



Executive Director
Marshall Stranburg

QUESTIONS:

1. WHETHER TAXPAYER'S MEMBERSHIP PROGRAM IS SUBJECT TO SALES TAX WHEN SOLD AND/OR WHEN PROVIDED AS A FREE TRIAL?
2. WHETHER TAXPAYER'S MEMBERSHIP PROGRAM IS SUBJECT TO COMMUNICATIONS SERVICES TAX ("CST") WHEN SOLD AND/OR WHEN PROVIDED AS A FREE TRIAL?

ANSWERS:

1. NO. TAXPAYER DEMONSTRATED THAT THE SERVICES PROVIDED TO ITS MEMBERS ARE NOT SUBJECT TO SALES TAX, WHETHER THE SERVICES ARE SOLD TO A MEMBER THROUGH THE MEMBERSHIP, OR PROVIDED AS A FREE MEMBERSHIP TRIAL. STREAMING VIDEO SERVICES AND ACCESS TO ELECTRONIC BOOKS ARE NOT SUBJECT TO SALES TAX IN FLORIDA. THE SHIPPING CHARGES ARE NOT SUBJECT TO SALES TAX BECAUSE TAXPAYER DEMONSTRATED THAT IT SEPARATELY STATES ALL SHIPPING AND HANDLING FEES AND THAT ALL SALES ARE SHIPPED F.O.B. ORIGIN, AS REQUIRED IN RULE 12A-1.045, F.A.C. IF THE TERMS OF THE MEMBERSHIP AGREEMENT CHANGE AND SHIPPING CHARGES ARE NO LONGER SEPARATELY STATED AND SHIPPED F.O.B. ORIGIN, THEN THIS ADVISEMENT WILL NO LONGER APPLY.
2. YES. TAXPAYER'S MEMBERSHIP PROGRAM INCLUDES THE PROVISION OF STREAMING VIDEO SERVICES, WHICH ARE SPECIFICALLY INCLUDED IN THE DEFINITION OF COMMUNICATIONS SERVICES IN S. 202.11(1), F.S. SALES OF MEMBERSHIPS WHICH INCLUDE ACCESS TO THESE STREAMING VIDEO SERVICES ARE SUBJECT TO CST WHEN THE SERVICES ORIGINATE OR TERMINATE IN FLORIDA AND WHEN SUCH SERVICES ARE CHARGED TO A FLORIDA SERVICE ADDRESS, PURSUANT TO S. 202.12(1), F.S. ADDITIONALLY, TAXPAYER MUST PAY CST WHEN IT PURCHASES STREAMING VIDEO SERVICES THAT IT THEN OFFERS TO MEMBERS IN FLORIDA AS PART OF A FREE TRIAL MEMBERSHIP, AS THAT PURCHASE IS THE RETAIL SALE OF COMMUNICATION SERVICES WHICH WILL TERMINATE IN FLORIDA AND HAVE A FLORIDA SERVICE ADDRESS. TAXPAYER'S MEMBERSHIP ALSO INCLUDES THE TEMPORARY AND PERMANENT DOWNLOAD OF ELECTRONIC BOOKS, WHICH ARE NOT SUBJECT TO CST, AS THEY ARE SPECIFICALLY LISTED AS "INFORMATION SERVICES IN S. 202.11(5), F.S., AND INFORMATION SERVICES ARE SPECIFICALLY EXCLUDED FROM THE DEFINITION OF COMMUNICATION SERVICES UNDER SECTION 202.11(1)(1), F.S. THE SHIPPING BENEFITS PROVIDED WITH MEMBERSHIP ARE ALSO NOT SUBJECT TO CST.

ACCORDINGLY, THE PORTION OF MEMBERSHIP FEES ATTRIBUTABLE TO THE PROVISION OF STREAMING VIDEO SERVICES IS SUBJECT TO CST. IF THAT PORTION IS NOT SEPARATELY ALLOCABLE IN TAXPAYER'S BOOKS AND RECORDS, THEN THE ENTIRE MEMBERSHIP IS SUBJECT TO CST.

April 7, 2014

RE: Technical Assistance Advisement 14A-XXX
Sales and Use Tax and Communications Services Tax ("CST")
XXX ("Taxpayer")
Chapters 202, 203 and 212, Florida Statutes ("F.S.")

Dear XXX,

This is a response to your letter dated XXX, for 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 XXX ("Membership" or "XXX"). An examination of your request has established you complied with the statutory and regulatory requirements for issuance of a TAA. Therefore, the Department is hereby granting your request for a TAA.

FACTS PRESENTED

Taxpayer offers a Membership program known as XXX to the general public for a fee. This fee is in the form of a lump sum charge. Members of the general public may also sign up for a free, one-month trial of the Membership program. With Membership, members receive a number of services. These services currently include:

1. Shipping benefits on certain purchases made from the XXX website. XXX members are entitled to receive free two-day shipping on certain purchases. Items eligible for free shipping are marked as such on the XXX website. XXX members are also eligible for reduced shipping costs for items that are not otherwise XXX eligible, that have additional shipping costs due to size, bulk, or other special circumstances, or on certain products sold by certain third-party websites.
2. Streaming video services. XXX members are able to stream movies and television that are designated as "XXX" as many times as they like during the term of their Membership. These videos are viewed on the member's television, computer, tablet computer, or other compatible device. These videos cannot be downloaded or stored on devices.
3. Temporary borrowing or permanent download of certain electronic books. Taxpayer's proprietary electronic reading devices are known as "XXX." The lending benefit is called the "XXX" program, and it allows XXX members who also own a XXX to "borrow" one book every thirty days from a limited library of electronic books. "XXX" allows XXX members to download one of four selected books each month at no cost. These books are available in advance of their official release date and

are permanent additions to a member's XXX "library." Unlike the "XXX," no XXX device is necessary for this benefit, as the books are also available via the XXX application that can be installed on a variety of electronic devices.

Taxpayer also provided a copy of the XXX Terms and Conditions. The terms of service for the Membership program provide that "[f]rom time to time, [Taxpayer] may choose in its sole discretion to add or remove XXX membership benefits from paid or free promotional programs."¹

You have indicated that Taxpayer does not directly provide any services included in the Membership. Instead, it purchases these services from affiliates and resells them in the form of the Membership program. For example, one affiliate provides the shipping services the Taxpayer resells, while a different affiliate provides e-book downloads and video streaming access, also resold by the Taxpayer. Both services are resold as part of the XXX membership.

REQUESTED ADVISEMENT

1. Is Taxpayer's sale of XXX Memberships to Florida customers subject to sales tax?
2. Is Taxpayer's provision of the free, one-month trial period of the XXX Membership to Florida customers subject to sales tax?
3. Is Taxpayer's sale of XXX Memberships to Florida customers subject to communications services tax and gross receipts tax (hereinafter "CST")?
4. Is Taxpayer's provision of the free, one-month period of the XXX Membership to Florida customers subject to CST?

APPLICABLE LAW AND DISCUSSION

Chapter 212, F.S., imposes a sales tax on the sale and use of tangible personal property and some services in the state of Florida. Sections 212.04 and 212.05, F.S., specifically impose a tax collection obligation on persons engaged in the business of making sales of tangible personal property and specified services. Chapter 202, F.S., imposes a communications services tax on the retail sale of communications services in Florida and a collection obligation for sellers of communications services in Florida. Gross receipts tax also applies to sales of communications services. Taxpayer has requested advisements on whether sales tax and/or CST apply to XXX Memberships under Florida law. As these taxes are in different chapters of the Florida Statutes and cover different types of transactions, they will be addressed separately, below.

As a general matter, XXX Memberships do not fall under the provision in s. 212.02(1), F.S., relating to Membership dues. That provision is specifically applicable to membership benefits to "a place of amusement, sport, or recreation" or that provide "recreational or physical fitness facilities" which the

¹ The Membership benefits are not limited to these services, nor are any of these services (other than shipping benefits) guaranteed with the Membership. Taxpayer continues to revise and modify the terms of the Membership.

XXX Membership does not. Although Taxpayer uses the moniker “Membership” to encompass the various services that Taxpayer provides in return for a single fee, the Department must examine such services individually.

Sales and Use Tax

Download of Electronic Books

Florida law does not currently impose sales or use tax on the sale of electronic books. As such, the portion of XXX Membership fees attributable to the lending or permanent download of electronic books is not subject to sales and use tax.

Streaming Video Services

Streaming video services are not subject to sales and use tax, as they are neither tangible personal property nor any of the enumerated taxable services in s. 212.05, F.S. As the XXX services are not subject to sales and use tax, the portion of XXX Membership fees attributable to streaming video services is also not subject to sales and use tax.

Shipping Benefits

Rule 12A-1.045, F.A.C., provides the general rule for the taxability of transportation charges associated with the sale of tangible personal property:

- (1) “Transportation charges” include carrying, delivery, freight, handling, pickup, shipping, and other similar charges or fees.
- (2) Transportation charges which are not separately stated on an invoice or bill of sale, but are included in the sales price of taxable tangible personal property, are subject to tax.
- (3)(a) Where the seller agrees to deliver tangible personal property to some designated place and the purchaser cannot elect to avoid the charge for transportation services, the charge for the transportation service is subject to tax, even if separately stated on an invoice or bill of sale.

- (5) If the seller contracts to sell tangible personal property F.O.B. origin, the title to the property passes at the point of origin. Since the title to the property passes at the point of origin, transportation services arranged by the seller and rendered to the buyer are not a part of the taxable selling price, provided the transportation charges are separately stated. Where the transportation charges are billed by the seller to the buyer, but documentation is inadequate to establish the point at which title passes to the buyer, it is presumed that

the tangible personal property was sold F.O.B. origin and the title to the property passes at the point of origin. In such instances, the transportation charges are not considered a part of the selling price of the property, if separately stated.

In general, sales of tangible personal property in Florida are subject to sales tax on both the item sold and on any services that are part of the sale. See s. 212.02(16), F.S. Transportation charges that are included with the sale of tangible personal property and are not separately stated are subject to sales tax. See Rule 12A-1.045(2), F.A.C. Taxpayer's shipping fees fall squarely within the definition of "transportation charges" found in Rule 12A-1.045, F.A.C. These charges are therefore taxable unless another provision applies.

Rule 12A-1.045(5), F.A.C., stipulates that separately stated transportation charges on items sold F.O.B. origin are not taxable. Taxpayer's Conditions of Use, as referenced in the XXX Terms and Conditions provide that all sales are F.O.B. origin, and each invoice or other billing statement breaks out shipping fees from the item(s) sold, even if the shipping fees are \$0.00. Consequently, XXX Membership costs attributable to S&H Fees are not subject to Florida sales tax, provided that each sale is shipped F.O.B. origin and the S&H Fees are broken out on all billing documents.

As none of the provided services (electronic downloads, streaming video, and F.O.B. origin shipping services) are subject to Florida sales and use tax, neither the sale of a full XXX Membership, nor the provision of a free trial XXX Membership are subject to Florida sales and use tax.

Communications Services Tax

Section 202.11(1), F.S., provides the following definition of "communications services:"

"Communications services" means the transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals, including video services, to a point, or between or among points, by or through any electronic, radio, satellite, cable, optical, microwave, or other medium or method now in existence or hereafter devised, regardless of the protocol used for such transmission or conveyance. The term includes such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code, or protocol of the content for purposes of transmission, conveyance, or routing without regard to whether such service is referred to as voice-over-Internet-protocol services or is classified by the Federal Communications Commission as enhanced or value-added. The term does not include:

(a) Information services.

Section 202.11(5), F.S., provides the following definition for information services:

“Information service” means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, using, or making available information via communications services, including, but not limited to, electronic publishing, web-hosting service, and end-user 900 number service. The term does not include video service.

Download of Electronic Goods

The temporary or permanent download of electronic books, via the XXX or the XXX program, is the acquisition or retrieval of information. More specifically, it is access to electronic publishing products. As these items are specifically listed as “information services” in s. 202.11(5), F.S., and information services are specifically excluded from communications services in s. 202.11(1)(a), F.S., these services are not subject to communications services tax in Florida. Accordingly, the portion of the XXX Membership fees attributable to the lending or permanent downloading of electronic books is not subject to communications services tax.

Streaming Video Services

In general, CST applies to the retail sale of communications services. Communications services are broadly defined in s. 202.11(1), F.S., to mean the:

“... transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals, *including video services*, to a point, or between or among points, by or through any electronic, radio, satellite, cable, optical, microwave, or other medium or method now in existence or hereafter devised, regardless of the protocol used for such transmission or conveyance....” (Emphasis supplied.)

Video services are defined in s. 202.11(24), F.S., as:

... the transmission of video, audio, or other programming service to a purchaser, and the purchaser interaction, if any, required for the selection or use of a programming service, regardless of whether the programming is transmitted over facilities owned or operated by the video service provider or over facilities owned or operated by another dealer of communications services. The term includes point-to-point and point-to-multipoint distribution services through which programming is transmitted or broadcast by microwave or other equipment directly to the purchaser’s premises, but does not include direct-to-home satellite service. The term includes basic, extended, premium, pay-per-view, digital video, two-way cable, and music services.

XXX services are “video services” pursuant to Florida law and, therefore, are communications services.

Retail sales of communications services are subject to CST when the services (1) originate and terminate in Florida, or (2) originate or terminate in Florida and are charged to a Florida service address. (s. 202.12(1), F.S.) The service address, in the instant case, would be the "... location of the communications equipment from which communications services originate or at which communications services are received by the customer." (s. 202.11(14)(a)1., F.S.) A "retail sale" of communications services means "the sale of communication services for any purpose other than for resale or for use as a component part of or for integration into communication services to be resold in the ordinary course of business." (s. 202.11(11), F.S.)

The retail sale of XXX services is the retail sale of communications services and when such services originate and/or terminate in Florida and are charged to a Florida service address, the sale is subject to CST.²

The sale of a XXX Membership includes XXX services. As such, the portion of the XXX Membership fees attributable to XXX services is subject to CST.

Additionally, a purchase of XXX services by Taxpayer from XXX that originate and/or terminate in Florida and are charged to a Florida service address would also be a taxable *purchase* of communications services, unless the transaction complies with the requirements to qualify as purchases for resale. Paragraph 202.16(2)(a), F.S., provides that,

"... charges paid by a video service provider for the purchase of video programming or the transmission of video or other programming by another dealer of communications services ... for resale, must be made in compliance with the rules of the department."

That paragraph also provides documentation requirements for sales for resale.³ Assuming Taxpayer has complied with these requirements, any purchase of communications services by Taxpayer from XXX is not subject to CST to the extent such services are later resold in a retail sale.

However, for the free trial XXX Memberships used by Florida residents, Taxpayer's purchase is the retail sale of the XXX services. As there was no "resale" to Florida users, but the "service address" for those users was in Florida, these transactions were retail sales to Taxpayer, rather than resales by Taxpayer.⁴ Taxpayer is therefore responsible for paying to its affiliate, or accruing and submitting separately, CST on the cost of providing XXX services to trial members of the XXX Membership program who are located in Florida.⁵

² See s. 202.12, F.S.

³ See 202.16(2)(b)

⁴ According to s. 202.11(14), F.S., the "service address" is, except as otherwise provided, "the location of the communications equipment... at which communication services are received by the customer." Section 202.12(1)(a), F.S., provides that tax is due on the sales price of a communications service which "1. Originates and terminates in this state, or 2. Originates or terminates in this state and is charged to a service address in this state" The services terminate in the homes of Florida customers, and the service address is the location at which such services are received (also a Florida location). As such, the purchase of services for use by these customers is taxable to Taxpayer.

⁵ See s. 202.16(4), F.S., which provides that a purchaser of communications services is liable for taxes imposed under Chapters 202 and 203, F.S.

Generally, the “sales price” subject to communications services tax is “the total amount charged in money or other consideration by a dealer for the sale of the right or privilege of using communications services in this state ...” See s. 202.11(13), F.S. This provision would normally mean that the entire purchase price of a XXX Membership would be subject to CST. However, paragraph 202.11(13)(b), F.S., excludes from the charges in subparagraph 8., “[c]harges for goods or services that are not subject to tax under this chapter ... that are not separately itemized on a customer’s bill, but that can be reasonably identified from the selling dealer’s books and records kept in the regular course of business.” As such, the tax on the sale of XXX services should be limited to the charges allocated for such services in Taxpayer’s books and records.

Shipping Benefits

Shipping benefits are not communications services. Therefore, the portion of XXX Membership fees attributable to shipping benefits is not subject to communications services tax, unless those fees are not distinguished from taxable communication services in Taxpayer’s books and records, as discussed above.

CONCLUSION

No portion of Taxpayer’s XXX Membership program is subject to sales and use tax in Florida at this time. The portion of the Membership attributable to XXX services (or other communications services) is subject to CST. If that portion is not separately allocable in Taxpayer’s books and records, then the entire XXX Membership fee is subject to CST. The CST must be paid by members when they purchase XXX Memberships. Furthermore, the CST must be paid by Taxpayer when it purchases XXX services or other communications services that it offers to members in Florida as part of a XXX Memberships.

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 advice is based, may subject similar future transactions to a different treatment than expressed in this response.

You are further advised that this response and 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,

Kimberly Bevis
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(850) 617-8346

Record ID: 156260