

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (Petitioner), asking whether the sale of its product constitutes the sale of pre-written computer software. We conclude that Petitioner's product is most appropriately characterized as an advertising service and, accordingly, is not subject to sales tax.

Facts

Petitioner provides marketing and customer relationship consulting services exclusively to businesses in the automotive industry, primarily car dealerships. Petitioner has particular expertise with consumer habits in the automotive industry, which it uses to design and launch effective targeted marketing campaigns for its customers. Petitioner uses its staff and proprietary software to gather sales data from dealerships, analyze the collected data to develop marketing models and study the effectiveness of marketing campaign strategies. Petitioner's employees compile the data collected from various dealerships to create usage reports. These reports are used by Petitioner's employees to identify success rates and trends and create analytic models that are used to develop new advertising campaigns based on identified trends. Petitioner's customers can access some reports of data and results of their own campaigns, but cannot access data or analysis related to another customer.

Petitioner consults and guides customers in the creation of effective advertising and promotional campaigns and ultimately launches a finalized advertising campaign using email, text messages, telephone calls and direct mailings. A customer is not able to independently launch an advertising campaign or to modify an existing advertising campaign. Customers are not able to directly access Petitioner's proprietary software.

Petitioner uses a secure website to communicate with its customers. Customers can view their account settings, their current advertisements and reports on past campaigns through this website, but cannot change them. A customer is not able to access data or analyses related to any other customer.

Petitioner charges a monthly fee for this service and has limited its inquiry specifically in this Advisory Opinion to whether this fee is subject to sales tax. Petitioner indicated that it passes through some third-party charges, such as for the printing of promotional items, but is not seeking an opinion about whether those charges are taxable. Petitioner separately states these pass-through charges and conducts a separate analysis to determine whether they are taxable.

Analysis

Tax Law § 1105(c) imposes sales tax on receipts from sales of certain services, which do not include consulting services. In addition, advertising services are expressly excluded from the tax imposed on information services. *See* Tax Law § 1105(c)(1); 20 NYCRR 527.3(b)(5).

We conclude that the primary function of Petitioner's service is an advertising service. Petitioner's customers purchase its service in order to obtain Petitioner's expertise regarding consumer habits in the automotive industry and to have Petitioner develop and launch effective advertising campaigns. Petitioner's service is not among the services subject to sales tax. *See* 20 NYCRR 527.3(b); TSB-A-16(22)S. The fact that customers can view some reports that reflect the data and analysis about their own advertising campaigns does not alter this conclusion.

In addition, we conclude that Petitioner's service does not constitute the sale of prewritten computer software. Tax Law § 1105(a) imposes sales tax on the receipts from sales of pre-written computer software. *See generally* Tax Law § 1101(b)(6). Here, Petitioner communicates with its customers through a secure website, where customers can view information on their advertising campaigns. Although customers communicate with Petitioner through a secure website and can view information regarding past campaigns, they are not able to independently launch or modify any advertisement or promotion. Only Petitioner can create and launch such advertisements through its proprietary software, which Petitioner maintains is never accessed by customers. The use of a secure website by which the customer can communicate with Petitioner and view certain information does not change the nature of this service.

DATED: November 17, 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.