STATE OF NEW YORK

DIVISION OF TAX APPEALS

_____

In the Matter of the Petition	:	
	:	
of	:	
	:	
NETVOYAGE CORP. AKA NETDOCUMENTS.COM	:	DETERMINATION DTA NO. 850246
	:	
for 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, 2017 through November 30,	:	
2019.	:	

_____

Petitioner, NetVoyage Corp. aka NetDocuments.com, filed a petition for 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, 2017 through November 30, 2019.

A formal hearing by videoconference was held before Winifred M. Maloney,

Administrative Law Judge, on April 23, 2024 and April 24, 2024, with all briefs to be submitted

by October 25, 2024, which date began the six-month period for the issuance of this

determination. Petitioner appeared by State Tax Consultants PLLC (Glenn Bartholomew, CPA).

The Division of Taxation appeared by Amanda Hiller, Esq. (Eric Gee, Esq., of counsel).

ISSUES

I. Whether the notice of determination issued in this matter had a rational basis.

II. Whether petitioner has established that the Division of Taxation erred in determining

that petitioner's document management services are taxable as sales of prewritten software.

III. Whether the asserted tax should be apportioned based upon user location.

FINDINGS OF FACT

1. Petitioner, NetVoyage Corp. aka NetDocuments.com (NetDocuments), a registered vendor for New York State sales tax purposes, is a Utah corporation based in Lehi, Utah. Petitioner provides cloud-based document management services to the legal, financial and accounting services industries.

2. In January 2020, the Division of Taxation (Division) commenced a sales and use taxes field audit of petitioner for the period June 1, 2017 through November 30, 2019 (audit period). At that time, Bradley Stanley, an Auditor 2, and a team leader in the Division's Rochester district office transaction field audit bureau, assigned Frances Allis, an Auditor 1 in the same office, to conduct the field audit.

3. At the hearing, the Division presented the testimony of Mr. Stanley because Ms. Allis no longer worked for the Division.

4. On January 29, 2020, Ms. Allis conducted a pre-audit analysis of petitioner. Ms. Allis reviewed petitioner's previous filings with the Division, including corporation franchise tax and sales tax returns and a certificate of authority. A review of the tax field audit report (audit report) indicates that there was no prior audit history for petitioner. Thereafter, a field visit was set up for March 3, 2020.

5. On January 29, 2020, Ms. Allis sent an audit packet to petitioner. The packet included an initial contact letter, an information document request (IDR), a form DO-1632, sales tax examination questionnaire, a form AU-431 responsible person questionnaire, and other informational Division publications.

6. The IDR (IDR#1) was a standard type issued at the commencement of a sales and use tax audit, and requested among other items: the general ledger, year-end trial balance, general

journal and closing entries, the chart of accounts, sales invoices, and all exemption documents supporting non-taxable sales, including documents showing resale, exempt use, exempt organization and capital improvement certificates. IDR#1 also requested any other documentation to prove non-taxable sales.

7. Ms. Allis and Mr. Stanley, travelled to Utah for a field visit at petitioner's offices on March 3, 2020. Ms. Allis and Mr. Stanley were at petitioner's place of business for 7.5 hours on March 3, 2020.

8. While they waited in the lobby of petitioner's offices, Mr. Stanley reviewed brochures that indicated petitioner offered a software product.

9. At the field visit, Ms. Allis and Mr. Stanley met with petitioner's then senior accountant, David Booth. During this meeting, Mr. Booth advised that petitioner sold software and collected and remitted tax on sales to clients with a New York billing address. Mr. Booth stated that petitioner's primary client base was law firms.

10. During the field visit, Mr. Booth completed petitioner's sales tax examination questionnaire. In response to the question regarding the "types of products or services" the company sells or provides, Mr. Booth wrote "[s]oftware as a service, cloud storage, secure document management." On this sales tax examination questionnaire, Mr. Booth noted that petitioner has a web site, a web address of "NetDocuments.com," and no sales are made through the web site. Mr. Booth also noted that petitioner makes tax-exempt sales, and the purchasers provide exemption certificates.

11. During the field visit, petitioner provided to the auditor and Mr. Stanley two completed and signed responsible person questionnaires, one for Mr. Booth and the other one for Hans Branch, petitioner's then controller.

12. In response to IDR#1, Mr. Booth provided to the auditor and Mr. Stanley various documents on a zip drive at the initial field visit. Specifically, Mr. Booth provided corporation franchise tax returns for the years 2017 and 2018, sales tax returns, sales invoices (invoices) for the entire audit period, sales tax transaction reports from Avalara and two exemption certificates.

13. At the field visit, Mr. Booth stated that petitioner used the Avalara reports to prepare its sales tax returns. Mr. Booth also stated that petitioner does not have any employees or facilities in New York State.

14. Upon return from the field visit, Ms. Allis and Mr. Stanley continued to review the documents provided. They compared the Avalara reports with the invoices provided to determine whether there were exceptions.

15. Mr. Stanley testified that he and Ms. Allis worked with Mr. Booth to provide an Avalara report that represented sales into New York State. Mr. Stanley testified that he accepted the reports provided by petitioner. Additionally, Mr. Stanley denied asking for the Avalara transaction detail log for all 50 states because he was told petitioner used the Avalara reports to prepare its sales tax returns.

16. In April and May 2020, Mr. Booth and Ms. Allis discussed discrepancies in the Avalara reports and other documents. The parties settled on a revised version of the Avalara reports that did not include duplicate items and other modifications. Upon review, the Division concluded that the Avalara report included more items than the invoices provided.

17. Based upon conversations with petitioner, Ms. Allis and Mr. Stanley considered the Avalara "committed" document line detail report as the control document for the audit because it was the only document that reconciled to the sales tax returns. Mr. Stanley testified that, once

they had the correct version of the Avalara report, he and Ms. Allis were able to reconcile the Avalara report to the sales tax returns.

18. Mr. Stanley testified that the Division used the Avalara report instead of the general ledger because petitioner never provided a general ledger or trial balance. Because Ms. Allis and Mr. Stanley were able to tie the Avalara report to the sales tax filings, they did not insist on further documents.

19. Based upon their review, Ms. Allis and Mr. Stanley believed they were conducting a routine audit consisting of instances of tax not collected or exempt sales that were not substantiated. Mr. Stanley testified that he and Ms. Allis found that about 25% of petitioner's reported New York State sales were not taxed during the audit period.

20. The auditors found three types of exceptions. Some transactions lacked an invoice, including unsubstantiated credit memos, some had invoices where items were not taxed, and some had rate errors.

21. On her sales exception report, Ms. Allis listed details of each exception she found under columns, including: "Vendor/Customer," "Invoice Date," "Invoice Number," "Invoice Amount," "Taxable Amount," "Juris," "Tax Rate," "Tax Paid," "Tax Accrued," "Additional Tax" and "Comments." Under the comments section, the specific reason for the exception was listed, i.e., taxable amount - no exemption certificate supplied, credit memo-need to see original invoice to see that tax was paid, and incorrect sales tax rate.

22. On December 10, 2020, Ms. Allis issued a sales exception report that included items for which petitioner had not provided any documentation and a statement of proposed audit change for sales and use tax (statement of proposed audit change). The Division securely sent

the workpapers and emails to petitioner to resolve what issues they could regarding the exceptions.

23. On December 21, 2020, Mr. Branch emailed the Division to inform it that petitioner had hired an outside consultant, Glenn Bartholomew, CPA, to assist in the audit. Once Mr. Bartholomew was retained, the nature of the audit changed from a review of various invoices to an examination of the taxability of the entire product. As Mr. Bartholomew wrote in his email dated February 1, 2021, to Ms. Allis, "[w]hen the Company sent the Department's assessment workpapers for my review, I did not review the mechanics of the assessment and went to the larger legal issue -- taxability."

24. Mr. Stanley testified that, instead of exchanging workpapers, the audit changed course to exchanging emails and letters on the issue of taxability and apportionment.

25. Mr. Bartholomew's initial memorandum/letter discussed why the product was not an information service.

26. On January 11, 2021, Mr. Stanley sent a letter to advise petitioner that the Division viewed petitioner's product as selling software as a service, not an information service.

27. On January 19, 2021, Ms. Allis sent IDR#2 to Mr. Bartholomew requesting copies of certain contracts and a demonstration of petitioner's product. Specifically, IDR#2 requested copies of contracts for "IFC Personal Money Managers," "Harris Law PLLC," "Kaufman Dolowich," "Milbank LLP," "O'Halloran Ryan," and "Nixon Peabody LLP."

28. In response to the Division's request in IDR#2, petitioner only provided contracts for Kaufman Dolowich, Nixon Peabody LLP and Milbank LLP. Petitioner stated that it was unable to find the remaining three contracts.

29. The record includes the NetDocuments® from LexisNexis Service Agreement entered into as of December 8, 2006, between LexisNexis (LN) and Kaufman, Dolowich, Schneider, Bianco & Voluck, LLP (Kaufman Dolowich contract). Under the contract's section 1, the following definitions were set forth. Section 1.2 defined "Add-On Services" as follows:

> "those services, such as the Local Document Service, the Document Import Service, Email Management Services, Handheld Access, Virus Scanning, additional searching engine or the Activity Logging Service, which are optional to the LN Base Service . . . and are subject to charges in addition to the Annual Subscription Fee set forth in Exhibit A attached hereto."

Section 1.4 defined "Customer Account" as the "account subscribed to by Customer hereunder, enabling Customer to use the LN Base Service under the terms of this Agreement by authorizing, among other things, access by Account Users." Section 1.7 defined the "LN Base Service," as follows:

> "the NetDocuments web-based document management services, hosted and licensed by LN as further described in Exhibit A. The LN Base Service may be enhanced, modified or updated (including the user interfaces) by LN upon notice to Customer. The latest features and functionality of the LN Base Service are made available on the LN and ND . . . web sites respectively. It is Customer's responsibility to monitor and be aware of changes to the LN Base Service features and functionality."

Section 1.8 defined "ND" as the "NetVoyage Corporation, dba NetDocuments, with whom LN has entered a business alliance with respect to providing the LN Base Service to Customers."

With respect to the LN Base Service, section 2.1 provided that:

> "[d]uring the Term . . . LN shall provide the LN Base Service to Customer pursuant to the terms and conditions herein. At the sole discretion of LN, the LN Base Service may be modified from time to time, and LN may include additional features and modifications provided that such enhancements, modifications or updates are reasonably likely to be generally perceived by Registered Users of the LN Base Service to enhance the LN Base Service. Customer, at its option, may request and receive LN Add-On Services, subject to charges in addition to the Annual Subscription Fee. LN shall, via email notices, help documentation and the LN and ND web sites respectively, keep Customer informed of Service Updates, Scheduled Maintenance, new versions of the LN Base Service offered

hereunder and other developments which may affect Customer's use of the LN Base Service."

Section 2.3 provided that:

"LN (or third party licensors of ND and LN who have licensed the right to offer certain features and functionality of the LN Base Service) shall at all times be the sole and exclusive owners of all intellectual property and other proprietary rights and interests in and to the LN Base Service, including all software code and other functional components thereof. This Agreement is not a royalty-bearing contract or sale and does not convey or transfer any interest, and Customer acknowledges that Customer has not acquired and will not attempt to claim, any interest in and to any or all of the LN Base Service, logos, marks and feature names associated with the LN Base Service or the use thereof, or any intellectual property associated with any of the foregoing, not explicitly granted in this Agreement."

Section 2.4 provided that:

"[u]se of the LN Base Service hereunder shall be permitted only by means of browsers, web folders, APIs and other software made available to Customer and Customer's Registered Users in object code form only, on a limited, revocable, nonexclusive and nontransferable basis."

Section 2.5 provided that:

"Customer shall not, and shall ensure that its Registered Users shall not, copy, modify, sublicense, distribute, rent, lease, convey, translate, disassemble or decompile any portion of the LN Base Service, related software or any other related technology. Moreover, Customer shall ensure that each of its Registered Users execute and comply with the LN Terms of Use Agreement ('TOU') to be entered into individually by each such Registered User as a condition to use of the LN Base Service. The TOU shall appear as a 'click-through['] agreement before Registered Users can access or use the LN Base Service."

Section 3 of the Kaufman Dolowich contract provided for an initial term of five years, with one-year renewal terms. The contract would renew for an additional term, unless Kaufman Dolowich notified LN in writing of the election to terminate at least 90 days prior to the next anniversary date. Attached to the contract as Exhibit A was the "LN Base Service and LN Add-On Services, Price List and Payment Schedules" that provided a LN Base Service (including storage) subscription fee for 50 internal users at an annual subscription fee of $185.24 per user

that included 50 GB of storage for a total annual fee of $9,262.00, as well as 150 external users

included in the total annual fee. The LN Base Service Subscription fee was listed as $9,262.00.

The optional Add-on services listed included Email Management Service at a subscription fee of

$2,315.00 for a total annual fee of $2,315.00, and additional storage with a subscription fee of

"$75/year/Gigabyte," with the total annual fee "TBD," with an add-on subscription subtotal of

$2,315.00. The annual subscription fee total (LN Base Service plus Add-On Services) was

$11,577.00.

30. The Kaufman Dolowich invoices revealed that no tax was charged on the

Professional Plus edition or ndMail products. Ms. Allis listed those charges in her sales

exception report.

31. The record includes the NetDocuments Service Agreement, entered into on August

21, 2009, by and between NetVoyage Corporation (NetVoyage) and Milbank, Tweed, Hadley &

McCloy LLP (Customer) (Milbank LLP contract). In its preamble, the contract stated, in part, as

follows:

> "WHEREAS, NetVoyage developed and owns a web-based, hosted document
> management software application, which is offered to NetVoyage's customers
> through a service known as NetDocuments Service and Additional Services,
> hosted by NetVoyage or its partners;
>
> WHEREAS, Customer desires, for itself and on behalf of its Customers and
> clients, to subscribe to and use the NetDocuments Service and related Additional
> Services, including updates, maintenance and Help Desk Support for its use[.]"

Within the definition section of the Milbank LLP contract, the following definitions,

among others, were provided. Section 1.1 defined "Additional Services" as "those services, such

as the Local Document Service, Email Management Services, NDSearch Analysis, Activity

Logging Service, or certain search features, which are optional to the NetDocuments Service and

require an additional Quarterly Subscription Fee, as outlined in Exhibit A." Section 1.6 defined

the "Customer Data" as "the data and documents uploaded to the NetDocuments Service by a

Service Subscriber, including metadata and any data stored by NetDocuments linked to such

documents that is either provided by a Service Subscriber, or that is generated as a result of

interaction with the NetDocuments Service by a Service Subscriber." Section 1.7 defined the

"Customer Service Account" as the "NetVoyage customer service account to be subscribed to by

Customer hereunder, enabling Customer to use the NetDocuments Service and Additional

Services on the terms and conditions of this Agreement by authorizing, inter alia, access by

Internal Users, External Users or NetBinder Users." Section 1.17 defined the "NetDocuments

Service" as "web-based (e.g. Software-as-a-Service or 'SaaS') document management, including

collaboration, sharing, retrieval, and archival features and functionality, as described in further

detail in Exhibit G, and the related Service Updates, maintenance, and Help Desk Support

offered by NetVoyage."

Section 2 of the Milbank LLP contract described the NetDocuments Service terms, in

part, as follows:

"2.1. NetVoyage shall provide during the Term the NetDocuments Service to
Customer and Customer's Service Subscribers pursuant to the terms and
conditions herein. At the sole discretion of NetVoyage, the NetDocuments
Service may be modified from time to time, and NetVoyage may include
additional features and modifications provided that such enhancements,
modifications or updates are reasonably likely to be generally perceived by
subscribers to the NetDocuments Service as improving and building upon the
NetDocuments Service; provided, however, that absent the written consent of the
Customer, the NetDocuments Service shall at all times during the Term meet the
minimum feature and function requirements described on Exhibit G. Customer
shall have the option to, but not be obliged to, take any enhancements,
modifications or Service Updates which involve payments in addition to the
Quarterly Subscription Fee. NetVoyage shall, via email notices, Help
documentation, and the NetDocuments web site, keep Customer informed of
Service Updates, Scheduled Maintenance, new versions of the NetDocuments

Service offered hereunder, and other developments which may affect Customer's use of the NetDocuments Service.

*   *   *

2.4. As part of Customer's use of the NetDocuments Service and related Additional Services and subject to the terms of this Agreement, NetVoyage grants to Customer the right [to] use the NetDocuments Service and related Additional Services, including by means of browsers, web folders, APIs and other software made available to Customer and Customer's Service Subscribers in object code form only on a limited, revocable, global, nonexclusive, nontransferable . . . basis.

2.5. Customer, including Internal Users, shall not modify, sublicense, distribute, rent, lease, convey, translate, disassemble or decompile any portion of the NetDocuments Service and related Additional Services, NetVoyage software and other technology. NetVoyage may require Service Subscribers to electronically execute and comply with the NetDocuments Terms of Use Agreement as a condition to use of the NetDocuments Service.

*   *   *

2.9. NetVoyage shall use commercially reasonable efforts to integrate the 'LexisNexis Search Advantage' product into the NetDocuments Service and, upon integration, shall use commercially reasonable efforts to support such product."

32. Section 3 of the Milbank LLP contract provided an initial term of five years, with one-year renewal terms. The contract would renew for additional renewal terms, unless Milbank LLP notified NetVoyage that it was terminating the contract. Section 5.2 required Milbank LLP to provide NetVoyage with the number of internal users for the subsequent quarterly period "no later than 30 days prior to the end of each then-current Quarterly Period." Attached to the contract as Exhibit A was the "Price List and Payment Schedule" that provided a "NetDocuments Base Service Fee" for 1,100 internal users at $162.00 per user that included 1,100 GB of storage for an estimated quarterly subscription fee total of $44,550.00, as well as a total of 3,300 external users included in the estimated quarterly subscription fee. The price list and payment schedule listed "Additional Services Fees" that included an add-on service for

"Email Management Service" at a quarterly subscription fee of "30% of Base Service Fee," with

1,100 GB storage included and an estimated quarterly subscription fee total of $13,365.00;

"NDSearch Analysis" at "10% of Base Service Fee," with a "No charge" estimated quarterly

subscription fee total; "Local Document Service" at "7% of Base Service Fee," with a "No

charge" estimated quarterly subscription fee total; "Activity Logging Service" at "2% of Base

Service Fee," with an estimated quarterly subscription fee total of $891.00. The estimated total

quarterly subscription fee was listed as $58,806.00 and included 2,200 GB of storage. On

Exhibit G of the Milbank LLP contract, a total of 60 "NetDocuments Features" were listed.

33. The Milbank LLP invoices revealed that those invoices did not include a charge for

tax on the NetDocuments Professional Plus quarterly service fees. Ms. Allis listed the charges

for the Professional Plus service fees as taxable in her sales exception report.

34. The record includes the NetDocuments Service Agreement, entered into as of June

28, 2013, by and between NetVoyage and Nixon Peabody LLP (Customer) (Nixon Peabody LLP

contract). In its preamble, the contract stated, in part, the following:

> "WHEREAS, NetVoyage owns and offers a Cloud-based document management
> service, known as the NetDocuments Service, in which documents and other data
> owned by its customers and their associates are stored on datacenters controlled
> by NetVoyage and accessed via the Internet using compatible devices and
> software[.]"

Within the definition section of the Nixon Peabody LLP contract, the following

definitions, among others, were provided. Section 1.1 defined "Additional Services" as "those

services identified under the heading Add-On Services on Exhibit A, to the extent subscribed by

the Customer, which services generally have the features described on the NetDocuments

Website from time to time." Section 1.7 defined "Customer Data" as follows:

> "data and documents uploaded to the NetDocuments Service by a Service User
> and any data that is generated as a result of interaction by a Service User with the

NetDocuments Service, including metadata, data tables and other data, all for the period they remain on the NetDocuments Service."

Section 1.9 defined the "Customer Service Account" as the "NetVoyage customer service account to be subscribed to by customer hereunder, enabling Customer to use the services on the terms and conditions of this Agreement by authorizing, inter alia, access to the Services by Internal Users and External Services by External Users." Section 1.13 defined "Echoing" as the "NetDocuments Service feature that enables Service Users to store the most recently edited documents on local storage equipment (such as a workstation or laptop)." Section 1.21 defined "Intellectual Property" as follows:

"all rights and interests in all (a) patents, utility models, patent applications, and continuing (continuation, divisional, or continuation-in-part) applications, re-issues, extensions, renewals, and re-examinations thereof and patents issued thereon; (b) registered and unregistered trademarks, service marks, trade names, domain names, and all of the associated goodwill; (c) registered and unregistered copyrights and all other literary and author's rights or moral rights; (d) trade secrets, know-how, show-how, concepts, ideas, methods, processes, designs, discoveries, improvements, and inventions, whether patentable or unpatentable; (e) all other intellectual, industrial, and proprietary rights now or hereafter coming into existence throughout the world; (f) applications for and registrations, renewals, and extensions of any of the foregoing; and (g) exclusive and non-exclusive license rights to any of the foregoing."

Section 1.22 defined "Internal User" as "each individual who is an employee of Customer or Employee Equivalent who access the NetDocuments Service or any other Service under the Customer Service Account, and any other Service User granted Internal User Rights under the Customer Service Account." Section 1.26 defined the "NetDocuments Service" as follows:

"document management service hosted by NetVoyage and accessible via the Internet from compatible devices and referred to as the NetDocuments Service, as the same is revised from time to time, and a current description of which is available on the NetDocuments Website. The NetDocuments Services include Services Update and Help Desk Support."

Section 1.34 defined the "Services" as the "NetDocuments Service and Additional Services

subscribed to by Customer." Section 1.37 defined the "Subscription Fee" as the "base fee for the

NetDocuments Service and Additional Services. The Subscription Fee for the Initial Term is

identified as the 'Total Monthly Subscription Fee' on Exhibit A. During any Renewal Term, this

amount is subject to adjustment as set forth in Section 3.1."

35. Section 2 of the Nixon Peabody LLP contract described the NetDocuments Service

terms, in part, as follows:

> "2.1. Subject to the terms and conditions of this Agreement, NetVoyage shall
> provide to Customer, during the Term, the NetDocuments Service and the
> Additional Services subscribed by Customer. Through the Customer Service
> Account, Customer shall be authorized to grant access to the NetDocuments
> Service up to the number of Internal Users specified on Exhibit A and, unless
> otherwise designated on Exhibit A, shall be authorized to grant access to the
> External Services to a number of External Users equal to up to three times the
> number of Internal Users authorized on Exhibit A. Customer shall provide
> NetVoyage with the number of Internal Users on a quarterly basis. Customer
> shall be required to pay additional subscription fees if the number of Internal
> Users exceeds the number of Internal Users authorized on Exhibit A. If the
> number of Internal Users is less than the number set forth on Exhibit A, then
> Customer shall be entitled to a credit of that amount. Any employees of
> Customer or Employee Equivalents authorized to access any Service through
> Customer must be authorized as Internal Users (not External Users), and
> Customer shall not permit the shared use of Internal User login information or
> accounts.
>
> 2.2. At the sole discretion of NetVoyage, following Digital Notice to Customer,
> the Services may be modified from time to time, provided that such modifications
> are reasonably likely to be generally perceived by subscribers to the Services as
> improving and building upon the Services. Customer shall have the option to, but
> not be obliged to, take any enhancements, modifications or Service Updates
> which involve payments in addition to the Subscription Fee. NetVoyage shall, via
> Digital Notice, keep Customer informed of Service Updates, Scheduled
> Maintenance, Service Update and other developments which may affect
> Customer's use of the Services.
>
> *   *   *
>
> 2.4. NetVoyage is the sole and exclusive owner of all Intellectual Property and
> other proprietary rights and interests in and to the Services, including all software

code and other functional components thereof. Customer acknowledges and agrees that Customer has no ownership interest in the Services or any Intellectual Property incorporated in the Services and that Customer does not, by means of this Agreement, acquire any ownership, license, lease or other interest in the Services or Intellectual Property incorporated in the Services other than the right to use the Services subject to the terms and conditions of this Agreement during the Term. Any access of Customer and the Service Users to software included or embedded in the Services shall be in object code form and only as incidental to the use of the Services pursuant to the terms and conditions of this Agreement.

2.5. Customer shall not, and shall ensure that its Service Users do not, copy, modify, sublicense, distribute, rent, lease, convey, translate, disassemble, reverse engineer or decompile any portion of the NetDocuments Service and related Additional Services, NetVoyage software and other Intellectual Property included or embedded in the Services. NetVoyage will require Service Users to electronically execute and comply with the NetDocuments Terms of Use Agreement as a condition to use the NetDocuments Service, the current version of which can be found at http://www.netdocuments.com/information/termsofUse.aspx and which is subject to modification by NetVoyage on no less than ninety (90) days Digital Notice."

36. Section 3 of the Nixon Peabody LLP contract provided an initial term of three years, with continuing one-year renewal terms, unless "either party elects to terminate this Agreement by giving written notice to the other party of the election to terminate at least thirty (30) days prior to the expiration of the then-current Initial Term or Renewal Term." Section 5.2 of the contract provided that:

"[u]nless otherwise set forth on Exhibit A, the Subscription Fee shall be invoiced monthly in advance and be payable within thirty (30) days of receipt. All other fees, reimbursements and other amounts payable to NetVoyage under this Agreement shall be due and payable within thirty (30) days of Customer's receipt of an invoice for such services. Undisputed payments not received within thirty (30) days after invoice date shall accrue interest thereon at the lower rate of twelve percent (12%) per annum or the highest legally allowable interest rate until paid. Failure by Customer to make any payment within sixty (60) days of receipt of an invoice shall be breach of a material provision of this Agreement."

The "Entire Agreement" of the parties is set forth in section 8.16 of the contract and provided that:

"[t]his Agreement, including the Exhibits hereto which are incorporated by reference herein, constitutes the entire understanding and agreement of the parties

relating to the subject matter hereof, and supersedes all prior or contemporaneous agreements and understandings, whether written or oral; provided, however, Customer acknowledges and agrees that the 'terms of use agreement' entered into separately between each Service User and NetVoyage, which shall be that generally applicable to all Net Voyage customers' users, shall govern each Service Users' use of the NetDocuments Service, and NetVoyage shall be permitted to strictly enforce the terms of such 'terms of use agreement.'"

The record does not include the NetDocuments "terms of use agreement" referenced in the

Nixon Peabody LLP contract.

37. Attached to the Nixon Peabody LLP contract as "Exhibit A" is a letter dated June 17,

2013, from Marc Duncan, senior account manager at NetDocuments, to Michael Green, CIO, at

Nixon Peabody LLP, that was sent via email. This letter provided, in part, as follows:

"We are pleased to present Nixon Peabody LLP a NetDocuments pricing proposal. NetDocuments is a state of the art [sic] document management system that includes extranet, built in business continuity and email management capabilities.

As a summary, the key benefits of NetDocuments, a document management software-as-a-service are:

- Reduced technology investment risk (no hardware to purchase).
- Updates and upgrades are automatic – users always have the latest features.
- No back office [sic] administration requirements allowing you to focus IT staff on other strategic initiatives.
- Technical support is available 24x7 and included in the price.
- Implementation is accelerated and conversion of documents is easy to do.
- Universal access to your documents from any Internet-connected device.
- Collaboration and sharing with clients is built-in.
- Business Continuity is built-in and included in the price.
- Open API for service integration."

The letter set forth a "Base Service Fee" for 1,500 internal users at a monthly subscription fee

per user of $38.00, with included storage of 4,500 GB and a monthly subscription fee total of

$57,000; 4,500 external users that were included in the monthly subscription fee per user and the

monthly subscription fee total; and unlimited "ShareSpace Users," which was used "[f]or secure

document sharing with users outside your organizations (e.g., clients)," and was included in the

monthly subscription fee per user and the monthly subscription fee total. A 25% volume

discount of $14,250.00, a 10% competitive switch discount of $5,700.00, a 5% discount for

signing the agreement by June 30, 2013, of $2,850.00 and a 3% marketing discount of $1,710.00

were also provided. After the discounts were subtracted, the monthly subscription fee for users

totaled $32,490.00.

The letter also set forth "Optional Add-on Services" for which "[a] detailed description of

each included Add-On for NetDocuments can be found here: http://www.netdocuments.com/en-

us/Pricing/AddOns." The listed add-on services included "Email Management Service" for

which the monthly subscription fee was "[i]ncluded in Pro+ Edition" for a monthly subscription

fee total of $0.00; "NDSearch Analysis" for which the monthly subscription fee was "[i]ncluded

in Pro+ Edition" for a monthly subscription fee total of $0.00; "Consolidated Reporting" for

which the monthly subscription fee was "[i]ncluded in Pro+ Edition" for a monthly subscription

fee total of $0.00; "NDLink" for which the monthly subscription fee was "[i]ncluded in Pro+

Edition" for a monthly subscription fee total of $0.00; "Local Document Server" for which the

monthly subscription fee was 3% of the monthly subscription fee for a monthly subscription fee

total of $975.00; and "4,500 GB Additional Storage" was included for $0.00 per "GB/Month."

The total monthly subscription fee including add-ons and additional storage of "9,000GB (9TB)"

was stated as $33,465.00. Under the heading "General Terms and Information," the letter

provided, among other things, that for technical support, the "NetDocuments service includes 24

X 7 helpdesk support for critical issues."

38. Attached to the Nixon Peabody LLP contract as "Exhibit B" is the "NetDocuments

Help Desk Support and Other Service Procedures" that contained a number of sections. Section

I defined NetDocuments help desk support as follows:

"that support included in the Subscription Fee for the Services. Help Desk Support is the means by which NetDocuments provides technical and engineering advice for responding to Service User interface and operational questions, errors, problem escalation, software bugs, and software and service failures of the NetDocuments Service and Additional Services after primary internal help desk resources have been exhausted or been deemed inapplicable. Help Desk Support does not include document Custom Services, which may be available at additional charges. All other support is to be provided by the Customer's help desk personnel. NetVoyage shall have no obligation or responsibility to provide technical support for any software or services that are not a part of the Services as defined herein, such as Microsoft Windows or Microsoft Office."

Section "V. Service Levels" provided, in part, as follows:

"Service. NetVoyage shall: use a multi-tier server structure consisting of web servers, directory servers, database servers, and indexer servers in which each class of server is highly available without a single point of failure; deploy a managed dual-level firewall and intrusion detection system that shall include monitoring for unauthorized access and denial of service attacks; store Customer Data designated as 'Storage' on a highly available storage device that is regularly replicated and stored off-site; provide the technology for redundant storage of documents on-site at Customer's designated location, either in the form of duplicating recently-edited documents at Service User workstations (Echoing), and/or at a Local Document Server (which is an Additional Service), as configured and managed by Customer in consultation with NetVoyage; maintain redundant high-capacity Internet service providers for its data services from major telecommunications providers; and provide automatic backup power generators to maintain the computer system in operation for three (3) calendar days in case of a major power outage affecting NetVoyage."

"Security. NetVoyage shall provide and maintain security measures designed to protect all documents stored in its NetDocuments Service; provide secure authentication for all Service Users, either in the form of a user name and password combination, or in the form of digital certificate-based logins; provide encrypted data transfer for all web communications between the NetDocuments Service hosting facility and Customer's workstations; deny unauthorized browsing of Service User profile information from the NetDocuments Service global directory; include logical and technical systems designed to ensure that only persons logged in as Service Users or authorized systems administrators can access documents and document profile information; permit Customer[s] to establish private repositories for Internal Users the Customer's system administrators have no access to the Internal Users' private documents without the use of the Internal User's password; maintain its public network and computer systems in highly secured environments; have at least one disaster recovery storage facility highly resistant against natural and man-made disasters."

"Service Availability. NetVoyage shall maintain a 99.9% NetDocuments Service availability (i.e., absence of a Service Outage) per Annual Period on a 24-hour period in a day, 7-day period in a week, and 365-day period in a year, subject to Scheduled Maintenance."

39. The Nixon Peabody LLP invoices revealed that petitioner charged tax for the Professional Plus monthly service fee but not on the add-on services listed on the invoice and included in the subtotal listed prior to the tax charged on such monthly invoices. In the sales exception report, Ms. Allis assessed tax on the remaining portion of the fees included on 6 Nixon Peabody LLP monthly invoices issued between June 1, 2019 and November 11, 2019.

40. The record includes the Amendment to NetDocuments Service Agreement, effective as of November 3, 2020, by and between NetDocuments Limited (formerly NetVoyage Corporation) and Nixon Peabody LLP. The amendment to agreement added a term to the agreement that required NetDocuments to bill the Subscription Fee and for Nixon Peabody LLP to pay the Subscription annually in advance commencing November 18, 2020.

41. In IDR#2, Ms. Allis also requested a demonstration of petitioner's product. In response to such request, petitioner set up the demonstration of the product. During his testimony, Mr. Stanley recounted the demonstration and observed that, in addition to storage, a user can create notes and manage workflow.

42. Mr. Stanley testified that, on February 2, 2021, petitioner additionally provided a video presentation of the platform by email with a link to a video. While reviewing the video presentation, Mr. Stanley took screenshots. The screenshots were submitted in evidence at the hearing.

43. During his testimony, Mr. Stanley recounted viewing the presentation by commenting on the screenshots. Mr. Stanley highlighted the workflow components, and identified buttons or tabs where a user could click to access tasks and review lists.

44. Mr. Stanley testified about the organizational features of the platform. The presentation illustrated the ability to organize files and emails. Specifically, Mr. Stanley pointed to the ndMail function that tracks emails and organizes those files within the platform. Mr. Stanley outlined how the interface organizes email, and how a user can tag emails to various client files. Mr. Stanley also pointed out the client portal abilities that allow users to share documents and notes with clients. Mr. Stanley showed how petitioner's interface allows a client to place its branding on their internal site. Lastly, Mr. Stanley discussed how the presentation showed how the product may be used on mobile devices.

45. Mr. Stanley testified that watching the video made the Division more confident in their position that petitioner was selling software.

46. On March 23, 2021, Mr. Stanley sent a letter to Mr. Bartholomew, stating, in part, that:

> "Net Documents [sic] has more nuances and tools compared to generic cloud storage integrates with applications like office 365 allowing customers to create, share and store documents on their system. For this reason, we will be moving forward with the workpapers that were previously issued. We should continue to look at all angles to see if there are any other reasons the listed items should not be taxed, an exempt customer for example, but we will not be removing them based on the nature of Net Document's [sic] sales. We believe those to be taxable software based on New York Sales Tax law. As we move forward, we can continue to discuss any additional information and the procedures for disagreeing with an audit adjustment."

47. On March 25, 2021, Mr. Bartholomew sent a letter to Ms. Allis and Mr. Stanley in rebuttal and disagreement with audit's position. Mr. Bartholomew, among other things, argued that the assessed tax should be further subject to apportionment based upon where the clients use the software.

48. On March 31, 2021, petitioner forwarded, and audit accepted, an exemption certificate to remove one of the exceptions. On April 5, 2021, Ms. Allis forwarded a revised

statement of proposed audit change to petitioner for the period June 1, 2017 through November

30, 2019. The statement advised that $301,810.87 in tax was due with $59,870.66 in interest for

a total of $361,681.53.

49. The Division rejected Mr. Bartholomew's apportionment argument because the audit

figures were calculated based upon provided New York billings. As Mr. Stanley testified, Mr.

Bartholomew's methodology would not account for users in New York, whose firms did not bill

to a New York address.

50. On April 12, 2021, Mr. Stanley sent a letter to Mr. Bartholomew that provided, in

part, as follows:

> "It is the Department's position that your client provides software. We have
> discussed your case with our Field Audit Management in Albany and we are all in
> agreement that the sales are taxable. This is based on our current understanding
> of the service provided. We understand that as part of this sale your client also
> provides data storage. Since the data storage is not separately stated from the
> portion of the sale the Department believes is software, the entire charge is subject
> to sales tax. See Regulation Section 527.1(b) related to taxable and exempt items
> sold as a single unit.
>
> Based on the data reviewed under audit it appears your client charges sales tax
> based on the billing address of their customer rather than the physical location of
> actual users. I realize you've provided a breakdown of office locations in New
> York and outside of New York for each listed customer on the workpapers, but
> we cannot accept this simplified allocation. This does not account for number of
> employees in New York versus outside of New York, for example. If your client
> can provide a breakdown of users in state and out of state for these companies, we
> would accept this and make the appropriate adjustments. It should be noted that
> your client should adjust their taxing practices to account for clients that may
> have billing addresses outside of New York but have New York users and vice
> versa.
>
> Unfortunately, it does not seem that you and the Department will agree on the
> taxability. We would like to make any adjustments for users outside of New York
> and then proceed to an assessment on this case. . . .Until any adjustments are
> completed your Statement of Proposed Audit Change for Sales and Use Tax dated
> April 5, 2021 with a due date of April 22, 2021 is still the Department's current
> proposed assessment."

51. On April 16, 2021, Mr. Bartholomew sent a letter and continued to concentrate on the overall taxability of the product. The letter separated features of NetDocuments to argue that the platform was not taxable software. Under cross-examination, Mr. Stanley stated that the Division was not persuaded by Mr. Bartholomew's argument to separate the pieces of the product because sales tax looks at what the client gets and how it is billed.

52. On May 4, 2021, Mr. Stanley sent another letter to Mr. Bartholomew to further understand petitioner's product regarding its storage features.

53. On May 4, 2021, while acknowledging that NetDocuments may have software features, Mr. Bartholomew again sent an email asserting that his client did not sell software. On May 5, 2021, Mr. Bartholomew sent a letter that acknowledged clients could use NetDocuments without its storage features. Mr. Bartholomew stated that:

> "[t]he [NetDocuments] Services are far more powerful than Dropbox in that it arranges each user's cabinet to have access to those 'client folders' and 'other folders' that each user needs to see, and is far more powerful in tracking who has the file, what changes were made, and who should be making changes. . . . All such ancillary features are integral to and indivisible from the core [NetDocuments] Services."

54. During his testimony, Mr. Stanley compared petitioner's product to storage products. He believed those could be designed similar to petitioner's product. Mr. Stanley highlighted the lack of fees for storage units but rather petitioner charged by the user.

55. On May 7, 2021, Mr. Stanley sent a letter in response to reiterate that the Division considered the document management features were taxable software. Once again, Mr. Stanley provided a statement of proposed audit change of the same date and stated that:

> "[w]e'd urge you to provide any information you can to remove items that are listed, not based on your opinion that your client's service is exempt since we do not agree with that statement. For example, there are some credit memos for sales tax listed and all we would need to verify to remove them as additional tax due is the original invoices charging the sales tax and the related payment information."

Petitioner did not provide any information that would allow the Division to remove items listed on the sales exception report, including the original invoices related to the credit memos and statements from its customers that provided breakdowns of users within New York State and users outside of the state.

56. The Division did not assess a penalty because it still viewed petitioner's conduct as non-willful as it appeared that they mistakenly did not tax some of their products.

57. On June 4, 2021, Mr. Bartholomew typed "DISAGREE" on the statement of proposed audit change and forwarded the same back to the Division.

58. On June 16, 2021,[1] the Division issued a notice of determination, notice number L-053599603 (notice), to petitioner asserting additional sales and use taxes due in the amount of $301,810.87, plus interest, for the audit period.

59. At hearing, Mr. Stanley tied the invoice charges in the Nixon Peabody LLP contract to charges in the Avalara report. Mr. Stanley pointed to Nixon Peabody LLP charges that were in the contracts provided, the Avalara report and the invoices provided. Mr. Stanley highlighted discrepancies where petitioner had taxed or not taxed the same items. As a result, the charges were entered on the exception worksheet.

60. Mr. Stanley testified that he and Ms. Allis reviewed the contracts and observed mostly generic standard language. Mr. Stanley testified that he reviewed clauses that were common in software contracts. Using the Nixon Peabody LLP contract as an example, Mr. Stanley highlighted the intellectual property protection and language that licensed the product to

---

[1] During the course of petitioner's audit, three consents were executed to extend the period of limitations to determine sales and use taxes due for the audit period until September 20, 2021.

the client during their term of use. Mr. Stanley also cited that the fees were per user and not for general digital storage. He explained that storage is usually billed by quantity of digital storage.

61. Petitioner offered the testimony of John Motz, petitioner's current chief technology officer. At the time of the hearing, Mr. Motz was employed by the company for a year and a half. Mr. Motz was not employed by petitioner at the time of the audit.

62. Mr. Motz described 50% of the employees under his supervision as software engineers. Mr. Motz's teams work on different software aspects of the product. For example, one group works on the Microsoft plug-in, a second group works on Microsoft integration and a third group works on Solar implementation. Another group works on internal software and its integration with third-party software.

63. Petitioner's remaining non-software employees, under Mr. Motz's supervision, are system engineers, including security analysts and project managers. In addition, the non-software employees include operational support that monitor how the platform runs and maintain licensing with third parties.

64. Mr. Motz described the company as offering document management to the legal field. He described the product as document storage and security, and claimed that it integrates with other tools like Microsoft and Google tools. Mr. Motz explained the differences between document management and storage. Storage is simply storage of files, whereas management is assigning permissions and organization.

65. Mr. Motz testified about the three contracts in the record. Mr. Motz testified that petitioner offers document management to the legal field and that large law firms are petitioner's typical clients.

66. Mr. Motz testified that the contracts covered the term of the contracts, security and customer service expectations. Mr. Motz described the Nixon Peabody contract exhibit B as helpdesk support definitions and system requirements, on the customer side to use the platform. Additionally, exhibit B of the contract has service level expectations for NetDocuments, such as the documents are available 99.9% of the time. Mr. Motz testified that some of the services in the contract were free. While Mr. Motz referred to certain features as add-on services, he acknowledged that some are included, and some are for extra charges.

67. Mr. Motz offered testimony regarding the platform's functions. He stated that there is only one version of NetDocuments that clients use. He testified that different components allow users to create workflow, mirror documents and other functions.

68. NetDocuments allows users to organize documents into digital cabinets, including storing email. Mr. Motz testified that no one at NetDocuments performs any of the organizing tasks, and the functionality is always provided by software. Multiple versions of the same document will remain on the system allowing users to access earlier versions. NetDocuments allows the user to sort and add documents to a matter.

69. Petitioner and Microsoft have a contract to allow access to Microsoft's developer tools. The contract also allows for support from Microsoft. Petitioner pays a fee to Microsoft for access.

70. NetDocuments has agreements with other software providers to access their technology, or it licenses technology from others, like Adobe reader.

71. Mr. Motz testified about implementation of NetDocuments. Often clients hire a third party to handle the migration of data to the NetDocuments platform. NetDocuments customers often hire a consultant to import documents into the system that are unrelated to NetDocuments.

Mr. Motz testified that after installation, clients may engage with the NetDocuments support team for assistance. Most of the calls are for user support, very little are for product defects.

72. In correspondence to the auditor, Mr. Bartholomew acknowledged that compared to storage products, NetDocuments offers more functions. Mr. Motz testified that NetDocuments offers more than Microsoft's OneDrive. Mr. Motz stated that NetDocuments allows security to restrict users based upon projects or case files.

73. ndMail captures emails from other applications and organizes them with other files.

74. LD service, or Local Drive, enables users to keep a copy of a document on the user's local computer.

75. Mr. Motz testified that not all users purchase the storage component. Some clients have offices that are in regions that do not permit usage of petitioner's cloud.

76. NetDocuments' Tasks function associates a task to be done to a file. During his testimony, Mr. Motz provided an example that a legal aide may send documents to a manager or a partner for review. The system will set an alert for a partner and track the document to notify others that the tasks were completed.

77. According to Mr. Motz, within Tasks, a task must be set up by a user. NetDocuments does not automatically create reminders or tasks.

78. NDSearch is powered by third party software, Solar, to provide search functions on the platform. Mr. Motz described the search function that allows the program to read the text in documents for easier searching. The user can search the files. Since the content does not change, the user searches the content of the files. Solar indexes the words in the documents and performs the search based upon those words. The system runs reports based upon the metadata attached to the documents.

79. OCR is a text reader that makes documents searchable.

80. Margin Notes allows users to make annotations to the documents. Margin Notes enables users to "**[f]acilitate centralized feedback, comments, and discussions on documents without ever removing them from your secure NetDocuments environment.**" Margin Notes is a feature that allows users to make notes on documents but not actually change the documents. The user may annotate and place notes on a file. The notes and annotations are visible to any other users that access the file.

81. Mr. Motz testified that NetDocuments sorts emails automatically to different case files after the user sets parameters within the platform.

82. Mr. Motz testified about how the ndLink feature allows the customer to link into third party apps, like Microsoft 365, to allow the users to open those files to make changes to documents in Word or Excel. Some clients also use Microsoft desktop versions. In that case, a petitioner-created plug-in is downloaded to allow users to edit Microsoft documents. The plug-in is certified by Microsoft.

83. Mr. Motz also highlighted security as a major feature. He testified that documents were stored in at least three different places, and all had different permissions to preclude users that were not authorized to view content from viewing such content.

84. ndThread allows users to communicate with each other. ndThread was replaced with Chatlink after the audit period. ndThread runs through the browser, whereas Chatlink integrates with Microsoft Teams.

85. Collabspaces allows users to share documents with clients depending upon the rights and permissions. According to Mr. Motz, Collabspaces creates a mini-cloud that allows the user and a client to share documents.

86. Highlights allows a user to attach Lexis case citations to the files.

87. NetKnowledge allows a search beyond the basic platform. NetKnowledge is run by third party software called BA Insight.

88. NetDocuments also provides analytics about users.

89. Petitioner offered the testimony of Kat McBride. Ms. McBride is the current controller of the company. Ms. McBride was not employed by petitioner during the audit.

90. Ms. McBride testified about the Master Services Agreement, referring to the Nixon Peabody LLP contract, and that the clients can modify their plans, whether at renewal or otherwise.

91. Ms. McBride stated that Avalara is tax software used to file taxes. She explained that petitioner uses NetSuite software to maintain its general ledger and it interfaces with Avalara. Ms. McBride testified that petitioner sets the sales taxability rules and that there are discrepancies that can occur in Avalara.

92. Under cross-examination, Ms. McBride acknowledged that the general ledger was not provided during the audit. Because she did not work at the company at the time of the audit, Ms. McBride could not speak to why or why not the prior team provided certain things to audit. Ms. McBride testified that she did not compare the audit findings to the general ledger for the audit period even though it was available.

93. Petitioner offered testimony about two specific Kelley Dreye & Warren LLP (Kelley Dreye) entries on the sales exception report. Specifically, the sales exception report listed that Kelley Dreye invoice number 412357, dated October 8, 2019, with an invoice amount and a taxable amount of $336,461.64 had no tax paid and additional tax due of $29,860.97 because it was "Taxable Item-No Exemption Certificate supplied/invoice not supplied." The sales

exception report also listed that Kelley Dreye invoice number 412359, dated October 8, 2019, with an invoice amount and a taxable amount of $330,052.79 had no tax paid and additional tax due of $29,292.19 because it was a "Taxable Item-No Exemption Certificate supplied/invoice not supplied." Ms. McBride advised that the Kelley Dreye invoices looked incorrect. Based upon her review, Ms. McBride could not find other data related to those entries within petitioner's records. However, petitioner did not introduce any evidence to support this claim. Although Ms. McBride referred to records regarding Kelley Dreye, she failed to bring those records to the hearing.

94. Petitioner did not provide any contract for Kelley Drye during the audit or at the hearing.

95. Ms. McBride acknowledged that she did not prepare the New York State transactions for the audit period document received in evidence as exhibit 11 or ensure that it tied to other records. A review of this exhibit indicates that it does not match petitioner's sales tax filings since it has a total of $11,276,569.65 in revenue compared with a total of $12,476,393.00 reported on its sales tax returns for the audit period.

96. Mr. Stanley testified about invoices with Florida addresses listed as the billing addresses. Mr. Stanley noted that petitioner provided those invoices to audit that may have been printed after an address change was entered into petitioner's system. Ms. Allis included those invoices in the sales exception report.

97. Several of the exceptions identified unsubstantiated credit memos. Ms. McBride recognized instances where petitioner would negate a charge that included bankruptcy, insolvency or credits for the product.

98. Regarding the credit memos, Mr. Stanley testified that if audit received the original invoices, those exceptions would be removed. However, despite requests, petitioner did not provide those documents. At the hearing, petitioner did not provide the original invoices related to those credit memos.

99. At the conclusion of the hearing, petitioner requested and was granted time post-hearing to file the affidavit of Mr. Booth; "the full transaction ledger, sales ledger . . . regarding the audit period, along with an affidavit from Ms. McBride . . .; and a document from the IT department regarding all of the users included in the assessment of large multi-state users, along with an affidavit of someone within the IT department or whoever with NetDocuments to explain those documents." In addition, the Division was granted the right to submit post-hearing rebuttal documents and affidavits.

100. As part of its post-hearing document submissions, petitioner submitted a total of 11 proposed exhibits consisting of: the affidavit of Ms. McBride, sworn to on June 17, 2024 (proposed exhibit 21); a document, titled "NY 06.01.17-11.30.19" (proposed exhibit 22); a document, titled "Tax Groupings, Account Summaries" (proposed exhibit 23); the affidavit of Mr. Bartholomew, sworn to on June 17, 2024 (proposed exhibit 24); Mr. Bartholomew's analysis of the manner in which the taxable charges should be apportioned by user (proposed exhibits 25 through 28); a document regarding credit memo history (proposed exhibit 29); and Mr. Bartholomew's workpapers based upon other proposed submissions (proposed exhibits 30 and 31).

101. Ms. McBride's affidavit is received into evidence as petitioner's exhibit 21. The NYS 06.01.17-11.30.19 document is received into evidence as petitioner's exhibit 22. The Tax Groupings, Account Summaries document is received into evidence as petitioner's exhibit 23.

The remainder of petitioner's proposed exhibits 24 through 31 will not be received into evidence for the reasons set forth in conclusion of law A.

102. In rebuttal to petitioner's post-hearing document submissions, the Division submitted the affirmation of Eric Gee, Esq., and the affidavit of Mr. Stanley, sworn to on July 8, 2024. Mr. Gee's affirmation is received into evidence as the Division's exhibit K, and Mr. Stanley's affidavit is received into evidence as the Division's exhibit L.

CONCLUSIONS OF LAW

A. Section 3000.15 (c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules) authorizes the administrative law judge assigned to conduct the hearing in a matter to, among other things, "regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of legal memoranda and other documents" (*see* 20 NYCRR 3000.15 [c] [3]). In the instant matter, the undersigned administrative law judge granted petitioner's request to file certain identified documents post-hearing (*see* finding of fact 99). Petitioner's post-hearing document submission consisted of a total of 11 proposed exhibits (*see* finding of fact 100), a number that far exceeds the number of documents that petitioner was granted permission to file post-hearing (*see* finding of fact 99). A review of those 11 proposed exhibits revealed that only proposed exhibits 21 through 23 qualified as documents to be filed by petitioner post-hearing (*id.*). Petitioner's proposed exhibits 21 through 23 have been received into evidence in this matter (*see* finding of fact 101). The remainder of petitioner's proposed exhibits do not qualify as documents to be submitted post-hearing, are rejected and will not be taken into consideration in this determination (*see* 20 NYCRR 3000.15 [c] [3]; *see also Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991).

B. It is well established 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" (***Matter of Hotel Depot***, Tax Appeals Tribunal, January 24, 2020, citing

Matter of Darman Bldg. Supply Corp. v Mattox, 106 AD3d 1150, 1151 [3d Dept 2013].

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 a rational

basis, so long as no evidence is introduced challenging the assessment (***see Matter of Leogrande***

v Tax Appeals Trib., 187 AD2d 768, 769 [3d Dept 1992], ***lv denied*** 81 NY2d 704 [1993]). If it

has no rational basis, it must be set aside (***see Matter of Synder v State Tax Commn.***, 114 AD2d

567, 568 [3d Dept 1985]; ***Matter of Ristorante Puglia v Chu***, 102 AD2d 348, 350 [3d Dept

1984]). In ***Matter of Atlantic & Hudson Ltd. Partnership*** (Tax Appeals Tribunal, January 30,

1992), the Tax Appeals Tribunal (Tribunal) established how the presumption of correctness of an

assessment may be overcome:

> "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" (citations
> omitted).

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).

C. Petitioner argues that the notice issued by the Division lacks a rational basis because

the Division relied upon the wrong information and made the wrong assumptions when it

concluded that petitioner's product, the NetDocuments Service, was software. Petitioner asserts

that its product is a non-taxable, cloud-based, platform-as-a-service that provides document storage to its customers. Petitioner's argument is unpersuasive.

Mr. Stanley testified regarding the basis for the audit. There were several factors that indicated the product was software. At the field visit, the auditors met with petitioner's then senior accountant, Mr. Booth. At that time, Mr. Booth advised that petitioner sold software to law firms to manage their documents and workflow. Nothing that transpired during the rest of the audit indicated otherwise. The auditors reviewed literature, participated in a demonstration and viewed a presentation about the platform. The demonstration and the presentation further confirmed Mr. Booth's statement that petitioner's product was software. Petitioner's presentation about the platform highlighted the features and tools that made its product more than simple document storage. During the audit, petitioner failed to rebut any of the presumptions made by the auditors.

Mr. Stanley also testified about the audit methodology used in this matter. At the field visit, Mr. Booth provided various documents to the auditors. Those documents included sales tax returns, invoices for the entire audit period, sales tax transaction reports from Avalara and two exemption certificates. At the field visit, Mr. Booth stated that petitioner used the Avalara reports to prepare its sales tax returns. Based upon the records provided, the auditors used an Avalara "committed" document line detail report because, after some email discussions with Mr. Booth, they were able to reconcile the Avalara report with the sales tax returns. Ms. Allis reviewed all invoices and the Avalara report and found three types of exceptions. Some exceptions lacked an invoice, including unsubstantiated credit memos, some exceptions had invoices where items were not taxed and some exceptions had rate errors. The auditors provided detailed sales exception reports to petitioner several times during the audit. Other than providing

one additional exemption certificate to the auditors, petitioner did not provide any further documentation to resolve any of the exceptions found by the auditors during the audit.

Based upon the information they reviewed during the audit, the Division's conclusions in the audit were rational.

D. Sales tax is imposed on the receipts from every retail sale of tangible personal property (*see* Tax Law § 1105 [a]; *Matter of Shuai Yin v State of N.Y. Dept. of Taxation & Fin.*, 151 AD3d 1497, 1498 [3d Dept 2017]). It is presumed that the receipts from the sale of tangible personal property are subject to tax until the contrary is established, and the burden of proving that any receipt is not taxable is on the person required to collect the tax or the customer (*see* Tax Law § 1132 [c] [1]; *see also* 20 NYCRR 532.4 [b] [1]).

A 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, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor" (Tax Law § 1101 [b] [5]; *see also* 20 NYCRR 526.7 [a]).

A "retail sale" is a sale of tangible personal property to any person for any purpose, other than for resale (*see* Tax Law § 1101 [b] [4] [i]).

For purposes of a license to use, transfer of possession occurs when one of the following attributes of property ownership has been transferred:

(i) custody or possession of the tangible personal property, actual or constructive;

(ii) the right to custody or possession of the tangible personal property;

(iii) the right to use, or control or direct the use of, tangible personal property (*see* 20 NYCRR 526.7 [e] [4]).

Tangible personal property, for tax purposes, includes prewritten computer software, "whether sold as part of a package, as a separate component, or otherwise, and regardless of the medium by means of which such software is conveyed to a purchaser" (Tax Law § 1101 [b] [6]). Prewritten computer software is any software that is not designed and developed by the author or other creator to the specifications of a specific purchaser (*see* Tax Law § 1101 [b] [14]). Prewritten computer software that is modified or enhanced to the specifications of a specific purchaser remains prewritten software, except that any modification or enhancement shall not constitute prewritten software where there is a reasonable, separately stated charge for such modification or enhancement (*id.*).

E. In this matter, the Division concluded that petitioner's sales of its NetDocuments Service to its customers were sales of prewritten software and subject to tax. Petitioner argues that its product is a non-taxable data storage and security service. Petitioner contends that its NetDocuments Service is a nontaxable platform-as-a-service. Petitioner argues that its customers are seeking an automated solution for storing and securing electronic documents in a highly secured environment while enabling wide collaboration. It claims that while there are amenities that add value to the document storage services, such amenities are incidental to the NetDocuments core services or are separately contracted add-on services. It further claims that the NetDocuments core services are a substitute for the paper document archives. Petitioner also asserts that its contracts make it clear that the primary function or purpose of the NetDocuments Service is connected to document storage and security services which are nontaxable in New York State. Petitioner claims that any other features of the NetDocuments Service offered by the contracts are at the sole discretion of NetDocuments and may be eliminated at any time. Petitioner claims that the Nixon Peabody LLP contract is not a contract that sells software to its

customer. It further claims that sections within the contract that referenced software, such as the one that referenced software licenses needed by the customer from outside sources and section 2.4 of the Nixon Peabody LLP contract, are universal clauses in all modern business contracts.

F. When software is the central element of a product sold, a customer is purchasing prewritten software used to facilitate a desired activity (*see Matter of Beeline.com*, Tax Appeals Tribunal, May 2, 2024). Here, customers purchase the NetDocuments Service to facilitate workflow and manage documents. The NetDocuments platform has tools and features that elevate it from simple storage. During the audit and the hearing, the various parts of the platform were discussed. Specifically, NetDocuments has features that allow annotation on documents, organization of files and emails and workflow tools. Mr. Motz described the product as more than simple storage and termed the platform a document management service. NetDocuments also has versions that are delivered without storage of documents. Consistent with software, users of the platform had the right to use the software. Once installed, the software does the work at the direction of the customer, and it is not merely a conduit for communication to deliver some other service provided by petitioner. Software is the core element of petitioner's platform and none of the functions could be accomplished without petitioner's development and the customer's use of the software. Petitioner's contracts included sections that required certain standards for its customer's internet connectivity and computer hardware. Extensive testimony was provided by both petitioner and the Division regarding the functions of the platform. The auditors reviewed a demonstration and presentation. The auditors observed that a user may tag documents for further review and annotate those documents. The platform further organizes emails and documents into case files. The platform also allows the user to share and collaborate with their clients on various files.

Beyond its functionality, the contracts for petitioner's platform indicate that a sale of software has occurred. During the audit, petitioner submitted three customer contracts for review. Mr. Stanley observed that the contracts contained clauses common in agreements with software companies. The contracts contained intellectual property protections and licensing type provisions. The contracts also required each customer's service users to execute a term of use agreement.

In its brief, the Division acknowledged that, in addition to prewritten software, petitioner sold additional services as part of a mixed bundle of tangible personal property and services. Contrary to petitioner's argument, the primary function test does not apply in this instance because petitioner sold a bundle of tangible personal property along with assorted services (*see Matter of Strata Skin Sciences*, Tax Appeals Tribunal, May 5, 2022, *confirmed* 225 AD3d 953 [3d Dept 2024], *lv denied* 42 NY3d 906 [2024]; *see also* 20 NYCRR 527.1 [b]). When a bundle of taxable and nontaxable property and services are sold together for one charge, the entire charge is taxable (*id.*; *see Matter of Lake Grove Entertainment, LLC v Megna*, 81 AD3d 1191, 1193 [3d Dept 2011]). Within the contracts and invoices provided by petitioner, the fees were bundled together in each contract's exhibit A. With respect to the Kaufman Dolowich contract, petitioner listed the LN Base Service that was charged per user. The contract listed a few other optional add-on services. Additional lines were included for implementation and training, but no fee was listed. The Kaufman Dolowich invoices revealed that no tax was charged on the Professional Plus edition or ndMail products. In her sales exception report, Ms. Allis included those charges. The Milbank LLP contract's exhibit A listed charges for the NetDocuments base service fee. Exhibit A also listed additional services, however, apart from the Email Management Service, the fees were included in the base service fee. None of the Milbank LLP

invoices included a charge for tax even though the product was NetDocuments Professional Plus

service fees. In her sales exception report, Ms. Allis assessed tax on those quarterly charges. On

the Nixon Peabody LLP contract's Exhibit A, the primary charge was base service fee, and the

fees were charged per user. The schedule included several optional add-on services that did not

have an additional charge and were included in the Professional Plus Edition. On the Nixon

Peabody LLP invoices, petitioner charged tax for the Professional Plus monthly service fee. The

Division charged tax on the remaining portion of the fees listed on those invoices. Petitioner has

never identified the nature of those fees, either during the audit or at the hearing.

Clearly, petitioner sold its NetDocuments Service comprised of a bundle of prewritten

software and services for one charge (*see Matter of Strata Skin Sciences*, 225 AD3d at 956; *see*

also 20 NYCRR 527.1 [b]). When a bundle of taxable property and nontaxable services are sold

together for one charge, the entire charge is taxable (*see Matter of Strata Skin Sciences*, 225

AD3d at 956). The Division's determination that petitioner's sales of its product, the

NetDocuments Service, were sales of taxable prewritten software was proper.

G. Petitioner argues that its customers' fees for using the NetDocuments software should

be apportioned by user. At the commencement of the audit, Mr. Booth told the auditors that

petitioner filed its sales tax returns based upon its customers that had a New York State billing

address. During the audit, Mr. Bartholomew raised the issue of apportionment by the number of

the offices located within New York State for each of its customers listed in the sales exception

report. Mr. Bartholomew and Mr. Stanley discussed this point by letter. Mr. Stanley requested

that petitioner provide statements from those customers that would provide a breakdown of their

users located in state and out of state, so that appropriate adjustments could be made to the audit

workpapers. Petitioner never provided such documentation to the auditors and no adjustments

were made to either the sales exception report or the statement of proposed audit change, dated

May 7, 2021. Subsequently, on June 16, 2021, the notice was issued to petitioner that reflected

the Division's findings. At the hearing, petitioner did not provide any documentation regarding

each of its customers' usage of the software within New York State and outside of New York

State during the audit period. As such, petitioner has failed to prove that it is entitled to an

apportionment of its customers' fees for using the NetDocuments software.

      H. The petition of NetVoyage Corp. aka NetDocuments.com is denied, and the notice of

determination, dated June 16, 2021, is sustained.

DATED: Albany, New York
        April 24, 2025

                                    /s/ Winifred M. Maloney
                                    ADMINISTRATIVE LAW JUDGE