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## Letter Ruling 08-6: Use of personal digital devices or Interest browsers for submitting patient prescriptions

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March 26, 2008

You have requested a Letter Ruling on behalf of your client, \*\*\*\*\* regarding the proper Massachusetts tax treatment of the transactions described below. The following statement of facts is condensed from your letter.

### Facts

\*\*\*\*\* provides \*\*\*\*\* service that allows doctors to use personal digital assistants [PDAs] or Internet browsers on personal computers to submit patient prescriptions to pharmacies electronically over the Internet \*\*\*\*\* . Because the \*\*\*\*\* Service may be accessed and used with a mobile PDA platform or an Internet browser on a personal computer, doctors may use the \*\*\*\*\* Service to prescribe medications at a variety of point-of-care locations, such as exam rooms, hospitals, offices, or at home.

With the \*\*\*\*\* Service, a doctor may prepare and submit a patient's prescription as follows. First, the doctor uses either a wireless-enabled PDA or an Internet browser to access, via the Internet, the patient's insurance eligibility, drug billing information, and medical information stored on \*\*\*\*\* secure servers. The doctor then selects and electronically submits a proposed prescription to the \*\*\*\*\* Service system, which cross-checks the proposed prescription for possible adverse reactions to allergies or previously prescribed medications. If results are favorable, the doctor prepares the prescription and submits the prescription to a pharmacy over the Internet. The \*\*\*\*\* Service monitors the prescription's status and adds the prescription to the patient's medical history maintained on \*\*\*\*\* servers.

Health care institutions enter into Sponsorship Agreements [agreements] with \*\*\*\*\* , under which they pay \*\*\*\*\* to provide \*\*\*\*\* Services directly to their associated doctors. Customers pay \*\*\*\*\* an initial fee for each associated doctor and \*\*\*\*\* provides doctor with a one-year \*\*\*\*\* Service subscription together with hardware, software, and related services necessary to access and use the \*\*\*\*\* Service. Title to any necessary hardware passes to customers or doctors, and \*\*\*\*\* separately states hardware charges on its invoices. After the initial \*\*\*\*\* Service subscription terms expire, customers or doctors may pay a renewal fee, which includes training and technical support services.

Each time a Provider logs onto the \*\*\*\*\* Service, a small software application preloaded onto the PDAs temporarily downloads another, larger, full software application maintained on \*\*\*\*\* servers. The reloaded software application serves no purpose other than to allow doctors to quickly log onto the \*\*\*\*\* Service and to download the full application which, in turn, enables PDAs to interface securely with the \*\*\*\*\* Service and access \*\*\*\*\* databases during that prescribing session. After doctors log off of the \*\*\*\*\* Service, the Full Software Application is eliminated from the PDA's memory.

You state that apart from enabling PDAs to securely interface with the \*\*\*\*\* Service system, the software serves no function and has no commercial value. It does not contain or store medical information, and \*\*\*\*\* does not sell software to non-subscribers, nor charge its customers to use it. Although agreements anticipate that software will be used to access the \*\*\*\*\* Service, they do not require any sale of software, which is an ancillary service, invisible to customers and doctors, and a mere enabling component of the \*\*\*\*\* Service. Moreover, the software's value is significantly less than ten percent of the value of the \*\*\*\*\* Services to which it relates. In addition, you note that doctors who use personal computers to access the Service do not use \*\*\*\*\* software. Instead, these doctors access the service by entering a URL into a common, commercially available Internet browser. \*\*\*\*\* does not provide personal computer equipment or maintenance.

\*\*\*\*\* performs several services during a Provider's initial set-up process and throughout the \*\*\*\*\* Service subscription term. The cost of the services is included in Initiation and/or renewal fees. During set-up, \*\*\*\*\* uploads doctors' patient information to its secure servers. \*\*\*\*\* also installs hardware necessary to access the Service, if any is required. Throughout the \*\*\*\*\* Service subscription term \*\*\*\*\* offers training and technical support services. \*\*\*\*\* support services may also periodically address hardware and software issues as they relate to access and use of the \*\*\*\*\* Service. \*\*\*\*\* , however, does not repair hardware and does not enter into maintenance contracts with customers or doctors. \*\*\*\*\* provides Support Services and Installation Services as part of the \*\*\*\*\* Service subscription package to ensure that doctors actually use the \*\*\*\*\* Service. By ensuring that doctors use \*\*\*\*\* Services, \*\*\*\*\* increases the likelihood that customers will renew or expand their Sponsorship Agreements.

#### Ruling Requested by Taxpayer

You request the following rulings:

- (i) Hardware sold for \*\*\*\*\* customers' use in Massachusetts is subject to sales or use tax;
- (ii) As \*\*\*\*\* Services, Support Services and Installation Services do not constitute telecommunication services, and are separately stated on invoices from hardware sales, they are not subject to sales or use tax;
- (iii) Because customers enter into Sponsorship Agreements for the basic purpose of acquiring \*\*\*\*\* Services, doctors incidental software use is not subject to sales or use tax; and
- (iv) \*\*\*\*\* is the consumer of software and only subject to use tax thereon to the extent it acquires software from vendors tax-free.

#### Discussion of Law

Massachusetts imposes sales tax on the purchase of tangible personal property in Massachusetts from a vendor or use tax on storage, use or other consumption in Massachusetts of tangible personal property or services acquired from a vendor. G.L. c. 64H § 2; G.L. c. 64I § 2. As regards services, only "telecommunication services" are subject to sales or use. G.L. c. 64H § 1, LR 02-8. These are defined as any transmission of messages or information by electronic or similar means, between or among points by wire, cable, fiber-optics, laser, microwave, radio, satellite, or similar facilities. "Telecommunications Services," 830 CMR 64H.1.6. Telecommunications Services do not include data processing services and database access or similar electronic information services. 830 CMR 64H.1.3(13); TIR 05-8.

Charges for installing tangible personal property are not subject to sales and use tax if they are separately stated from the sales price of tangible personal property and if they are reasonable and set in good faith. 830 CMR § 64H.1.3(4)(c). Training, maintenance and similar services are subject to sales or use tax only if their purchase is required when acquiring acquisition of computer hardware. 830 CMR § 64H.1.3(4)(h)(1).

Prewritten software is considered tangible personal property for sales and use tax purposes regardless of how the software is delivered. 830 CMR 64H.1.3(3)(a), (b). In addition, charges for access or use of software on a vendor's remote server generally are subject to sales and use tax. 830 CMR 64H.1.3(14). However, if a service provider makes an "inconsequential" transfer of software in connection with providing a service, and does not separately state charges for the software on its invoices, the incidental software transfer is not subject to sales and use tax. See 830 CMR 64H.1.1(2)(a)(2). Instead the service provider is treated as the consumer of the software. *Id.*

### Rulings

(i) Hardware is tangible personal property. Accordingly, \*\*\*\*\* sales of hardware, sales in which title to the tangible personal property at issue passes to from \*\*\*\*\* to \*\*\*\*\* customers, are subject to sales/use tax. As a result, \*\*\*\*\*, as a vendor, must collect and remit sales tax to the Commissioner in such form as the Commissioner has prescribed. As costs for installation of hardware (if any) are separately stated from hardware charges, they are not subject to sales or use tax. See G.L. c. 64H, § 1 (definition of "sales price").

(ii) \*\*\*\*\* Services will be subject to sales or use tax if the use of these services constitutes "telecommunication services." \*\*\*\*\* argues that they do not, and we agree: although \*\*\*\*\* uses the Internet to send and receive information from doctors, \*\*\*\*\* does not perform transmission services. Instead, \*\*\*\*\* provides database access and data processing services. We therefore rule that since \*\*\*\*\* Services involve database access rather than telecommunication services, they are subject to neither sales nor use tax.

(iii) You argue that support services provided as part of \*\*\*\*\* Services are not taxable. As noted above, 830 CMR § 64H.1.3(4)(h)(l) indicates that services similar to those provided by \*\*\*\*\* may be subject to sales or use tax if the services must be purchased to acquire computer hardware. \*\*\*\*\*, however, does not require customers to purchase Support Services in order to receive hardware. Instead, support services are included in the basic charge to ensure that doctors properly use \*\*\*\*\* Services. We therefore rule that because customers are not required to purchase support services, maintenance contracts or the like in order to acquire hardware, ancillary "free" support services are not subject to sales or use tax.

(iv) You argue that \*\*\*\*\* customers' enter into Sponsorship Agreements for the "basic purpose" of acquiring \*\*\*\*\* Services, not for purposes of acquiring the software itself, and that the software possesses no inherent value apart from access to the product. We do not think it necessary to refer to the "object of the transaction" test enunciated in *Houghton Mifflin* in this instance, since we agree that the software used here has no inherent value; \*\*\*\*\* customers are not charged for software, cannot use it independently and have no control over it. We believe, therefore, that value of software licenses transferred by to doctors is less than ten percent of the of any initiation and/or renewal fees, and is therefore "inconsequential" within the meaning of G.L. c. 64H, § 1. Transfers of this software to \*\*\*\*\* customers are therefore not subject to sales or use tax. Instead, \*\*\*\*\* is treated as the consumer of software and must pay sales to supplier's from who it purchases software, if any. We note, however, that \*\*\*\*\* develops software in-house and does not acquire software from vendors. In such a case, no sales or use tax would be due.

Very truly yours,

/s/Navjeet K. Bal

Navjeet K. Bal

Commissioner of Revenue

NKB:MTF:lr

LR 08-6