

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance received a Petition for an Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner asks whether the charges for use of its web portal are subject to State and local sales taxes. We conclude that charges for use of Petitioner’s software by customers and applicants constitutes the sale of prewritten software subject to sales tax. However, Petitioner’s fees for optional custom programming services, data entry, and training services are not subject to sales tax if they are reasonable, separately stated charges.

**Facts**

Petitioner hosts a product called [REDACTED] (Portal), which is an integrated, online, web-based portal for the preparation, submission, and review of paperless applications. Petitioner’s customers consist of property owners or building management companies. Portal is used in conjunction with the purchase, lease or refinancing of residential property and enables geographically dispersed parties to collaborate simultaneously to complete, submit and process an application. Reviewing parties can log in and vote, download, sign and upload documents related to the acceptance or rejection of applications.

Petitioner installs and configures proprietary software on its servers, provides hardware maintenance, performs back-up services, deploys updates, and offers support personnel for customer service requests. There is no additional charge for these services.

Petitioner’s customers can register buildings they own or manage on Portal. Once registered, customers create application packages for each building. Each application is customized based on type (purchase or lease) and specific building association requirements. Applicants (buyers and lessees) can then access the applications through a unique log-in page, often linked from a customer’s website. The completed application is a collection of personalized forms that each party will access and electronically sign as part of the application process, and that may include attachments (such as a bank statement), certain notices, and credit authorizations.

As part of the service agreement with Portal subscribers, Petitioner provides the following for a set fee:

- Builds a customized application review workflow;
- Creates a set of fee types;
- Assists customers in developing customized application packages for each building;
- Provides technical support with set-up;

- Customizes the customer’s web page look and layout with the customer’s logo and color scheme;
- Provides 16 hours of initial support services and consulting to the customer.

Once an application is completed, the customers or their authorized personnel use Portal to approve, sign and upload documents related to the acceptance or rejection of applications. Portal also processes application fees for their customers.

Petitioner also offers certain optional services for additional fees. These optional services include: the creation or modification of forms and packages for each building; custom programming services; data entry services; additional training services; and additional form and package creation services. The charges for the optional services are separately stated.

### **Analysis**

Sales tax is imposed on retail sales of tangible personal property. *See* Tax Law §§ 1105(a). Tax Law § 1101(b)(5) defines “sale” as “any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume . . . conditional or otherwise, in any manner or by any means whatsoever for a consideration . . . .” “Transfer of possession with respect to a rental, lease or license to use, means that one of the following attributes of property ownership has been transferred: (i) custody or possession of the tangible personal property, actual or constructive; (ii) the right to custody or possession of the tangible personal property; [or] (iii) the right to use, or control or direct the use of, tangible personal property.” *See* 20 NYCRR 526.7(e)(4).

The definition of tangible personal property includes prewritten computer software. *See* Tax Law § 1101(b)(6). Prewritten computer software is software, including prewritten updates, that is not designed to the specifications of a specific purchaser. The combining of two or more prewritten computer software programs remains prewritten computer software. *See* Tax Law § 1101(b)(14). Prewritten computer software that is modified or enhanced to meet the specifications of a specific purchaser remains prewritten software, except to the extent of such modification or enhancement, and but only if there is a reasonable and separately stated charge for the modification or enhancement.

The sale of prewritten computer software has been interpreted to include: (a) charges for online access to “loan origination and processing services,” that allowed customers to complete and print loan processing documents (*see* TSB-A-09(15)S); (b) charges for access to forms that customers could populate and download (*see* TSB-A-13(22)S); and (c) a license to use a software product that allowed customers to upload and manipulate images (*see* TSB-A-08(62)S). The point at which possession of tangible personal property is transferred by the vendor to the purchaser, or the purchaser's designee, controls both the tax incidence and the tax rate. *See* 20 NYCRR 525.2(a)(3).

Petitioner’s charges to its customers to access and use Portal constitutes the sale of prewritten software. Customers obtain constructive possession of the software and the right to use, control, or direct the use of the software, because they access the software to create and review

applications, and they direct potential applicants to use Portal to submit application packages for review. *See* 20 NYCRR 526.7(e)(4)(i) & (ii).

Petitioner's optional services consist of: (1) the creation of forms or modification of standard forms and packages; (2) custom programming services; (3) data entry services; (4) additional form and package creation services; and (5) training services. Charges for the optional services of creating forms or modifying standard forms and packages, and of creating additional forms and packages are exempt only to the extent that the modifications or customized forms are created to the specifications of a specific customer and only for that customer's use, provided the charges are separately stated and reasonable in relation to the overall charge. Similarly, custom programming services and any charges for custom modifications of existing software at the request of a specific customer and only for that customer's use are exempt if the charges are separately stated and reasonable. *See* TSB-A-16(21)S. Optional data entry services and training services are not among the services subject to sales tax, provided the charges for these services are separately stated and reasonable. *See* TSB-A-15(16)S, TSB-A-10(32)S, TSB-M-96(8)S.

Finally, the situs of the sale for purposes of determining the proper local sales tax rate and jurisdiction is the location associated with the license to use, i.e., the location of the Petitioner's customers' employees that use or direct the use of the software. *See* 20 NYCRR 526.7(e)(1) & (4), TSB-A-03-(5)S, & TSB-A-13(22)S. If the customers' employees who use the software are located both in and out of New York State, Petitioner is required to collect tax based on the portion of the receipts attributable to the use by its customers' employees located in New York State.

DATED: July 16, 2024

/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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.