



This Week in State Tax (TWIST)

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New York: Taxpayer was Not Licensing Prewritten Computer Software

An Administrative Law Judge (ALJ) for the New York Division of Tax Appeals recently concluded that a taxpayer was providing nontaxable information services, not licensing taxable prewritten computer software. The taxpayer's mission was to help companies sell smarter and more effectively by identifying effective and ineffective email messaging. In all cases, the taxpayer's customers used their own email application to interact with their clients. To provide these services, of which there were three options that varied by price, the taxpayer tracked data received from email recipients and provided individualized reports that summarized a customer's sales leads. The information the taxpayer collected included data on how the email recipients interact with those emails, including whether they read the emails, clicked links, downloaded attachments, or replied to the emails. To perform the email tracking, analytics, and reporting, the taxpayer's clients downloaded a browser extension. The browser extension was software that was licensed to clients, but clients did not pay separately for the extension. In addition to the reports, the taxpayer's services, depending on the option selected, included certain enhancements, such as offering clients sharing of templates, mail merge, touchpoint campaigns, click-to-call, and integration with Salesforce. After an audit, the Division of Taxation asserted that the taxpayer was selling prewritten computer software and issued an assessment accordingly. The taxpayer challenged this assessment.

While acknowledging that the Division of Taxation had a rational basis for its conclusion, the ALJ disagreed that the taxpayer was licensing prewritten computer software. In the ALJ's view, the taxpayer's service was a bundled service, and the primary function test must be applied to determine its taxability. The Division had argued that the primary function test should not be applied because the transactions at issue involved the licensing of software. However, the ALJ rejected this assertion and determined that the primary function of the taxpayer's services was to provide customers with reports regarding activity that occurred with the emails they sent to their prospective clients, including whether they read the emails, clicked links, downloaded attachments, or replied to the emails. To provide this service, the taxpayer tracked, processed, and analyzed data received from email recipients and generated information and individualized reports to assist clients with their email prospecting and customer relations. While the taxpayer provided software to customers as part of its services, the ALJ concluded that customers did not have the use of the software, or access to the software. With respect to the customers' ability to engage in sharing templates, mail merge, touchpoint campaigns, click-to-call, and integration with Salesforce, the ALJ determined that all these things were ancillary to the primary service, which is to inform the taxpayer's customers as to which of their sales solicitations are effective. Because the reports provided to clients consisted solely of the customer's own data and the reports were not furnished to or incorporated in reports to others, the ALJ concluded that the taxpayer was providing a nontaxable information service. Please contact [Judy Cheng](#) with questions on *Matter of Petition of Yesware, Inc.*



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