

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition  
of  
**1LIFE HEALTHCARE, 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 March 1, 2011 through  
February 28, 2017.

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DETERMINATION  
DTA NO. 829434

Petitioner, 1Life Healthcare, Inc., 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 tax periods March 1, 2011 through February 28, 2017.

A videoconferencing hearing via CISCO Webex was held on October 13 and 14, 2020, with all briefs to be submitted by May 17, 2021, which date began the six-month period for issuance of this determination. Petitioner appeared by Pillsbury Winthrop Shaw Pittman LLP (Marc A. Simonetti, Esq. and Zachary T. Atkins, Esq., of counsel) and Andersen Tax LLC (Raymond J. Freda, Esq., and John R. Steffy, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Melanie Spaulding, Esq., of counsel). After reviewing the entire record in this matter, Jessica DiFiore, Administrative Law Judge, renders the following determination.

***ISSUES***

I. Whether the notice of determination had a rational basis.

II. Whether the Division of Taxation erred in determining that petitioner's annual membership fee is taxable as the sale of prewritten software.

III. Whether the notice of determination violates the Internet Tax Freedom Act.

IV. Whether the statutory penalty asserted against 1Life Healthcare, Inc., should be abated for reasonable cause.

### ***FINDINGS OF FACT***

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

1. Petitioner, 1Life Healthcare, Inc., is a Delaware corporation headquartered in San Francisco, California. During the period March 1, 2011 through February 28, 2017 (the audit period), petitioner was not registered with New York State to collect sales and use tax and, thus, did not collect New York State sales and use tax or file sales and use tax returns. Petitioner also did not file use tax returns or remit use tax during the audit period.

2. Petitioner has operated in the New York market since 2009.

3. Petitioner was founded in 2007 to address consumers' frustrations with the traditional healthcare model and the lack of what petitioner refers to as "high-touch" customer service.

4. Petitioner's company ethos and guiding philosophy is to provide world class service to healthcare patients and foster relationship-based primary care.

5. In the overview of its business in its Annual Report (Form 10-k) for the fiscal year ended December 31, 2019, petitioner provides, in relevant part, as follows:

“Our vision is to delight millions of members with better health and better care while reducing the total cost of care. Our mission is to transform health care for all through our human-centered, technology powered model. We are a membership-based primary care platform with seamless digital health and inviting in-office care, convenient to where people work, shop, live and click.

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We have developed a modernized healthcare membership model based on direct consumer enrollment as well as employer sponsorship. Our annual membership model includes seamless access to 24/7 digital health services paired with inviting in-office care routinely covered under health insurance programs. Our technology drives high monthly active usage within our membership, promoting ongoing and longitudinal patient relationships for better health outcomes and high member retention. Our technology also helps our service-minded team in building trust and rapport with our members by facilitating proactive digital health outreach as well as responsive on-demand virtual and in-office care.”

6. In the section of the Annual Report entitled “Value Proposition for Consumer,” petitioner lists, among other things, greater engagement for better health and better care, unique digital health experience, superior in-office care experience, and longitudinal approach to care.

In the subsection for greater engagement for better health and better care, it states as follows:

“We regularly and proactively engage our members digitally and in-person. Members can digitally access medical information, prescriptions, lab results and other health data, and can reach out to our team regarding medical issues or health questions around-the-clock. Members may receive digital health status check-ins before and after office encounters, and our technology facilitates further follow-up from our providers.”

In the subsection for unique digital health experience, it states:

“Our dedicated and compassionate providers and other team members deliver 24/7 digital care. Members engage through our website or mobile app in timely synchronous and asynchronous interactions, selecting their communication modality of choice, including messaging, text, voice and video. Our in-house virtual team delivers 24/7 service to address health concerns and administrative questions, coordinating with our in-office providers through a common EHR that is shared across digital and in-office settings.”

7. In the section of the Annual Report entitled “Our Competitive Strengths,” there is a subsection stating, “Extraordinary Customer Experience.” This subsection provides as follows:

“Our human-centered approach is focused on providing a superior experience to our members, as evidenced by the bundling of services within our membership model, the way we hire and train our team, the culture of caring we foster, our easy-to-use technology, our 24/7 digital health, our inviting in-office

care, our compassionate and salaried providers and our streamlined Lean processes. Whether members call, click or visit, they consistently experience outstanding service. Our virtual care is available around-the-clock. Our medical offices feel more like health spas, and our providers and staff are very friendly and trained in customer service. We do not keep members waiting long, if at all, and our longer appointments provide our team with more time to address member needs. Our technology is designed to promote frictionless access, ease of use and high engagement. We look to address the whole-person needs of our members, providing physical and mental health services, lab services, and coordinating specialty services with health network partners. Our administrative staff is available to answer benefits questions and help navigate the healthcare ecosystem on behalf of our members.”

8. Petitioner offers membership-based services, referred to as “care navigation services,” to patients of One Medical PCs to complement the One Medical PCs’ medical care and professional clinical services. One Medical PCs are physician-owned professional corporations that provide medical services in-office or virtually (collectively One Medical Group). Petitioner and the One Medical PCs operate under the brand name “One Medical.”

9. Petitioner does not own the One Medical Group or any of the One Medical PCs, nor does it have any authority or responsibility with respect to the provision of medical care and services to the patients of the One Medical PCs.

10. The One Medical PCs are owned by healthcare providers licensed in their respective states.

11. Petitioner has entered into an administrative services agreement with each One Medical PC to provide non-medical administrative, management and operations support services.

### ***Care Navigation Services***

12. Petitioner’s care navigation services it provides to patients of One Medical PCs are non-clinical, personal services.

13. During the audit period, petitioner provided the following ten care navigation services to its members: (i) advice regarding One Medical provider selection (24/7); (ii)

specialist referral management advice (24/7); (iii) primary care, specialty care, and procedure booking (24/7); (iv) assistance with billing and insurance inquiries (24/7); (v) responses to individuals' non-clinical health questions (follow-up questions and information requests) (24/7); (vi) coordinating advance visit travel vaccination consultation; (vii) confirmation of prescription orders and refills from licensed prescribers at One Medical; (viii) access to, and transmission of, a member's electronic medical records, when requested by a member; (ix) personal reminders about certain health tasks, such as necessary lab work and vaccinations; and (x) wellness and behavioral coaching.

14. With respect to the first care navigation service, "advice regarding One Medical provider selection," petitioner advises its members on selecting One Medical clinicians that are the best match for them. Petitioner's members may have specific health concerns and are searching for a clinician with expertise in a particular area, they may be interested in seeing a clinician who has a certain practice style, or they may be looking for a clinician who has experience with a particular population, and petitioner helps them select One Medical clinicians that best fit their needs.

15. With respect to the second care navigation service, "specialist referral management advice," petitioner assists members with seamlessly finding and timely seeing specialists for their particular healthcare needs. Petitioner identifies and refers members to the specialists for their needs, contacts specialists on members' behalf, and works to secure specialist appointments for members, streamlining members' access to leading specialists.

16. For the third care navigation service, "primary care, specialty care, and procedure booking," petitioner assists its members with booking primary care and specialist appointments and procedures with the One Medical PCs and other practices.

17. With respect to the fourth care navigation service, “assistance with billing and insurance inquiries,” petitioner answers its members’ questions regarding medical bills and insurance and acts as a liaison between members and insurance companies or other third parties. Petitioner spends time explaining medical billing and insurance-related matters to its members, helping them understand the process and communicating on behalf of its members with insurance companies and others who issue medical bills.

18. With respect to the fifth care navigation service, “responses to individuals’ non-clinical health questions (follow-up questions and information requests) (24/7),” petitioner answers any questions its members may have about how petitioner’s services work, how they can obtain something, or what they may need to do next.

19. With respect to the sixth care navigation service, “coordinating advance visit travel vaccination consultation,” petitioner supports members who may be traveling internationally and require advance healthcare-related planning. A member may need certain medications or vaccinations prior to traveling internationally and the member can reach out to petitioner for assistance obtaining the necessary medications or vaccinations prior to the trip.

20. With respect to the seventh care navigation service, “confirmation of prescription orders and refills from licensed prescribers at One Medical,” petitioner supports members’ prescription needs. Petitioner provides information to members about their prescriptions, facilitates prescription renewals for members, and communicates with pharmacies on behalf of members.

21. With respect to the eighth care navigation service, “access to, and transmission of, member’s electronic medical records, when requested by a member,” petitioner maintains electronic medical records for its members. When a member specifically requests it, petitioner

will file, edit, organize, or transmit its member’s electronic medical records to or on behalf of the member as appropriate.

22. With respect to the ninth care navigation service, “personal reminders about certain health tasks, such as necessary lab work and vaccinations,” petitioner regularly and proactively engages with its members to assess their health status and mental wellness, encourage adherence to treatment protocols, and follow up with reminders on key health initiatives. Petitioner proactively reaches out to members to encourage screening for cancers, chronic diseases, anxiety, and depression.

23. With respect to the tenth care navigation service, “wellness and behavioral coaching,” petitioner advises members with lifestyle changes, such as stress or weight management, and provides wellness offerings. For members with very complex diagnoses, petitioner’s tenth care navigation service may include providing greater care coordination and an extra personal connection.

24. Petitioner has a team that provides the care navigation services to members (the Care Team). The Care Team is comprised of the Admin Team, Office Managers and Operations, the Membership Advisory Team, the Virtual Routing Team, Care Navigators, and Health Coaches.

25. Petitioner’s Care Team had the following number of full-time equivalent members as of December 31 each year from 2013 to 2017.

Care Team Headcount					
	2013	2014	2015	2016	2017
Full-time Employees	114	150.4	279.5	349.95	373.645

26. Petitioner’s Admin Team, which comprised the largest sub-team within the Care Team, had the following number of full-time equivalent members as of December 31 each year from 2013 to 2017.

Admin Team Headcount					
	2013	2014	2015	2016	2017
Full-time Employees	92	116	221	275	284

27. The Admin Team is the front-line customer service team that interfaces with and provides care navigation services to petitioner’s members. Petitioner could not provide care navigation services to its members without the Admin Team. The Admin Team works from the One Medical PC offices, which gives them a better understanding of how the One Medical PCs operate, and in turn allows them to provide a higher degree of care to members.

28. The Admin Team receives and responds to members’ telephone calls, messages, and e-mails, requesting assistance related to the medical care they are receiving from the One Medical PCs. Members can also speak with the Admin Team in person at the One Medical offices or send secure messages to them through the One Medical web portal (Web Portal). The Admin Team also proactively calls and otherwise reaches out to members to ensure that their needs relative to the medical care they receive from the One Medical PCs are being met. Admin Team members are encouraged to form relationships with members.

29. The recruiting process for the Admin Team is competitive and rigorous, and petitioner looks for candidates with hospitality and service industry backgrounds, strong verbal and written communication skills, strong problem-solving skills, and team-working skills. Admin members must have high emotional intelligence (EQ), be empathetic and provide exceptional customer service. Many Admin Team members have a bachelor’s degree. During



the audit period, new Admin Team members were required to undergo a four-week training process, including a full day of dedicated training on petitioner’s service ethos, multiple orientations, classroom time, shadowing training managers, and engaging in live practice with an observer. New Admin Team members generally take between three and six months to achieve full productivity. Petitioner carefully controls the quality of petitioner’s care navigation service. It does not hire temps for its Admin Team or outsource Admin Team functions to third parties. Petitioner’s provision of care navigation services is very labor-intensive.

30. Petitioner’s Admin Team handled the following number of non-clinical requests and tasks (e.g., emails, messages, referrals, refills, and billing support inquiries) for its members each year from 2011 to 2017:

Non-Clinical Member Requests and Tasks Handled by Admin Team							
	2011	2012	2013	2014	2015	2016	2017
Requests and Tasks	N/A	N/A	286,601	932,250	1,253,820	1,605,816	1,936,482

31. Petitioner’s Admin Team received the following number of calls from its members each year from 2011 to 2017:

Member Calls Received by Admin Team							
	2011	2012	2013	2014	2015	2016	2017
Calls	140,021	229,562	341,165	457,014	670,169	862,054	1,029,431
Average Calls/Week	2,693	4,415	6,561	8,789	12,888	16,578	19,797

32. On average, members made 1.8 calls to the Admin Team for every One Medical doctor visit during the audit period.

33. The Admin Team has very high service targets, such as answering incoming members calls within 18 seconds and responding to member e-mails and messages within 24 hours.

34. Petitioner’s total labor costs of providing care navigation services to its members from 2011 to 2017 were as follows:

Labor Costs of Providing Care Navigation Services							
	2011	2012	2013	2014	2015	2016	2017
Labor Costs	\$2,426,840	\$5,017,314	\$5,695,501	\$7,411,494	\$11,125,758	\$16,611,039	\$19,054,159

35. The Admin Team accounted for most of petitioner’s labor costs of providing care navigation services during the audit period.

36. Virtual routing was included in Admin costs. Virtual routing is moving information within petitioner’s system. Virtual routers will move forms of patient requests that come in via fax or mail and get them to the person to perform the required task.

***Membership Fees***

37. Petitioner’s membership-based service for One Medical Group patients is based on direct consumer enrollment and employer sponsorship.

38. Petitioner sells memberships directly to consumers for an annual fee (Membership Fee).

39. Petitioner also is engaged in contractual arrangements known as capitation arrangements with enterprise clients (employers) for memberships for their employees in exchange for Membership Fees. When enterprise clients pay the fee for their employees, petitioner refers to them as Enterprise Fees. The Enterprise Fees clients pay to petitioner under capitation arrangements are typically based on a per employee per month rate.

40. Payment of the Membership Fee or Enterprise Fee is not a prerequisite for receiving medical care from the One Medical PCs.

41. Petitioner had the following number of New York members as of December 31 of each year from 2011 to 2017:

New York Members							
Year	2011	2012	2013	2014	2015	2016	2017
Members	7,339	14,290	19,813	24,255	33,988	50,606	67,841

42. When petitioner first entered the New York market in 2009, the Membership Fee for new consumer members was \$199.00 per year.

43. During the audit period, the membership fee for new consumer members in the New York market was \$199.00 per year.

44. During the audit period, petitioner’s website provided the following regarding the Membership Fee:

“The Annual Membership Fee covers costs associated with access to the 1Life Healthcare proprietary technology platform, which includes such benefits as online appointment booking and online prescription renewal requests. Members who pay the Annual Membership Fee also have access to time-saving services through the One Medical Mobile App offered by petitioner, including online appointment booking, online prescription renewal requests, on-demand video visit technology, and digital access to virtual medical services on the go. The Annual Membership Fee also covers costs associated with high-touch and value-added non-medical services including lifestyle and wellness offerings and value-added personal assistance services . . .”

45. The website also provided as follows:

“1Life Healthcare is a healthcare technology and management services company affiliated with One Medical Group, which develops enhanced digital health tools and other services. 1Life Healthcare provides a proprietary technology platform which supports electronic management of health records, online scheduling and patient billing as well as other administrative services.

1Life Healthcare's mobile data and technology services offering includes video visit technology, digital dermatology and nutritional coaching apps.”

*Accessing the Care Navigation Services*

46. During the audit period, petitioner's members had five different means of accessing its care navigation services: (i) in person; (ii) by telephone; (iii) via e-mail; (iv) through the Web Portal; and (v) through the Mobile App.

47. Not all members used all of the various means of accessing petitioner's care navigation services.

48. The Web Portal is a website that members log into to access a variety of options that facilitate access to care navigation services.

49. Members have been able to access certain of petitioner's care navigation services through the Web Portal since at least 2006.

50. Contacting the Admin Team by telephone is quicker than contacting the Admin Team through the Web Portal or Mobile App.

51. At various points during the audit period, members could do the following through the Web Portal: (i) book primary care appointments with One Medical PC healthcare providers; (ii) view information based on their health history with One Medical PC health care providers, such as medications and blood pressure data; (iii) communicate with the Admin Team and One Medical PC healthcare providers via secure messaging; and (iv) request renewals of existing prescriptions.

52. All of the Web Portal's functions can be accomplished through other means.

53. Members are not required to use the Web Portal to access care navigation services.

54. Some care navigation services were not directly accessible through the Web Portal, such as specialty care and procedure booking outside the One Medical PCs. However, both

could be done through the Web Portal if sought through sending a message. Some care navigation services were only accessible through the Web Portal for part of the audit period.

55. Members who wish to use the Web Portal must create a user account with credentials provided as part of the member registration process.

56. Members who access care navigation services through the Web Portal do not incur any additional charges for doing so. Petitioner has never incrementally increased the Membership Fee because it added new features to the Web Portal.

57. The Web Portal has evolved over time, with features having been introduced before, during, and after the audit period.

58. All information accessible to members through the Web Portal resides in petitioner's backend computer system.

59. During the audit period, members' access to and use of the Web Portal and Mobile App were subject to written terms and conditions contained in petitioner's Terms of Service. The parties stipulated that the Terms of Service submitted into the record were consistent with those that were provided during the audit period. The Terms of Service stated, in part, as follows:

“Welcome to One Medical Group! 1Life Healthcare, Inc. (“1Life Healthcare”) and its affiliated One Medical Group entities (collectively, the “Companies,” “we” or “us”) offer a service that allows Users (defined below) to manage their health using online-enabled technology, enhanced digital health tools and other services (the “Service”) through its online platform located at [www.onemedical.com](http://www.onemedical.com) (the “Website”) and mobile device application (“App”).”

60. Its terms of service granted members a personal, limited, non-exclusive, nontransferable, non-sublicensable license to download, install, and use the Mobile App on a mobile device. Petitioner's terms of service also restricted members' use of the software and technology that enabled the Mobile App, together with any updates and bug fixes, and the

graphics, audio, messages, photos, or profiles and works of authorship that petitioner provided or made available through its services, to personal and non-commercial purposes.

61. Petitioner launched the Mobile App for the iOS mobile operating system on September 27, 2010.

62. Mobile applications developed for the iOS mobile operating system are not compatible with Android mobile operating systems and vice versa.

63. Petitioner launched the Mobile App for the Android mobile operating system on March 27, 2013. Before the Mobile App launched for the Android mobile operating system, members with Android mobile devices were unable to download, install, or use the Mobile App.

64. Members can download the iOS version of the Mobile App from the iOS app store and the Android version of the Mobile App from the Google Play app store.

65. The Mobile App is only available for iOS and Android mobile devices, and members with mobile devices running other mobile operating systems are unable to download, install, or use the Mobile App.

66. Approximately 80% of members use iOS devices and approximately 20% of members use Android devices.

67. Both the iOS and Android versions of the Mobile App can be downloaded and installed for free.

68. Some care navigation services are not accessible directly through the Mobile App, including advice regarding One Medical provider selection, specialist referral management advice, specialty care and certain procedure booking, and coordinating advance visit travel vaccination consultation. However, advice regarding provider selection and specialist referral management is accessible through the app if those care navigation services are sought through

sending a message using the app. Some care navigation services were only accessible through the Mobile App for part of the audit period.

69. At various points during the audit period, members were able to do the following through the Mobile App: (i) book primary care appointments with One Medical PC healthcare providers; (ii) communicate with One Medical PC healthcare providers by video; (iii) submit health-related information to One Medical PC healthcare providers; (iv) request renewals of existing prescriptions; (v) communicate with the Admin Team and One Medical PC healthcare providers via secure messaging; and (vi) view information based on their health history with One Medical PC health care providers, such as vaccinations, allergies, and medications.

70. The Mobile App facilitates communication between people.

71. Members are not required to download or use the Mobile App to obtain petitioner's care navigation services.

72. All of the Mobile App's functions can be accomplished through other means.

73. The Mobile App is almost entirely duplicative of the Web Portal.

74. Members use the same credentials for the Mobile App and Web Portal.

75. The Mobile App and Web Portal connect to the same backend computer system.

76. Messages sent or received through the Web Portal are also accessible on the Mobile App.

77. Data is not permanently stored on the Mobile App; it is stored in petitioner's databases.

78. The Mobile App has evolved over time, with features introduced during and after the audit period.

79. Petitioner has never incrementally increased the Membership Fee because it added new features to the Mobile App. It also did not increase the Membership Fee incrementally after launching each version of the Mobile App.

80. The Mobile App is proprietary to petitioner.

81. Petitioner tracks how its members use the Mobile App through a variety of mechanisms. There are two primary mechanisms to track activity. One is that certain activities create changes to data in its database so it can track when that data has been changed. The other is that petitioner uses analytics tracking software packages to log when activities have occurred and on what platform.

82. Petitioner does not know the percentage of members who used the Mobile App for 2011 through 2014 and for part of 2015. At that time, petitioner's analytics platform, and ability to understand the Mobile App activity was not sufficiently sophisticated. During the trackable part of 2015, approximately 25% of members used the Mobile App at least once over the course of that year. In 2016, approximately 40% used the Mobile App at least once, and in 2017, 53%.

83. In 2016, on average, 13.3% of petitioner's members took at least one meaningful action, such as booking an appointment or sending a message to the Admin Team, in the Mobile App, in any given month. Meaningful action requires an action, such as booking a visit or requesting a video visit. Searching for an appointment but not actually booking one would not constitute an action that is meaningful.

84. Petitioner's Product Development Team is responsible for designing and building the internally developed software, including internal tooling that supports petitioner's business operations, the Web Portal, and the Mobile App. The Product Development Team consists of software engineers who write code, product designers who design the experience, and product



managers who are responsible for determining requirements for each feature and coordinating feature launches.

85. The Product Development Team does not interface with members.

86. Petitioner's Product Development Team had the following number of employees as of December 31 each year from 2011 to 2017:

Product Development Team Headcount							
	2011	2012	2013	2014	2015	2016	2017
Employees	10	19	22	31	38	58	60

87. Only a small percentage of the Product Development Team actively worked on the Mobile App.

88. From January 2013 to February 2017, a total of seven different software engineers and one third-party firm actively worked on the Mobile App.

89. In 2014, three individuals actively worked on the Mobile App.

90. Petitioner's Mobile App-related costs from January 2013 to February 2017 accounted for 5.645% of its labor costs related to the Product Development Team from 2013 to 2017.

91. Petitioner's Mobile App-related costs from January 2013 to February 2017 accounted for 5.164% of its total costs related to the Product Development Team from 2013 to 2017.

92. Petitioner's Mobile-App related costs from January 2013 to February 2017 accounted for 3.026% of its total technology spending from 2013 to 2017.

93. Petitioner's labor costs of providing care navigation services to members from 2013 to 2017 were more than 35 times greater than its Mobile App-related costs between January 2013 and February 2017.

### *The Audit*

94. On or about May 25, 2017, the Division of Taxation (Division) commenced a sales and use tax examination of petitioner for the audit period.

95. The Division's auditor, Charles Crane, had conference calls and exchanged emails with petitioner's representatives to discuss the company's business, sales, and purchases.

96. The Division examined three areas of petitioner's business: (i) its sales; (ii) its fixed asset purchases, such as fixtures and equipment; and (iii) its non-fixed asset purchases.

97. On or about June 2, 2017, the Division issued an information document request (IDR) to petitioner. The IDR was the only one the Division issued during the course of the audit, and it was a standard type issued at the commencement of a sales and use tax audit. The Division did not issue any additional IDRs to specifically examine the taxable or nontaxable components of petitioner's Membership Fee.

98. In the IDR, the Division specifically requested all exemption documents supporting non-taxable sales, including documents showing resale, exempt use, exempt organization, and capital improvement certificates. The IDR also requested any other documentation necessary to prove non-taxable sales.

99. The Division reviewed, among other things, petitioner's accounting books and records, including, but not limited to, invoices, sales journal data, fixed asset lists, and expense records, petitioner's terms of service, petitioner's website, and petitioner's Web Portal terms of use.

100. The Division reviewed petitioner's sales records in detail and determined that they were adequate.

101. The Division was not familiar with petitioner's care navigation services.

102. The Division never requested or received a demonstration of the Web Portal or Mobile App during the audit. The Division's auditor had no first-hand knowledge of the Web Portal or the Mobile App.

103. The Division's auditor was not a member of petitioner and had never been a member.

104. The Division determined that petitioner's Membership Fee sales had both nontaxable and taxable components.

105. The Division requested a breakout of the nontaxable and taxable portions of petitioner's services. The Division advised petitioner that if the company provided documentation quantifying the portions of the Membership Fees that related to software and care navigation services, respectively, the Division would assess tax on the portion that related to software. However, petitioner did not provide a breakdown of its services.

106. The Division's auditor testified that determining the taxability of a transaction that has taxable and nontaxable components can complicate a sales and use tax audit because it requires an examination of the components of the transaction to determine the transaction's primary function.

107. The Division determined that petitioner's care navigation services, described in petitioner's terms of service as "higher touch and value-added nonmedical services," were nontaxable. However, based on a review of petitioner's website, including petitioner's terms of

service, e-mail correspondence with petitioner's representative, and conversations within the Division, it concluded that petitioner was selling taxable software to its members.

108. The Division determined the use of the software through the app was not incidental and was taxable because the Membership Fee and Enterprise Fee covered the cost associated with the proprietary technology platform and the customer has the right to use and control the app. People who do not pay the fee do not have access to the app. It concluded that the Membership Fee and Enterprise Fee constituted receipts from sales of prewritten computer software and were taxable in their entirety.

109. The Division determined that petitioner earned the following Membership Fees and Enterprise Fees in New York during the audit period:

Period Ended	Membership and Enterprise Fees
05/31/2011	\$146,798.61
08/31/2011	\$195,778.47
11/30/2011	\$245,140.41
02/29/2012	\$285,334.41
05/31/2012	\$385,626.85
08/31/2012	\$470,162.44
11/30/2012	\$526,323.52
02/28/2013	\$596,727.03
05/31/2013	\$686,903.18
08/31/2013	\$755,917.80
11/30/2013	\$803,497.59
02/28/2014	\$862,462.00

05/31/2014	\$984,469.30
08/31/2014	\$971,883.42
11/30/2014	\$1,043,166.80
02/28/2015	\$1,060,658.89
05/31/2015	\$1,231,331.29
08/31/2015	\$1,378,456.28
11/30/2015	\$1,388,439.59
02/29/2016	\$1,435,978.04
05/31/2016	\$1,507,245.50
08/31/2016	\$1,551,770.93
11/30/2016	\$1,653,758.28
02/28/2017	\$1,833,337.87
<b>TOTAL</b>	<b>\$22,001,168.50</b>

110. Petitioner does not dispute the amount of Membership Fees or Enterprise Fees that the Division determined petitioner earned during the audit period.

111. The Division computed the sales tax allegedly due on petitioner’s sales of memberships during the audit period by multiplying the Membership Fees and Enterprise Fees by the combined state and local sales tax rate in New York City, 8.875%, as shown in the table below.

Period Ended	Membership and Enterprise Fees	Tax Rate	Tax
05/31/2011	\$146,798.61	8.875%	\$13,028.38
08/31/2011	\$195,778.47	8.875%	\$17,375.34

11/30/2011	\$245,140.41	8.875%	\$21,756.21
02/29/2012	\$285,334.41	8.875%	\$25,323.43
05/31/2012	\$385,626.85	8.875%	\$34,224.38
08/31/2012	\$470,162.44	8.875%	\$41,726.92
11/30/2012	\$526,323.52	8.875%	\$46,711.21
02/28/2013	\$596,727.03	8.875%	\$52,959.52
05/31/2013	\$686,903.18	8.875%	\$60,962.66
08/31/2013	\$755,917.80	8.875%	\$67,087.70
11/30/2013	\$803,497.59	8.875%	\$71,310.41
02/28/2014	\$862,462.00	8.875%	\$76,543.50
05/31/2014	\$984,469.30	8.875%	\$87,371.65
08/31/2014	\$971,883.42	8.875%	\$86,254.65
11/30/2014	\$1,043,166.80	8.875%	\$92,581.05
02/28/2015	\$1,060,658.89	8.875%	\$94,133.48
05/31/2015	\$1,231,331.29	8.875%	\$109,280.65
08/31/2015	\$1,378,456.28	8.875%	\$122,337.99
11/30/2015	\$1,388,439.59	8.875%	\$123,224.01
02/29/2016	\$1,435,978.04	8.875%	\$127,443.05
05/31/2016	\$1,507,245.50	8.875%	\$133,768.04
08/31/2016	\$1,551,770.93	8.875%	\$137,719.67
11/30/2016	\$1,653,758.28	8.875%	\$146,771.05
02/28/2017	\$1,833,337.87	8.875%	\$162,708.74
TOTAL	\$22,001,168.50		\$1,952,603.69

112. Based on its calculations, the Division concluded that petitioner owes \$1,952,603.69 of New York sales tax on Membership Fees and Enterprise Fees received during the audit period.

113. Petitioner does not dispute the computation of New York sales tax that would be due if Membership Fees and Enterprise Fees were taxable for the audit period.

114. The Division reviewed petitioner's capital records and determined that they were adequate.

115. The Division concluded that petitioner owes New York use tax on purchases of fixtures and equipment during the audit period.

116. The Division estimated the use tax allegedly due on petitioner's purchases of fixtures and equipment during the audit period.

117. The Division computed the New York portion of fixed assets petitioner purchased during the audit period using invoices for a test period.

118. The Division multiplied the total purchase price of the estimated New York fixed assets by an error ratio to estimate the purchase price of taxable fixtures and equipment petitioner purchased during the audit period for use in New York, which amounts are shown in the table below.

Period Ended	Deemed Taxable Capital
05/31/2011	\$66,590.99
08/31/2011	\$112,177.92
11/30/2011	\$72,454.76
02/29/2012	\$149,110.54

05/31/2012	\$49,535.10
08/31/2012	\$94,533.97
11/30/2012	\$69,669.18
02/28/2013	\$20,079.66
05/31/2013	\$10,968.68
08/31/2013	\$4,731.72
11/30/2013	\$12,768.45
02/28/2014	\$4,757.75
05/31/2014	\$2,558.99
08/31/2014	\$3,517.30
11/30/2014	\$7,627.72
02/28/2015	\$17,378.14
05/31/2015	\$25,552.34
08/31/2015	\$131,519.55
11/30/2015	\$205,586.70
02/29/2016	\$117,525.86
05/31/2016	\$202,669.30
08/31/2016	\$217,440.34
11/30/2016	\$90,788.39
02/28/2017	\$14,238.08
TOTAL	\$1,703,781.43

119. The Division computed the use tax it claimed was due on petitioner's purchases of fixtures and equipment during the audit period by multiplying the estimated purchase price of



taxable fixtures and equipment purchased for use in New York, as shown in finding of fact 118, by the combined state and local use tax rate in New York City, 8.875%, as shown in the table below.

Period Ended	Deemed Taxable Capital	Tax Rate	Tax
05/31/2011	\$66,590.99	8.875%	\$5,909.95
08/31/2011	\$112,177.92	8.875%	\$9,955.79
11/30/2011	\$72,454.76	8.875%	\$6,430.36
02/29/2012	\$149,110.54	8.875%	\$13,233.56
05/31/2012	\$49,535.10	8.875%	\$4,396.24
08/31/2012	\$94,533.97	8.875%	\$8,389.89
11/30/2012	\$69,669.18	8.875%	\$6,183.14
02/28/2013	\$20,079.66	8.875%	\$1,782.07
05/31/2013	\$10,968.68	8.875%	\$973.47
08/31/2013	\$4,731.72	8.875%	\$419.94
11/30/2013	\$12,768.45	8.875%	\$1,133.20
02/28/2014	\$4,757.75	8.875%	\$422.25
05/31/2014	\$2,558.99	8.875%	\$227.11
08/31/2014	\$3,517.30	8.875%	\$312.16
11/30/2014	\$7,627.72	8.875%	\$676.96
02/28/2015	\$17,378.14	8.875%	\$1,542.31
05/31/2015	\$25,552.34	8.875%	\$2,267.77
08/31/2015	\$131,519.55	8.875%	\$11,672.36
11/30/2015	\$205,586.70	8.875%	\$18,245.82

02/29/2016	\$117,525.86	8.875%	\$10,430.42
05/31/2016	\$202,669.30	8.875%	\$17,986.90
08/31/2016	\$217,440.34	8.875%	\$19,297.83
11/30/2016	\$90,788.39	8.875%	\$8,057.47
02/28/2017	\$14,238.08	8.875%	\$1,263.63
TOTAL	\$1,703,781.43		\$151,210.60

120. Based on its calculations, the Division concluded that petitioner owes \$151,210.60 of additional New York use tax on fixtures and equipment purchased during the audit period.

121. Petitioner does not dispute the computation of use tax on the estimated taxable New York fixtures and equipment purchased during the audit period.

122. The Division reviewed the expense, or non-fixed asset purchase records that petitioner provided and determined that they were adequate.

123. The Division used a test period to estimate the use tax allegedly due on petitioner's non-fixed asset purchases during the audit period.

124. The Division used the period January 1, 2016 through March 31, 2016 (test period) as the test period to estimate the New York use tax allegedly due on petitioner's non-fixed asset purchases during the audit period.

125. The Division determined that petitioner had a total of \$12,599.66 of non-fixed asset expenses during the test period and deemed such expenses taxable.

126. The Division determined that petitioner allegedly owes \$1,118.22 of New York use tax on non-fixed asset purchases made during the test period by multiplying the deemed taxable purchase price of \$12,599.66 by the combined state and local use tax rate in New York City, 8.875%.

127. The Division computed the use tax allegedly due on petitioner's non-fixed asset purchases for the audit period by extrapolating the \$1,118.22 of use tax due for the test period to all the filing periods, as shown in the table below.

Period Ended	Deemed Tax Due
05/31/2011	\$1,118.22
08/31/2011	\$1,118.22
11/30/2011	\$1,118.22
02/29/2012	\$1,118.22
05/31/2012	\$1,118.22
08/31/2012	\$1,118.22
11/30/2012	\$1,118.22
02/28/2013	\$1,118.22
05/31/2013	\$1,118.22
08/31/2013	\$1,118.22
11/30/2013	\$1,118.22
02/28/2014	\$1,118.22
05/31/2014	\$1,118.22
08/31/2014	\$1,118.22
11/30/2014	\$1,118.22
02/28/2015	\$1,118.22
05/31/2015	\$1,118.22
08/31/2015	\$1,118.22
11/30/2015	\$1,118.22

02/29/2016	\$1,118.22
05/31/2016	\$1,118.22
08/31/2016	\$1,118.22
11/30/2016	\$1,118.22
02/28/2017	\$1,118.22
Total	\$26,837.28

128. Based on its calculations, the Division concluded that petitioner owes \$26,837.28 of additional New York use tax on non-fixed asset purchases during the audit period.

129. Petitioner does not dispute the computation of use tax on the non-fixed assets estimated to be due based on the test period.

130. Based on its calculations, the Division concluded that petitioner owes additional New York sales and use tax for each of the taxable periods within the audit period as shown in the table below.<sup>1</sup>

Period Ended	Tax on Sales	Tax on Capital	Tax Expenses	Total Tax
05/31/2011	\$13,028.38	\$5,909.95	\$1,118.22	\$20,056.55
08/31/2011	\$17,375.34	\$9,955.79	\$1,118.22	\$28,449.35
11/30/2011	\$21,756.21	\$6,430.36	\$1,118.22	\$29,304.79
02/29/2012	\$25,323.43	\$13,233.56	\$1,118.22	\$39,675.21

<sup>1</sup> In the stipulation of facts and petitioner's proposed findings of fact, the tax on capital appears to have the tax due for the period ending May 31, 2011 as the amount for the period ending August 31, 2011, causing the amount for each period to actually be the amount due for the following period (i.e., the tax on capital due for May 31, 2011 in the proposed findings of fact table of \$9,955.79 is actually the tax due for the period ending August 30, 2011). Additionally, the \$9,955.79 amount showing in the tax on capital amount for February 28, 2017 should read \$5,909.95 as that is the amount that would have been entered for the tax on capital for May 31, 2011 if everything were not off by a row. However, the total tax due collectively for sales, capital and tax on expenses is the correct amount. Additionally, the total tax due for February 28, 2017 is shown to be \$165,090.53 in the stipulation of facts. According to the exhibits submitted with the stipulation, and by adding the three proper amounts due for sales, capital and expenses, the actual amount due is \$165,090.59.

05/31/2012	\$34,224.38	\$4,396.24	\$1,118.22	\$39,738.84
08/31/2012	\$41,726.92	\$8,389.89	\$1,118.22	\$51,235.03
11/30/2012	\$46,711.21	\$6,183.14	\$1,118.22	\$54,012.57
02/28/2013	\$52,959.52	\$1,782.07	\$1,118.22	\$55,859.81
05/31/2013	\$60,962.66	\$973.47	\$1,118.22	\$63,054.35
08/31/2013	\$67,087.70	\$419.94	\$1,118.22	\$68,625.86
11/30/2013	\$71,310.41	\$1,133.20	\$1,118.22	\$73,561.83
02/28/2014	\$76,543.50	\$422.25	\$1,118.22	\$78,083.97
05/31/2014	\$87,371.65	\$227.11	\$1,118.22	\$88,716.98
08/31/2014	\$86,254.65	\$312.16	\$1,118.22	\$87,685.03
11/30/2014	\$92,581.05	\$676.96	\$1,118.22	\$94,376.23
02/28/2015	\$94,133.48	\$1,542.31	\$1,118.22	\$96,794.01
05/31/2015	\$109,280.65	\$2,267.77	\$1,118.22	\$112,666.64
08/31/2015	\$122,337.99	\$11,672.36	\$1,118.22	\$135,128.57
11/30/2015	\$123,224.01	\$18,245.82	\$1,118.22	\$142,588.05
02/29/2016	\$127,443.05	\$10,430.42	\$1,118.22	\$138,991.69
05/31/2016	\$133,768.04	\$17,986.90	\$1,118.22	\$152,873.16
08/31/2016	\$137,719.67	\$19,297.83	\$1,118.22	\$158,135.72
11/30/2016	\$146,771.05	\$8,057.47	\$1,118.22	\$155,946.74
02/28/2017	\$162,708.74	\$1,263.63	\$1,118.22	\$165,090.59
TOTAL	\$1,952,603.69	\$151,210.60	\$26,837.28	\$2,130,651.57

131. Based on its calculations, the Division concluded that petitioner owes \$2,130,651.57 of additional New York sales and use tax for the audit period.

132. The Division also asserted a penalty against petitioner pursuant to Tax Law § 1145 (a) (1) (i) for failure to file a return or pay over any sales or use tax.

133. On or about April 3, 2019, the Division issued to petitioner a statement of proposed audit changes asserting that it owes additional tax in the amount of \$2,130,651.57, interest in the amount of \$1,793,742.32, and penalty in the amount of \$639,192.84, for a total of \$4,563,586.73 for the audit period.

134. The Division issued to petitioner notice of determination L-049666990, dated April 12, 2019 (notice), asserting that petitioner owes additional tax in the amount of \$2,130,651.57, interest in the amount of \$1,807,795.67, and penalty in the amount of \$639,192.84, for a total of \$4,577,640.08 for the audit period.

135. By letter dated August 21, 2019, the Division notified petitioner that it had completed its sales and use tax examination.

136. Pursuant to 20 NYCRR 3000.15 (d) (6), petitioner submitted 185 proposed findings of fact. In accordance with State Administrative Procedure Act § 307 (1), proposed findings of fact 1, 3 through 15, 17 through 20, 22 through 25, 29, 30, 32 through 44, 47 through 71, 74, 75, 77, 78, 80 through 82, 84 through 88, 90 through 92, 94 through 100, 102 through 106, 108 through 111, 113, 114, 116, 121, 124 through 134, 136 through 139, 141 through 146, 148, 152 through 154, and 157 through 184 are supported by the record, and have been consolidated, condensed, combined, renumbered and substantially incorporated herein. Proposed findings of fact 2, 28, 45, 83, 89, 101, 107, 112, 119, 120, 140, 147, 150, 151, and 156 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 16, 21, 26, 27, 31, 46, 72, 73, 76, 79, 93, 115, 117, 118, 122, 123, 135, 149, 155, and 185 are rejected as conclusory, irrelevant and/or not supported by the record.

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

137. Petitioner asserts the notice has lost the presumption of correctness, its Membership Fees are for nontaxable services and not the taxable sale of prewritten software, the Division's assessment violates the Federal Internet Tax Freedom Act (ITFA), and the Division's assessment of a statutory penalty should be abated. Petitioner asserts the notice is irrational because the Division did not properly examine petitioner's business. It claims the Division did not understand the services petitioner provided and did not request an explanation of the same, so it did not have the information necessary to determine the primary function of the transaction.

Petitioner contends that its Membership Fees are not subject to sales tax because they are for care navigation services that are not enumerated taxable services and the primary function of a membership is receiving those services, not the sale of prewritten software. Petitioner also asserts that the Division's imposition of sales tax on its Membership Fees violates ITFA because the Division has imposed sales tax on the care navigation services provided through a Mobile App that are not subject to tax when provided through other means, constituting per se discrimination against electronic commerce. It claims the Division's assessment also constitutes a "tax on internet access" to the extent it imposes tax on the homepage and messaging features of petitioner's Web Portal and Mobile App. Petitioner also seeks to have the statutory penalty abated claiming it acted with reasonable cause and not willful neglect because it had no reason to believe its Membership Fees were subject to New York sales tax.

138. The Division asserts petitioner is selling taxable prewritten software when it gives its clients access and the right to use its software. The Division contends that the use of

petitioner's Mobile App and Web Portal constitutes a transfer of possession of the software because the member gains constructive possession, including the right to use, control, or direct the use of the software. The Division also argues that the use of petitioner's software is the primary function of its product, claiming the software's functionality and convenience offered to petitioner's members is the very reason customers purchase a membership.

The Division asserts that it had a rational basis to issue the notice because it requested documents supporting petitioner's position that it was making non-taxable sales, but it failed to provide any documentation in response. The Division also argues that assessing tax on prewritten software is not a violation of ITFA because petitioner is not offering its users "internet access." The Division claims that taxing petitioner's product does not violate ITFA because petitioner provides messaging capabilities between its customers and its administrative team, but it does not provide its customers with an email platform to send emails to persons outside of petitioner's Admin Team. The Division also argues that prewritten software is taxable regardless of whether it is delivered in person on tangible media or electronically over the internet and therefore, it does not violate ITFA's prohibition on discriminatory taxes on electronic commerce. The Division contends petitioner has failed to meet its burden of proving that there is reasonable cause for penalty abatement because being a start-up is not a compelling argument to abate statutory penalty.

### ***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 Tribunal*, 187 AD2d 768 [3d Dept 1992], *lv denied* 81 NY2d 704 [1993]). However, a determination of tax must have a rational basis 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 Comm'n*, 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 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.”

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).

Petitioner argues that the notices are irrational because the Division did not have the information necessary to determine the primary function of the transaction because it never requested it. Petitioner asserts that the Division’s auditor had no knowledge of the care

navigation services and therefore, could not determine the primary function of the integrated service. This argument is not persuasive.

Upon commencing the audit, the Division issued an IDR requesting, among other things, all exemption documents supporting non-taxable sales, including a catchall phrase stating “[a]ny other documentation necessary to prove non-taxable sales.” After this, in discussions with the taxpayer, the Division again requested any additional information regarding petitioner’s position that its Membership Fee is for a service that is not subject to tax. The parties also stipulated that the Division reviewed petitioner’s accounting books and records, including invoices, sales journal data, fixed asset lists, expense records, petitioner’s terms of service, its website and its Web Portal’s terms of use. Additionally, Petitioner’s terms of service states that it offers “a service that allows users to manage their health using online-enabled technology, enhanced digital health tools and other services through its online platform . . . and mobile device application.” The terms of service also describe the petitioner in the section regarding the annual membership fee as “a healthcare technology and management services company . . . which develops enhanced digital health tools and other services . . . The Annual Membership Fee covers costs associated with access to the 1Life Healthcare proprietary technology platform . . .” Petitioner’s website also states as follows:

“The Annual Membership Fee covers costs associated with access to the 1Life Healthcare proprietary technology platform, which includes such benefits as online appointment booking and online prescription renewal requests. Members who pay the Annual Membership Fee also have access to time-saving services through the One Medical Mobile App offered by 1Life, including online appointment booking, online prescription renewal requests, on-demand video visit technology, and digital access to virtual medical services on the go.”

The Division requested records from petitioner on multiple occasions to support its position that it was selling a non-taxable service and then extensively reviewed the records

provided before ultimately determining it was selling taxable prewritten software. Based on the evidence provided in the record, the Division's determination that petitioner's Membership Fee was the taxable sale of prewritten software had a rational basis. If the Division did not have all of the information necessary to determine the primary function of the transaction, it is because such documentation was not provided by the petitioner, the entity required to present that evidence (*see Matter of Hygrade Casket Corp.*, Tax Appeals Tribunal, December 16, 1993). While petitioner may disagree with the Division's conclusion as to what it is selling, that does not make the Division's audit and ultimate issuance of the notice irrational.

B. Where there is a rational basis for the auditor's conclusion, the burden is then on the taxpayer to show by clear and convincing evidence that the methodology was unreasonable or that the amount assessed was erroneous (*see Matter of Meskouris Bros v. Chu*, 139 AD2d 813, 815 [3d Dept 1988]). Here, petitioner has met that burden.

Tax Law § 1105 (a) imposes a sales tax on the retail sale of tangible personal property, which is defined to include "pre-written computer software" (prewritten software) (*see* Tax Law §§ 1101 [b] [6]; 1105 [a]). Tax Law § 1101 (b) (14) defines prewritten software as "software which is not designed and developed by the author or other creator to the specifications of a specific purchaser." Tax Law § 1132 (c) creates a presumption that all receipts for property or services subject to tax under subdivisions (a) through (d) of Tax Law § 1105 are subject to tax and the burden of proving the contrary is borne by the vendor or its customer (20 NYCRR 532.4 [a] [1]; [b] [1]).

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 [SSOV]). In *SSOV*, the petitioner's purpose was to enable its members to meet with other

members of their choosing. Each member would submit a resume describing him or herself. The resume together with a photograph and a two or three-minute interview constituted that member's profile. The profile was then placed in the member profile library for other members to view. Each member could review the other members' profiles and issue invitations to meet each member they selected. The Division conducted an audit and ultimately issued a notice of determination finding the service provided to be a taxable information service pursuant to Tax Law § 1105 (c) (1). The petitioner paid the tax due and applied for a refund. The Division did not respond to the refund claim and ultimately the petitioner filed a petition appealing the denial. The administrative law judge determined that petitioner's activities constituted a taxable information service. He found that where each customer had a resume, photograph, and videotape compiled to create a member profile, this profile constituted a report and that members received a report every time another member's profile was reviewed.

The Tax Appeals Tribunal then reversed the administrative law judge's determination, finding that the primary function of petitioner's service was not to provide information services but to allow members to meet others. The Tribunal concluded "the 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" (citing *Matter of Building Contrs. Assoc. v Tully*, 87 AD2d 909 [3d Dept 1982] and *Matter of Woolworth Co.*, Tax Appeals Tribunal, December 1, 1994). The Tribunal rejected the Division's argument that the means by which a service is provided is the controlling factor in determining whether the subject service is taxable and also found "[t]o 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]).

The parties here disagree as to the nature of the Membership Fee. Petitioner contends that its Membership Fee is nontaxable because it is for its care navigation services, including, among others, medical provider selection advice, specialist referral management advice, primary care, specialty care and procedure booking, and billing and insurance inquiries assistance. The parties agree that the care navigation services petitioner provides are nontaxable. Some of these services are offered through the Mobile App and Web Portal, in addition to being available by phone, email, or in person. Others are available through messaging in the Mobile App and Web Portal. The Division argues that petitioner is selling prewritten software for use of the Mobile App and Web Portal, and the use of the prewritten software is the primary function of petitioner’s service. Petitioner’s Membership Fee includes the granting of a license to use software to its customers for use of the Mobile App and Web Portal to access the care navigation services. Petitioner advertises on its website that it uses a proprietary technology platform for its service.

Viewing petitioner’s service in its entirety, its primary function is to provide the care navigation services associated with the administrative part of its members medical needs. Because these services are not enumerated in section 1105 (c) of the Tax Law, petitioner’s Membership Fee is not subject to the sales tax imposed by this section. The mere fact that customers may utilize petitioner’s offerings through its software by accessing them through the Web Portal or the Mobile App does not make the service taxable (*see SSOV*). Using the Mobile App or the Web Portal to access the services is merely a component of petitioner’s overall service (*see id.*). To hold otherwise would be to determine the Membership Fee’s taxability by

the means in which the service is effectuated, not the service in its entirety, as required by the Tribunal (*see id.*).

The primary function of petitioner's service is to provide administrative assistance with its customers' medical needs. Using petitioner's software is only one way to take advantage of the services provided. People who subscribe have the option to contact petitioner over the phone, in person, through email, and through the Web Portal and Mobil App to assist them with, among other services, booking appointments, wellness coaching, explaining medical bills, and finding specialists. Petitioner's primary function is to assist its members with anything they may need regarding their care. Petitioner accomplishes this through its heavy investment in its Admin Team, the team that interacts with its customers directly. Petitioner's focus on its Admin Team is shown both in its Annual Report where extraordinary customer service is its strength with a focus on superior experience and in the time spent hiring and training its Admin Team. The hiring process for the Admin Team is competitive and extensive.

Additionally, petitioner has shown that the software it provides is not integral for all members who pay the Membership Fee. While some users may find using petitioner's software to access these services integral to their Membership Fee, others do not. This is evidenced by the fact that petitioner's members made 1.8 calls to it for every medical doctor visit during the audit period. Additionally, in 2015, approximately 75% of petitioner's members did not log into the Mobile App at all to access its services and, in 2016, approximately 60% did not log into the Mobile App.<sup>2</sup> This finding is further supported by the fact that the Membership Fee in the New York market has not changed since 2009, prior to petitioner launching the Mobile App for iOS

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<sup>2</sup> Notably, it was not provided in the record how many members logged into the website, another method of utilizing petitioner's software, to access its services.

mobile operating systems on September 27, 2010 and for Android mobile operating systems on March 27, 2013, the only operating systems on which the Mobile App can be accessed. The Membership Fee has also not increased despite the fact that more of the services included in the fee were accessible via the Mobile App and Web Portal as the audit period progressed. Further, while not controlling, petitioner's investment in its care navigation services both financially and in dedicated personnel is substantially larger than the costs associated with development of its Mobile App.

C. The Division relies on *Matter of Penfold v State Tax Commn*, in support of the proposition that if an aspect of a service is integral to the totality of the service, then the entire charge is taxable pursuant to Tax Law § 1101 (b) (3). There, petitioner attempted to separate out two parts of the same transaction. Petitioner provided refuse removal services and billed customers charging tax only on the refuse removal, but not the charge for ultimately dumping the refuse, taking the position that this was a separate, nontaxable service. In confirming the holding of the State Tax Commission, the Third Department cited to the language in Tax Law § 1105 (b) (3) that defines "receipt" as the charge for any taxable service without the deduction for expenses and found that the disposal of the refuse was an integral aspect of the refuse removal service and could not be a separate service arising from a different transaction and therefore, was also subject to tax. This holding stands for the proposition that an integral aspect of a service cannot be treated as a separate service arising out of a different transaction (*see id.*). It does not stand for the proposition that if an aspect of a service is integral to the service, the entire transaction is taxable. Indeed, that is not the standard for integrated services (*see id.*; *SSOV*). The standard for determining the taxability of integrated services with multiple components, as stated above, is to

determine the primary function of the service (*see SSOV*). Something can be integral to a service without being the primary function.

D. Because petitioner's Membership Fee has been found to be for nontaxable care navigation services, petitioner's argument that taxing it violates ITFA is moot. However, for completeness, such argument will be addressed.

In 1998, ITFA was enacted establishing a moratorium on state and local taxes on internet access and discriminatory taxes on electronic commerce (Pub L 105-27, 47 USC § 151 note), amended by Pub L 107-75; Pub L 108-435; and Pub L 110-108). Petitioner asserts that the Division's imposition of sales tax on its care navigation services, when provided over the internet through the Mobile App but not when provided through other means, is a "discriminatory tax" under ITFA § 1105 (2) (A) (i). A "discriminatory" tax is one that is imposed on products sold in electronic commerce but not on similar products sold by other means, or a tax imposed on products at a different rate than on transactions involving similar property, goods, or services, or imposing an obligation to collect or pay tax on a different person or entity than in other transactions involving similar property, goods, or services (*id.*).

Here, the Division is not assessing tax on the concededly nontaxable care navigation services, but is taxing the prewritten software used in offering these services, as it would if the prewritten computer software was sold by other means (*see* Tax Law §§ 1101 (b) (6); 1105). Additionally, state and local taxes on prewritten computer software are not discriminatory because they apply equally and at the same rates regardless of whether software is sold via electronic commerce or other means (*see id.*). The Division found that the prewritten software was the primary function of petitioner's service and was assessing tax on that sale of prewritten software; it was not unequally or unfairly taxing a product sold in electronic commerce.



Accordingly, the Division's assessment of tax does not discriminate against electronic commerce.

Petitioner also asserts that the Division's assessment of tax on the Membership Fee imposes a prohibited tax on internet access. ITFA provides that non-taxable internet access includes "homepage, electronic mail and instant messaging . . . that are provided independently or not packaged with [other] internet access" (47 USC § 151, note § 1105 [5] [E]). ITFA prevents states from taxing internet access services (*see* 47 USC § 151, note § 1101 [a] [1]). Internet access service is defined as "a service that enables users to access content, information, electronic mail, or other services offered over the Internet and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers" (47 USC § 151, note § 1101 [a] [3] [D]).

Petitioner's product is not internet access. The Division assessed petitioner's sale of prewritten computer software. Moreover, despite a general prohibition on taxation of internet access, federal law allows taxing jurisdictions to impose tax on internet access charges if the charges are aggregated with other charges that are subject to taxation (47 USC § 151, note § 1106 [a]). Here, if prewritten software was the primary function of the Membership Fee and was, therefore, taxable, any tax on the internet access would be permissible since the charges are combined as one fee. The Division's assessment did not impose a prohibited tax on internet access.

E. As the Membership Fee has been determined to be a nontaxable service, petitioner's arguments regarding abatement of penalties as to that is moot. However, the use tax and penalty due on purchases of fixtures, equipment, and non-fixed assets, remains at issue. Petitioner does not dispute the amount of tax determined to be due or the fact that it failed to pay sales or use tax

on fixed asset purchases and non-fixed asset purchases (expenses). Petitioner is not shielded from tax liability or audit because it is unregistered. Tax Law § 1132 (c) states that every sale is presumed taxable until the contrary is established and that the burden of establishing whether a receipt is taxable or not rests upon the vendor *or the customer* (emphasis added) (*see also* 20 NYCRR 533.2 [a]). The clear implication is that a customer or user must prove to the Division that it paid tax on its purchases of tangible personal property and that such a demonstration of proof would occur in the context of an audit. As petitioner has the burden of proving that the assessment is erroneous but has not submitted any evidence of the same, including any evidence that it paid taxes on its purchases, the assessment of tax for fixed assets and expenses is sustained.

F. Tax Law § 1145 (a) (1) (i) requires that a penalty shall be imposed upon any person failing to file a return or pay over any sales or use tax. Petitioner bears the burden of establishing that the failure to pay tax “was due to reasonable cause and not due to willful neglect” (Tax Law § 1145 [a] [1] [iii]; *see Matter of Coppola v Tax Appeals Trib. of State of N.Y.*, 37 AD3d 901 [3d Dept 2007]; *Matter of MCI Telecommunications Corp.*, Tax Appeals Tribunal, January 16, 1992, *confirmed* 193 AD2d 978 [3d Dept 1993]).

Petitioner’s argument that the statutory penalty must be abated was primarily directed at the penalty imposed for failure to collect and remit tax on the Membership Fee. However, to the extent it is also asserted that the penalty must be abated for the assessment of use tax for capital purchases and expenses, such argument is addressed below.

Petitioner failed to pay tax on or file returns with respect to certain of its purchases of fixed assets and expenses. Tax Law § 1133 (b) provides that where any customer fails to pay the tax imposed by article 28 to the person required to collect the same, the tax is payable by the

