

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

TSB-A-08(24)S
Sales Tax
June 6, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S071227B

On December 27, 2007, the Department of Taxation and Finance received a Petition for Advisory Opinion from STCR Business Systems, Inc., 10 Prospect Street, Endwell, New York 13760.

The issue raised by Petitioner, STCR Business Systems, Inc., is whether charges for sales and installation of tangible personal property, including charges for installing software, equipment testing, and set-up in customer locations, are subject to New York State and local sales tax.

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

Petitioner sells point-of-sale (POS) equipment to retail stores. Petitioner purchases POS equipment from a manufacturer and takes delivery in New York State. Petitioner stages the equipment, installs prewritten software into the equipment, and makes minor modifications to the software related to customer preferences. The equipment is tested, packed, delivered, and set up at a customer's location within New York State. Petitioner charges the customer for staging, installing prewritten software, testing, and setup as a single invoice line item shown as "PROJECT MANAGEMENT" and charges applicable State and local sales tax on the entire amount.

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:

* * *

(3) Receipt. The amount of the sale price of any property and the charge for any service taxable under this article ... without any deduction for expenses or early payment discounts and also including any charges by the vendor to the purchaser for shipping or delivery, ...

* * *

(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 therefore, 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.

* * *

(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:

* * *

(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 525.2(a)(3) of the Sales and Use Tax Regulations provides:

Except as specifically provided otherwise, the sales tax is a “destination tax.” The point of delivery or point at which possession is transferred by the vendor to the purchaser, or the purchaser’s designee, controls both the tax incidence and the tax rate.

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....

* * *

(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.

Section 527.5(a) of the Sales and Use Tax Regulations provides, in part:

Imposition. (1) The tax is imposed on receipts from every sale of the services of installing, maintaining, servicing or repairing tangible personal property, by any means including coin-operated machines, whether or not any tangible personal property is transferred in conjunction with the services.

(2) Installing means setting up tangible personal property or putting it in place for use.

* * *

(3) Maintaining, servicing and repairing are terms used to cover all activities that relate to keeping tangible personal property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition.

* * *

Example 6: A company operates a diagnostic service in which it tests an appliance for a set fee, but does not repair the appliance. The charge for the diagnostic service is taxable.

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.

* * *

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 conjunction with custom software are exempt from tax.

Opinion

Petitioner purchases point-of-sale (POS) equipment from a manufacturer and sells it to retail stores. The equipment is delivered to Petitioner in New York State, where Petitioner installs prewritten software and makes minor modifications to the software based on customer preferences. All equipment is then tested, packed, delivered, and set up at the customer's location.

Petitioner's sales of the POS equipment itself, along with the services of testing and installing the equipment, equate to the sales, testing, and installation of computer hardware. Sales of computer hardware and services of testing and installing computer hardware are subject to sales tax under sections 1105(a) and 1105(c)(3) of the Tax Law. See section 527.5(a) of the Sales and Use Tax Regulations. Petitioner's sales of prewritten software are also subject to tax under section 1105(a) as sales of tangible personal property. See section 1101(b)(6) of the Tax Law. The State and local sales tax due is based on the tax rate in effect in the location where the tangible personal property and services are delivered to the customer. See section 525.2(a)(3) of the Sales and Use Tax Regulations.

The taxable services enumerated under section 1105(c) of the Tax Law are not subject to sales tax when performed on computer software. See section 1115(o) of the Tax Law. Custom modifications or enhancements of prewritten software for a specific purchaser are also not subject to tax. See section 1101(b)(14) of the Tax Law. However, when the customer purchases these services to the software in conjunction with the purchase and installation of computer hardware and the charges for the services to the software are not reasonable and separately stated on the invoice to the customer, the services to the software become a constituent cost and expense of the purchase of the equipment and installation services. See sections 1101(b)(14) and 1115(o). Therefore, Petitioner's lump-sum single-line item charge for staging, testing, and installing the equipment, and the otherwise nontaxable services to the prewritten software are

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subject to sales tax. See TSB-M-93(3)S, *supra*. It is noted that if Petitioner provided a separately stated charge for its services of modifying and installing the prewritten software on its invoice, and if such charges were reasonable, the amount of such charge would be exempt from tax.

DATED: June 6, 2008

/s/
Jonathan Pessen
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Taxpayer Guidance Division

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.