Georgia Letter Ruling: LR SUT-2018-03
Topic: Accommodations, Sales Price
Dated: March 26, 2018

This letter is in response to your letter ruling request dated March 20, 2017, regarding the application of Georgia sales and use tax to certain charges made by your client.

Facts Presented By Taxpayer

[Redacted] ("Taxpayer") manages a senior living housing complex [Redacted] (the "Facility"). Taxpayer offers residents at the Facility a wide variety of services (e.g., housekeeping, utilities, security, maintenance, local transportation, etc.) and amenities (e.g., a library, a media lounge, a salon/spa, concierge healthcare, and a state-of the-art health and wellness center). Additionally, Taxpayer provides residents at the Facility with a variety of dining options, including full-service fine dining and a café.

All residents at the Facility enter into a rental agreement with the Taxpayer and pay the Taxpayer a monthly fee (the "Monthly Service Fee"). The Monthly Service Fee includes the charge for residents' accommodations, as well as various services that the Taxpayer offers. Each rental agreement for independent living residents requires residents to have a monthly dining allowance (the "Dining Allowance"), which is included in the total price of the Monthly Service Fee.

The Dining Allowance is a defined portion of the Monthly Service Fee that the independent living resident can apply toward food and beverages available at the Facility. The Dining Allowance is mandatory for all independent living residents at the Facility. Independent Living residents dining at the Facility charge the price of their meals against their monthly Dining Allowance, thereby reducing the amount of Dining Allowance available. To the extent an independent living resident exceeds his or her allotted monthly Dining Allowance, Taxpayer would bill the resident for the excess (the "Overage"). In the event an independent living resident does not fully utilize his or her monthly Dining Allowance, the resident is not permitted to carry forward any unused Dining Allowance and still remains liable for the entire Monthly Service Fee.[1] The Dining Allowance is priced so that most independent living residents will come close to, but not exceed, their monthly Dining Allowance.

Although all independent living residents are required to have a Dining Allowance, the purpose of the Dining Allowance is to provide independent living residents with flexibility regarding their meal consumption and dining options. For instance, residents are able to decide for themselves whether to dine at the dining hall or café, and they are able to allocate how much of the Dining Allowance they spend each meal. Additionally, guests of an independent living resident are able to dine at the Facility, if accompanied by the resident. A guest may purchase a meal by either charging the meal to a resident's Dining Allowance or paying for the meal directly. Meals provided to independent living residents and their guests are individually priced, so that the residents can manage their Dining Allowance.

In contrast to independent residents, residents in assisted living and memory care units do not have a monthly Dining Allowance. Rather, Taxpayer provides three meals a day to these residents in the dining hall. The cost of these meals is included in the Monthly Service Fee paid by the assisted living and memory care residents. Taxpayer purchases the same bulk food and food ingredients for all care levels.

Taxpayer is not registered with the Department as a dealer and does not have a Georgia sales tax license. Taxpayer pays the applicable Georgia state and local sales tax when it purchases the food and beverages that it serves to its residents. Taxpayer does not collect Georgia sales tax on the Monthly Service Fee, the Dining Allowance included therein, or any Overage it may charge its residents.

Issue

Is Taxpayer a service provider who should pay the applicable state and local sales tax on the purchase of food and food ingredients it uses to prepare meals for its residents, or is Taxpayer making taxable retail sales of food?

[1] The Independent Living Agreement between Taxpayer and a resident provides that if a resident is absent from the Facility for more than 14 consecutive days during a given month, the resident may request a credit of the Dining Allowance up to $10/day.

Analysis

Imposition of Sales and Use Tax

Georgia levies and imposes a tax (subject to certain exemptions) on the retail purchase, retail sale, rental, storage, use, or consumption of tangible personal property and on certain enumerated services.[2] "Retail sale" means any sale, lease, or rental for any purpose other than for resale, sublease, or subrent.[3] "Sale" means any transfer of title or possession, exchange, barter, lease, or rental, conditional or otherwise, in any manner, or by any means of any kind of tangible personal property for a consideration.[4]

Although sales of most services are not taxable retail sales, "retail sale" includes the sale or charges for any room, lodging, or accommodation furnished to transients by any place in which rooms, lodgings, or accommodations are regularly furnished to transients for a consideration.[5] However, sales tax does not apply if the rooms, lodgings, or accommodations are supplied for a period of 90 continuous days or more ("Long-Term Accommodations", and those less than 90 continuous days, "Short-Term Accommodations").

Every person making a sale of tangible personal property at retail in this state or furnishing a service the purchase of which is a retail sale is a dealer and generally must collect the tax from the purchaser or consumer and pay the tax over to the Department.[6] Unless the dealer chooses to absorb the tax, the dealer must add the tax to the sales price or charge. Any dealer who neglects, fails or refuses to collect the tax upon a retail sale of tangible personal property made by him shall be liable for and shall pay the tax himself.[7] The dealer is liable for a tax on the sale at the state rate of 4 percent of the sale price plus applicable local tax at a rate that varies by local jurisdiction.[8]

Sales of services are not subject to the tax unless specifically designated as taxable. "A purchase of tangible personal property to be transferred to another in the course of providing a service, is a taxable retail transaction, even though the actual consumption of the item is made by the recipient of the service . . ."[9] Thus, a service provider (whether the service is taxable or not) is the end user and consumer of tangible personal property and, as such, is liable for sales and use tax on all purchases of tangible personal property and taxable services used to provide the service.[10]

---

[2] O.C.G.A. §§ 48-3-1 and 48-8-30.
[3] O.C.G.A. § 48-8-2(31).
[4] O.C.G.A. § 48-8-2(33)(A).
[5] O.C.G.A. § 48-8-2(31).
[6] O.C.G.A. § 48-8-30(b)(1).
[7] O.C.G.A. §§ 48-8-30 and 48-8-35.
[8] O.C.G.A. §§ 48-8-1, 48-8-30, 48-8-32, 48-8-80, 48-8-100, 48-8-109.1, 48-8-110, 48-8-140, 48-8-200, 48-8-240, 48-8-260, 48-8-269.7, and 48-8-269.22; The MARTA Act of 1965, as amended.
[9] *L. M. Berry & Company v. Blackmon*, 129 Ga App 347 199 (1973). *See also Atlanta Americana Motor Hotel Corp. v. Undercofler,* 222 Ga. 295 (1966) (holding that purchases of items of tangible personal property for use in rooms furnished to paying guests are taxable purchases and or not tax-free purchases for resale).
[10] See O.C.G.A. § 48-8-63 (While this statute generally addresses the tax treatment of people who contract to furnish tangible personal property and to perform services, the tax treatment would be the same for people who contract only to perform services, i.e., in either case the person is the consumer of tangible personal property and owes tax on its purchases of tangible personal property); see also Ga. Comp. R. & Regs. r. 560-12-1-.14(7) (stating the general rule for all service providers in the context of property withdrawn from inventory for use by a service provider).

Retail Sales and Uses of Food; Food and Accommodations

Generally, retail sales of food and food ingredients by restaurants, hotels, clubs, cafes, caterers, boarding houses, and others are taxable transactions.[11] Accordingly, those business entities purchase food tax free for resale and are required to remit the applicable state and local sales tax on the sale of the prepared food.[12] In contrast, some entities offer or provide food as an integral component of a related service transaction. Because service providers generally are the consumers of tangible personal property used during the provision of a service, subject to limited exceptions, they are liable for the tax on the purchase of food when it is used as a critical component of a service transaction.

Hospitals and nursing homes are service providers that are the users of all tangible personal property purchased for use in connection with the operation of those institutions.[13] Providing nourishment to patients is an essential component that is integrally related to the caregiving services administered by hospitals and nursing homes. As a corollary result, and in contrast to restaurants and hotels which purchase food tax free for resale because they are not considered service providers for taxation purposes, hospitals and nursing homes are required to pay tax on food at the time of purchase because they use that food to provide their respective services.[14]

Like hospitals and nursing homes, student societies with communal living are service providers who provide food or meals as one component part of their accommodation services. Fraternities, sororities and other student societies, with members residing at a common location and jointly sharing household expenses (including food) are not considered to be making retail sales of food to members. Instead, the organization's purchase of food is subject to the tax.[15]

In connection with accommodations that have a food component, it is important to distinguish the taxable differences between Short-Term accommodations and Long-Term Accommodations. Specifically, because Short-Term Accommodations are taxable, all additional underlying charges that are also part of a guest's invoice are taxable as well. For Long-Term Accommodations, which are not taxable, for so long as mandatory food charges constitute an integral component of the underlying Long-Term Accommodation, then such food is also provided tax-free to the recipient. Generally speaking, when a provider of Long-Term Accommodations starts selling food that is not considered mandatory, and as such, not integral to the Long-Term Accommodation itself, the provider becomes a seller of tangible personal property and is required to register as a dealer and fulfill all sales tax compliance obligations.[16]

Taxpayer's Monthly Service Fee

Taxpayer, as it relates to its independent living residents, is primarily engaged in the business of rendering services: Long-Term Accommodations with certain related components. Thus, payment of the Monthly Service Fee is not subject to sales tax because the fee is a charge for rendering services which are not specifically enumerated as taxable.

Dining Allowance

A mandatory and integral portion of the Monthly Service Fee is designated as the Dining Allowance, which basically serves as a monthly food/meal allotment. When it comes to food and meals, the independent living residents have the option to eat at multiple dining establishments, with each establishment having specific itemized pricing similar to that which would be included on a traditional restaurant menu. Taxpayer's provision of food (within the mandatory Dining Allowance), although it appears similar to provisions found at a typical restaurant, is still nothing more than a providing an integral component part of Taxpayer's Long-Term Accommodation services. Serving food to independent living residents (and sometimes guests) is an essential part of the accommodation services being provided

[11] Ga. Comp. R. & Regs. r. 560-12-2-.65.
[12] *Id*.
[13] Ga. Comp. R. & Regs. r. 560-12-2-.50(1)
[14] See Ga. Comp. R. & Regs. r. 560-12-2-.104(4)(b)(1)(iii) (Rule presumes that day care centers and for-profit nursing homes are service providers who use food in providing a service).
[15] Ga. Comp. R. & Regs. r. 560-12-2-.65. See also Ga. Comp. R. & Regs. r. 560-12-2-.23(4) (distinguishing the taxable retail sale of meals to college students from the college's use of food paid for by room, board, and tuition charges).
[16] Ga. Comp. R. & Regs. r. 560-12-2-.50(3)

at the Facility. As such, the mandatory Dining Allowance is simply an allocated component of the overall non-taxable Monthly Service Fee.

Overages

While neither a resident's payment nor use of the Dining Allowance is a taxable transaction, the payment of any Overages warrants further analysis. Service providers may provide certain features as part of a service but also separately make retail sales of these features. For example, an inn may provide breakfast as part of an accommodation but also sell food in the same location at lunch.[17]

Here, Taxpayer, through its Monthly Service Fee, does not provide its independent living residents with a dwelling and unlimited services. For example, Taxpayer provides certain standard utilities as part of the underlying accommodation service but requires residents to separately coordinate and purchase premium cable. Additionally, Taxpayer provides some basic social programs as part of the accommodation service but charges extra for special activities.[18] With respect to food, Taxpayer includes a base amount of food as part of its charge for Long-Term Accommodations, but the food component of Taxpayer's services is limited to the monthly allotted Dining Allowance. In fact, as a byproduct of the Taxpayer setting the Dining Allowance at a certain price point, the Taxpayer itself has made the determination as to when food should no longer be considered a mandatory and integral component of the accommodation services.

When a resident exceeds his or her base Dining Allowance, the resident is required to pay an Overage to obtain additional food. The Overage is the charge for Taxpayer to transfer tangible personal property to a resident or guest. Such transactions are optional and distinct from both the Dining Allowance and the bundle of other services offered by Taxpayer in exchange for the Monthly Service Fee. Instead, these transactions are akin to the purchase of food at a traditional restaurant. As such, all Overages incurred, whether an entire meal in the dining room or a cup of coffee in the café, are taxable as retail sales because those purchases of food or any other tangible personal property are outside the scope of Taxpayer's services (i.e. not covered by the Monthly Service Fee).

Rulings

Taxpayer provides rooms and related important amenities to independent seniors for a Monthly Service Fee. In doing so, Taxpayer is primarily a service provider and must pay state and local sales and use tax on the purchase of food and food ingredients that it uses to provide meals which are a part of its long-term accommodations.

To the extent Taxpayer, in exchange for additional consideration, provides a resident with tangible personal property that is not included as part of Taxpayer's services, Taxpayer is making a retail sale. Since retail sales are subject to state and local sales and use tax, Taxpayer must register with the Department as a dealer and remit tax on the Overages, which are the sales prices of the meals that are outside the scope of Taxpayer's services. When Taxpayer makes retail sales of food, Taxpayer can purchase the component food and food ingredients tax-free for resale.[19]

The opinions expressed in this ruling are based upon the information contained in your request and limited to the specific transactions, facts, circumstances and taxpayer in question. Should the circumstances regarding the transactions change or differ materially from those represented, this ruling may become invalid. In addition, 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 tax treatment than that expressed in this ruling.

---

[17] See generally O.C.G.A. § 48-8-39, Ga. Comp. R. & Regs. r. 560-12-1-.17 and r. 560-12-2-.23(4) (showing that a taxpayer may use tangible personal property as a service provider and also make retail sales of like tangible personal property).
[18] See Independent Living Rental Agreement, p. 4-5.
[19] Inventory may be purchased exempt for resale by providing the supplier with a properly completed ST-5 Certificate of Exemption. Alternatively, Taxpayer may submit a refund claim or take a credit for tax paid on the cost of goods which are later resold.