Executive Director
Marshall Stranburg

QUESTION ONE: DOES FLORIDA SALES TAX APPLY TO THE PURCHASE OF MAINTENANCE AND SUPPORT SERVICES COVERING . . . [SUBJECT SOFTWARE] THAT WAS/IS DELIVERED IN AN ELECTRONIC FORMAT (INCLUDING VERSION XX AND HIGHER)?

ANSWER: THE FACTS SUBMITTED FOR REVIEW INDICATE THAT THE SUBJECT SOFTWARE UPGRADE (VERSION XX) IS A STAND-ALONE SOFTWARE PRODUCT THAT WAS DELIVERED IN AN ELECTRONIC FORMAT AND THAT THE TAXPAYER HAS NOT RECEIVED ANY TANGIBLE PERSONAL PROPERTY IN CONJUNCTION WITH THE DELIVERY OF THE UPGRADE PRODUCT. THE UPGRADE IN THIS CASE WAS NOT A RENEWAL OF THE SOFTWARE PROVIDED WITH THE INITIAL TRANSACTION. THEREFORE, THE PURCHASE OF THE SUBJECT SOFTWARE UPGRADE (VERSION XX) IS NOT SUBJECT TO SALES TAX. FURTHERMORE, FLORIDA SALES TAX DOES NOT APPLY TO THE PURCHASE OF MAINTENANCE AND SUPPORT SERVICES COVERING THE SOFTWARE UPGRADE REFERENCED IN THE AGREEMENT AND ADDENDUM (VERSION XX).

QUESTION TWO: IS [THE TAXPAYER] ENTITLED TO A REFUND OF THE FLORIDA SALES TAX BILLED TO [THE TAXPAYER] AND REMITTED TO THE DEPARTMENT BY [THE SOFTWARE VENDOR] IN THE LAST 3 YEARS ON SUCH MAINTENANCE AND SUPPORT SERVICES?

ANSWER: THE TAXPAYER IS ENTITLED TO A REFUND OF THE FLORIDA SALES TAX IT PAID TO THE SOFTWARE VENDOR FOR PURCHASES OF THE SUBJECT SOFTWARE UPGRADE AND OF ANY TAX THAT TAXPAYER MAY HAVE PAID ON THE MAINTENANCE AND SUPPORT COVERING THE SOFTWARE UPGRADE, AS LONG AS THE TIME LIMITATIONS FOR CLAIMING A REFUND IN SECTION 215.26, F.S., HAVE NOT EXPIRED. RULE 12A-L.014, F.A.C., REQUIRES THAT THE TAXPAYER MUST SECURE A REFUND OF THE TAX FROM THE SOFTWARE VENDOR AND NOT FROM THE DEPARTMENT.

October 26, 2015

Re: Technical Assistance Advisement 15A-015
Sales and Use Tax– Software Upgrade
Sections 212.02, 212.05, 212.0506, and 215.26, Florida Statutes (F.S.)
Rules 12A-1.014, 12A-1.032, and 12A-1.062, Florida Administrative Code (F.A.C.)
XXXX (Taxpayer)
FEI #: XXXX
XXXX (Software Vendor)
FEI # XXXX

Dear XXXX:

This is in response to your letter dated May 4, 2015, requesting this Department's issuance of a Technical Assistance Advisement ("TAA") pursuant to section 213.22, F.S., and Rule Chapter 12-11, F.A.C., concerning the taxability of a software maintenance contract. An examination of your letter has established that you have complied with the statutory and regulatory requirements for issuance of a TAA. Therefore, the Department is hereby granting your request for a TAA.

Facts

Your letter dated May 4, 2015, provides the following in part:

> Back in 1996, [the Taxpayer] purchased its corporate ERP (enterprise resource planning) software [(Subject Software)] from XXXX [a predecessor to the Software Vendor]. This software manages many of [the Taxpayer's] corporate functions, including budgeting, payroll, accounting, accounts payable and receivable, asset management, human resources, personnel, and other back-of-house functions. As was the case with most software in 1996, the software was delivered in a tangible format on a disk. The software purchased in 1996 was . . . version XXXX.
>
> [The Subject Software] has been updated and upgraded various times since the original 1996 purchase by [the Taxpayer]. These updates and upgrades are provided free of charge by [the Software Vendor and its predecessor] as part of the maintenance and support contract. Like most software, when [the Software Vendor's predecessor] upgraded or updated its software, the version number [would change]. So minor updates to . . . version 5 would be named 5.1, 5.2, etc. Those updates would not replace the existing software; they would be installed on top of the existing installation. However, a major new release . . . would be named version XXXX, then version XXXX, then version XXXX, and so on. This is considered an "upgrade" to the software. A major new release or "upgrade" is not an update or patch to the existing version of the software; the new release of the software stands on its own and fully replaces the prior version. [The Taxpayer] is not required to acquire the upgrades; it chooses to do so when it feels it desires the software's new features.
>
> [The Taxpayer] acquired version XXXX of the . . . software in 2008. When [the Taxpayer] upgraded to . . . Version XXXX, a complete new copy of the software was delivered to the Taxpayer electronically. As discussed in the paragraph above, version XXXX was a major new release of [software]. Thus, it is not a patch or update; it is a fully self-contained release of the software that does not require any of the prior code from previous versions to operate.
>
> [The Taxpayer] signed a new . . . Software End User Agreement in January of 2003 [with the Software Vendor's predecessor] . . . . This is a master agreement; it contains terms and conditions related to the use of [the Subject Software]. A new Software End User Agreement does not need to be signed after the acquisition of each new major release. . . . [The Software Vendor] agreed to execute an addendum to the 2003 agreement to clarify the electronic method of delivery for . . . version XXXX (as well as any updates, upgrades, patches, and enhancements) . . . .

> [The Taxpayer] annually purchases Maintenance and Support Services related to [the Subject Software]. The annual fee for the maintenance contract includes unlimited repairs, maintenance, updates, and upgrades to the software. . . .

* * *

Included with your request for advisement is a Master Terms and Conditions for [Subject Software] End User Agreement (the Agreement) executed by the Software Vendor's predecessor on January 29, 2003, and a Maintenance and Support Second Addendum (the Addendum) executed by the Software Vendor's predecessor and the Taxpayer on April 8, 2015. The Addendum provides the following, in part:

> . . . In case of any conflict between the Agreement and this Addendum, the terms and conditions of this Addendum shall control. . . .
>
> The parties agree as follows:
>
> l. For purposes of this second addendum, the term "tangible media" means "disks, tapes, CDs, or similar tangible media."
>
> 2. To the best of [the Software Vendor's] knowledge, since 2008, all new releases of . . . software products provided to [the Taxpayer] pursuant to the Agreement, including . . . Version XXXX, have been delivered electronically by remote telecommunications; no tangible media has been delivered to[the Taxpayer].
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> 3. To the best of [the Software Vendor's] knowledge, since 2008, any repairs, replacements, upgrades, updates, and enhancements provided to [the Taxpayer] as part of Maintenance and Support Services for the . . . software products have been performed or delivered electronically by remote telecommunications; no tangible media were used to deliver such repairs, replacements, upgrades, updates, and enhancements.
>
> 4. [The Software Vendor] acknowledges that when [the Taxpayer] upgraded to [Subject Software] Version XXXX, a complete new copy of the software designed to replace the prior version of the . . . software was delivered electronically by remote telecommunications.

* * *

Requested Advisement

The Taxpayer requests a TAA that addresses the following Requested Advisements:

> 1. Florida sales tax does not apply to the purchase of Maintenance and Support Services covering . . . [Subject Software] that was/is delivered in an electronic format (including version XXXX and higher).

2. If the answer to question 1. is that sales tax is not due on the Maintenance and Support Services in question, then [the Taxpayer] is entitled to a refund of the Florida sales tax billed to [the Taxpayer] and remitted to the Department by [the Software Vendor] in the last 3 years (the statute of limitations for refund) on such Maintenance and Support Services. [The Software Vendor] can lawfully refund such sales tax to [the Taxpayer] and take a credit on its own sales tax return for the tax lawfully refunded.

Applicable Authority and Discussion

Section 212.05, F.S., provides that every person is exercising a taxable privilege who engages in the business of selling tangible personal property. The tax is due and payable on the total consideration received for each item or article of tangible personal property when sold in this state. Section 212.02(16), F.S., provides that when tangible personal property and services are a part of the same sale, the entire sales price is subject to tax. Service only transactions, except those authorized for taxation by Chapter 212, F.S., are generally not subject to tax.

Rule 12A-1.032(4), F.A.C., provides that prepackaged or canned software supplied on a tangible medium is taxable as a sale of tangible personal property. Charges for services that are part of the sale of such taxable software are part of the sales price and are subject to sales tax. Computer hardware is tangible personal property subject to sales tax. Electronically accessed software is subject to Florida sales tax when sold as part of the sale of taxable computer hardware. Such software is considered to be a service that is included in the sales price of the computer hardware.

"Tangible personal property" is defined under s. 212.02(19), F.S., to mean and include ". . . personal property which may be seen, weighed, measured, or touched or is in any manner perceptible to the senses . . . ." Section 212.02(15) F.S., defines the term "sale" to include licenses of tangible personal property for a consideration. A license to use canned or prepackaged software that was delivered in a tangible format is subject to tax. Charges for license renewals or upgrades of such software products are taxable when considered to be renewals of the initial software. Such charges are considered to be for the license to use tangible personal property.

Rule 12A-1.032(4), F.A.C., provides that a sale of customized software is a service transaction and is not subject to sales tax provided the customized software is not part of the sale of other tangible personal property. Likewise not subject to tax is a sale that solely involves software, canned or customized, that is provided to the customer in an electronic format, as there is no conveyance of tangible personal property.

In addition, a charge solely for electronically transmitted information is not subject to sales tax, pursuant to Chapter 212, F.S., as there has been no exchange of tangible personal property. See Department of Revenue v. Quotron Systems, Inc., 615 So.2d 774, 778 (Fla. 3rd DCA 1993), where the court held that electronic images that appear on video display screens are not "tangible personal property" as defined in s. 212.02(19), F.S., and that transmission of such images is not a "sale." See also Rule 12A-1.062(5), F.A.C., which provides that information furnished by way of electronic images, which appear on the subscriber's video display screen, are not subject to sales tax.

Section 212.0506, F.S., provides that maintenance or service warranty contracts covering taxable tangible personal property are taxable. A service warranty is defined as "any contract or agreement which indemnifies the holder of the contract or agreement for the cost of maintaining, repairing, or replacing tangible personal property." See section 212.0506(3), F.S. Since canned or prepackaged software delivered to a customer in tangible form is tangible personal property subject to sales tax, an agreement for the cost of maintaining, repairing, or replacing canned or prepackaged software is a service warranty subject to sales tax. However, an agreement that solely provides for support services for electronically delivered software is not a service warranty and is not subject to sales tax.

Your letter provides that when the Taxpayer upgraded to the current version of the Subject Software product (version XXXX) it received "a complete new copy of the software" that was delivered electronically. You provide that the current version of the software is "fully self-contained" and "does not require any of the prior code from previous versions to operate." The Addendum provides, in part, that the current version of the software was delivered electronically and was "designed to replace the prior version of the . . . software" and that "no tangible media has been delivered to [the Taxpayer]."

Section 215.26(2), F.S., provides that requests for tax refunds must be filed within certain time periods. For taxes paid after on or after July 1, 1999, such requests must be filed within three years from the date the tax was paid. Rule 12A-1.014(4), F.A.C., provides that a taxpayer who has paid tax when tax is not due must secure a refund of the tax from the dealer and not from the Department. If the dealer refuses to refund the tax, the taxpayer may provide the Department an Assignment of Rights that is signed by the dealer. An Assignment of Rights assigns any right of the vendor to recover sales tax that was paid to the Department. An Assignment of Rights allows the taxpayer to acquire the dealer's right to any refund and protects against the Department refunding the money to both the taxpayer and the dealer.

Rule 12A-1.014(5)(b), F.A.C., provides that, in lieu of a refund to which the dealer is entitled, a dealer may take a credit on its sales and use tax return. Rule 12A-l.014(6), F.A.C., provides that "[a]ny dealer who takes a credit, or applies for a refund, for tax paid to the state is required to keep and preserve all information and documentation necessary to substantiate the dealer's entitlement to a refund or credit of tax paid until tax imposed under Chapter 212, F.S., may no longer be determined and assessed under s. 95.091, F.S."

Conclusion

The facts submitted for review indicate that the Subject Software upgrade (version XXXX) is a stand-alone software product that was delivered in an electronic format and that the Taxpayer has not received any tangible personal property in conjunction with the delivery of the upgrade product. The upgrade in this case was not a renewal of the software provided with the initial transaction. Therefore, the purchase of the Subject Software upgrade (version XXXX) is not subject to sales tax. Furthermore, Florida sales tax does not apply to the purchase of maintenance and support services covering the software upgrade referenced in the Agreement and Addendum (version XXXX). Please note this response only addresses the software upgrade that is the Subject Software upgrade (version XXXX) that is the subject of the Agreement and Addendum and does not address the taxability of other or future upgrades or purchases of software products by the Taxpayer.

The Taxpayer is entitled to a refund of the Florida sales tax it paid to the Software Vendor for purchases of the subject software upgrade and of any tax that Taxpayer may have paid on the maintenance and support covering the software upgrade, as long as the time limitations for claiming a refund in section 215.26, F.S. have not expired. As provided, Rule 12A-l.014, F.A.C., requires that the Taxpayer must secure a refund of the tax from the Software Vendor and not from the Department. If the Software Vendor refuses to refund the tax, the Taxpayer may provide an Assignment of Rights signed by the Software Vendor.

This response constitutes a Technical Assistance Advisement under section 213.22, F.S., which is binding on the Department only under the facts and circumstances described in the request for this advice as specified in section 213.22, F.S. Our response is predicated on those facts and the specific situation summarized above. You are advised that subsequent statutory or administrative rule changes, or judicial interpretations of the statutes or rules, upon which this advice is based, may subject similar future transactions to a different treatment than that expressed in this response.

You are further advised that this response, your request and related backup documents are public records under Chapter 119, F.S., and are subject to disclosure to the public under the conditions of section 213.22, F.S. Confidential information must be deleted before public disclosure. In an effort to protect confidentiality, we request you provide the undersigned with an edited copy of your request for Technical Assistance Advisement, the backup material, and this response, deleting names, addresses, and any other details which might lead to identification of the taxpayer.

Your response should be received by the Department within 15 days of the date of this letter.

Sincerely,

Brinton Hevey
Tax Law Specialist
Technical Assistance and Dispute Resolution
850/717-6839

Record ID: 196908