

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

TSB-A-15(28)S
Sales Tax
July 9, 2015

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION No. Z120320B

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] "Petitioner". Petitioner asks whether its on-line meetings and conferences and remote access computer products described below are subject to sales and use tax. We conclude that the products are not taxable for sales tax purposes or for purposes of the excise tax on telecommunication products under Tax Law § 186-e.

Facts

Petitioner's products generally enable its subscribers to remotely (1) host and participate in online meetings; (2) organize and present on-line conferences and webinars; (3) provide live technical support to its employees and customers; and (4) remotely access their computers. All of Petitioner's products enable customers to communicate with others on their own computers through the Internet by providing secure connections among multiple users. Petitioner continuously monitors those connections, using software controlled by its employees, to ensure that they remain strong and secure and that unauthorized users cannot gain access. All communications are encrypted and only authorized users can access the product. Petitioner is not an Internet access provider, and subscribers to Petitioner's products must have their own hardware and software, broadband Internet connections, and Internet service provider that allow them to connect with Petitioner's "broker" server as described below.

Petitioner does not provide a software license *per se* to the subscriber for any of its products. However, subscribers do have to complete a subscription agreement to access Petitioner's applications or products. Petitioner maintains that it is the user of the proprietary software used to provide its products, and that its charges are only for these products. For each product, a connection is established by downloading an applet that allows the subscriber or user to connect from a remote location and use Petitioner's product over a proprietary network. Once a connection is established, an encrypted data stream is passed through the servers that connect with one or more computers or electronic devices that may be dispersed within the State, nationally and internationally.

Each of the products is separately available for sale. Petitioner's customers pay a monthly subscription charge based on the number of their users. Payment of the subscription charge permits unlimited usage by each user.

Each of Petitioner's products is described below.

(1) Online Meeting Product (Video and Audio). The Online Meeting Product enables individuals and organizations to conduct multiparty conferences over the Internet. To use this product, a subscriber creates an account by entering into a contract with Petitioner or registering online and creating a username and password. The subscriber then uses its own Internet browser to visit Petitioner's website and to download an applet that identifies the subscriber and permits a secure connection. The subscriber's only use of the applet is to enter a username and password.

Once registered, subscribers are able to conduct Internet meetings for a monthly or annual fee and invite others to attend and view the meetings through the Internet. Users of the product include paying subscribers, non-paying participants invited by any subscriber, and trial users, all of whom download the applet. Meetings may be scheduled on a one-time or recurring basis, and the application integrates such features as the participant's third party calendar software and enables the organizer to track certain things, such as meeting attendance.

A subscriber organizes and hosts a meeting by sending participants a uniform resource locator (URL) that identifies them and enables them to download an applet that functions as a key to the connection to the meeting organizer's computer. The applet consists of a small series of coded commands in the Java computer language that establishes a secure connection with Petitioner's "broker" server. Once the broker server identifies the participant and the organizer whose meeting the participant wants to attend, it connects the participant with the spot on Petitioner's communication's server where the meeting is being hosted, to which the organizer, through a similar process will also be connected. As with the other applets used by Petitioner, the applet sent the subscriber has no function without being connected to the Petitioner's proprietary system over the Internet. Once a connection is established, an encrypted data stream is passed through Petitioner's data centers.

There is no charge to the meeting participants or attendees and, unlike the subscriber organizing the meeting, the participants and attendees do not have to be registered users. The organizer does not pay a fee to allow potential participants to download the applet. With the appropriate Java applet, attendees may also connect using certain smart phones or tablets. The participants may connect through an invitation e-mail, or enter their name and the 9-digit meeting ID number to access the meeting. During presentations, the meeting host retains control of the content on the host's computer. The subscriber must pay other providers for telecommunication or Internet access service to Petitioner's servers. However, it is not necessary to use a computer headset or microphone to access Petitioner's meeting product. A subscriber may require the participants to pay for their own long distance service, or provide a toll free number secured from a third party telecommunications service provider. However, a subscriber may also elect to use a toll free number provided by an entity related to Petitioner. The cost of the toll-free service, whether purchased from the related entity or from another provider, is billed to the customer by the provider and is not part of the fee for Petitioner's product. Petitioner's request for an Advisory Opinion does not concern the taxability of this charge.

The organizer has authority to initiate a digital recording feature, which records to the organizer's computer. Petitioner does not supply software to play these recordings, and it does not have access to them.

(2) Online Conferencing and Web Seminar Product. The Online Conferencing and Web Seminar Product enables individuals and organizations to present information over the Internet. Through this product Petitioner allows the subscriber "organizer" to hold seminars on the Internet with up to 1,000 attendees. Petitioner's infrastructure for this product includes multiple data centers around the world that help it provide a high quality of transmission and connection. The product uses end-to-end encryption for all data. This product includes a recording feature similar to the one discussed above. The organizer can post the webinar to a web seminar server. The organizer can then e-mail a URL designation to others who may wish to view it.

The connection between the computer of the organizer and the web seminar attendee is brought about through the use of applets in the same way as discussed above with regard to Petitioner's on-line meeting product.

(3) Online Remote Support. This web-based product allows a subscriber's own technicians to assist and support the subscriber's employees or, in some cases, the subscriber's customers from a remote location. This product enables shared screen, mouse, text chat, and keyboard control from one computer to another. An applet that allows a connection to the product is installed on the computer system operated by the technician employed by the subscriber. A support request is initiated by a subscriber's employee visiting an Internet support portal maintained on Petitioner's server and entering the support request. The request is then queued for the subscriber's next available technician. With the employee's permission, the representative is granted access to the employee's computer through Petitioner's broker server over the Internet, as described above for Petitioner's on-line meeting product. The representative then begins a remote support session with the employee. Alternatively, the employee can initiate a remote support session with a telephone call. The technician provides the employee with the web portal URL or web address to begin the session. The representative can, from a remote location, diagnose, troubleshoot, and resolve problems. Petitioner charges its subscribers for this product on a monthly per-user basis or on a day-pass basis.

The product provides subscribers with a secure environment for their own technicians to gain remote access to the computers of their employees or customers. Petitioner provides no problem solving or troubleshooting. It provides only access for the subscriber's own technician to perform those activities. A computer "key" used by the employee to obtain access to this product is generated each time an employee uses the product and nothing is left on the employee's computer that can function independent of a connection to Petitioner's server.

(4) Remote Computer Access. This product allows a subscriber to access a computer located elsewhere. The computer being accessed is known as the host computer and the computer used to access it is the remote computer. Once the subscriber's host computer is configured with the applet that allows connection to Petitioner's server, the employee using the remote computer then visits Petitioner's website, enters a user name and password, and clicks on a connect button. That employee then downloads an applet that functions as a key permitting a secure connection to the product and to the subscriber's host computer. The authentication process and the actual connection between the two computers are done using the same technology as discussed above with regard to Petitioner's on-line meeting product. All transmissions through Petitioner's server are encrypted and only those subscriber computers previously configured are displayed and accessed remotely.

Analysis

Tax Law § 1105 imposes sales and use tax on, among other things, retail sales of tangible personal property, including prewritten software, and certain enumerated services. *See* Tax Law § 1105(a), (b), and (c). Tax Law § 1105(b)(1)(B) imposes sales tax on receipts from every sale, other than sales for resale, of intra-state "telephony and telegraphy and telephone and telegraph service of whatever nature." The terms "telephony and telegraphy" include the "use or operation of any apparatus for transmission of sound, sound reproduction or coded or other signals." 20

NYCRR § 527.2(d)(2). Tax Law § 186-e imposes an excise tax on the sale of certain telecommunication services by a provider of telecommunication services. The two taxes are to be construed together, given the overlap in their subject matter. *See* McKinney's Statutes § 221 (statutes that relate to the same persons or things are to be construed together).

Petitioner's web-hosting and online meeting products allow the output stream of the host's computer to be connected with the in-input stream of another or multiple other computers. For example, the on-line remote computer access and on-line remote support products allow a computer to connect with a remote computer for the sole purpose of using the software on the remote computer or fixing something on the remote computer. For each product, Petitioner makes this connection or "bridge" on its communication server, as the users of both computers must provide their own Internet connections to Petitioner's broker server, which then is able to bring the connection about on Petitioner's communication server. The Department has held that "bridging" services are not telephone or telecommunication services for purposes of sales tax or the excise tax imposed by § 186-e. *See* NYT-G-06(1)C/NYT-G-06(3)S; TSB-A-99(35)S and (20)C. Accordingly, Petitioner's products are not subject to sales and use tax or § 186-e tax as telecommunication services.

To access each of these products, the customer must download a Java applet, which consists of a small series of coded commands in the Java computer language that establishes a secure connection with Petitioner's broker server. Also, for some of the products the customer can initiate a recording feature, which appears to be done through software. In light of the limited functionality of the software provided to customers in the overall context of Petitioner's products, the products do not constitute the sale of prewritten software. *See* TSB-A-13(1)S.

To the extent that the conclusions here are inconsistent with the conclusions in TSB-A-82(31)S, TSB-A-04(16)S, and TSB-A-10(41)S, those AOs no longer reflect the policy of this Department.

DATED: July 9, 2015

/S/

DEBORAH R. LIEBMAN
Deputy Counsel

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.