

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 if its receipts from its digital advertising campaign management platform are subject to New York State and local sales and use Tax.

We conclude that Petitioner’s receipts from its platform are subject to sales and use tax.

Facts

Petitioner, a corporation headquartered outside New York State, provides digital advertising products to customers using an advertising campaign management platform (“the Platform”). The Platform, which is hosted on Petitioner’s servers, allows Petitioner’s customers to access a package of software tools to create, deliver and manage their own digital advertising. Access to the Platform is granted to a customer through the execution of a service agreement with the Petitioner, by which the customer is granted a non-exclusive, non-transferable and limited right to access and use the Platform. The service agreement forbids customers from copying, distributing, publishing or transferring the Platform or any other intellectual property. The Platform allows a customer to access and use the following products to create digital advertisements:

1. Rich Media – Interactive digital advertisements that Petitioner sends to various online third-parties that, in turn, publish the advertisements on their web pages. Rich Media allows the web page viewer to engage and interact with the advertisement, for example, by expanding the advertisement when the viewer clicks or rolls the cursor over the advertisement.
2. Standard Media – Standard flash advertisements that typically include text with a visual logo or graphic. Standard Media involves only one interaction, meaning that when the viewer clicks on the advertisement, the viewer will be taken to a destination website.
3. Tracking – Tracking involves a third-party tracking tag sent to a publisher when that publisher cannot serve advertisements. The Tracking product provides click and

- impression data and allows the customer to see how often its individual advertisements were opened.
4. In-Stream – Digital video advertisements that automatically start playing when a person opens a web page or is viewing video content online.
 5. Mobile (Standard and Tracking) – Digital advertising services for campaigns that target mobile devices, such as cell phones or mobile tablets. Such services can include the above-listed Digital Advertising Products, but are targeted to users of mobile devices.
 6. Smart Versioning, (also known as Dynamic Creative Optimization or “DCO”) – This digital advertising product allows the advertiser to tailor the advertisement version to the specific audience, geography or behavioral profile they desire.
 7. Viewability/Verification – This is a suite of products that assist customers in determining whether their digital advertisements were actually posted on a web page and, if so, verifying where the posting occurred. This product ensures that a customer’s digital advertisement is not placed at the bottom of a web page, or adjacent to offensive content.
 8. Channel Connect for Search (or CC4S) – This product allows customers to track their search marketing campaigns together with their display advertising campaigns, served by Petitioner, and see all the data together. Such information is individual in nature to the customer and is not incorporated into reports furnished to other persons.
 9. Trading – This product involves a media buy for a customer across multiple publishers. Such media is purchased in a real-time bidding environment.
 10. Creative/Services – Also referred to as production fees or build fees, these services include any changes made to a digital advertisement, such as adding animation.
 11. Analytics – This product involves the reporting and data collection for individual customers with respect to their digital advertising campaigns. These analytics are individual in nature to the customer and are not incorporated into reports furnished to other persons.

Petitioner also provides additional services, including consulting with customers about how to optimize their digital advertising campaigns. Customers may use Petitioner’s consulting services as much or as little as they wish. In all cases, Petitioner’s personnel approve a final advertising campaign and place digital advertisements using its network of third-party publishers.

Most of Petitioner's receipts are based on the number of "impressions" (views) of ads on a publisher's website by visiting users. For certain other digital advertising products, customers are billed at a percentage of an advertising budget or on an hourly basis. Regardless of the type of service provided or the form of billing, each customer receives an invoice that states a total charge for each advertising campaign for that invoice period. There is no specifically identified charge for access to the Platform.

Analysis

Sales tax is imposed on retail sales of tangible personal property, including prewritten software. *See* Tax Law §§ 1101(b)(6); 1105. 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" *See also* 20 NYCRR 526.7. "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).

Prewritten computer software is computer software that is not designed and developed by the creator to the specifications of a specific purchaser. Tax Law § 1101(b)(14). "Prewritten computer software is included within the definition of tangible personal property, 'regardless of the medium by means of which such software is conveyed to the purchaser.'" TSB-A-08(62)S; Tax Law § 1101(b)(6). Selling a customer access to or the right to use prewritten software constitutes the sale of prewritten software, which is taxable under Tax Law § 1105(a). *See* TSB-A-15(25)S; TSB-A-15(1)S; TSB-A-08(62)S.

Here, the Platform allows Petitioner's customers access to certain software tools to create, deliver and manage their own digital advertisements. Although the agreement refers to these products as "services," they are software that allow customers to create and deliver their own advertisements and to track the placement and exposure of those advertisement. This software is "prewritten" because it is not customized to the specifications of a particular customer. By giving its customers access to prewritten software for their own use, Petitioner is making sales of tangible personal property in New York to the extent that any of its customers' employees who use the software are located in New York.

Petitioner also provides consulting services and advertisement placement services. These are not among the services subject to sales tax. Petitioner would not be required to collect sales tax on receipts from these services if the charges for these services were separately stated and

