

Sales/Use/Indirect:

New York: Service Provider Deemed to Sell Nontaxable Information Services Rather than Software

Determination DTA Nos. 829638, 829639 and 829640, N.Y. Div. of Tax App., ALJ Div. (9/29/22). An administrative law judge (ALJ) with the New York Division of Tax Appeals held that a company providing email tracking, including analytics and reports on the tracking and templates, was performing bundled nontaxable information services rather than selling taxable prewritten software under the facts. In doing so, the ALJ stated that the New York Division of Taxation (Division) was wrong to assert that the primary function test should not be applied here as this case specifically involves software being licensed, concluding that such position by the Division “goes against binding precedent and must be rejected.” In this respect, the ALJ rejected the Division’s argument that the primary function test should not be used where there is a license of software. The ALJ explained that the primary function of the company’s service in this case is to provide its customers with “reports regarding what activity occurred with the emails it sent to their prospective clients, including whether they read the emails, clicked links, downloaded attachments, or replied to the emails,” and the company “tracks, processes, and analyzes data received from email recipients and generates information and individualized reports to assist clients with their email prospecting and customer engagement.”

URL: <https://www.dta.ny.gov/pdf/determinations/829638.det.pdf>

The ALJ also explained that the company’s use of various forms of prewritten software to perform such services “is not a significant enough component” of the services to constitute a primary function. According to the ALJ, the company’s customers are paying for information, and the company is merely using its proprietary software to convert that information into readable data and provide its customers with reports showing the most effective methods for conveying their messages to their own prospective clients. In this respect, the ALJ concluded that the company’s customers are purchasing the synthesized information that is the result of the tracking and, under the facts, its customers cannot use, do not have access, and do not control the software to perform the underlying functions. “Because it is undisputed that the information in the reports consists solely of the customers’ own data, and that the reports are not furnished to other customers,” the ALJ also determined that the company’s information services are *not* taxable under state law because they are personal or individual in nature and are not incorporated in reports furnished to others. Please contact us with any questions.

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