

## SUMMARY

**QUESTION:** Is the license to use Taxpayer's software, which is downloaded electronically by the customer subject to Florida sales tax?

**ANSWER – Based on the Facts Below:** The license to use software that is downloaded electronically by the customer is a service transaction and is not subject to sales tax provided it is not part of the sale of tangible personal property.

June 21, 2010

XXX

Re: Technical Assistance Advisement (TAA) 10A-028  
Sales and Use Tax – Computer Software  
Sections 212.02, 212.05, and 212.0506, Florida Statutes (F.S.)  
Rule 12A-1.032, Florida Administrative Code (F.A.C.)  
XXX (“Taxpayer”)  
FEI # XXX

Dear XXXr:

This is in response to your letter dated May 13, 2010, 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 the sale, installation, and support of computer software offered by your company. An examination of your letter has established 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 provides the following in part:

The primary business activity of [Taxpayer] is the development, sale, installation and support of Medical Practice Management and Electronic Medical Records software. We do not sell any computer or networking products. Our principal customers are physicians and associated health care providers located throughout the world. The software permits our customers to perform multiple tasks related to patient care and medical office management including billing, scheduling, documenting patient encounters electronically, marketing, letter writing, photo imaging of medical records, and integration with web site portals.

Our software always requires installation/configuration by our Client Services and Software Development department personnel working with the customer by phone and over the Internet. [Taxpayer] software can never be used by a customer without [Taxpayer] involvement in set-up, installation and configuration of the software on the customer's computers and networks. All of our contracts contain professional services fees related to set-up, installation and configuration of the software. In many cases, historical data migration is required to bring patient demographics, scheduling, clinical encounters and/or financial transactions from legacy software systems into our software, and this always requires the services of one of our software developers.

[Taxpayer] software has been designed to permit a broad range of uses to accommodate each customer's unique circumstances. This requires extensive setup of the software, consultation and training with our customers before they can use the software. [Taxpayer] software cannot be used without [Taxpayer] setup and training. Further it cannot be used by other customers once it has been installed and/or configured for use for a specific customer.

[Taxpayer] software is always downloaded electronically by a [Taxpayer] support specialist from a [Taxpayer] server to a customer's computer network. We do not provide a disk or any other tangible media containing our software. This is our standard practice for both new software and upgrades to previously downloaded software.

\* \* \*

[Taxpayer] software contracts always include an amount for Annual Support and Internet downloadable software upgrades and other training and support services. [Taxpayer] does not sell any tangible personal property to its customers as indicated by the attached sample purchase agreement and invoice.

\* \* \*

Along with your request for advisement you provided a copy of a Software License Agreement (the Agreement), including addendums to the Agreement regarding Evaluation and Management Coding and [Forms] and State Mandated Informed Consent. You also provided a copy of standard software training and implementation documents that you state are sent electronically to your clients.

The Agreement provides the following in part:

. . . 1.2 Purpose: Under the terms and conditions contained herein, the User intends to purchase from [TAXPAYER] a non-exclusive License to use certain Software and Documentation owned by [TAXPAYER].

\* \* \*

## 2.0 Definitions

2.1 Software: Software refers to the practice management software product known as “[Taxpayer] Practice.” Software includes any copies in any form, in whole or part, of any version thereof.

2.2 Documentation: Any written Electronic materials provided by [TAXPAYER] to the User relating to the Software, and any copies thereof.

2.3 Electronic Data: Electronic Data shall mean all information regardless of form that User has entered or transferred through the Software. Electronic Data shall include, but is not limited to, digital information regarding client data, Electronic PHI, and other information.

### 3.0 Software

3.1 Grant of License: [TAXPAYER] will provide through Internet download one (1) copy of the Software and applicable online Documentation to the User. [TAXPAYER] hereby grants the User a non-exclusive License to use the Software and Documentation during the term of this Agreement. The User agrees to the following restrictions: (1) User shall limit the use of this Software to use on a single server/workstation plus the number of purchased licenses as specified in a signed purchase agreement, (2) User shall make no copies thereof unless [TAXPAYER] provides prior authorization, except for one (1) backup copy for archival purposes, program error verification, or to replace defective media, and all copies made must bear the copyright notices contained in the original downloaded, (3) User shall not modify, adapt, translate, create derivative works, disassemble, decompile or otherwise reverse engineer the Software except and only to the extent that such activity is expressly permitted by applicable law notwithstanding this limitation. . . .

\* \* \*

3.3 Upgrades: From time to time, [TAXPAYER] may make improvements, upgrades via internet download, and repairs to the Software and Documentation. . . .

### 5.0 Limited Warranties. Disclaimers and Remedies

5.1 Limited Warranty and Disclaimer: [TAXPAYER] warrants for a period of Ninety (90) Days from the date of the installation of the Software, or as the date is extended by the User subscribing to annual support agreements, that the Software will execute its programming instructions when properly installed on a personal computer or workstation meeting specifications recommended by [TAXPAYER]. [TAXPAYER] does not warrant that the operation of the Software will be uninterrupted or error free. In the event that this Software fails to execute its programming instructions during the warranty period, User’s sole and exclusive remedy shall be to provide access to [TAXPAYER] to the computer network on which the Software resides for [TAXPAYER] to attempt resolution within a reasonable time based on the severity of the issue. Such correction is not warranted nor guaranteed; however, [TAXPAYER] will continue to provide whatever service and/or Internet update of software as necessary during the warranty period in an attempt to

correct the problem(s). . . .

\* \* \*

The Addendum to the Agreement regarding Evaluation and Management Coding, describes [Taxpayer] Practice E&M Coding to provide “features and algorithms to assist in calculating office visit service codes for billing”

The Addendum to the Agreement regarding [Forms] and State Mandated Informed Consent describes [Forms] as “a comprehensive set of content-specific electronic forms, letters and patient education documents, including informed consent documents from the American Society of Plastic Surgeons (ASPS) Patient Consultation Resource Book. [Forms] is a module in the practice management software product known as [Taxpayer] Practice (Software.)”

The standard software training and implementation documents provide that the “software download and installation will be done over the Internet.” The training documents also provide that the “[Forms] electronic procedure education, post-op, recovery, and consent content” will be provided in an electronic format.

### **Requested Advisement**

You request that the Department of Revenue (the Department) provide an advisement on the taxability of the charge imposed for the license to use Taxpayer software.

### **Applicable Authority**

Section 212.05, F.S., provides that the sale of tangible personal property is subject to tax. The term “sale” includes a license to use tangible personal property. See Section 212.02(15), F.S. Service only transactions, except those authorized for taxation by Chapter 212, F.S., are generally not subject to tax. When tangible personal property and services are a part of the same sale, the entire sales price is subject to tax. See Section 212.02(16), F.S. Software supplied on a tangible medium is taxable. 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.

Rule 12A-1.032, 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 exempt 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. Keep in mind that electronically accessed software is subject to Florida sales tax when sold as part of the sale of tangible personal property.

With regard to annual support charges that cover the cost of technical support, software upgrades, and other support related services, Section 212.0506, F.S., indicates that an agreement that covers the cost of maintaining, repairing, or replacing canned or prepackaged software (tangible personal property) is subject to sales tax, while an agreement that covers the cost of maintaining, repairing, or replacing customized software or software that was downloaded electronically is not subject to sales tax.

In this case, your letter and the Agreement provide that the software is “always downloaded electronically by a [Taxpayer] support specialist from a [Taxpayer] server to a customer’s computer network.” [Taxpayer] does “not sell any computer or networking products” or any other tangible personal property to its customers. All improvements and upgrades are done via internet download. All training documents and forms are provided in an electronic format as well.

### **Conclusion**

The facts submitted for review indicate that the software under advisement was provided in an electronic format. In addition, you assert that Taxpayer did not provide any tangible personal property. According to the foregoing discussion, the license to use Taxpayer’s software that was delivered via electronic download is not subject to Florida sales tax, regardless of whether or not the software is customized or canned. Also exempt is a service agreement that covers the cost of maintaining, repairing, or replacing software that was electronically downloaded.

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  
850/488-7157

Record ID: 83527