this is completed, the buyer accesses the platform and reviews the electronic documents. If the buyer accepts the offer, it can either approve the documents electronically and transmit them back to the seller or sellers, or it can download, print, and sign a tangible version of the documents and send them to the seller or sellers via mail, courier, etc. If a buyer does not approve the offer, it can reject the offer or make a counter-offer by editing the documents and transmitting them electronically to the seller. The seller may also edit the documents. The parties can download the documents and either print them or store them in electronic format.

XYZ establishes security measures that ensure that each buyer can access only the documents related to the transaction to which it is a party. Each transaction involves only one buyer. A buyer cannot obtain the identities of other buyers or the details of other transactions. XYZ provides the seller with a daily spreadsheet by e-mail, which includes data relating to its sales. These data include current dollar values of both outstanding and settled transactions. XYZ does not track or provide information about loan balances. These spreadsheets are kept confidential and are not shared with anyone other than the seller to which they refer. XYZ does not use the spreadsheets or the information they contain for any other purpose. XYZ also assists sellers in coordinating transaction completion dates and provides reminders to buyers of applicable deadlines.

The second product differs from the first only in the following ways: First, the financial instrument being sold is a "completed primary" or "secondary trade." This transaction involves the subsequent sale of all or part of a primary syndication. Second, the seller or sellers have the option of establishing a data link and inputting their own information onto the platform, rather than XYZ's inputting the information. The data link also allows the seller or sellers to obtain the daily spreadsheet on their own, rather than XYZ's sending the spreadsheet by e-mail.

XYZ's subscribers access its products by means of an interactive Internet-based electronic system or "platform." Subscribers must, at their sole expense, obtain all the equipment and communications connections to allow access to XYZ's platform. XYZ does not provide any telecommunication service or Internet access service. The equipment and connections must meet certain minimum specifications established by XYZ. Subscribers are provided with a digital certificate, user name, or password, which allows access to the platform. XYZ's sample contract with its subscribers states that "[n]o license for any software or any other product or service is transferred either expressly or by implication, temporary or permanently, to the Subscriber." Subscribers are charged for each primary syndication or secondary trade that is closed.

We conclude that provision of either of the products described above does not constitute the sale of a taxable service. Sales tax is imposed only on certain enumerated services. Among these is the service of “furnishing information by printed mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the service 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.” See Tax Law §1105(c)(1). Converting information already in a customer’s possession from one form or medium to another, without interpreting or recasting it, so that the form of the information changes but not the intelligence contained therein, does not constitute an information service. Finserv v. Tully, 94 AD2d 197 (3d Dep’t 1983) aff’d, 62 NY2d 947 (1984). When XYZ enters information provided by a subscriber onto the platform to be incorporated into contracts and other documents, it is not adding intelligence; rather, it is merely converting information already possessed by the subscriber into a different form. Therefore, this aspect of XYZ’s service is not an information service for purposes of Tax Law section 1105(c)(1).

XYZ also prepares daily spreadsheets containing the current dollar value and status of outstanding and settled transactions. This is not information provided by the subscriber or in the customer’s possession; rather, it is XYZ’s compilation of data from the subscriber’s transactions. Because the spreadsheet provides new information to the subscriber, it is an information service for purposes of Tax Law section 1105(c)(1). Nevertheless, because the information contained in the spreadsheets is specific to the subscriber and is not shared with others or used by XYZ for any other purpose, it is personal or individual in nature, and thus excluded from the sales tax imposed by Tax Law section 1105(c)(1). Calendaring deadlines and providing reminders to the parties involved in a transaction is not an enumerated service for purposes of sales tax.

Tax Law section 1105(c)(9) imposes sales tax on information and entertainment services provided via telephony or telegraphy or telephone or telegraph service of whatever nature. However, the tax imposed by that section does not apply unless the underlying service would otherwise be subject to tax as an information service under section 1105(c)(1). Because we conclude that XYZ’s services described above are not information services that are subject to tax under Tax Law section 1105(c)(1), they are not subject to tax under section 1105(c)(9).

We further conclude that provision of the second product described above constitutes the sale of prewritten computer software. Pre-written computer software is defined as tangible personal property subject to State and local sales tax, “regardless of the medium by means of which the software is conveyed to a purchaser.” Tax Law §1101(b)(6). The sale of pre-written computer software is subject to tax as the sale of tangible personal property. See Tax Law §§1101 (b)(6); 1105(a). “Sale” is defined as “[a]ny 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) or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor.” Tax Law §1105(b)(5). Sales and Use Tax Regulation section 526.7 provides generally that “a sale is taxable at the place where the tangible personal property or service is delivered or the point at which possession is transferred by the vendor to the purchaser or his designee.” Regulation section 526.7(e)(4) further provides that a transfer of possession has occurred if there is actual or constructive possession, or if there has been a transfer of “the right to use, or control, or direct the use of tangible personal property.” The location of the code embodying the software is irrelevant, because the software can be used just as effectively by the customer even though the customer never receives the code on a tangible medium or by download.

The first product described above does not constitute the sale of pre-written computer software, because the subscriber does not obtain constructive possession or the right to use or control the software. XYZ maintains control over the software and inputs all of the information provided by the subscriber. However, with the second product, the subscriber has the option of obtaining a data link to input all of its own information and to generate and obtain spreadsheets and reports. This option, whether or not exercised, provides the subscriber with the right to control the software sufficient to constitute a taxable sale. Although the sample contract between XYZ and its subscribers provides that no license to use software is transferred to the purchaser, this characterization is not controlling. The

subscriber has the right to obtain a password that permits access to the platform and allows it to use and control the software. Thus, provision of the second product described above is the sale of pre-written computer software and is subject to tax when provided to a subscriber in New York. The situs of the sale for purposes of determining the proper local tax rate and jurisdiction is the location of the subscriber or its agents or employees who use the software. If the subscriber's employees who use the software are located both in and out of New York State, XYZ must collect tax based on the portion of the receipt attributable to the users located in New York. See TSB-A-03(5)S.

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/S/

Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

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