Executive Director
Leon M. Biegalski

QUESTION: IS THE SALE OF THE SERVICES (BOTH, SOFTWARE AND CLOUD-COMPUTING) SOLD BY [THE TAXPAYER] TO ITS CLIENTS SUBJECT TO SALES TAX?

ANSWER – BASED ON THE FACTS BELOW: NO. BASED ON THE FACTS PROVIDED, THE SALE OF THE SUBSCRIPTIONS TO THE SOFTWARE AND THE SALE OF THE CLOUD-COMPUTING SERVICES DESCRIBED IN THE LETTER ARE NOT SUBJECT TO FLORIDA SALES AND USE TAX. TAXPAYER'S REPRESENTATIVE HAS DESCRIBED THE SALE OF CUSTOMIZED SOFTWARE, DELIVERED ELECTRONICALLY, WHICH IS NOT SUBJECT TO TAX. THE REPRESENTATIVE HAS PROVIDED THAT THE TAXPAYER DOES NOT DELIVER ANY TANGIBLE PRODUCTS TO ITS CLIENTS.

August 8, 2016

Re: Technical Assistance Advisement 16A-014
Sales and Use Tax– Computer Software and Cloud Computing Services
Sections 212.02 and 212.05, Florida Statutes (F.S.)
Rules 12A-1.032 and 12A-1.071, Florida Administrative Code (F.A.C.)
XXXX (the Taxpayer)
FEI #

Dear XXXX:

This is in response to your letter dated October 15, 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 the computer software and services sold by your client. 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 dated October 15, 2015, provides that following in part:

> . . . [The Taxpayer] is a limited liability company domiciled and headquartered in Florida.
>
> [The Taxpayer] has a partnership with [the Software Provider], which allows [the Taxpayer] to license basic software developed by [the Software Provider] (the "Basic Software") and sold to [the Taxpayer] by . . . the "Reseller," pursuant to [a] Services Provider License Agreement (the "SPLA" . . .) with [the Software Provider].
>
> [The Taxpayer] is allowed to customize and resell the Basic Software to its clients (the "Clients").

The SPLA also grants [the Taxpayer] cloud-computing services (hosting, access, back-up and storage), which are hosted and supported by [the Software Provider], and sold to [the Taxpayer] by [the Reseller].

Hence, [the Taxpayer] purchases subscriptions to the Basic Software and to the cloud-computing services. [The Taxpayer] then customizes the Basic Software for resale to its Clients, which must also subscribe to receive the software and cloud-computing services from [the Taxpayer].

Naturally, the subscriptions purchased by [the Taxpayer] are vastly different from the subscriptions that [the Taxpayer] sells to its Clients. But the underlying concept is that [the Taxpayer] purchases the Basic Software for customization and resale. And, [the Taxpayer] purchases the cloud-computing services as an integral part and necessary component to both access and deployment of the software, as well as to resell the cloud-computing services to its Clients.

To that end, we note that [the Taxpayer] does not receive or provide the software through a tangible medium. [The Taxpayer] and its Clients are only able to access the server and the software remotely. The server from where the software and data are hosted and backed-up are at locations, the "Data Center(s)", which are owned, operated and maintained by [the Software Provider]. The Data Centers are located outside Florida.

[The Taxpayer]'s Clients are primarily venture capital firms and/or family offices. As a result, the software sold to each Client is highly customized and designed to meet the specific needs and requirements of each Client, with measures, tools, and metrics specific to each Client's industry and market.

For example, [the Taxpayer] purchases the subscription for the Basic Software, which could be accounting software, from [the Software Provider]. [The Taxpayer] will then heavily customize that Basic Software to serve particular functions, such as accounting and fund management, customer relationship management, reporting solutions, portfolio management solutions, event management portals, etc. These software products and solutions are then further customized by [the Taxpayer] to suit the specific and individualized needs for each of its Clients (e.g., the software product is tailored for a specific industry and/or for a precise brand, product, project or any other item indicated by the Client). The customization includes variables such as industry specific terminology, but it could also be tailored to product or project specific reports, as required by each Client. Thus, while the infrastructure for the software and the hardware is dependent on [the Software Provider], the actual installation and configuration (i.e., the customization) of the software for its Clients, is done by [the Taxpayer].

[The Taxpayer] has employees in three other states. These out-of-state employees are involved with sales and consulting. All other employees are in Florida. Hence, [the Taxpayer] has no employees at the Data Centers.

> [The Taxpayer] has been charging its Clients sales tax on the sale of the subscriptions. . . .
>
> Again, [the Taxpayer] does not provide any tangible property to its Clients. That is, the software is never made available to [the Taxpayer]'s Clients by disk or any other tangible medium. Further, [the Taxpayer] does not provide any hardware - the Clients use their own hardware to access the software. At no time do the Clients have any control of [the Taxpayer's] hardware**.**
> With the exception of a very exclusive number of Clients, the software is only available to the Clients on-line. Hence, there is never an element of tangible personal property that [the Taxpayer] sells or delivers (or otherwise grants use or access to) for which [the Taxpayer] receives compensation.

* * *

In an e-mail dated XXXX, you confirmed that the Taxpayer selected the Data Centers that are owned, operated and maintained by the Software Provider are located outside of Florida. Specifically, you provided that the Taxpayer ". . . selected the XXXX Data Center and the XXXX Data Centers."

* * *

Along with the request for advisement, you included copies of the following:

- A Services Provider License Agreement (Indirect) (the SPLA), between the Taxpayer, as the "Customer," and the Software Provider;
- a Financial Products License Agreement executed by the Taxpayer and one of its clients (the Client) on June 14, 2012;
- a software as a service (SaaS) Product Rider for [Software Product #1], executed by the Taxpayer and the Client on June 14, 2012;
- a software as a service (SasS) Product Rider for [Software Product #2], executed by the Taxpayer and the Client on June 14, 2012; and,
- Invoice XXXX issued by the Taxpayer to the Client on March 1, 2015.

The SPLA provides the following in part:

> . . . 3. How to qualify for this program.
>
> To be eligible for this program, Customer must enroll and maintain its status as a Member of the [Software Provider] Partner Network at any level (Community, Subscriber, Competency, or Advanced Competency) and join the Hosting Community. . . .
>
> 4. Definitions. . . .
>
> "Client Software" means software that is installed on an End User's device that allows the device to access or use the Products.
>
> "End User" means an individual or legal entity that obtains Software Services directly from Customer, or indirectly through a Software Services Reseller.

> "End User Agreement" means the agreement between Customer and an End User under which Customer provides Software Services to the End User. . . .
>
> "Software Services" means services that Customer provides to End Users that make available, display, run, access, or otherwise interact, directly or indirectly, with the Products. Customer must provide these services from data center(s) through the Internet, a telephony network or a private network, on a rental, subscription or services basis, whether or not Customer receives a fee. Software Services exclude any services involving installation of a Product directly on any End User device to permit an End User to interact with the Product.
>
> "Software Services Reseller" means a legal entity to which Customer grants rights under this Agreement to provide Customer's Software Services to End Users.
>
> 5. Reseller.
>
> . . . a. Reseller. Customer must designate a Reseller by submitting the form provided by [Software Provider] . . .
>
> 6. How Products may be used.
>
> . . . a. License grant to provide Products as Software Services. Subject to the terms of this agreement, [the Software Provider] grants Customer a non-perpetual, non-exclusive, terminable, non-transferable, worldwide and limited right during the term of this agreement to copy, install, access, display, run, distribute, make available or otherwise interact with the Products in order to provide Software Services. . . .

The Financial Products License Agreement provides the following in part:

> . . . 1.1 [The Taxpayer] is in the business of licensing customized software solutions (the "Solution(s)") to the financial investment and services industry. [The Taxpayer's] Solutions may be licensed for installation (referred to herein as a "License") or for access on a subscription (software as a service) basis (referred to herein as a "Subscription").
>
> 1.2 Customer desires to license or subscribe to one or more Solutions from [the Taxpayer] for use within Customer's business as provided more specifically in the Solution-specific riders ("Product Riders") that are attached to this Agreement . . . .
>
> 2. Definitions
>
> . . . 2.12 "Hosted Systems" means the hardware, configuration, systems software, applications software, software utilities, firmware, embedded software, telecommunications equipment and connectivity, and other facilities where the Subscribed Solutions are hosted or that [the Taxpayer] uses to provide access to them and includes the Subscribed Solutions hosted thereon.

* * *

6. Subscription Licenses

. . . 6.3 Unless otherwise expressly provided in the applicable Product Rider, the following terms and conditions apply to all Subscription licenses:

(a) Customer acknowledges that its access and use of the Subscribed Software will be web-based only. The Subscribed Software will not be provided to Subscriber in CD-ROM form (or any other form of media) and will not be installed on any servers or other computer equipment owned or otherwise controlled by Customer. Instead, the Subscribed Software will he hosted by [the Taxpayer] at a hosting facility that [the Taxpayer] leases from a third-party hosting vendor (the "Hosting Site") and accessed and used by Customer through the use of the Internet and Customer's computers. The Hosting Site servers may be owned or leased by [the Taxpayer] in its discretion. . . .

(d) [Taxpayer] will provide Customer with login ids to access the Subscripted Solutions. . . .

10. Warranties and Limitations of Liability

. . . 10.6 Customer shall be responsible for selecting, obtaining and maintaining any equipment needed for the operation, access and use of the Licensed Solutions and any equipment or ancillary services needed or to connect to, access or otherwise use the Subscription Solutions . . . .

The SaaS Product Rider for [Software Product #1] provides the following in part:

This software as a service (SaaS) Product Rider to the . . . [Taxpayer] Financial Products License Agreement (the "Agreement) between [the Taxpayer], and . . . ("Customer"). . . .

1. Subscribed Solutions. The Subscribed Solutions covered by this Product Rider are . . .

- [Software Product #1] Solution
- Added Features: CRM Solution and Data Warehouse with XXXX

* * *

5. Grant of Subscription Licenses.

(a) [Software Product #1] Solution Subscription License. Subject to the terms and conditions of this Product Rider and the Agreement, including without limitation all terms applicable to Subscription licenses, [the Taxpayer] grants Customer's Authorized Business Units a personal, non-exclusive and non-transferable limited license to access via the Internet and use the hosted [Software Product #1] Solution during the Initial Term and any Renewal Term for Authorized Usage only . . . .

(i) Storage Capacity. The Subscriptions include a database and document storage allowance of 5 gigabytes (GB) (the "Storage Allowance").

* * *

8. Subscription Fees.

. . . (c) Storage Fees. There is no charge for the Storage Allowance. [Taxpayer] may impose an incremental excess storage fee (the "Additional Storage Fee") for each month in which (he combined size of the databases used by the Subscribed Solutions exceeds five (5) gigabytes (GB) at any time during the month . . . .

* * *

The SaaS Product Rider for [Software Product #2] provides the following in part:

1. Subscribed Solutions

This is a software as a service (SaaS) Product Rider to the . . . [Taxpayer] Financial Products License Agreement (the "Agreement") between [the Taxpayer] and . . . ("Customer"). . . .

Subscribed Solutions, The Subscribed Solutions covered by this Product Rider are . . .

- [Software Product #2] - 350 Investor/Contacts / 2 Administrators

* * *

5. Grant of Subscription Licenses.

(a) [Software Product #2] Solution Subscription License. . . . [Taxpayer] grants Customer's Authorized Business Units a personal, non-exclusive and non- transferable limited license to access and use a hosted installation of the [Software Product #2] (the "Hosted Investor Portal") via the Internet during the applicable Term for Authorized Usage only . . . .

(f) Storage Capacity. The Investor Portal Subscription includes a document storage allowance of l5 gigabytes (GB) (the "Storage Allowance").

* * *

8. Subscription Fees.

. . . (e) Storage Fees: There is no charge for the Storage Allowance. If document storage in the Hosted Investor Portal exceeds the Storage Allowance during a calendar quarter or partial calendar quarter in the Term, then [Taxpayer] will invoice Customer for additional storage for the month(s) in which the Storage Allowance is exceeded (the "Additional Storage Fee"). . . .

Requested Advisement

You have asked several questions regarding the tax treatment of Taxpayer's services. I will respond to these questions in the conclusion section of this letter.

Taxpayer's Position

Your letter dated October 15, 2015, provides that following, in part, regarding the Taxpayer's position:

> In sum, the sale of the subscriptions to the software (which is customized and delivered to the Clients electronically) and the sale of the cloud-computing services sold by [the Taxpayer] to its Clients, is exempt from Florida sales and use tax.

Applicable Authority and Discussion

All sales of tangible personal property in the State of Florida are subject to tax, unless specifically exempt by Chapter 212, F.S. The term "sale" is defined in s. 212.02, F.S., to mean "[a]ny transfer of title or possession, or both . . . of tangible personal property for a consideration." Section 212.02(15), F.S., provides that a "sale" of tangible personal property includes the lease or rental of tangible personal property. Pure service transactions that do not involve the sale of tangible personal property are generally not subject to tax under Florida law, unless the taxation of the service is specifically authorized by Chapter 212, F.S. When tangible personal property and services are sold as part of the same sale, the entire sales price is subject to tax. Section 212.02(16), F.S., defines "sales price" to include "any services that are sold as part of the sale" of tangible personal property.

The terms "lease," "let" and "rental" are defined in s. 212.02(10)(g), F.S., to include transactions in which the owner of tangible personal property transfers possession or use of property to another, for consideration, without the transfer of title. Rule 12A-1.071(1)(b)1., F.A.C., provides that transfer of custody or possession of the property, actual or constructive, constitutes an attribute of tangible personal property ownership with respect to an operating lease. Any person who leases or rents tangible personal property in this State is exercising a taxable privilege. Computer hardware is tangible personal property. Sales and leases of computer hardware are subject to sales tax. Charges for services included in the sale or lease of computer hardware are also subject to tax. See section 212.05, F.S.

Rule 12A-1.032(4), F.A.C., provides that prepackaged or canned software supplied on a tangible medium is taxable. However, the rule further 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. Customized software is defined as modifying or altering the prepackaged program to the customer's specifications, at the customer's request. Likewise exempt is a sale that solely involves software, canned or customized, electronically downloaded by the customer, as there is no conveyance of tangible personal property. However, electronically accessed software and customized software is subject to Florida sales tax when sold as part of the sale of tangible personal property. Such software is considered to be services that are included in the "sales price" of the computer hardware.

According to the National Institute of Standards and Technology, "cloud computing" is a "model for enabling convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction." [1]

Your letter provides that the Taxpayer does not receive the software in a tangible format from the Software Provider. The software is hosted at data centers that are owned and operated by the Software Provider. The Taxpayer and its customers are only able to access the server and the software remotely. You also provide that the software is never made available to the Taxpayer's customers by disk or any other tangible medium, and the Taxpayer does not provide any hardware to its customers.

The SPLA confirms that the Taxpayer must provide its products and services "from data center(s) through the Internet, a telephony network or a private network, on a rental, subscription or services basis . . . ." The Financial Products License Agreement provides that access and use of the subscribed software will be "web based only" and will be hosted at a hosting facility and accessed and used by the Client through the use of the Internet and customer's computers. The SaaS Product Riders for [Software Product #1] and [Software Product #2] provide that the Client receives non-exclusive and non-transferable limited licenses to access the products "via the Internet."

Conclusions

Your letter implies that the Taxpayer does deliver some elements of tangible personal property to an "exclusive number of Clients" as part of the services it provides. Please note, this response is regarding the subject transaction described in your letter and does not address the "exclusive number" of transactions that involve the delivery of tangible personal property.

Questions:

> 1. Whether [the Taxpayer] should charge, collect or remit sales tax on the sale of the services (both, software and cloud-computing) sold by [the Taxpayer] to its Clients? a. Whether [the Taxpayer] should charge, collect or remit sales tax on the sale of the customized software (which is delivered to the Clients electronically and accessed by the Clients over the internet)? b. Whether [the Taxpayer] should charge, collect or remit sales tax on the sale of the cloud-computing services (which includes access, storage and backup)?

Response:

Based on the facts provided, the sale of the subscriptions to the software and the sale of the cloud-computing services described in your letter are not subject to Florida sales and use tax. You have described the sale of customized software, delivered electronically, which is not subject to tax. You have provided that the Taxpayer does not deliver any tangible products to its clients.

[1] National Institute of Standards and Technology, U.S. Department of Commerce, Special Publication 800-145, p. 2.

2. With respect to question 1., above, does it matter if [the Taxpayer] installs the software directly onto the Client's hardware? In this case, the software is highly customized (it has been designed by [the Taxpayer] specifically for that Client, using terms, measurements, metrics and other variables unique to that Client), and it is installed by [the Taxpayer] (hence, the software is not delivered to the Client on a disk or by any other tangible medium).

Response:

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. You have provided that the software is "highly customized" and does not involve the sale or delivery of tangible personal property. If that is the case, the charge for software installation is not subject to sales tax.

3. Whether [the Taxpayer] should pay sales tax to [the Reseller] for the subscription to the software and/or the cloud-computing services?

Response:

Based on the facts provided, the purchase of the subscriptions to the software and cloud-computing services described in your letter is not subject to Florida sales and use tax.

4. Whether, [the Taxpayer] should charge Florida sales tax to its Clients which are not located in Florida? a. Would it make a difference if the software was canned, but is electronically delivered to the Clients' out-of-State location? b. Would it make a difference if the software is customized, but is electronically delivered to the Clients' out-of-state location? c. Would it make a difference if the software was canned, and delivered to the Clients' out-of-State location through a disk?

Response:

Sales to clients who receive software products outside Florida are not within Florida's taxing jurisdiction.

5. With respect to question 4., would it make a difference if the software was canned, and delivered to the Clients' in-state location through a disk?

Response:

Yes. Rule 12A-1.032(4), F.A.C., provides that prepackaged or canned software supplied on a tangible medium is taxable.

6. With respect to cloud-computing services (to host, store and back-up),
a. Since the server is in a state other than Florida, are such services subject to sale tax when [the Taxpayer] purchases the cloud-computing services?

Response:

Based on the facts provided, the purchase of the subscriptions to the software and cloud-computing services described in your letter is not subject to Florida sales and use tax.

> b. Since the cloud-computing services will be resold to [the Taxpayer]'s Clients, if the Department determines that the cloud-computing services are taxable, can such services be purchased exempt, if [the Taxpayer] were to extend a resale certificate to [the Reseller]?

Response:

Based on the facts provided, the charges for the subject cloud-computing services are not subject to Florida sales tax. The use of a resale certificate is unnecessary.

> c. and d. If the server were in the State, would the cloud-computing services be subject to sales tax at the time of purchase . . . [or] at the time of sale?

Response:

The Department declines to respond to these questions as they are hypothetical in nature and are not related to the transaction that is the subject of your request for advisement.

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: 206044