

SUMMARY

QUESTION 1: Are the initial software licenses Vendor sells, for which the customer downloads the software electronically, subject to Florida sales tax?

ANSWER 1- Based on the Facts Below: No. The charge for electronically transmitted software is not subject to tax, pursuant to Chapter 212, F.S., as there has been no exchange of tangible personal property. This charge is construed to be a service.

QUESTION 2: Does the answer to Question 1 change because the customer receives tangible items, such as documentation to confirm the purchase, manuals and guides, that are minor and inconsequential to the software license?

ANSWER 2- Based on the Facts Below: No. If a manual is provided to a customer, as part of the purchase of software downloaded via the internet, the purchaser's receipt of the manual would qualify for the exemption provided in s. 212.08 (7)(v)1., F.S., because the manual would be viewed as an inconsequential element of the sale.

Nov 20, 2002

Re: Technical Assistance Advisement 02A-052

Sales and Use Tax - Software License Renewals
Sections: 212.05(1), 212.02(15),(16),(19), 212.0506(3),
212.08(7)(v)1., F.S.
Rule: 12A-1.032(4), (5), F.A.C.
XXX (Vendor)
FEI #: XX

Dear :

This is in response to your letters dated XX, 2002, and XX, 2002, and other correspondence provided requesting a technical

assistance advisement (TAA) regarding the above referenced party and matter. Your letter has been carefully examined and the Department finds it to be in compliance with the requisite criteria set forth in Chapter 12-11, F.A.C. This response to your request constitutes a TAA and is issued to you under the authority of section 213.22, F.S.

FACTS

You state in your letters referenced above that your client is XXX, Inc. (Vendor). Vendor sells software licenses for a fee. The fee includes the right to use the licensed software and any documentation, as well as any periodic updates available throughout the license period. Vendor also sells software license renewals. License renewals give the customer the right to any software upgrades available during the duration of the license renewal period.

Vendor also sells computer hardware. The computer hardware sales and the software license sales are separate transactions. The computer hardware purchased from Vendor is fully operational (contains an operating system) for its intended use prior to installation of any of the software licenses purchased and delivered via the electronic download process. In some cases, Vendor does not know if the software purchased pursuant to the licenses is loaded onto machines purchased from Vendor.

The Vendor sells software licenses to customers in three different forms.

Scenario 1:

For some licenses, the purchase is the customer's initial purchase of the software license. After the license is purchased, the customer downloads the software from Vendor's server for use inside Florida. The customer does not receive the software on tangible storage media from the Vendor.

Scenario 2:

The customer also purchases software license renewals from Vendor and may be able to download updates electronically from the manufacturer. With respect to these renewals, the customer

may have received the software on tangible storage media when it purchased the initial license now being renewed. The customer purchased the initial licenses from Vendor. When the initial software license was purchased, Vendor collected and remitted the applicable sales tax.

Scenario 3:

Same as scenario 2, except the customer originally purchased the software licenses from another vendor or the manufacturer.

Vendor does not know whether the customer received the original software license on tangible storage media or not.

TAXPAYER POSITION

In your correspondence you request a ruling on five transactions, dealing with the renewal of software licenses, that you believe are not subject to Florida sales tax under Chapter 212, F.S. Your most recent letter withdraws your request for rulings numbered 2, 3 and 5, which are therefore omitted from this response.

The following are excerpts from your letter dated May 17, 2002:

In Department of Revenue v. Quotron Systems, Inc., 615 So.2d 774 (Fla. 3d DCA 1993), the Court held that electronic images do not constitute tangible personal property and the transmission of such images does not constitute a sale. Id. at 776. Therefore, the transmission of electronic images is not a sale of tangible personal property subject to sales tax under chapter 212 of the Florida Statutes. Id. at 777. As a result of Quotron, the Department has taken the position that "any recurring or per usage charge to view, access, download, or obtain financial, stock, bond, or other information is not subject to Florida Sales and Use Tax, as long as the information is provided in an electronic format." TAA 98A-081. Therefore, the electronic download of software is exempt from sales tax because there is no sale of tangible personal property. TAA 01A-075 and TAA 01A-037.

When Vendor sells the customer an initial software license,

a sale within the meaning of section 212.02(15)(a), F.S., has taken place. The customer downloads the software from Vendor's server and never receives any tangible storage media. Because the software is delivered electronically, the sale is not a sale of tangible personal property as required by section 212.05(1)(a)1.a., F.S. Therefore, the sale of the software license is not subject to sales tax.

...

As part of the software license, the customer receives documentation such as confirmation of the purchase, reference manuals and user guides. This documentation is a minor part of the license when the license is viewed in its entirety. No part of the license price is attributable to the documentation. Although the documentation is tangible personal property, it is a minor or inconsequential part of the sale. The receipt of the documentation does not make the sale of the license the sale of tangible personal property. See Rule 12A-1.032(5), F.A.C., TAA 99A-039 and TAA 93A-073. Therefore, the sale or renewal of a software license for which the customer receives appropriate documentation but does not receive the software on tangible storage media is not subject to sales tax.

REQUESTED ADVISEMENT

In your original letter dated May 17, 2002, you requested five rulings. The second letter dated August 28, 2002, eliminates Vendor's request for rulings numbered 2, 3 and 5, and requests a ruling on numbers 1 and 4 as stated below:

The initial software licenses Vendor sells, for which the customer downloads the software electronically, are not subject to Florida sales tax.

The answer to the above requested ruling(s) does not change because the customer receives tangible items, such as documentation to confirm the purchase, manuals and guides, that are minor and inconsequential to the software license.

APPLICABLE STATUTES AND RULES

Section 212.05 (1), F.S., levies a tax upon the sale of tangible personal property as follows:

(a)1.a. At the rate of 6 percent of the sales price of each item or article of tangible personal property when sold at retail in this state, computed on each taxable sale for the purpose of remitting the amount of tax due the state, and including each and every retail sale.

Section 212.02, F.S., provides in pertinent parts:

(15) "Sale" means and includes:

(a) Any transfer of title or possession, or both, exchange, barter, license, lease, or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration.

(16) "Sales price" means the total amount paid for tangible personal property, including any services that are a part of the sale, valued in money, whether paid in money or otherwise, and includes any amount for which credit is given to the purchaser by the seller, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service cost, interest charged, losses, or any other expense whatsoever. "Sales price" also includes the consideration for a transaction which requires both labor and material to alter, remodel, maintain, adjust, or repair tangible personal property....

(19) "Tangible personal property" means and includes personal property which may be seen, weighed, measured, or touched or is in any manner perceptible to the senses, including electric power or energy, boats, motor vehicles and mobile homes as defined in s. 320.01(1) and (2), aircraft as defined in s. 330.27, and all other types of vehicles....

Section 212.0506(3), F.S., provides:

For purposes of this section, "service warranty" means any

contract or agreement which indemnifies the holder of the contract or agreement for the cost of maintaining, repairing, or replacing tangible personal property. The term "service warranty" does not include contracts or agreements to repair, maintain, or replace tangible personal property if such property when sold at retail in this state would not be subject to the tax imposed by this chapter, nor does it include such contracts or agreements covering tangible personal property which becomes a part of real property.

Section 212.08(7)(v)1., F.S., provides:

1. Also exempted are professional, insurance, or personal service transactions that involve sales as inconsequential elements for which no separate charges are made.

Rule 12A-1.032, F.A.C., provides in pertinent parts:

(4) ...Retail sales of pre-packaged programs for use with audio/visual equipment or other computer equipment, where the programs are fully useable by the customer without modifications and the vendor does not perform a detailed analysis of the customer's requirements in selecting or preparing the programs, are taxable as sales of tangible personal property....

(5) When a computer technician surveys a customer's needs and as a result makes recommendations which may include instructional material, diagrams and layouts, a software package, including pre-punched cards or programmed tapes, the charge made is construed to be for professional services and is exempt.

RESPONSE

The charge for electronically transmitted software is not subject to tax, pursuant to Chapter 212, F.S., as there has been no exchange of tangible personal property. This charge is construed to be a service. Pursuant to Rule 12A-1.032(4), F.A.C., the sale of canned software provided to customers on a

disk is subject to sales tax as the sale of tangible personal property. The sale of computer hardware is also subject to sales tax as the sale of tangible personal property.

Section 212.02(16), F.S., defines the term "sales price" as "[t]he total amount paid for tangible personal property, including any services that are part of the sale, [and as] the consideration for a transaction which requires both labor and material to alter, remodel, maintain, adjust, or repair tangible personal property". The retail sale of electronically transmitted software may be viewed as a service rendered as part of the sale of tangible property subject to sales tax if: 1.

The sales of the electronically transmitted software and the tangible personal property are part of the same sales transaction and 2. The sale of the electronically transmitted software is not incidental to the sale of the tangible personal property. American Telephone and Telegraph Company v. Florida Department of Revenue, 764 So.2d 665 (Fla. 1st DCA 2000).

Electronically transmitted software that is sold as part of the same sales transaction as the sale of canned software, such as a CD-ROM backup copy or the sale of computer hardware is subject to sales tax. Sales tax would apply if both a sale of hardware and a sale of the electronically transmitted software were part of the same transaction, regardless if more than one invoice is involved.

If a manual is provided to a customer, as part of the purchase of software downloaded via the internet, the purchaser's receipt of the manual would qualify for the exemption provided in s. 212.08 (7)(v)1., F.S., above because the manual would be viewed as an inconsequential element of the sale. If a manual is invoiced as a charge that is separately stated on the customer's invoice, the transaction is a sale of tangible personal property, as defined in s. 212.02(15), F.S.

Please be advised that, if transactions involving tangible personal property are covered by a "service warranty", as defined in s. 212.0506(3), F.S., the sale of such service warranties are subject to tax, pursuant to s. 212.0506, F.S. Rule 12A-1.105, F.A.C., interprets the statute. The service warranty would be taxable if the contract included warranty

provisions on both tangible personal property and electronically transmitted software. Rule 12A-1.105, F.A.C., contains a provision that the term "service warranty" does not extend to "... property which when sold at retail in this state would not be taxable". Thus, should the Vendor issue a service warranty solely on the electronically transmitted software, sales tax would not apply to the sale of the service warranty.

This response constitutes a Technical Assistance Advisement under s. 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 s. 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 advise is based, may subject similar future transactions to a different treatment than 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 s. 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,

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Technical Assistance and Dispute Resolution
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Ctrl# 51642