

State Ruling

## **401-742, Technical Bulletin TB-72-- Sales and use-- Taxability of persons and transactions-- Computers, software, and services-- Cloud computing (SaaS, PaaS, IaaS)**

¶401-742. Technical Bulletin TB-72, New Jersey Division of Taxation, July 3, 2013 .

**Sales and use: Taxability of persons and transactions: Computers, software, and services: Cloud computing (SaaS, PaaS, IaaS).**— The New Jersey Division of Taxation has issued a bulletin addressing the application of sales and use tax to the sale of cloud computing. Cloud computing refers to services that allow a customer to access and use the software of a service provider. The software is hosted by a seller that owns, operates, and maintains the software. The seller houses the software on its own servers. Customers access the software via the Internet. The software is not transferred to the customer, nor does the customer have the right to download, copy, or modify the software. Rather, customers merely receive access to the software. Cloud computing is offered in three product categories: Software as a Service (SaaS), Platform as a Service (PaaS), and Infrastructure as a Service (IaaS). Cloud computing is distinguished from the purchase of downloaded or otherwise electronically delivered software, which is taxable as the sale of tangible personal property unless the business use exemption is applicable to the purchase. In addition, the sales and use tax is imposed on information services, regardless of the fact that such services may meet the above description of cloud computing.

### **NEW JERSEY DIVISION OF TAXATION REGULATORY SERVICES BRANCH TECHNICAL BULLETIN**

**TB - 72**

**ISSUED: 7-3-13**

**TAX: SALES AND USE TAX**

**TOPIC: CLOUD COMPUTING (SaaS, PaaS, IaaS)**

This Technical Bulletin addresses the application of the New Jersey Sales and Use Tax Act ( *N.J.S.A. 54:32B-1 et seq.*) to the sale of cloud computing. Cloud computing refers to services that allow a customer to access and use the software of a service provider. The software is hosted by a seller that owns, operates, and maintains the software. The seller houses the software on its own servers. Customers access the software via the Internet. The software is not transferred to the customer, nor does the customer have the right to download, copy, or modify the software. Rather, customers merely receive access to the software. Cloud computing is offered in three product categories: Software as a Service (“SaaS”), Platform as a Service (“PaaS”), and Infrastructure as a Service (“IaaS”).

Cloud computing is distinguished from the purchase of downloaded or otherwise electronically delivered software, which is taxable as the sale of tangible personal property unless the business use exemption is applicable to the purchase. (See *TB-51R, Taxability of Software*) In addition, the NJ Sales and Use Tax Act imposes tax on information services, regardless of the fact that such services may meet the above description of cloud computing.

#### **Relevant Statutes**

“The receipts from every retail sale of tangible personal property or digital property, except as otherwise provided in this act” are subject to sales tax. *N.J.S.A. 54:32B-3(a)*.

“Tangible personal property” means “personal property, that can be seen, weighed, measured, felt or touched, or that is in any other manner perceptible to the senses. Tangible personal property includes...prewritten computer software, including prewritten computer software delivered electronically.” *N.J.S.A. 54:32B-2(g)*.

“Sale” is defined as “any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration...” *N.J.S.A. 54:32B-2(f)*.

“Sales price” includes the total amount of consideration, without any deduction for the seller's expenses in selling the goods or service. *N.J.S.A. 54:32B-2(oo)*.

“Receipts from sales of prewritten [computer] software delivered electronically and used directly and exclusively in the conduct of the purchaser's business, trade or occupation are exempt from the tax imposed under the “Sales and Use Tax Act” *N.J.S.A. 54:32B-8.56*.

“Delivered electronically” means “delivered to the purchaser by means other than tangible storage media.” *N.J.S.A. 54:32B-8.56*.

The sale of information services received by customers in New Jersey is subject to sales tax. *N.J.S.A. 54:32B-3(b)(12)*.

“Information services” means “the furnishing of information of any kind, which has been collected, compiled, or analyzed by the seller, and provided through any means or method, other than personal or individual information which is not incorporated into reports furnished to other people.” *N.J.S.A. 54:32B-2(yy)*.

### **Software as a Service (SaaS)**

SaaS providers offer the use of software on a per transaction basis, through a service contract, or by subscription. SaaS providers do not transfer software to their customers. Rather, SaaS providers only allow customers to access software through remote means.

SaaS providers obtain licenses to use the software they offer their customers, perform regular maintenance on that software (generally in the form of updates, etc.), and maintain server space to house the software. Examples of SaaS are Salesforce, Google Apps, and DeskAway.

### **SaaS is not the sale of tangible property**

The definition of tangible personal property includes prewritten computer software delivered electronically. *N.J.S.A. 54:32B-2(g)*. Because SaaS only provides the customer with access to the software and the software is not “delivered electronically,” it is not the sale of tangible personal property.

SaaS providers fully retain and operate the software applications to which they sell access. Customers only have access to the software through remote means. SaaS customers do not receive title or take possession of the software. The SaaS provider uses the software it owns or licenses to provide the service and does not transfer the software to its customers. An SaaS provider is not treated as a reseller of a license to use the software. Therefore, the sale of SaaS is not a sale of tangible personal property. Rather it is the sale of a service. *N.J.S.A. 54:32B-3(a), N.J.S.A. 54:32B-2(f)*.

### **Is the sale of SaaS the sale of an enumerated service?**

Services delivered into New Jersey are taxable when they are specifically listed under *N.J.S.A. 54:32B-3*. Use of a software application is not listed as a taxable service. Therefore, most charges for SaaS are not subject to sales tax. However, SaaS which meets the definition of an information service is subject to sales tax. Charges for SaaS where the software is accessed and used as a tool for providing information to customers by an information service provider are sales of information services. The law defines information services as “the furnishing of information of any kind, which has been collected, compiled, or analyzed by the seller, and provided through any means or method, other than personal or individual information which is not incorporated into reports furnished to other people.” ( *N.J.S.A. 54:32B-3(b)(12)*). Some common examples of taxable information services which are conveyed through SaaS are Westlaw, LexisNexis, CCH, and RIA.

Where use of the software does not relate to the provision of information services, SaaS is not subject to sales tax.

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## SaaS provider's tax obligations

The SaaS provider is the owner of the underlying software and is selling access to the software rather than the software itself. As such, the SaaS provider must pay sales tax on the purchase of any software used to provide the service, except where the business use exemption is applicable. *N.J.S.A. 54:32B-3(a)*, *N.J.S.A. 54:32B-8.56*.

### Platform as a Service (PaaS)

PaaS provides customers access to computing platforms. PaaS customers create software using tools and/or libraries provided by the PaaS providers. The PaaS provider provides the networks, servers, storage, and other services. Platforms are operating systems. Some common examples include Windows XP or Mac OS X.

### PaaS is not the sale of tangible property

The definition of tangible personal property includes prewritten computer software delivered electronically. *N.J.S.A. 54:32B-2(g)*. Prewritten computer software includes operating systems and software applications. . Because PaaS only provides the customer with access to the software and the software is not "delivered electronically," it is not the sale of tangible personal property.

Further, PaaS providers fully retain and operate the software applications to which they sell access. Customers only have access to the software through remote means. PaaS customers do not receive title or take possession of the software. The PaaS provider uses the software it owns or licenses to provide the service and does not transfer the software to its customers either as is, or as a component part of its service. A PaaS provider is not treated as a reseller of a license to use the software. Therefore, the sale of PaaS is not a sale of tangible personal property. Rather it is the sale of a service. *N.J.S.A. 54:32B-3(a)*, *N.J.S.A. 54:32B-2(f)*.

### Is the sale of PaaS the sale of an enumerated service?

Services delivered into New Jersey are taxable when they are specifically listed under *N.J.S.A. 54:32B-3*. Use of a software application or platform is not listed as a taxable service. Where use of the software is the true object of the sale, PaaS is not subject to sales tax. So long as the use and access to PaaS does not include the transfer of tangible personal property, the sale of PaaS is not subject to sales tax. This is true whether the software is located on a server in New Jersey or on a server outside the State.

## PaaS provider's tax obligations

The PaaS provider is the owner of the underlying software and is selling access to the software rather than the software itself. As such, the PaaS provider must pay sales tax on the purchase of any software used to provide the service, except where the business use exemption is applicable. *N.J.S.A. 54:32B-3(a)*, *N.J.S.A. 54:32B-8.56*. The PaaS provider must also pay tax on the purchase of any hardware or other equipment used to perform the service. *N.J.S.A. 54:32B-3(a)*.

### Infrastructure as a Service (IaaS)

IaaS providers purchase and maintain hardware, software, and any other equipment and services necessary to support and manage the content and dataflow of its customers. IaaS may be viewed as the outsourcing of IT functions. It may be purchased as part of a disaster recovery strategy, or it may provide the backbone to support fast-paced secure transactions pursuant to a long-term arrangement.

As with the other cloud computing products, IaaS providers maintain ownership of the software, hardware, and other equipment purchased for use in providing the service. IaaS providers address a wide range of needs. An IaaS provider may only need a few servers to support some customers, or may maintain and operate large facilities filled with hardware and equipment.

### IaaS is not the sale of tangible property

The definition of tangible personal property includes prewritten computer software delivered electronically. *N.J.S.A. 54:32B-2(g)*. Because IaaS only provides the customer with access to the software and the software is not “delivered electronically,” it is not the sale of tangible personal property. Rather it is the sale of a service.

Like the other cloud computing providers, IaaS providers fully retain and operate the software applications to which they sell access. Customers only have access to the software through remote means. IaaS customers do not receive title or take possession of the software. The IaaS provider uses the software it owns or licenses to provide the service and does not transfer the software to its customers. An IaaS provider is not treated as a reseller of a license to use the software. Therefore, the sale of IaaS is not a sale of tangible personal property. Rather it is the sale of a service. *N.J.S.A. 54:32B-3(a)*, *N.J.S.A. 54:32B-2(f)*.

Unlike the other cloud computing providers, IaaS providers may provide separately stated charges for the use or rental of hardware related to the service. As there is no exchange of title or possession, these charges are not treated as rentals. These charges generally reflect choices made by the customer as to type, capacity, speed, or size. At times, these charges are for hardware which will be dedicated to a single customer. Although these charges may be separately stated, they are merely add-ons to the customer's IaaS arrangement and are therefore, part of the sales price that make up the underlying receipt for the service. *N.J.S.A. 54:32B-2(oo)*.

### **Is the sale of IaaS the sale of an enumerated service?**

Services delivered into New Jersey are taxable when they are specifically listed under *N.J.S.A. 54:32B-3*. IaaS is not listed as a taxable service. Where use of the software and supported network is the true object of the sale, IaaS is not subject to sales tax.

IaaS providers often provide separately stated charges for telecommunications and utility services. IaaS providers may also charge for the regular maintenance to the network or system as well as repairs to the hardware which supports the service. Any separately stated charges to the IaaS customer for servicing or repairing software or hardware are not taxable to the customer as those charges are part of the seller's overhead cost in providing the service. *N.J.S.A. 54:32B-2(oo)*. This is true even when the work performed is on a dedicated piece of equipment. Dedicated equipment is equipment which is identified by the service provider as equipment that will be utilized in performing services for a particular customer.

For example, an IaaS customer enters into a contract for IaaS, including space on servers dedicated only to that customer. If a third party makes repairs to one of the dedicated servers, the IaaS provider must pay tax on the purchase of those repairs. The IaaS agreement may dictate that the IaaS provider pass on the cost of repairs to its customer. However, the IaaS provider is not a reseller of the repair service.

### **IaaS provider's tax obligations**

The IaaS provider must pay tax on any purchases of tangible goods, telecommunications services, utilities, charges for servicing or repairing, etc., for use in the performance of their service contracts. The IaaS provider is not deemed to be a reseller of these goods and services even if these purchases are passed on as a separate line item to the customer.

When an agreement for IaaS does not provide for the transfer of tangible personal property or provide for taxable services to any property owned by the customer, sales tax is not applicable.

This is true whether the software is located on a server in New Jersey or on a server outside the State.

### **Related Services**

#### ***Data Hosting***

Sellers may provide mere space on their server to their customers to store data. This service is called data hosting. Data hosting services are not subject to sales tax as they are not specifically listed under *N.J.S.A. 54:32B-3*.

#### ***Webhosting***

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Webhosting services include creative services, graphics, computer coding, web “traffic” management, website security, and server space to house a website. Webhosting services are not subject to sales tax as they are not specifically listed under *N.J.S.A. 54:32B-3*.

For information on related topics, see the Division's *TB-51(R)* on the applicability of sales and use tax to the sale of software and **Tax Note - Information Services**.

**Note:** A Technical Bulletin is an informational document designed to provide guidance on a topic of interest to taxpayers and describe changes to the law, regulations, or Division policies. It is accurate as of the date issued. However, taxpayers should be aware that subsequent changes in the Tax Law or its interpretation may affect the accuracy of a Technical Bulletin. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.