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# Highlighting indirect tax developments



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Welcome to the US Indirect Tax Digest. We highlight significant sales and use tax legislative enactments, regulatory adoptions, judicial decisions, and administrative guidance. We hope that you find the digest valuable and look forward to your feedback.

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## New York issues guidance on software and web-based services

The New York Department of Taxation and Finance issued several advisory opinions released in September to address questions regarding software and web-based services.

The Department issued an advisory opinion on June 26, 2024, concluding that a secure hosted exchange email service from an out-of-state provider is not subject to sales tax. The taxpayer, a New York-based business, subscribes to a secure hosted exchange service from a Florida provider, which includes features such as unlimited mailbox storage, premium email security, synchronization across devices, software licenses, and software support. The taxpayer renews the service annually, using it for business email.

The taxpayer inquired whether its subscription for the secure hosted exchange service is subject to sales tax. New York statute provides that email services qualify as taxable telephony but are exempt from sales tax under the Internet Tax Freedom Act (ITFA).

**Observation:** The ITFA prohibits taxation on Internet access services, including electronic mail, whether bundled with Internet access or sold separately.

The Department found that the hosted email service qualifies as Internet access exempt from sales tax under the ITFA.

**Take action:** Companies should review Internet and email service contracts to ensure compliance and identify any unnecessary sales tax charges.

### [TSB-A-24\(4\)S, New York Department of Taxation and Finance \(6/26/24\)](#)

The Department issued an advisory opinion on July 15, 2024, addressing whether sales receipts from a web and mobile analytics service provider are subject to sales tax. The taxpayer provides analytics for online behavior to customers using their mobile apps or websites, tracking user actions and generating custom reports. To perform these services, the taxpayer embeds software into the customer's website to obtain and track data specific to each customer, and for the customer to utilize the dashboard features the taxpayer provides with its subscription plans.

New York imposes sales tax on the furnishing of information by printed, mimeographed, or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling, or analyzing information of any kind or nature and furnishing reports thereof to other persons. Tax does not apply to the furnishing of information that is personal or individual in nature and that is not or may not be substantially incorporated into reports furnished to other persons.

The taxpayer inquired whether its services are subject to sales tax since its customers' data is individual and confidential. The state contended that since benchmark reports based on this data were made public, the exclusion for individual information did not apply.

The Department found that (1) utilization of the software is a single aspect of a more comprehensive information service, which appears to be the primary function of the taxpayer's services, (2) the taxpayer's analytics services constitute taxable information services, and (3) while push notifications and messaging qualify for an advertising exclusion if sold separately, they are part of the broader taxable information service since they were not sold as a stand-alone service.

**Observation:** Companies should evaluate digital services offerings to comply with sales tax New York imposes on information services, particularly when offering data-driven analytics or reporting services. It also is important to note that New York has been seeking to impose tax on IT antivirus, firewall, and other IT security measures under the theory that they are protective and detective services. (See [Secureworks, Inc. Tax Appeals Tribunal, DTA No. 828328 and 828329, February 17, 2022](#)).

[TSB-A-24\(6\)S, New York Department of Taxation and Finance \(7/15/24\)](#)

The Department issued an advisory opinion on July 16, 2024, regarding whether charges for the use of a taxpayer's web-based portal are subject to sales tax. The taxpayer operates a web-based portal that facilitates the preparation, submission, and review of applications related to property purchases, leases, or refinancing. The portal also handles document uploads, approvals, and fee processing for applications.

New York imposes sales tax on prewritten computer software, including software hosted remotely, since customers obtain the right to use and control the software. Optional services such as custom programming, data entry, and training are not taxable, provided they are separately stated and reasonably priced.

The taxpayer requested clarification on whether sales tax applies to charges for accessing its portal and optional services like custom programming and data entry, and whether the transfer of the right to use the software constituted taxable possession. The Department determined that the fees charged for access to the portal represent a taxable sale of prewritten software since customers gain control over the software when they use it to process applications. However, optional services, such as custom programming and data entry, are not taxable if separately stated and reasonable.

The Department noted that the software sale is sourced to the location associated with the license to use, i.e., the location of the taxpayer's customers' employees that use or direct the use of the software.

**Observation:** The Department stated that if the customers' employees who use the software are located both in and out of New York, the taxpayer is required to collect tax based on the portion of the receipts attributable to the use by its customers' employees located in state.

[TSB-A-24\(8\)S, New York Department of Taxation and Finance \(7/16/24\)](#)

The Department issued an advisory opinion on July 30, 2024, clarifying the sales tax treatment of various fees associated with the use of a web-based electronic trading system for foreign exchange markets. The taxpayer operates an electronic trading platform that allows users, including traders, asset managers, and brokers, to execute currency trades. The taxpayer charges customers for annual software license fees, user/transaction support charges, and various transaction-related fees.

New York statute imposes sales and use tax on tangible personal property including prewritten computer software "regardless of the medium by means of which such software is conveyed to a purchaser." The taxpayer collected sales tax on the software license and user/transaction fees but sought guidance on whether its receipts from sales of the electronic trading system were subject to sales tax.

The Department ruled that (1) most fees related to the use of software, including license fees, transaction charges, charges to obtain secure ID tokens, and those for software upgrades and system integration, are taxable, (2) the taxpayer should collect tax based on the portion of the receipts attributable to the customer's users located in state, (3) charges for user/transaction support are exempt if reasonable and separately stated, and (4) providing a monthly report for benchmarking purposes is an information service that

could be exempt if personal or individual in nature, not substantially incorporated in reports furnished to other persons, and separately stated.

[TSB-A-24\(9\)S, New York Department of Taxation and Finance \(7/30/24\)](#)

The Department issued an advisory opinion on August 2, 2024, to provide sales tax guidance on services provided online. The taxpayer provides a website and mobile application for a library of astrological content, expert advice, and consultations.

New York statute provides that receipts from the sale of information services that are personal or individual in nature, and that are not or may not be substantially included in reports given to other persons are exempt from sales tax. The taxpayer requested clarification on whether its personalized services are subject to sales tax.

The Department found that personalized astrological services were clearly distinguishable from a taxable information service of retrieving, collecting, compiling, and furnishing information. The Department concluded that the services are not subject to sales and use tax.

**Observation:** The Department historically has found that the furnishing of information based on public data is taxable. Companies should review service offerings to determine whether this ruling may provide guidance.

[TSB-A-24\(23\)S, New York Department of Taxation and Finance \(8/2/24\)](#)

## Washington rules digital advertiser is not a marketplace facilitator

The Washington Department of Revenue on September 9, 2024, ruled that a digital advertiser was not a marketplace facilitator, and was obligated to pay business and occupation (B&O) tax on gross income, including payments to third parties.

The taxpayer operates a digital advertising platform that facilitates real-time bidding for advertising space on websites and mobile apps. The taxpayer charged advertisers for ad placements and paid a portion of the income to publishers that own the advertising space. The taxpayer excluded from gross income payments to publishers when filing its B&O tax return.

The B&O tax is based on the gross income or gross proceeds of sales of the business. Washington provides a B&O tax deduction for reimbursements or advances when payments fulfill client obligations.

Upon audit, the Department stated that the gross income, including amounts paid to publishers, was subject to B&O tax. The taxpayer petitioned for review, arguing it should be classified as a marketplace facilitator, which would limit its tax obligation to commissions earned for facilitating sales, since the statute's marketplace definition was ambiguous, allowing for the sale of services, and certain services, like advertising services, are not retail sales.

The Department found that the taxpayer's service, which includes lead generation optimization and providing advice concerning the best methods of advertising, constitutes advertising services. The Department noted that businesses providing advertising services are not considered marketplace facilitators unless they contract with sellers to sell products, and "sellers" must make retail sales.

The Department denied the petition, finding that (1) payments to publishers were

considered part of the taxpayer's business costs, and not obligations of its clients, (2) digital advertising services do not constitute retail sales, and (3) since the taxpayer was not facilitating retail sales, it did not meet the marketplace facilitator definition and must include payments to publishers in its gross income for B&O tax purposes.

**Observation:** Companies should review and monitor Washington B&O tax developments related to marketplace facilitators to better understand when the lines may be blurred between the provision of services and marketplace facilitation.

[Det. No. 22-0027, 43 WTD 69, Washington Department of Revenue \(9/9/24\)](#)

## Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

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