

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition  
of  
**BEELINE.COM, INC.**  
for a Revision of a Determination or for Refund of  
Sales and Use Taxes under Articles 28 and 29 of the  
Tax Law for the Period June 1, 2010 through May 31,  
2016.

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DETERMINATION  
DTA NO. 829516

Petitioner, Beeline.com, Inc., filed a petition for a revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period June 1, 2010 through December 31, 2014.

A videoconference hearing via Cisco Webex was held on February 11, 2022, with all briefs to be submitted by August 9, 2022, which date began the six-month period for issuance of this determination.<sup>1</sup> Petitioner appeared by Akerman, LLP (Peter O. Larsen, Esq., Raye C. Elliott, Esq., and David J. Rosen, Esq., of counsel), and the Division of Taxation appeared by Amanda Hiller, Esq. (Elizabeth Lyons, Esq., of counsel).

After reviewing the entire record in connection with this matter, Nicholas A. Behuniak, Administrative Law Judge, renders the following determination.

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<sup>1</sup> Petitioner filed a notice of filing supplemental authority dated October 7, 2022, with the Division of Tax Appeals. The Division responded to petitioner's filing of a supplemental authority on October 14, 2022.

***ISSUE***

Whether the Division of Taxation erred in determining that Beeline.com, Inc.'s vendor management system fees are taxable as the sale of pre-written software.

***FINDINGS OF FACT***

The parties executed a stipulation of facts and exhibits in connection with this matter. Those stipulated facts have been substantially incorporated into the findings of fact set forth herein. The Division of Taxation (Division) submitted unnumbered proposed findings of fact in a narrative format as part of its post-hearing brief. Given the manner in which such proposed findings of fact were presented, it is not possible to make ruling on such (*see* State Administrative Procedure Act § 307 [1]); however, the relevant and appropriately supported portions of the Division's proposed findings of fact have been incorporated herein. In addition, petitioner, Beeline.com, Inc., submitted 36 proposed findings of fact. Petitioner's proposed findings of fact 1, 2 and 33 through 36 are supported by the record and have been substantially incorporated herein. Proposed findings of fact 3 through 30 and 32 have been modified to more accurately reflect the record and/or accepted in part and rejected in part as conclusory, irrelevant and/or not supported by the record; to the extent accepted, they have been consolidated, condensed, combined, renumbered, and substantially incorporated herein, as modified. Proposed finding of fact 31 is rejected as conclusory, irrelevant and/or not supported by the record.

1. Petitioner is a company headquartered in Jacksonville, Florida, that provided services/products (services) in New York during the periods of June 1, 2010 through May 31, 2016 (periods at issue).

2. Petitioner provided services to assist large national and global companies (customers) with gathering, organizing, assembling and managing their contingent labor force. Petitioner's customers were typically large companies that spent between twenty million to several billion dollars annually on contingent labor temporary workers.

3. By an appointment letter dated September 20, 2016, the Division's auditor, Norai Pisano, scheduled a field audit of petitioner for the periods at issue. In response to the Division's request for books and records, petitioner produced certain information including copies of its payment register, certain contracts and pages of its general ledger showing petitioner's New York revenue by year. In addition to reviewing the documents provided by petitioner, the Division's auditor also reviewed petitioner's website, did general online research of petitioner's marketing materials and spoke with several of petitioner's representatives regarding petitioner's operations.

4. As a result of the audit, the Division determined that petitioner sold licenses to use pre-written software referred to as petitioner's vendor management system (VMS). The Division also determined that petitioner sold nontaxable professional services referred to as petitioner's managed supplier program (MSP). The Division determined that petitioner's books and records reflected that petitioner accounted for receipts from the sale of VMS separately from the receipts from the sale of MSP. The Division concluded that petitioner owed sales tax on the sale of the VMS but not the MSP.

5. The Division issued notice of determination, notice number L-048608997, dated July 31, 2018 (notice), assessing petitioner additional sales tax of \$686,570.66 plus interest thereon of \$306,698.60, and no penalties. Pursuant to the stipulation executed by the parties, neither the audit methodology nor the calculation of the amount of sales tax due is in dispute.

6. Petitioner submitted a request for a conciliation conference to the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice. A conciliation conference was held on December 4, 2018, and BCMS issued an order, dated July 19, 2019, sustaining the notice.

7. Petitioner filed a petition with the Division of Tax Appeals in protest of the BCMS order and a videoconferencing hearing via CISCO Webex was held on February 11, 2011, before the Division of Tax Appeals.

8. At the hearing, the Division's auditor testified that she concluded that petitioner generates revenue through the sale of pre-written software. The Division concluded that petitioner bills its VMS fees separately from any other fees it bills clients. Ms. Pisano concluded that a client could purchase only the VMS or could buy the VMS along with the MSP. She concluded that if the customer also enters into a MSP agreement with petitioner, the fees for MSP services are separately stated on petitioner's books and records. The Division concluded that petitioner's employees perform no services other than IT support of the software and do not provide the MSP services themselves. Petitioner's clients access the VMS through the internet via a username and password.

9. Copies of pages of petitioner's website were included in the audit file. Petitioner's website noted that:

“[s]implify put VMS is the software that automates the hiring process of contract workers. It is often a web-based application that helps to manage and procure staffing services from requisition through billing. Most VMS tools are delivered through a software-as-a-service model. VMS tools provide significant improvements in reporting analytics capabilities that far outperform manual system and processes.

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This structure enables a streamlined and automated process with real-time visibility for all parties. Suppliers see all relevant job orders, and you can

accurately assess labor services spend [sic] and performance, leading to significant cost reduction.”

10. During the audit, petitioner provided the Division with six contracts/agreements as an example of its agreements with clients. Specifically, they were: (i) a blank sample contract; (ii) a copy of a contract with NYSE Euronext; (iii) a copy of a contract with Verizon Telematics, Inc.; (iv) a copy of a contract with Deutsche Bank, AG; (v) a copy of a contract with Marsh & McLennan Companies, Inc.; and (vi) a copy of a contract with The Bank of New York Mellon Corporation.<sup>2</sup>

11. At the hearing, petitioner<sup>3</sup> introduced into evidence 15 contracts/agreements.<sup>4</sup> They were as follows:

Exhibit 1	Sample Client Services and Solutions Agreement
Exhibit 2 <sup>5</sup>	Sample Exhibit A to the Sample Client Services and Solutions Agreement
Exhibit 3	Beeline Access and Services Agreement with NYSE Euronext, dated January 30, 2012
Exhibit 4	Client Services and Solutions Agreement with Verizon Telematics, Inc., dated October 3, 2014
Exhibit 5	Managed Supplier Program (MSP) Professional Services Agreement between Beeline.com., Inc., and The Bank of New York Mellon Corporation, dated December 30, 2011
Exhibit 6	Managed Supplier Program Professional Services Agreement with Deutsche Bank, AG, dated February 24, 2006
Exhibit 7	Master Services Agreement with Marsh & McLennan Companies, Inc., effective as of March 1, 2011
Exhibit 8	Client Access Agreement with Pfizer, Inc., dated July 31, 2015
Exhibit 9	Services and Solutions Agreement with Allegis Global Solutions, Inc., dated January 1, 2013

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<sup>2</sup> It appears that most of the contracts/agreements petitioner provided the Division during the audit were also offered by petitioner as separate exhibits during the hearing.

<sup>3</sup> In its post-hearing briefs, petitioner did not offer any detailed analysis of the contracts/agreements in the record.

<sup>4</sup> An examination of the contracts/agreements petitioner submitted into evidence reveals that petitioner’s chief operating officer executed exhibits 4, 7, 8 9, 11, 12 and 13.

<sup>5</sup> It appears exhibits 1 and 2 are part of the same contract.

Exhibit 10	Application Service Provider Agreement with MasterCard International Incorporated, dated February 29, 2012
Exhibit 11	Master Application Service Provider Agreement with Metropolitan Life Insurance Company, dated April 20, 2015
Exhibit 12	Client Services and Solutions Agreement with Epiq Systems, dated November 1, 2013
Exhibit 13	Client Services and Solutions Agreement with OFI Global Asset Management, Inc., dated April 21, 2016
Exhibit 14	Supplier Access and Services Agreement (sample)
Exhibit 15 <sup>6</sup>	MS Online Services Client Access and Terms of Use with The Bank of New York Mellon Corporation, dated December 30, 2011

12. It appears that in all of contracts for VMS services entered into the record, petitioner granted to its client a license to use petitioner's software technology. In the contracts where it appears the MSP service is offered, the MSP service fees appear to be separately billed from the VMS service.<sup>7</sup>

**TESTIMONY OF AUTUMN VAUPEL, CHIEF OPERATING OFFICER**

13. At the hearing, petitioner presented the testimony of Ms. Autumn Vaupel, petitioner's chief operating officer. Ms. Vaupel characterized petitioner's business as follows:

14. Petitioner essentially provided a "matching" service to match customers that desired to purchase the services of temporary workers with the suppliers of temporary contingent labor.

15. Petitioner provided services by obtaining large amounts of information from the customers regarding the customer's needs and processes and used that information to match the needs to the available supply of labor.

16. Petitioner's services also included the provision of legal compliance services. These services included the hiring, invoicing and payable process, the management of data and reports

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<sup>6</sup> It appears exhibits 5 and 15 are part of the same contract.

<sup>7</sup> The record is not entirely clear what petitioner's MSP service was.

to the customers and suppliers and other general services to assist in all aspects of contingent labor management.

17. In order to most efficiently provide its services, petitioner used the services of its hundreds of employees, a minority of which designed and used an internet-based system or process, which enabled petitioner to streamline the process of assisting in the recruiting, management and hiring of contingent labor.

18. When customers were interested in entering into an agreement with petitioner, petitioner spent months of time gathering information about the scope of a customer's particular labor needs and business processes that would include the different labor categories the customer wanted petitioner to manage, the customer's locations, the customer's internal hiring and other processes and workflow, and the customer's data. For example, petitioner would need to gather information about the customer's internal organizational structure in order to create a work process to properly route and tailor labor requisition requests in the most efficient format through the customer's approval hierarchy. For example, petitioner spends an average of nine months and hundreds or thousands of hours of labor gathering information from customers about their needs and business before the customer even signs a contract with petitioner.

19. Petitioner spent hundreds or thousands of hours gathering information from a customer because petitioner tailored its services based on each individual customer and therefore needed to understand the scope of the services required by the customer. As part of that process, petitioner advised customers on best practices in all aspects of managing their contingent labor program. Because petitioner works with so many large global companies managing their contingent labor programs, petitioner knows and understands the best practices, needs and solutions for procuring and managing contingent labor.

20. Petitioner customizes its approach to each customer to match the customer's system requirements and needs. For example, petitioner sends the suppliers' invoices to the customer in a format that complies with the customer's accounts payable system and other invoicing processes so that the suppliers' invoices meet the customer's payable and information needs and allows the invoices to be pulled into the customer's system for a fast turnaround of payment and accurate capture of the needed information.

21. After a customer signs a contract with petitioner, petitioner continues to provide all of the services to the customers and the suppliers, including consulting and training services to the customer throughout the lifecycle of the contract. For example, petitioner initiated 18,000 customized work orders for customers in 2021. Petitioner's customer programs, processes, needs and requirements are changing constantly because of the complexity of and change in customer needs, supplier needs, hiring processes and laws.

22. Petitioner also regularly makes changes to its work processes and systems for a wide variety of events and occurrences, such as if a customer brings a new labor category into its contingent labor program because a customer may have a different process for hiring information technology (IT) workers than for hiring warehouse workers.

23. Petitioner also regularly updates the services it provides based on changes in labor, tax or other laws. For example, a recent tax law change in India required petitioner to advise suppliers and customers of the law change and to change the invoicing process and structure for all of its customers with contingent labor in India.

24. Petitioner also makes recommendations to customers about potential suppliers that would support the customers' overall business needs and strategy. For example, if a customer were to institute a new or updated diversity and inclusion initiative, petitioner would recommend



suppliers that would help meet that specific need, such as “The Mom Project” which gets working mothers back into the workplace.

25. Petitioner also provides training to its customers on the best and most efficient ways to manage its purchases of contingent labor and of petitioner’s services, such as how to best create a requisition for labor, as well as how to view various reports that petitioner makes available on its site. Petitioner creates a variety of customized reports regarding the customer’s contingent labor program and needs which the customer receives by email or views on petitioner’s system. Approximately 50% of petitioner’s employees during the periods at issue were involved in directly providing the services to customers and suppliers and the remaining 50% of petitioner’s employees worked in product management and development, finance, accounting or legal areas.

26. Petitioner also has employees and teams that are dedicated to each individual customer. Petitioner assigns to each customer one or more “client operations managers” who assist the customer with managing its contingent labor program, assist the customer with changes the customer may want to make to its processes, and communicate updates on the services or service changes that petitioner can provide to the customer. Petitioner also assigns to each customer one or more dedicated “client relation managers” that perform similar functions. Petitioner also has what it refers to as “centers of excellence” consisting of teams of experts that support the customers during the life of the contract, such as experts in reporting or invoicing or in other specialized areas.

27. Petitioner has a team that specializes in understanding the specific customer’s contingent labor program which are referred to as “solution consultants” who are focused on resolving customers’ problems and providing consulting on best practices.

28. One of the many aspects of petitioner's integrated services included the management of, and consulting for, the labor requisition process that involves a customer submitting a request for contingent labor, which petitioner then reviews and eventually sends to the suppliers, who then submit candidates for consideration by the customer, and who then ultimately choose the candidates for the positions. Petitioner has a very large and extensive network of suppliers that it has curated over many years and petitioner sends the customer's requests for labor to the specific suppliers based upon petitioner's knowledge of which suppliers would be most appropriate to best provide the workers for each customer.

29. Prior to using petitioner's services, a customer may only know the suppliers it had worked with in the past and typically would only have used one or two suppliers to provide its contingent labor. There could be hundreds of suppliers that might be able to supply the labor required by the customer, but the customer may only know of one or two suppliers. With petitioner's services, customers have access to hundreds of suppliers that can best provide the labor the customer needs and whom petitioner has reviewed, evaluated and determined on a regular basis were suitable suppliers for the customer. Based on its extensive knowledge of the suppliers, petitioner carefully evaluated and often identified areas where customers were overpaying or could save money on contingent labor. Since petitioner is able to provide highly specialized insight into the market and to exert some control and influence over the rates charged by suppliers, petitioner can ensure the customer is not overpaying for contingent labor.

30. In order to work with petitioner as a supplier to customers, the suppliers sign an access agreement that allows the suppliers to have access to the customers and work with petitioner. Suppliers that enter into contracts with petitioner are able to review the customers' contingent labor needs and respond to requests from petitioner and petitioner's customers.

31. The benefit of petitioner's services to the suppliers is that they streamline, organize, and make the hiring process more efficient than in the past. Previously, a customer would have had to send a requisition by mail, fax, or email or make a telephone call to each supplier with a description of the customer's needs. Similarly, each supplier would then have to obtain, review and submit resumes of potential candidates to the customer by mail, fax or email or by calling the customer and describing the candidate.

32. Petitioner's services provide similar benefits to the customers. The customers no longer have to send requisitions by mail, fax, or email or make telephone calls to multiple suppliers to try to fill their contingent labor needs. Instead, the customer's hiring manager can create multiple and varying requests for labor in a single request (instead of multiple requests to multiple suppliers) that petitioner can review, provide input and consulting, and then release to multiple suppliers. Previously, the hiring manager may have had to fill out a paper form or Excel spreadsheet to capture all of the information required by the customer to request contingent labor. With petitioner's services, each customer can use a unique and customized form that the hiring manager uses to request contingent labor. That unique form is set up for each customer during petitioner's customer onboarding process. Petitioner customizes the customer's hiring requisition needs and forms by identifying the information the customer needs to capture any information that the customer wants the suppliers to be able to see. Petitioner does not charge a separate fee to the customer for customizing the hiring requisition form and instead, it is included as part of petitioner's overall and integrated services. Petitioner is also able to advise the customer on the information that should be included in its hiring requisition form in order for the customer to get the strongest candidates based on its experience in the industry.

33. Customers also benefit from the services because the approval process for hiring contingent labor is now streamlined. Every customer has its own approval process for the expenditure of money, the hiring of contingent labor, and compliance with labor and tax laws, invoicing, payables, generation of relevant reports and managing the efficiency of the process. Previously, the hiring manager would have to go to their manager's office to obtain approval of a paper labor requisition or send an email to the manager with details on the labor requisition. The manager may also have had to obtain approval from his or her manager. With petitioner's services, the approval process is accelerated and streamlined because when the hiring manager creates the requisition using petitioner's services, petitioner's personnel and system will generate emails or other notifications to route the requests for approval to the correct manager or managers and will also manage and monitor any responses.

34. Once the hiring requisition is reviewed by petitioner and approved by the customer's internal decision makers, petitioner releases the requisition to the suppliers to allow suppliers to evaluate the request and bid on the work. The supplier then submits candidates for the customer's consideration through petitioner's system. Petitioner also vets or evaluates candidates for customers by reviewing potential candidates submitted by multiple suppliers and curating the potential candidates down to a short list of the most viable candidates for the customer to select, saving the customer time and expense. The customer's hiring managers view candidates' resumes that petitioner has obtained from the suppliers and select candidates the hiring manager may want to interview. The hiring manager's request to interview a candidate would be routed back to the supplier and petitioner would set up that interview.

35. Petitioner also provides monitoring services to ensure that customer required background checks, drug testing and other employment related services are properly performed

by the vendor who performs those services and that all relevant information regarding these services is provided to the proper persons.

36. Petitioner also provides legal compliance services to its customers by having a team of people that research various labor, tax and other laws that affect contingent labor on a global basis. Any changes to labor or employment, tax or other laws that affect a particular customer are typically communicated to the customer by the customer's client operations manager. For example, a change in a labor law in the United Kingdom would be communicated to customers who have contingent labor programs in the United Kingdom.

37. Another aspect of petitioner's integrated services is the management of invoicing, including assistance with providing suppliers the information to enable the suppliers to submit invoices in the proper form and the consolidation of all of the supplier invoices for each customer so that the customer only receives one consolidated invoice for the particular project, rather than hundreds of invoices from different suppliers. The customer then pays the consolidated invoice by submitting the funds to petitioner which then remits the funds to the suppliers. According to Ms. Vaupel, the suppliers pay petitioner's fee for the services based typically on a percentage of the supplier's fees and therefore, according to Ms. Vaupel, petitioner is actually paid by the suppliers and not by the customers for the services.

38. Ms. Vaupel testified that none of the services provided by petitioner are separately billed, there is no separate charge for any of the services and that the invoices sent to customers do not include any charge for a software license or a subscription fee. Ms. Vaupel asserted that petitioner's only charge is to the suppliers for the integrated services provided to customers and suppliers.

39. Neither the customers nor the suppliers may log-in and use petitioner's systems unless they have entered into a contract with petitioner that governs all of the integrated services provided by petitioner.

40. Petitioner's customers are not allowed to and do not alter or download petitioner's systems, modify the systems or re-sell or re-license the systems. Neither petitioner's customers nor the suppliers can modify the system.

41. Petitioner's contracts with its customers are designed to protect petitioner. Petitioner needs to ensure that its customers cannot copy the systems, sell the system to another party, or use it for an unintended purpose. The use of the term "license" in the customer contracts is to confirm that the customers and suppliers are allowed to access petitioner's systems that petitioner created to assist it in the performance of the services, but further cautions that the customers and suppliers cannot download, alter, modify, distribute or use it in any other way to protect petitioner's proprietary technology that it has developed over years.

42. Ms. Vaupel asserted that unlike software companies that track licenses to use software and the number of users accessing software and who sell software based on the number of users or licenses, petitioner does not track information for users or charge for software usage in any form.

43. Petitioner marketed its services through a variety of methods, including using a network of business connections, advertising, its website and videos which are intended to provide prospective customers and suppliers with "sound bites" of the value that petitioner can bring to the customers and suppliers. Any tangible marketing materials are tailored to the person being addressed, which in some cases can be senior management, finance people, human resources personnel, hiring managers and others. In its marketing materials, petitioner does not

fully describe all of the work that it does in order to provide its services because it only provides the information that the customer or supplier would believe provides them the most value. Ms. Vaupel testified that the specific petitioner marketing video submitted by the Division into evidence was directed solely to the tasks that a customer's hiring manager would perform and was not intended to represent a summary of the true object of petitioner's services. The video and the website information submitted by the Division concentrates on the technology that customers may find useful from the standpoint of efficiency and provides information on how to navigate within the system to obtain information. The marketing video submitted into evidence by the Division was directed at a customer's hiring manager to show the hiring manager how easy it is to work with petitioner and how much benefit the customer would get from working with petitioner. Petitioner might market its services differently to a customer's chief financial officer or legal counsel. For those individuals, petitioner's marketing would focus on risk mitigation and compliance factors, cost savings and other similar things. Petitioner did not submit any additional website, video or other marketing materials into the record.

44. Petitioner owns the servers the VMS software runs on. The VMS software is developed solely by petitioner. Petitioner has internal programmers and other professionals that designed the VMS software.

45. Ms. Vaupel testified that petitioner attempts to avoid customizing its software for particular customers but that such customization is possible.

46. When asked about why the contracts were so long, Ms. Vaupel testified that petitioner needs to protect its intellectual property and that petitioner is "providing access to a platform, we need to ensure that a customer can't copy that platform or use it for some other unintended purpose or try to resell our IP to another party."

47. Ms. Vaupel explained that petitioner only offered the MPS service up until 2012;<sup>8</sup> however, after that year petitioner no longer offered that separate service. Ms. Vaupel asserted that all of the services she testified about above were part of the VMS bundled package of services. The Division does not advance that the services offered, aside from the software, are taxable.

### EXAMPLE VMS CONTRACT LANGUAGE

48. As noted above in finding of fact 10, during the audit, petitioner provided the Division examples of the contracts entered into with its customers. During the hearing, petitioner also entered additional certain contracts into the record. Petitioner's contract with Verizon Telematics, Inc., dated October 3, 2014 (example contract), was both provided to the Division during the audit as a model contract and was also separately submitted into evidence by petitioner during the hearing. The example contract was executed by Ms. Vaupel, as petitioner's chief operating officer.

49. The example contract states the following:

"1. **Definitions:** Besides the terms defined elsewhere in this Agreement, the following terms shall have the following meanings: a) ***'Beeline VMS' is Beeline's vendor management system, a web based application delivered through a software-as-a-service model,***<sup>9</sup> b) **'Documentation'** means the User instructions and such other instructional information provided by Beeline for use with the Beeline VMS and Services; c) **'Services' means the Beeline VMS, solutions and services as set forth in a statement of work attached hereto that are procured by Client and made available by Beeline via the Internet at the URL and/or other web pages designated by Beeline.** Services specifically excludes staffing services; d) **'Supplier(s)'** means the third party labor suppliers designated by Client, who have entered Into Beeline's Supplier Access and Services Agreement; e) **'Users'** means employees, consultants and contractors of Client using and accessing the Services (excluding Suppliers), Beeline VMS, and Documentation

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<sup>8</sup> It appears the Division mistakenly believed that petitioner offered the separate MPS service throughout the entire period at issue.

<sup>9</sup> The contract provision describing "VMS" as a "web based application delivered as a software-as-a-service model" appears in several of VMS contracts petitioner placed into evidence for this case.



who are properly registered and authorized to access the Beeline VMS by virtue of password(s).

2. Beeline VMS Services; Services Use.

a) ***Beeline hereby grants to Client a limited, nonexclusive, nontransferable license to use and access the Beeline VMS solutions set forth in Exhibit A in the Beeline VMS areas designated by Beeline in object code form during the Term.*** The Beeline VMS and Services shall be used by Client and Users solely (i) for Client's internal business purpose and (ii) to implement electronic procurement and supply chain management. Client may also use the Documentation in association with the licensed use of the Beeline VMS. Client shall administer the registration and password access of its Users and remove or deny access to terminated or unauthorized personnel, Client agrees to immediately notify Beeline of any unauthorized use of any registration or password. Client shall not share passwords or transfer registrations from one User to another.

b) ***Suppliers shall be permitted to use and access areas of the Beeline VMS designated by Beeline.*** Suppliers may use the Documentation designated by Beeline in connection with Supplier's use of the Beeline VMS. The terms of Suppliers' use and access of the Beeline VMS, Services and Documentation shall be governed by Beeline's Supplier Access and Services Agreement. Client is not responsible for breaches of the Beeline Supplier Access and Services Agreement,

3. Services Scope: Billing.

a) ***Client or its agent shall have and maintain a direct contractual relationship with each Supplier for that Supplier's services, and Beeline shall not serve as a prime contractor in this regard. Client acknowledges and agrees that Beeline is not Client's or Supplier's agent for any purposes other than as expressly stated herein and is not responsible for the acts or omissions of Client or any Supplier, the quality of services or products derived from any Supplier, or for the quality or accuracy of information received from any Supplier.***

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4. Proprietary Rights.

a) Beeline, its affiliates and licensors, retain all right, title and interest in, to and under the Beeline VMS and Documentation, as well as all software, source code and components thereof and all know how, ideas and developments derived thereby. No title or right, or any intellectual property or other right, express or implied, is transferred by Beeline to Client by virtue of this Agreement. ***The license granted hereunder is limited solely to the right to access the Beeline VMS via the World Wide Web and does not include the transfer or distribution of software or source code to Client. Beeline shall inform each Supplier of the same in the Supplier Access and Services Agreement.***

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5. Payment and invoicing.

a) The fees due Beeline for Services rendered and use of the Beeline VMS and Documentation ('Fees') are set forth in Exhibit F.<sup>10</sup> Unless otherwise stated in Exhibit F, Beeline shall submit consolidated invoices to Client for Fees due Beeline and amounts due Suppliers. Client shall pay such consolidated invoices in the method and timeframe described in Exhibit F.

b) Client shall remain responsible for the payment of all applicable taxes, duties, assessments and levies attributable to the fees or use of the Beeline VMS, Services or Documentation, including all state and local sales or use, gross receipts, transaction privilege, business and occupation and other similar taxes or levies, VAT, electronic/internet commerce, export/import and withholding taxes, penalties and interest. Beeline shall remain responsible for any taxes based on Beeline's income.

c) Client shall remit payments to Beeline Settlement Company LLC, a single purpose special bankruptcy remote company established by Beeline and incorporating governance and other standards consistent with rating agency requirements for bankruptcy remote entities, for the purpose of remitting payment to Suppliers. Client's payments to Beeline Settlement Company LLC shall not be co-mingled with other Beeline operating accounts. Within seven (7) business days of receipt of payment from Client, Beeline shall send payment to Suppliers" (emphasis in original and added).

50. Exhibit A to the Example Agreement provides in relevant part:

"1. SERVICES AND SOLUTIONS.

Client retains Beeline to provide its Vendor Management System, consisting of its core platform, ('Beeline VMS') and purchased solutions set forth in this Exhibit A (together, the 'Service'); to facilitate Client's procurement of contingent workers from sources and suppliers identified and selected by Client ('Suppliers') and in accordance with Client specifications (the 'Client Program'). ***Beeline VMS, a web-based application delivered through software-as-a-service, provides, automation solutions for sourcing, managing, and measuring Suppliers and their personnel ('Supplier Personnel'). Solutions available on the Beeline VMS may include Contingent Staffing, Resource Tracking, Outsourced Workers, and Services Procurement. Client will be provided with approved access to utilize the Service to facilitate the procurement and management of Supplier Personnel"*** (emphasis added).

51. Exhibit A to the example contract goes on to note that the following are

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<sup>10</sup> Exhibit F to the example contract provides a fee scale based upon the client's "Annualized Spend Capture in Technology" (e.g., If the client's Annualized Spend Capture in Technology is \$30,000,001.00 - \$60,000,000.00 in year 1 petitioner's fee is .95%, in year 2 petitioner's fee is .85%, in year 3+ petitioner's fee is .65% of the total amount due suppliers).

included under Beeline VMS:

### “3.1. Contingent Staffing

Contingent Staffing encompasses sourcing non-employees of professional and temporary staffing needs, such as Admin/Clerical, IT, Non-IT, Blue-Collar/Light Industrial, and Onshore/Offshore, on a per-worker basis through Supplier.

3.1.1. Procurement and Sourcing. Through Supplier-neutral sourcing, approved Suppliers receive job requisitions based on rules predefined by Client. They respond with potential candidates who in turn, follow Client’s qualifications processes. This competitive model is facilitated automatically and results in lower time-to-fill ratios, higher quality candidates, more competitive pricing, and overall improved supplier performance...

### 3.2. Services Procurement

Services Procurement encompasses strategic management and procurement of complex category services including but not limited to contract labor, consultancy service, IT, marketing, and legal services, typically through a Statement of Work with Supplier.

### 3.3 Outsourced Workers

Outsourced Workers encompasses management and tracking of non-strategic services outside the core competencies of Client’s organization that are generally not time constrained. These services are usually bound by agreements between Client and the non-strategic services Supplier. Some examples of non-strategic services include lawn maintenance, janitorial services, security guards, maintenance and facilities, dining services.

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### 3.5. Additional Solutions

3.5.1. SmartView®. Interactive data discovery platform enables visibility to track, measure, trend, and predict Supplier metrics, total spend and compliance issues, program performance, and quality improvement opportunities. Through a visual, interactive and web-based interface, users explore and analyze program data collected by the Beeline VMS. The following capabilities comprise SmartView, but do not represent an exhaustive feature set: Standard Visualizations (Adoption Management, Process Efficiency, Program Metrics, Rate Intelligence Metrics, Risk Mitigation Metrics, Supplier Optimization), Charts, Graphs, Outlier Diagrams, Maps, Dynamic Analysis, Filters, Export Services (PDF, MS Excel), and Bookmarking/Social BI.”

52. Exhibit B-1 to the example contract provides in relevant part:

“The following Beeline VMS Solutions will be implemented in Phase 1, in the United States, with invoicing in US dollars, and will include business units identified by Client. Deployment of any other VMS Solutions will require a separate [statement of work]. Unless otherwise expressed in this Exhibit It [sic] is intended that the *VMS Solutions described herein will be deployed in a standard fashion utilizing the VMS technology without, customization of software. Any deviations or requirements subsequently identified that require software development shall require a separate [statement of work], and be subject to additional costs as may be applicable at rates described in [another exhibit to the agreement]*” (emphasis added).

53. Exhibit B-1 to the example contract provides that the VMS Solutions referred to in the above provision includes what appears to be most of the services petitioner provides its clients, classifying such as “Contingent Staffing”, “Standard Integrations” and “Non-Standard (Custom) Integrations” and expressly including all of those services described in Exhibit A to the contract.

#### **EXAMPLE SUPPLIER ACCESS AND SERVICES AGREEMENT**

54. As noted above, during the hearing petitioner submitted an example of the contracts it entered into with the suppliers of labor (*see* exhibit 14 in evidence [example supplier contract]). The example supplier contract notes that the services for which suppliers are engaged are for “the electronic procurement and supply chain management services available on [petitioner’s website] which are offered by [petitioner].” The example supplier contract provides:

“2. Technology Access; Services Use. Beeline hereby grants to Supplier a limited, nonexclusive, nontransferable license to use and access certain Technology areas designated by Beeline for Supplier during the Term solely for Supplier’s use in fulfilling Client’s labor and/or professional requirements.”

55. Exhibit A to the example supplier contract provides:

“FEES. *Client shall pay a fee to Beeline as set forth in Beeline’s agreement with Client*. Beeline shall have the right to collect such fee by collecting from Supplier an amount equivalent to \_\_\_% of all charges by Supplier attributable to

services delivered each month by Supplier to Client, exclusive of expense reimbursement and applicable taxes. Beeline may deduct the amount of the fee from the payment received from the Client attributable to Supplier's services, and the balance shall be accepted by Supplier as payment in full for services rendered to Client. Beeline has agreed to invoice Client every X days. Beeline shall remit the balance to the Supplier at the address currently on file with Beeline, within 5 business days of receipt from Client. Beeline shall in no case be responsible for failure or delay in payment by Client" (emphasis added).

***SUMMARY OF THE PARTIES' POSITIONS***

56. Petitioner claims that it does not receive payments from its customers for a license to use software. Petitioner claims that the primary purpose of its service was to act as a "matching" agent for suppliers of temporary labor and customers needing such labor and not the license of software. Petitioner also asserts that it is not paid by the customers who hire the labor but rather the suppliers of the labor. Finally, petitioner claims that the Division misunderstood petitioner's business model by incorrectly concluding that both the VMS and MPS services were offered throughout the periods at issue and this misunderstanding led the Division to the erroneous conclusion that petitioner offered and billed for software separately from all of the other services that were what customers were paying for.

57. The Division asserts that petitioner is licensing pre-written software to their customers, and such is a taxable service. It claims that petitioner licenses its software to its customers and that it is billed separately from other consulting services. The Division acknowledges that some of the related services may be tax exempt, but claims they are being performed by taxable software that has been licensed to the customer. It asserts that the primary function test does not apply because tangible personal property is being licensed by petitioner to their customers.

### **CONCLUSIONS OF LAW**

A. A presumption of correctness attaches to a properly issued statutory notice issued by the Division and the taxpayer bears the burden to prove that the assessment is incorrect (*see Matter of Hotel Depot, Inc.*, Tax Appeals Tribunal, January 24, 2020, citing *Matter of Darman Bldg. Supply Corp. v Mattox*, 106 AD3d 1150, 1151 [3d Dept 2013]; *Matter of Blodnick v New York State Tax Commn.*, 124 AD2d 437, 438 [3d Dept 1986] *appeal dismissed* 69 NY2d 608 [1987]). Although a determination of tax must have a rational basis in order to be sustained, the presumption of correctness raised by the issuance of the assessment, in itself, provides the rational basis, so long as no evidence is introduced challenging the assessment (*see Leogrande v Tax Appeals Trib.* 187 AD2d 768 [3d Dept 1992], *lv denied* 81 NY2d 704 [1993]). In this case, after reviewing all of the documentation and information provided and obtained during the audit, the auditor determined that the VMS service was the taxable sale of pre-written software and petitioner's MSP service was not a taxable sale and was billed separately. Given these facts, the Division had a rational basis for determining petitioner's VMS service included the taxable sale of pre-written software. At the hearing, with the testimony of petitioner's chief operating officer, it was brought to light that petitioner's MSP service was only available through 2012, and that the VMS service might include more elements than what the Division first knew about.<sup>11</sup> The fact that the Division was not fully aware of all of the work being performed as part of the VMS service does not impact the fact that at the time of the issuance of the notice, based upon all the information the auditor was provided, issuance of the notice was rational (*see Matter of March*, Tax Appeals Tribunal, November 26, 2018; *Matter of Grillo*, Tax Appeals Tribunal, August 23,

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<sup>11</sup> It is noted that the existence of much of the work discussed by petitioner's chief operating officer at the hearing does not appear to be easily ascertainable from the contracts and other materials petitioner provided the auditor during the audit. This is not to conclude that such work does not actually take place, but much of it remains inconspicuous, if disclosed at all, in the contracts and other evidence petitioner provided during the audit.

2012, citing *Powers v Commissioner*, 100 TC 457 [1993]). The Division only subjected petitioner's fees for the VMS service to sales tax, so the remaining question is whether this approach was correct given all the evidence presented at the hearing. Petitioner does not meet its burden to refute the Division's approach.<sup>12</sup>

B. Tax Law § 1105 (a) imposes sales tax on the receipts from every "retail sale" of tangible personal property, which includes "pre-written computer software" (*see* Tax Law §§ 1101 [b] [6]; 1105 [a]). Tax Law § 1101 (b) (14) provides that pre-written software is:

"Computer software (including pre-written upgrades thereof) which is not software designed and developed by the author or other creator to the specifications of a specific purchaser. The combining of two or more pre-written computer software programs or pre-written portions thereof does not cause the combination to be other than pre-written computer software. Pre-written software also includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than such purchaser. Where a person modifies or enhances computer software of which such person is not the author or creator, such person shall be deemed to be the author or creator only of such person's modifications or enhancements. Pre-written software or a pre-written portion thereof that is modified or enhanced to any degree, where such modification or enhancement is designed and developed to the specifications of a specific purchaser, remains pre-written software; provided, however, that where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for such modification or enhancement, such modification or enhancement shall not constitute pre-written computer software."

In this case, petitioner's software appears to be primarily pre-written software.

Petitioner's chief operating officer, Ms. Vaupel, testified that petitioner typically tried to use the same software with all of its customers but could customize the software when necessary (*see* finding of fact 45). Moreover, the express terms of the example contract petitioner supplied

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<sup>12</sup> Throughout petitioner's filings in this matter, it repeatedly cites to determinations of the administrative law judges at the Division of Tax Appeals in support of its arguments. Tax Law § 2010 (5) states that determinations "shall not be cited, shall not be considered as precedent nor given any force or effect in any other proceedings conducted pursuant to the authority of the division or in any judicial proceedings conducted in this state." As such, petitioner's arguments citing these determinations are without authority.

indicates that the VMS software was in fact standardized software but could be customized for a separate fee and agreement (*see* finding of fact 52). The Division only subjects the VMS fees and not any specialized customization software or other fees to sales tax.

C. “Sale” is defined as “[a]ny transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including with respect to computer software, merely the right to reproduce) conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor” (*see* Tax Law § 1101 [b] [5]). 20 NYCRR section 526.7 (e) (4) provides that a transfer of possession has occurred if there is actual or constructive possession, or if there has been a transfer of “the right to use, or control or direct the use of, tangible personal property.” Contrary to Ms. Vaupel’s opinion, the example contract in this case provides that petitioner’s customers are given a license to petitioner’s software technology (*see* finding of fact 49 [section 2 of the example contract]).<sup>13</sup> Even without this express reference to a “license” in the contract, it is abundantly clear from the record that petitioner’s customers and the labor suppliers are being provided specialized access to and utilization of petitioner’s software, thus resulting in a “sale” of the software for Tax Law purposes. The fact that petitioner goes to great lengths to limit parties other than either its customers or the suppliers from accessing the

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<sup>13</sup> “In the absence of fraud, accident or mistake, the parol evidence rule prohibits resort to extrinsic evidence to vary the meaning of a contract when the language of the contract is unambiguous” (*Matter of Emery Air Freight Corp.*, Tax Appeals Tribunal, October 17, 1991, *confirmed* 188 AD2d 772 [3d Dept 1992]). The Tribunal has consistently applied this standard and rule so as to bar oral testimony as a basis for varying or modifying the unambiguous language of a contract (*Id.* [oral testimony to construe a written lease term barred as irrelevant in determining the intent of the parties]; *see Matter of Landmark Dining Systems, Inc.*, Tax Appeals Tribunal, September 8, 1994, *confirmed* 224 AD2d 785 [3d Dept 1996] [evidence of a contemporaneous oral agreement barred for purposes of modifying the terms of an unambiguous integrated written contract]; *Matter of Schechter*, Tax Appeals Tribunal, October 13, 1994 [barring oral testimony regarding the existence of a contractual contingency]). At the same time, where the language of a contract is ambiguous, the rule will not serve as a bar to the admissibility of extrinsic evidence to explain that which is unclear (*Matter of Howard Enterprises*, Tax Appeals Tribunal, August 4, 1994 [oral testimony not used to contradict written terms, but allowed to clarify vague terms (“all liability” for third party debts)]; *see also Matter of OfficeMax North America v Tax Appeals Trib.*, 33 AD2d 1161 [3d Dept 2006], *lv denied* 8 NY3d 804 [2007]).



software technology is an indication the software technology is extremely valuable to petitioner and that parties are providing consideration for access. The example contract provides that customers pay fees for the VMS service, and the contract includes the license of petitioner's software as part of the VMS service (*see* finding of fact 49). Petitioner claims that the fees are not for the utilization of the software; however, the contract does not make that distinction or support that assertion.

D. Where the sale of bundled taxable and nontaxable services is considered, the taxation of such is determined according to the primary function of the bundle (*see Matter of Strata Skin Sciences, Inc.*, Tax Appeals Tribunal, May 5, 2022). However, the Tax Appeals Tribunal has reserved judgment on whether "all mixed bundled sales of tangible personal property and services should be analyzed using the primary function test" (*id.*). In the case at hand, the sale of the pre-written software, which as noted is considered tangible personal property, is bundled and sold together as one product with other nontaxable services. The VMS software is anything but incidental to the entire bundled package being sold by petitioner. Petitioner's website highlights how important the VMS software is to the final product; it is the software that streamlines, automates and integrates the entire bundle of services petitioner is selling (*see* finding of fact 9). Petitioner's contracts stress that the entire bundled package of VMS services is "a web based application delivered through a software-as-a-service model" (*see* finding of fact 49). In the example contract, the software technology and license are prominently emphasized early on and the contract appears to cover all aspects of the VMS services. The software technology and license appear to be completely intertwined with all the services petitioner offers in the contract (*see* finding of fact 49 through 53). Petitioner's chief operating officer explained that petitioner was involved with various work in preparation of entering into its contracts with customers or to

maintain the contracts throughout their term (*see* finding of fact 14 through 47); however, that does not change that the ultimate goal was to provide customers a seamless, automated and efficient system of fulfilling and monitoring their temporary employment needs, and that required, as the contract reflects, utilization of the software technology license. To attempt to separate the software component from the remaining services offered by petitioner would appear to greatly diminish the value of the ultimate product customers purchased. Even if the primary purpose test is applied in this case the software licensing would be part and parcel of that primary purpose. To proceed otherwise would be attempting to “split the baby” and materially degrade the ultimate services which petitioner sells. The fee structure which bundles the software along with all the other VMS services together into one product further supports the conclusion that the two are necessary components of each other’s value.

E. Petitioner’s chief operating officer asserted that the businesses that supply the labor are the parties who really pay the fee for petitioner’s VMS services. Petitioner appears to claim that it merely bills its customers the standard labor costs on behalf of the labor suppliers and then takes its fee out of that amount; thus, claiming it is the suppliers who are actually paying petitioner’s fees. At first glance, it is not clear whether this assertion, even if true, would result in a different outcome in this case; petitioner does not offer any analyses of the ramifications of this assertion. Based upon the record, it appears the suppliers are also licensing the software and are subject to a similar arrangement as the customers are (*see* finding of fact 49 [section 4 of the example contract] and 54).<sup>14</sup> Furthermore, the example contract and the example supplier contract appear to delineate between the fees due petitioner and those due the labor suppliers.

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<sup>14</sup> This fact further supports the conclusion that the software technology was materially important to the overall services provided by petitioner.

The VMS contracts are between petitioner and its customers, and they appear to create a contractual obligation upon the customers to pay fees for the VMS services to petitioner separate and distinct from any direct labor costs associated with the arrangement (*see* finding of fact 49 [sections 3 and 5 (a) of the example contract]). Likewise, the example supplier contract notes that the customer/client shall pay the fee to petitioner (*see* finding of fact 55). These provisions appear to establish that petitioner's customers/clients are the party liable for the fee at issue; the payment scheme may be somewhat contorted, but that does not change the customer's/client's liability for the fee. Petitioner's arguments in this regard do not affect the conclusions found herein and the Division appropriately determined the VMS fees were subject to sales tax.

F. The petition of Beeline.com, Inc., is denied, and the notice of determination, dated July 31, 2018, is sustained.

DATED: Albany, New York  
February 9, 2023

/s/ Nicholas A. Behuniak  
ADMINISTRATIVE LAW JUDGE