

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

TSB-A-07(26)S
Sales Tax
October 18, 2007

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S040503A

On May 3, 2004, the Department of Taxation and Finance received a Petition for Advisory Opinion from Thomson Financial Inc., 22 Thomson Place, Boston, MA 02210.

The issue raised by Petitioner, Thomson Financial Inc., is whether its purchases of computer equipment that is provided for an additional charge to Petitioner's customers in conjunction with the sale of information and technology applications qualify for exemption from sales and use tax as purchases for resale.

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

Petitioner is a provider of integrated information and technology applications to the global financial services industry. Thomson ONE (formerly known as ILX), one of Petitioner's business units, is a provider of real-time or delayed data-feed products to the financial services industry, and operates as part of Petitioner.

In providing its services to its clients, Petitioner furnishes computer equipment to them. The equipment usually includes a server and, in some cases, a router. Some software, which enables the client to receive the data at its location, is loaded on the server. Once the data is received, a router distributes the data to the various users in the client's office. Petitioner would prefer that the client use Petitioner's equipment, but if the client has someone in-house to configure the equipment, then Petitioner will not insist on the client using Petitioner's equipment. Petitioner has approximately 160,000 users using its service. Of this number, approximately 42,000 users do not access data from equipment provided by Petitioner. Instead, these clients purchase equipment or lease it from other vendors. The remaining 118,000 users access the data through equipment provided to them by Petitioner for an additional charge. Petitioner is not in the business of selling or leasing equipment, so equipment is only provided to the client in conjunction with Petitioner's services. Since Petitioner has no control over the equipment provided to a client, a client may use the equipment to receive or distribute information from other companies.

All of Petitioner's agreements with clients contain an itemized cost breakdown of the equipment. The itemized cost breakdown is presented to the client as an attachment to the agreement, as specified on the initial service proposal and price list. All invoices to clients include a separate line charge for the subject equipment.

Petitioner retains title to all equipment and retains the right to maintain or upgrade the equipment. At the termination of a service agreement, the equipment is returned to Petitioner for deployment to other clients, upgraded and redeployed, or scrapped if obsolete.

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:

* * *

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax.

* * *

(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 therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

Section 1105(a) of the Tax Law imposes a tax on "The receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

Section 1105(c) of the Tax Law imposes sales tax upon receipts from the sales, except sales for resale, of certain enumerated services.

Section 1110(a) of the Tax Law provides, in part:

Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state on and after June first, nineteen hundred seventy-one except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail,...

Section 526.6 of the Sales and Use Tax Regulations provides, in part:

(a) The term *retail sale* or *sale at retail* means the sale of tangible personal property to any person for any purpose, except as specifically excluded.

* * *

(c) *Resale exclusion.* (1) Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer.

* * *

(2) A sale for resale will be recognized only if the vendor receives a properly completed resale certificate. See sections 532.4 and 532.6 of this Title.

(3) Receipts from the sale of property purchased under a resale certificate are not subject to tax at the time of purchase by the person who will resell the property. The receipts are subject to tax at the time of the retail sale.

* * *

(6) Tangible personal property purchased for use in performing services which are taxable under section 1105(c)(1), (2), (3) and (5) of the Tax Law is purchased for resale and not subject to tax at the time of purchase, where the property so sold (i) becomes a physical component part of the property upon which the services are performed, or (ii) is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax.

* * *

(7) Tangible personal property purchased for use in performing a service not subject to tax is not purchased for resale.

Opinion

Petitioner is in the business of providing integrated information and technology applications to the global financial services industry. Petitioner purchases the servers and routers needed for Petitioner to deliver these services. Petitioner has approximately 160,000 users of its services. Of this number, approximately 42,000 users do not access the data from servers and routers provided by Petitioner. Instead, those customers obtain servers and routers from other vendors. The remaining 118,000 users access the data through servers and routers provided to their companies by Petitioner. When Petitioner's customers require the use of Petitioner's routers and servers to obtain access to the data they purchase from Petitioner, such customers are

invoiced additional charges for their use of Petitioner's equipment. Petitioner's agreements with its clients contain an itemized "cost breakdown" of the equipment, if any, provided to the client.

In order for a purchase of tangible personal property to qualify as a purchase for resale, the property must be purchased exclusively for resale as such or as a physical component part of tangible personal property that is resold, or for use in performing services subject to tax under section 1105(c) of the Tax Law. See section 1101(b)(4)(i) of the Tax Law and section 526.6 of the Sales and Use Tax Regulations. (See also *Matter of Micheli Construction v Tax Comm* 109 AD2d 957; *Albany Calcium and Light v State Tax Comm* 44 NY2d 986.)

Persons engaged in integrated sales of services and tangible personal property are not necessarily precluded from purchasing property used in the provision of such services for resale. However, in order to be purchased for resale, the property must be actually transferred to the customer in conjunction with performance of the service. (See section 1101(b)(4)(i)(B) of the Tax Law.) The Tax Appeals Tribunal has said that for purposes of the resale exemption, "actually transferred" means "permanently" transferred. See *Matter of Modern Disposal Services Inc.*, Dec Tax App Trib, May 23, 1996, DTA No. 812565; and *Waste Management of New York, Inc.*, Dec Tax App Trib, March 21, 1991, DTA No. 7805791, affd 185 AD2d 479 (3d Dept 1992). Petitioner does not permanently transfer servers and routers to its customers in conjunction with the sale of its services. Therefore, Petitioner's purchases of such equipment do not qualify for the resale exemption under section 1101(b)(4)(i)(B) of the Tax Law as purchases of property for use in performing services subject to tax under section 1105(c).

Petitioner's purchases of such equipment would only qualify for the resale exemption if the equipment were sold or rented as such to Petitioner's clients. See section 1101(b)(4)(i)(A) of the Tax Law.

In order for tangible personal property to be purchased for resale as such there must be a specified charge to the customer for the rental of the property, the charge must be reasonable, the property may not be used interchangeably for rental and non-rental (self use) purposes, and the property must be purchased exclusively for resale (or rental). (*Matter of C.I.D Refuse Services*, Dec Tax App Trib, Aug 31, 1995, DTA No. 809934.)

Petitioner offers its services for sale to clients without any requirement that the customers purchase and use the servers and routers that Petitioner makes available to clients who need such equipment. Clients are billed an additional charge for their use of the servers and routers separate and apart from the charge to such clients for their purchase of Petitioner's services. Clients may put the servers and routers obtained from Petitioner to additional uses other than accessing the services purchased from Petitioner. Under the circumstances described in this Opinion, Petitioner is making separate rentals of equipment to clients in addition to its sales of services, which equipment rentals are subject to the sales tax imposed by section 1105(a) of the Tax Law. Likewise, under the described circumstances, Petitioner has purchased such servers and routers for resale as such. Provided that Petitioner makes no other use of such servers and

routers, Petitioner may purchase such servers and routers exempt from tax as purchases for resale.

DATED: October 18, 2007

/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.