

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance (“Department”) received a Petition for Advisory Opinion from [REDACTED] (Petitioner). Petitioner asks whether charges for its “online webhosting solution,” including charges for certain “optional stand-alone services,” are subject to State and local sales tax. We conclude that Petitioner’s charges for the use of its product are generally not subject to State and local sales tax, but that some of its charges for optional services may be subject to tax when provided in New York State.

Facts

Petitioner is a self-described provider of a “cloud-based solution” for webcasting and virtual communications. Specifically, Petitioner provides a platform through which customers are able to conduct audio and video meetings, conferences, webinars, and live presentations (collectively “events”) with others. To conduct these events, Petitioner’s customers simply upload content that they create onto Petitioner’s platform, and then present this content online. Other than an Internet connection and a device capable of accessing the Internet, neither of which Petitioner sells, no other hardware or software is required to use Petitioner’s product. All connections made between users of Petitioner’s platform are continuously monitored using software that is controlled by Petitioner’s employees, and all communications are encrypted so that only authorized users can access the product. Petitioner uses application and web servers located in co-location facilities, as well as content distribution networks (i.e., globally distributed networks of servers deployed in multiple data centers throughout the world), to make its customers’ hosted materials available to end-users via the Internet.

Petitioner’s customers generally pay an annual fee to use its product. This fee, according to Petitioner, guarantees customers that their events will be “hosted and maintained,” and that Petitioner’s platform will be operational and available for use and access at all times (excluding periods for scheduled maintenance) up to a maximum amount of streaming minutes and viewer access. In addition, Petitioner maintains that this fee also ensures that customers will have access to the digital storage of their events (i.e., “on-demand” viewing access to past events via the Internet), as well as to technical support and training for problem solving. Petitioner indicates that a “standard” event package generally includes three months of digital storage and a limited amount of customer support, though additional storage and support may be purchased for an additional fee.

Petitioner’s platform operates via the use of proprietary software that is hosted outside of New York State. While Petitioner does not provide a software license to customers, *per se*, its

customers are able to create registration and “launch” pages for events, send e-mails to participants using Petitioner’s product, and to control the player/console interface during presentations. In addition, Petitioner’s platform gives customers the ability to include “webinar features” in their events, such as Q&A, chat, polling, surveys, and the ability to allow Facebook to be displayed during a webcast. Also, Petitioner’s “Webcasting and Virtual Events Terms and Conditions,” which are incorporated into all of Petitioner’s contracts, acknowledge that customers may be given access to the software that is used for the provision of Petitioner’s service. All right, title and interest in this software, however, is explicitly retained by Petitioner.

In addition to webcasting and virtual communications, Petitioner offers additional “stand-alone services” to customers, including:

- the delivery of data to customers about the viewers of their webcast that they (the customers) can use for marketing leads or other purposes. Petitioner indicates it does not share this information with other customers or use it for any of its own purposes);
- creative services, such as branding, the creation of logos, and graphics production/design;
- recordings of events created and made available to customers in various formats, as well as conversion of customer content to another file format;
- professional services, such as event management, support, training, and other general “people” services, including audio/video recording either on or off a customer’s location, editing, conversion, and encoding of content, production management, moderator services, transcription, translation, transmission, field producer, field crew, and makeup;
- the rental of production equipment or studios; and
- the provision of “standard reports.”

According to Petitioner, the additional “stand-alone services” listed above are optional, and each service is separately priced and distinct from the customer’s subscription agreement.¹

Analysis

Sales tax applies to the receipts from every retail sale of tangible personal property, except as otherwise provided for in the Tax Law, and the receipts from every sale, except sales for resale, of certain enumerated services. *See* Tax Law § 1105(a), (c). “Sale” is defined, in pertinent part, as “[a]ny transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume...for a consideration, or any agreement therefor.” *See* Tax Law § 1101(b)(5). “Tangible personal property” is defined to include pre-written software, regardless of the medium by means of which such software is conveyed to a purchaser. *See* Tax Law § 1101(b)(6).

¹ Petitioner’s “full service” agreement sets forth various “additional” options and services that may be purchased by customers. However, Petitioner did not provide any information about these, and it is not clear whether they are encompassed in the list above.

Petitioner offers a product that allows customers to host events – including “webinars” and live events - over the Internet. To host such events, customers upload self-created content to servers where it can be accessed and viewed online by others. Petitioner deploys the necessary technology to allow viewers to access this content, but does not provide Internet access service or any other equipment that is required to participate in events. Other than Internet access and a device capable of accessing the Internet, no other hardware or software is required to use Petitioner’s product. Petitioner’s product, to the extent that it facilitates the hosting of events, is not taxable. *See* TSB-A-17(21)S (“webinar” and “live stream” product not taxable). *See also* Tax Law § 1105; TSB-A-16(6)S; TSB-A-15(28)S.

Petitioner’s product, however, allows customers to do more than simply “host” events. For example, customers can create registration and “launch” pages, build “webinar features” into events, send e-mails to event participants, and control the player/console interface during events. In addition, Petitioner provides customers with a certain amount of “digital storage” and on-demand viewing of events, and also provides access to technical support and training. Some of these features, such as the digital storage of events and the provision of technical support and training, are not enumerated services, and thus do not make the product (or any portion thereof) subject to sales and use tax. *See, e.g.*, TSB-A-16(19)S (electronic data storage not subject to sales tax); TSB-A-13(37)S (training, consulting and customer support are not services subject to sales tax). *See also* TSB-A-17(21)S TSB-A-11(17)S L However, other aspects of petitioner’s product – the ability to create event pages, build “webinar features” into events, to control the player/console interface, etc. - involve the use of software that, if sold separately, would be taxable as the sale of prewritten software. *See* Tax Law §§ 1101(b)(6), 1105(a). *See also* TSB-A-17(21)S. However, because these features all appear to be included as part of Petitioner’s product at no additional charge, they are ancillary to the main function of the product, and their tax status is not separable from it. These features, therefore, do not suffice to make Petitioner’s product taxable. *See Penfold v. State Tax Commission*, 114 AD2d 696 (3d Dep’t 1985); TSB-A-17(21)S.

As noted above, Petitioner also sells additional “stand-alone services” to customers, which it describes as optional services that are separately priced and distinct from Petitioner’s core offering. Petitioner, though, does not provide detailed information about any of these “stand-alone services,” other than what is set forth in the facts, above. We are, therefore, unable to provide a definitive opinion regarding the taxability of each these “services” beyond what is discussed above. We note, however, that to the extent that Petitioner rents production equipment to customers in New York State, or to the extent it provides creative and recording services to customers here and delivers the product on tangible media, this would be considered the taxable sale of tangible personal property. *See* Tax Law § 1101(b)(5) (sales includes rentals for consideration); TSB-A-06(32)S (graphic designs delivered on tangible media subject to sales tax).

Finally, to the extent that any of Petitioner’s “stand-alone services” are taxable, this alone will not affect the taxability of Petitioner’s core webcasting and virtual communications product, so long as each taxable “service” is available for purchase separately, is billed separately, and the

charges for such are reasonable in relation to Petitioner's entire charge, Petitioner may collect sales tax on only the separately-stated charges for these services. *See, e.g.*, TSB-A-03(11)S (noting that where sales of taxable and non-taxable items are sold for a single charge, the entire charge is subject to tax unless charges for non-taxable items are separately stated, are reasonable in relation to the total charges, and the non-taxable items may be purchased separately). If Petitioner does not state a reasonable and separate charge for any optional "services" that are taxable, however, then Petitioner's entire charge will be subject to sales tax. *See* 20 NYCRR 527.1(b); TSB-A-16(30)S; TSB-A-15(36)S.

DATED: October 27, 2020

/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.

