

Four Things You Should Know about New York State's Recent Advisory Opinion on the Taxation of Software as a Service ("SaaS")

By Richard E. Nielsen and Michael J. Cataldo

On May 15, 2015, the New York State Department of Taxation and Finance released Advisory Opinion TSB-A-15(2)S which concluded that sales of certain cloud computing services are not subject to New York State sales and use tax. The Advisory Opinion is noteworthy because of the Department's position on the taxability of licensing prewritten software.

- 1. The Opinion was based on the unique facts of the taxpayer.** The taxpayer provided Internet infrastructure through servers and other hardware that its customers could access remotely to run business software applications or to host a commercial website. No specific servers or hardware were dedicated to any particular customer, the customers had no physical access to the servers or hardware, and the taxpayer decided which servers and hardware would be used for each customer. The taxpayer did not charge customers for operating system software. All charges were based on hourly rates and the amount of computing power the customers consumed. Customers were not charged any fixed fees for the service.
- 2. The SaaS at issue was primarily for the use of taxpayer's computing power.** The Department considered how the taxpayer advertised its offering to determine the SaaS at issue was not a taxable license to use prewritten software. Although the operating systems offered by the taxpayer were the type of prewritten software generally subject to tax, the Department found that the taxpayer's customers did not subscribe to the cloud computing service for that purpose, but rather did so primarily to use taxpayer's computing power to run applications. Any transfer of the right to use operating system software was found to be only incidental to the offering.
- 3. The Department did not address whether the taxpayer's offering was a taxable information service.** Taxpayers should consider whether their offerings might be taxable information services. A recent case from the Tax Appeals Tribunal held that certain data processing services provided through the use of proprietary software applications were taxable information services. (See Matter of SunGard Securities Fin. LLC, DTA No. 824336 (N.Y.S. Tax App. Trib., Mar. 16, 2015).)

4. Businesses offering SaaS under even slightly different models might be treated differently.

Businesses offering SaaS in New York State should consult their tax advisors to consider the impact of the Advisory Opinion on their particular SaaS offerings.

The information presented is only of a general nature, intended simply as background material, is current only as of its indicated date, omits many details and special rules, and accordingly cannot be regarded as legal or tax advice.

If you have any questions about the content of this alert, please contact one of the authors, the Pillsbury attorney with whom you regularly work, or one of the attorneys below.

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