

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

of

YESWARE, INC.

for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Tax Periods October 1, 2014 through May 31, 2018.

In the Matter of the Petition

of

MATTHEW BELLOWS

for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Tax Periods October 1, 2014 through May 31, 2018.

DETERMINATION
DTA NOS. 829638,
829639 and 829640

In the Matter of the Petition

of

P. CASHMAN ANDRUS

for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Tax Periods October 1, 2014 through May 31, 2018.

Petitioners, Yesware, Inc., Matthew Bellows, and P. Cashman Andrus, filed petitions for revision of determinations or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the tax periods October 1, 2014 through May 31, 2018.

A consolidated hearing was held on November 1 and 2, 2021, with all briefs to be submitted by March 29, 2022, which date began the six-month period for issuance of this determination. Petitioners appeared by Brann & Isaacson (Martin I. Eisenstein, Esq., David Swetnam-Burland, Esq., and Jamie E.T. Szal, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Brandon Batch, Esq., of counsel). After reviewing the entire record in this matter, Jessica DiFiore, Administrative Law Judge, renders the following determination.

ISSUES

- I. Whether the notices of determination had a rational basis.
- II. Whether the Division of Taxation erred in determining that Yesware Inc.'s subscription fees are taxable as the sale of prewritten software.

FINDINGS OF FACT

The parties entered into a stipulation of facts, which has been incorporated into the findings of fact below.

1. Petitioner, Yesware, Inc. (Yesware), is a Delaware corporation formed in 2012. Its primary place of business is Massachusetts. Yesware's website is <https://www.yesware.com>.
2. The Division of Taxation (Division) conducted a sales and use tax audit of Yesware for the period October 1, 2014 through May 31, 2018 (audit period). The Division audited Yesware for all transactions entered into with customers having a New York billing address for the entire audit period.

3. Petitioner, P. Cashman Andrus, is the co-founder of Yesware. During the audit period, he served as Chief Technology Officer.

4. Petitioner, Matthew Bellows, is the co-founder of Yesware. During the audit period, he served as the Chief Executive Officer. Mr. Bellows stepped down from his role as CEO in June 2018. Mr. Bellows currently is Chairman of the Board of Directors of Yesware.

5. Yesware's mission is to help companies sell smarter. Yesware describes its services in promotional materials to its clients and prospective clients as providing "a prescriptive sales platform that helps sales teams sell smarter and more effectively, right from their inbox" by providing "actionable data on how to engage with prospects, and give managers better insight into the sales platform." Its promotional materials also describe Yesware services as providing "a sales solution for data-driven sales organizations," and claims to permit sales teams to "make smarter decisions, faster, with detailed analytics on emails sent, opens, and response rates across your entire sales team."

6. Yesware's services allow Yesware clients to identify effective and ineffective messaging through the information, analysis, and reports Yesware prepares and provides. Testimonials of clients show that they purchased and used Yesware services for its tracking, reporting and templates/mail merge features. Yesware customers also used Yesware for automatic Gmail and Salesforce¹ email sync, Google Calendar to Salesforce Calendar syncing, and to be able to create/edit Salesforce records from Gmail.

7. Subscribers to Yesware's services included individual users and companies for use by their sales teams.

¹ It is not clear from the record what Salesforce is. It appears to contain customer records for sales teams of various organizations.

8. Yesware did not provide its clients an email platform. Yesware clients use their own preferred, existing email platform, such as Gmail or Outlook, to send emails. Yesware performs its services using data received from the recipients of its clients' emails that its clients launched using Gmail or Outlook.

9. Yesware provides its customers with various "customer engagement services." During the audit period, Yesware offered three customer engagement service options to clients: Pro Services; Team Services (also known as Premium Services); and Enterprise Services.

10. The prices for Pro Services, Team Services and Enterprise Services were each a flat, per user, fee, and did not vary based on the features that a client actually used.

11. During the audit period, Pro Services main functions consisted of email tracking, analytics and reports on the tracking, and templates. Send Later and Reminders were also features offered at this level. Send Later and Reminders are common features in email platforms, but they did not work with Yesware's tracking. Because of this, Yesware needed to provide a version of these features that would work with Yesware so that it could track when one of its users used Send Later to send an email at a different scheduled time to see what was done. Reminders also reminded Yesware's customers to follow-up with prospective clients.

12. Team Services consisted of all of the Pro Services plus team template sharing and reporting, and multi-stage mail merge. Teams level subscribers had the ability to organize a client's representatives into teams and share content and rollout reports among team members. Enterprise Services consisted of everything included in Team Services plus Touchpoint campaigns, prescriptive analytics reporting, click-to-call, and integration with Salesforce.

13. For each service option, and to perform Yesware's email tracking, analytics, and reporting, Yesware's clients download a browser extension. The browser extension is software

that Yesware licenses to its clients. The Yesware client does not separately pay for the browser extension and Yesware receives no independent consideration when its clients download the browser extension.

14. The browser extension integrates with Gmail and Outlook to provide Yesware's servers and proprietary microapplications with the information about what happens once a Yesware client sends an email to its customers and prospective customers so that Yesware can perform its tracking, analysis and reporting services. To do this, the browser extension embeds an invisible image reference known as a pixel or a GIF, in each email that Yesware's clients send from their preferred email platform. The pixel is then loaded onto the Yesware client's customer's or prospective customer's (the recipient's) email platform. The browser extension itself cannot and does not perform the customer engagement services, including providing tracking, merge/purge, and reports.

15. When a Yesware client sends an email, the pixel registers with Yesware's servers, specifically, one of the microapplications known as "Tauntaun."

16. When the recipient receives the email and opens it, their email platform loads the pixel/GIF that is embedded in the email. The recipient's email platform transmits the pixel/GIF to the Yesware servers (and only to Yesware's servers) and the fact that the recipient opened the email. Yesware's servers, through the Yesware proprietary software, registers the fact that the email was opened, processes the data, and incorporates that data into reports that Yesware prepares. The pixel is not transmitted to Yesware's client, nor even if it had been, could the client determine from it that an email was opened, since only the Yesware proprietary software is able to receive, process, and analyze recipient engagement data. The same process is true where the recipient then clicks on a link in the email.

17. An API (application programming interface) allows Yesware to communicate with its client, in order to transmit the results of its analysis from its proprietary back-end software and servers to its client's computer. The API is a component of Yesware's proprietary back-end software. It acts as a channel of communication between the browser extension and Yesware's back-end, with instructions for how the back-end servers and proprietary software communicates with the browser extension.

18. Yesware produces its services through a combination of servers, microapplications that are proprietary software, and personnel operating on data generated by the client and the recipients of email marketing. Each microapplication is a Yesware trade secret.

19. Yesware uses more than 60 microapplications to provide its customer engagement analysis services. Each microapplication runs on its own series of containers. A container is a small piece of server processing capacity located on dedicated Yesware servers. Each Yesware microapplication runs between 10 and 300 containers. During the audit period, Yesware ran approximately 4,000 small containers. Each microapplication is a software application programmed by Yesware to perform a unique function. Each microapplication cooperates with the other microapplications to provide the overall Yesware service.

20. Yesware's clients do not have access to the proprietary software run by the microapplications. Yesware's clients do not and cannot use, modify, or manipulate the proprietary software run by the microapplications.

21. Yesware does not license the microapplications, or its servers to its clients. Yesware also does not disclose its proprietary software to its clients. Yesware's clients cannot separately use its back-end servers or microapplications, and do not have access to those servers or applications.

22. Yesware's clients cannot use the data Yesware collected and stored to compile or prepare their own reports.

23. When Yesware's clients install and use the browser extension, they are not accessing Yesware's proprietary trade secrets, but only accessing the reports and analytics that are produced by Yesware. Yesware's clients cannot use the extension to produce a Yesware report without subscribing to Yesware's services.

24. Yesware tracks, processes, and analyzes data it receives from recipients of its clients' emails and generates individualized reports to assist clients with their email prospecting and customer engagement efforts. The information Yesware collects includes 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.

25. Yesware provides its clients with a variety of different reports. One report has things organized by email activity. This report shows emails sent, emails tracked, the percentage that were opened and the percentage that were replied to. Filters were also available such as limiting the period of time during which emails were sent or by type of user. Subscribers can also see the information presented by recipient engagement or link engagement.

26. Clients receive the reports through multiple means: the Yesware website, the browser extension on their email platform, or, depending on their level of service subscription, through Salesforce.

27. To use the website, Yesware clients log in and there is a dashboard that contains all of the analytical reports and information that Yesware prepares for its clients. When clients log into the website, they are automatically brought to the report dashboard as it is the default landing page. The dashboard provides summary analytics prepared by Yesware, as well as

reports. Reports that can be generated include emails opened, links clicked, and tracking results by template.

28. Yesware does not share tracking information with anyone other than the user who sent the email or, if that user was a member of a team of a client that subscribed to Teams or Enterprise services levels, their team manager.

29. Yesware does not commingle data from one client with the analysis or reports provided to another client. Each report that Yesware prepares for a client is unique.

30. During the audit period, Yesware updated the analysis and reports for each client once a night.

31. Yesware's clients create and write their own templates. Templates consist of prewritten text that can be copied into Yesware's product to be used in the body of emails. The clients do not use Yesware's browser extension, services, or proprietary software to create their templates. Yesware does not write the templates. Yesware tracks the "success" of the template, meaning whether it was opened and if there is a link, whether it was clicked on. This can help salespeople see which of their templates for their sales marketing is most effective.

32. Yesware's servers store its clients' templates. They also push them out to individual users who have access to them and make them available for insertion. At the Pro level of service, the templates that are stored are the templates of a single user. This means that members of a sales team did not share their templates. At the Team or Premium level, a customer had the ability to organize representatives in teams and share content and issue reports about them. If a template is shared to a team, all members of that team will have access to use that template in sending their email. If more emails are getting opened if they have a certain template in them, this is tracked and will be included in Yesware's reports to its customers.

33. Yesware will collect all of the information about how a template was used, what emails it was used in, what engagement happened on those emails and roll that out to the reports about templates or about the activity of the user. In its templates reporting, Yesware analyzes templates both by user as well as by template. Templates-by-user reporting organizes the analysis by the team member that uses the template. This includes how many templates the individual user used, emails tracked, open rate and click rate. Templates-by-template reporting organizes the analysis by the template: which templates did team members use, how many users used the template, how many times were the templates used and opened.

34. At the Team level, a client's representatives can do more than share templates. A team can be organized for both reporting and content sharing. A user can be a member or a manager of several teams. Managers can add or remove members of teams and change their roles on the team. Team membership gets used for determining who gets access to a set of templates.

35. Mail merge was also part of the Team level service during the audit period. Mail merge would auto fill things such as your first name and canned language based on the person Yesware's client is soliciting. Mail merge also offered not just one email but a sequence of emails. Typically, each of those emails included a template but the sequence of them would be a campaign. An example of mail merge would be a client sending an initial sales email, then an automated email to follow up two days later, then a third automated email the day after that. As soon as the recipient of the email engages somehow, they are automatically dropped out of the campaign of templated emails. Yesware tracks who on the team gets added to a mail merge, when those messages were sent, and what the engagement was on each of the messages that was sent. This information is then relayed to Yesware's clients through various reports. This helps

Yesware's clients send the most effective messaging because they are consistent across team members.

36. The main additional feature for the Enterprise level of service was Salesforce integration. Sales teams use Salesforce to contain their customer records. Prior to Yesware's services, sales representatives would do manual data entry putting information into Salesforce so that they could make projections and understand what was happening with their sales process. The data was often incomplete. Using Yesware's Enterprise service automated the data entry by syncing the information from the email tracking with Salesforce. This was done by giving customers software to be installed inside their Salesforce system that would cause it to integrate with the Yesware services. It functions in a similar way to the browser extension for email described above. Yesware automatically collected data about the email marketing and put it in one place so that sales management would know what was happening. The software plugin cannot be used without subscribing to Yesware.

Salesforce Sidebar was a commonly used feature. If one clicks on an email where the person who sent it or the person it was sent to has a record in Salesforce, it will automatically look them up and show their information. The Salesforce Sidebar feature allows customers to track emails, make calls, access existing Salesforce.com records, and manage open tasks in Salesforce without leaving their inbox.

The Salesforce Sync toggle will look up whoever is in the "to" field of the email and try to associate that record in Salesforce and then automatically store the information that Yesware collects into Salesforce so the client can do reporting on it. Clients who use Salesforce Sync can also see every attachment downloaded, presentation viewed and meeting scheduled. Customers

who use the Salesforce package could use their own analysts to interpret the data Yesware collected and reported in Salesforce. However, it could not be compiled into a Yesware report.

37. Touchpoints was also offered at the Enterprise level. Touchpoints was an enhancement to mail merge. Touchpoints was a sequence of different email templates and other marketing activity touchpoints, such as making a phone call. A Touchpoints campaign could consist of sending an email, then making a call using Yesware, then sending another follow-up email. The purpose of the contacts is to get the recipient to engage. Through the Touchpoints feature, Yesware analyzes every aspect about a marketing campaign, including all of the actions, all of the outreach, and any customer engagement, to prepare its reports. Like templates reporting, the Touchpoints reporting analyzes campaigns by user as well as by campaign. Yesware stores the campaign sequences its customers create.

38. Campaigns-by-user reporting organizes the analysis by the team member that uses the campaign and the engagement at each step in the sequence.

39. Campaigns-by-campaign reporting organizes the analysis by the template: which templates did team members use, how many users used the template, how many times were the templates used and opened. Customers can compare one campaign to another to see which one is more effective at engaging recipients of the customers' emails.

40. Yesware provides its services with the support of a large team of engineers. Yesware's engineers write, update, and oversee operation on Yesware's servers and proprietary trade secret software.

41. Yesware has a Customer Success Division made up of two categories of employees: Customer Experience Specialists and Account Managers. Customer Experience Specialists answer inbound questions and assist Yesware clients with technical support. Account Managers

foster ongoing relationships with the bigger Yesware clients, helping their clients use the more advanced Yesware features, and prepare custom reports. The Account Managers prepare customer reports for roughly 200 of Yesware's largest clients. The Account Managers prepare these reports at least monthly per client.

42. On May 17, 2017, the Division sent Yesware an Information Document Request (IDR) requesting sales tax returns, sales invoices, all exemption documents, bank statements, cash receipts journals and cash disbursement journals. The Division sent a second IDR on August 16, 2018, requesting the same information. The sales records provided in response were adequate and the auditor conducted a detailed review of such records.

In response to these requests and as part of the audit, the Division visited Yesware and was provided with sales information. Yesware's representative also provided a description of the different levels of service provided. The Division was also provided with contracts and invoices, and videos demonstrating how the service worked. The order form refers to Yesware's customer as a licensee and at the bottom under a section entitled "Terms" it provides that the order form is a legally binding agreement governed by and subject to the Yesware Terms of Service. Invoices do not refer to the customers as licensees.

43. There were four versions of the Yesware Terms of Service during the audit period. However, the relevant provisions remained materially the same. The Terms of Service as quoted from the first half of the audit period, provided in relevant part, as follows:

"These Yesware Service Terms (these "Terms") explain the relationship between Yesware . . . and you when you (i) access and use yesware.com and its related domains (together, the "Site") and/or (ii) download, install, use and in some cases purchase Yesware's proprietary email software applications . . . and any other services offered through the Site

* * *

1. License Grant. The Yesware Services are owned by Yesware and are licensed, not sold, to you. Yesware grants to you a personal, nonexclusive, nontransferable, limited license (without the right to sublicense) to access and use the Site and to access, download, install and use the Yesware Services subject to the limitations set forth in these Terms, any relevant purchase order or ordering document related to the Yesware Services (“Order Form”) and any and all other terms and policies set forth in the Yesware Services. You acknowledge that the source code for the Yesware Services and other trade secrets embodied in the Yesware Services have not been and will not be licensed or otherwise disclosed to you. All rights not expressly granted herein are reserved by Yesware.”

44. The Division also requested a demonstration of petitioners’ service but was not provided with one.

45. On July 23, 2019, the Division issued notice of determination L-050308752 to Yesware for the audit period, assessing sales tax in the amount of \$308,481.91, plus interest.

46. On July 25, 2019, the Division issued notice of determination L-050315635 to Mr. Bellows for the audit period, assessing sales tax in the amount of \$308,481.91, plus interest. The notice stated that Mr. Bellows was liable for the outstanding tax liability of Yesware due to his position as an officer/responsible person.

47. On July 25, 2019, the Division issued notice of determination L-050315634 to Mr. Andrus for the audit period, assessing sales tax in the amount of \$308,481.91, plus interest. The notice stated that Mr. Andrus was liable for the outstanding tax liability of Yesware due to his position as an officer/responsible person.

48. On October 18, 2019, Yesware filed its petition challenging the Division’s assessment of sales and use taxes for the audit period.

49. On October 18, 2019, Mr. Bellows filed his petition challenging the Division’s determination that he was personally liable for the assessment of sales and use taxes against Yesware for the audit period. However, pursuant to the stipulation of facts submitted by the

parties, Mr. Bellows now concedes he is a responsible person for Yesware, as defined by New York Tax Law, during and after the audit period.

50. On October 21, 2019, Mr. Andrus filed his petition challenging the Division's determination that he was personally liable for the assessment of sales and use taxes against Yesware for the audit period. However, pursuant to the stipulation of facts submitted by the parties, Mr. Andrus concedes he is a responsible person for Yesware, as defined by New York Tax Law, during and after the audit period.

51. The parties do not dispute the methodology used to calculate the tax due or the amount due, only the Division's taxability determination.

52. At hearing, the auditor testified that when determining whether software is taxable, she looks at how the customer is using the software, how the product is marketed, the reviews of it, demos, and how the user interacts with the software program.

The auditor determined that Yesware sold a license to use software, which is taxable. The auditor considered the tracking, templates and campaign features when finding the service to be taxable. She considered the additional features that were added to an existing email platform. In the audit report, the auditor determined that the service was a bundled service and that the software was not incidental for six reasons as follows: (i) that the product was advertised as a sales tool kit and was an email feature extension that is taxable as software; (ii) the product came in multiple variants; (iii) customers may use different components of the product without incurring extra charges as a result; (iv) the different components are synergistic; (v) customer invoices do not have multiple charges; and (vi) a license to use is being sold. The auditor found that the main element of Yesware's service was the email tracking. The Division found that the software was integrated with email and Salesforce and that Yesware synchronized with

Salesforce and allowed its clients to track and monitor its sales leads. The Division concluded petitioner was selling a license to use software.

53. Petitioners provided a pre-recorded demonstration of the services it provides. The demonstration showed how the reports could be viewed using the Yesware website, the browser extension, and Salesforce. The reports appeared in different forms, such as dashboard alerts on the browser extension, and in-depth reports.

54. Pursuant to 20 NYCRR 3000.15 (d) (6), petitioners submitted 106 proposed findings of fact. In accordance with State Administrative Procedure Act § 307 (1), proposed findings of fact 1 through 4, 6 through 10, 12 through 14, 17 through 21, 23, 24, 26 through 69, 71 through 73, 75 through 99, and 101 through 106 are supported by the record, and have been consolidated, condensed, combined, renumbered, and substantially incorporated herein. Proposed findings of fact 5, 11, 22, 25, and 74 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 findings of fact 15, 16, 70, and 100 are rejected as conclusory, irrelevant and/or not supported by the record.

SUMMARY OF THE PARTIES' POSITIONS

55. Petitioners claim that the Division had no rational basis to conclude that Yesware's services were the sales of pre-written software, but even if it did, the amount assessed is erroneous because Yesware does not receive payments from its clients for the license to use software. Petitioners assert that the Yesware services were not taxable sales of pre-written software but non-taxable information and data storage services, individualized to each Yesware client. Petitioners claim that the primary purpose of Yesware's services was to produce client-

specific analytic reports and information to aid email prospecting and engagement with the client's customers, essentially, to collect data about email recipients and report on it to clients. Petitioners also claim that Yesware's storing of templates is the service of storage, an undisputedly nontaxable service.

56. The Division asserts that petitioners are selling pre-written software to their customers, which is a taxable service. It claims that the use of Yesware's email program plugin and website constitute a transfer of possession of the software because the customer gains constructive possession of the software for its intended purposes. The Division contends Yesware licenses its services to its customers, and that the license allows the user to access the service, and to access, download, install and use the products petitioners are selling.

The Division asserts that Yesware's service is not a mixed bundle service where the standard to be applied is the primary function of the service. Instead, it asserts that the service involves the licensing of software that performs many functions. The Division acknowledges that some of the functions may be tax exempt, but claims they are being performed by a 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 petitioners to their customers.

CONCLUSIONS OF LAW

A. It is well settled that 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 [1992], *lv denied* 81 NY2d 704 [1993]). However, a determination of tax must have a rational basis in order to be sustained upon review (*see Matter of Grecian Sq. v New York State Tax Commn.*, 119 AD2d 948, 950 [3d Dept 1986]). If it has no rational basis, it must be set aside (*see Matter of Snyder v State Tax Commn.*, 114 AD2d 567, 568 [3d Dept 1986]; *Matter of Ristorante Puglia, Ltd. v Chu*, 102 AD2d 348, 350 [3d Dept 1984]). In *Matter of Atlantic & Hudson Ltd.* (Tax Appeals Tribunal, January 30, 1993), the Tax Appeals Tribunal (Tribunal) established how the presumption of correctness of an assessment may be overcome. Therein, the Tribunal stated:

“Although a determination of tax must have a rational basis in order to be sustained upon review, 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. Evidence that both rebuts the presumption of correctness and indicates the irrationality of the audit may appear: on the face of the audit as described by the Division through testimony or documentation; from factors underlying the audit which are developed by the petitioner at hearing; or in the inability of the Division to identify the bases of the audit methodology in response to questions posed at the hearing.”

The record must provide sufficient evidence to allow the trier of fact to determine whether the audit had a rational basis (*see Matter of Hammerman*, Tax Appeals Tribunal, August 17, 1995).

Petitioners argue that the notices are irrational because Yesware did not receive payments from its clients for the licensing of software.² Upon commencing the audit, the Division requested and reviewed information from Yesware. The Division met with Yesware and its

² Notably, throughout petitioners’ briefs, they repeatedly cite to determinations of the administrative law judges at the Division of Tax Appeals in support of their 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, petitioners’ arguments citing these determinations are without authority.

representative, and during such meeting, Yesware's representative provided a description of the different levels of service provided. The Division also reviewed videos demonstrating how the Yesware services worked and reviewed contracts and invoices and found that the contracts stated there was a license to use. The Division found that the software was integrated with email and Salesforce, and that Yesware synchronized with Salesforce and allowed its clients to track and monitor its sales leads.

In addition to the fact that the contracts listed Yesware's clients as licensees and the Terms of Service provide for a license, the Division considered the language used in advertisements of petitioners' product referring to it as a sales tool kit, the fact the service was offered in multiple levels, and that different components of the product could be used without incurring extra charges. After reviewing all of the documentation and information provided, the auditor determined that the service was a bundled service, that the software was not incidental and that the primary function of the service was tracking. Given these facts, the Division had a rational basis for determining Yesware's services were the taxable sale of prewritten software.

B. Despite the Division's determination having a rational basis, Yesware's service is a bundled non-taxable information service. Tax Law § 1105 (a) imposes sales tax on the receipts from every "retail sale" of tangible personal property, which includes "pre-written computer software" (prewritten software) (*see* Tax Law §§ 1101 [b] [6]; 1105 [a]). Tax Law § 1101 (b) (14) defines prewritten software as software that is not designed and developed by the author or other creator to the specifications of a specific purchaser. A "retail sale" is "[a] sale of tangible personal property to any person for any purpose, other than . . . for resale as such . . ." (Tax Law § 1101 [c] [4] [i] [A]). A sale is defined as follows:

"Any 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 therefore, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.”

C. Where the service being offered is an integrated service, it is to be taxed according to its primary function (*see Matter of SSOV '81 Ltd.*, Tax Appeals Tribunal, January 19, 1995). The Division asserts that the primary function test should not be applied here because this case specifically has software being licensed. This position goes against binding precedent and must be rejected. The primary function test applies to bundled sales of taxable and nontaxable services (*see Matter of Strata Skin Sciences, Inc.*, Tax Appeals Tribunal, May 5, 2022; *Matter of SSOV '81, Ltd.*; *Matter of Principal Connections, Ltd.*, Tax Appeals Tribunal, February 12, 2004). “[T]he analysis employed by the New York courts and the Tax Appeals Tribunal focuses on the service in its entirety, as opposed to reviewing the service by components or by the means in which the service is effectuated” (*Matter of SSOV '81, Ltd.*, citing *Matter of Building Contractors Assoc. v Tully*, 87 AD2d 909 [3d Dept 1982] and *Matter of Woolworth Co.*, Tax Appeals Tribunal, December 1, 1994). “To neglect the primary function of petitioners’ business in order to dissect the service it provides into what appear to be taxable events stretches the application of Article 28 far beyond that contemplated by the Legislature” (*id.*; *see also Matter of Penfold v State Tax Commn.*, 114 AD2d 696 [3d Dept 1985]).

Here, the primary function of Yesware’s service 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. Yesware 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. These reports can be assessed on the Yesware website, using the browser, or through Salesforce.

In addition to tracking the emails, Yesware also provides the storage and sharing of templates, mail merge, touchpoint campaigns, click-to-call, and integration with Salesforce. The parties agree that the storage of templates is not taxable. At the Pro level, petitioner simply tracks emails and stores the templates for each user. At each level above, more functionality is added. However, the primary purpose of the services remains the same. At the Teams and Enterprise level, these templates can be shared among users on a team. While Yesware's clients can use the software provided through the browser extension in the email platforms to share the templates, this is incidental to the primary purpose of reporting on the tracking of the emails that are sent. The reason the templates are shared is because they received positive responses when they were previously used, and Yesware's clients are hoping to have the same result across multiple members of the team. While sharing the templates is a use of prewritten software, it is not a significant enough component of Yesware's service to constitute a primary function, rendering the service taxable. The same is true for mail merge, touchpoint campaigns, and click-to-call. These features are all provided so that petitioners can track the emails, links, attachments, and calls made, either for one email, a series of emails, or a series of emails and calls, and report back to its customers which touches were successful. Yesware's customers want to know which of their sales solicitations are effective. They are paying Yesware for information. Yesware uses 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 prospective clients. Yesware is tracking emails, but its customers are not

paying it to do so. Yesware's customers are purchasing the synthesized information that is the result of the tracking.

The integration with Salesforce occurs just like the integration with the email platform. Yesware's client downloads a plugin in Salesforce to allow it to sync with the chosen email platform. The reports from the tracking results are then generated by Yesware, using its proprietary software, and are sent to Salesforce. The license to use the ancillary software that allows for the syncing of the email platform and Salesforce is incidental to the primary purpose of providing the reports.

The Division asserts that the primary function of Yesware's service is tracking the emails. While tracking is performed, it is performed by Yesware using its proprietary software and not by a customer. Additionally, the tracking would be meaningless without the resulting information. Yesware's clients pay to find out about customer engagement, i.e., what emails are getting responses and what links are being clicked.

D. The Division claims Yesware is selling tangible personal property subject to tax by giving its clients a license to use prewritten software. This conclusion is not supported by the evidence. Yesware's customers do not have use of the software. The free browser extension and plugin used to sync Salesforce cannot and do not perform the tracking and analyzing of data created by the client's emails or generate reports from that data. The browser extension inserts the pixel onto emails sent by Yesware's client. When the email is opened by the recipient, the recipient's email platform transmits the pixel/GIF to the Yesware servers (and only to Yesware's servers) the fact the recipient opened the email, and Yesware's servers, through the Yesware proprietary software, registers the fact that the email was opened, processes the data, and

incorporates that data into reports that Yesware prepares. Yesware's customers cannot use, do not have access, and do not control the software to perform those functions.

E. The Division relies on *Matter of Galileo Intl. Partnership* (Tax Appeals Tribunal, March 24, 2005, *confirmed* 31 AD3d 1072 [3d Dept 2006]) in support of the proposition that petitioner is licensing prewritten software which is taxable as the sale of tangible personal property. In *Galileo*, the Tribunal held, and the Third Department confirmed, that the petitioner in that case leased equipment and licensed software and that the rental payments on those leases were subject to sales tax. In that case, the taxpayer provided subscribers (mainly travel agents) access to a computer reservations system through which subscribers could obtain information about and make reservations for flights, car rentals, hotels and cruises. In addition to granting access, the taxpayer leased computer equipment and software to its subscribers. The contracts referred to the computer equipment transfer as a lease. Where the amount of equipment provided was increased, the monthly fixed charge on the invoice also increased. In their appeal to the Third Department, petitioners argued that the Tribunal failed to apply the "true object test," and that such a test would show that their agreements with subscribers were for nontaxable connectivity services. In confirming the holding of the Tribunal, the Third Department found "[t]here was adequate evidence to sustain the Tribunal's conclusion that the transfer of equipment was a lease and that such was a significant part of the transaction, not merely a trivial element of a contract for services." There is no transfer of equipment or evidence of a lease in this case and the holding in *Galileo* is inapplicable. The primary function test that applies here does not apply to the bundled sales of tangible personal property and services (*see Matter of Strata Skin Sciences, Inc.*, Tax Appeals Tribunal (May 5, 2022)).

F. The Division asserts that the manner in which petitioners billed subscribers during the periods at issue is relevant in determining whether a license of tangible personal property is occurring and cites to *Matter of U-Need-A-Roll Off Corp. v New York State Tax Commn.*, 67 NY2d 690 [1986] in support of its position. This argument is misplaced and the facts of *U-Need-A-Roll Off Corp.* are distinguishable. There, the issue was whether tangible personal property, that would otherwise have been taxable, was excluded from sales tax because it was subject to resale, not whether the product itself would be taxable barring any exclusion (*see id.*). The Division also argues that if there are different versions of the product that should be considered when determining whether the product or service being sold is taxable prewritten software. However, the Division does not offer any caselaw or statutory support for this proposition.

G. Yesware is not selling prewritten computer software but is instead selling an information service under Tax Law § 1105 (c) (1), (9). Tax Law § 1105 (c) (1) provides that the receipts from every sale, except for resale, of the furnishing of information, including the services of collecting, compiling, or analyzing information of any kind and furnishing reports thereof are taxable, excluding the furnishing of information that is personal or individual in nature and is not incorporated in reports furnished to others. Tax Law § 1105 (c) (9) extends the taxation of information services to those provided by telephony or telegraphy, with the same exclusion. Where information is more than simply converted from one form to another and is instead analyzed, providing additional intelligence, such service is an information service (*see ADP Automotive Claims Services, Inc. v Tax Appeals Tribunal*, 188 AD2d 245, 248 [3d Dept 1993]). 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, Yesware's

information service is not taxable because it is personal or individual in nature and is not incorporated in reports furnished to others.

H. Mr. Bellows and Mr. Andrus concede they were responsible persons for Yesware, as defined by New York Tax Law, during and after the audit period (*see* findings of fact 48 and 49). Tax Law § 1133 (a) imposes liability for the tax imposed on any person who is responsible to collect a tax imposed by Tax Law article 28. People required to collect tax include any officer, director or employee of a corporation who is under a duty to act for such corporation in its compliance with the requirements of article 28. As Mr. Bellows and Mr. Andrus concede they were required to collect the tax imposed, they are responsible persons and are personally liable for the payment of any outstanding taxes due from Yesware for the audit period (*see* Tax Law § 1133; *Coppola v Tax Appeals Tribunal*, 37 AD3d 901, 902-903 [3d Dept 2007]). However, because the tax asserted against Yesware has been cancelled, the notices of determination issued to petitioners Bellows and Andrus are likewise cancelled.

I. The petitions of Yesware, Inc., Matthew Bellows, and P. Cashman Andrus are granted, and the notices of determination are cancelled.

DATED: Albany, New York
September 29, 2022

/s/ Jessica DiFiore
ADMINISTRATIVE LAW JUDGE