

Date Issued: June 9, 2014  
Georgia Letter Ruling: LR SUT-2014-05  
Topic: Service Provider

This letter is in response to your request for guidance on the application of Georgia sales and use tax to a Cloud-based system provided by Taxpayer.

**Facts as provided by the Taxpayer**

Taxpayer is a technology service provider. Taxpayer offers a cloud-based service to customers nationwide. The cloud-based system (“System”) will provide certain cloud-based applications and related services (collectively, the “Services”) that support a customer’s telecommunication equipment, including its voice, video, messaging, presence, audio, web conferencing, and mobile capabilities. Taxpayer is specifically requesting a ruling concerning the applicability of sales and use taxes in Georgia to its System.

Generally, a business’s phone systems, computers and other telecommunications equipment utilize various software applications and hardware in order to operate and function in the manner necessary for the business’s needs. For instance, although a business may have a telecommunications provider that provides it with telephone lines to make outgoing and receive incoming calls, the business will need hardware and software that internally instructs the business’s telecommunications equipment as to how to process and route those calls. Historically, customers have handled these functions internally. Through the System, Taxpayer will provide these functions as a service to its customers from an offsite location.

Specifically, the System replaces certain customer-owned and maintained software applications and related computer hardware that support customer telecommunication equipment with a Taxpayer hosted alternative. In this hosted alternative, Taxpayer owns (or is the lessee or licensee of) and maintains certain hardware and software. The customer utilizes the hosted applications by means of the customer’s existing telecommunications, Internet, or network connections, for which it pays its own third party telecommunications provider. In essence, in exchange for a monthly fee, Taxpayer will operate back-office equipment and software applications that provide necessary or enhanced functionality for a customer’s phone systems and other telecommunications equipment. The customer will provide the telecommunications equipment.

Taxpayer will acquire, operate and maintain all the hardware and software necessary to provide the Services and ensure optimal performance. The hardware and software required for providing the Services will be installed on servers located in another State. Taxpayer employees working outside of Georgia will maintain the hardware and software, will remotely monitor performance, perform necessary adds, moves, changes, and deletions, and provide troubleshooting for issues that arise during performance. At no time is any software or application transferred to the customer, and the customer cannot access the hosted software code nor manipulate the software in any way. At no time does a customer receive title to any hardware, and at no time does the customer have any rights of possession or control of any hardware.

The Services will be provided by Taxpayer on a remote basis through the use of Taxpayer owned equipment (“Equipment”) clusters located at a Taxpayer data center. The Equipment will deploy a variety of available Taxpayer-owned, client software applications that are utilized by customer-owned phones and workstations located at customer sites.

Taxpayer may also host and deploy certain customer-owned software applications that provide enhanced functionalities for a customer’s phone systems and other telecommunication equipment. Such hosted services are available as add-on services for additional fees (as described below), and are utilized by customers in the same manner as the Taxpayer-owned and hosted software applications.

To purchase the System, customers will enter into a contract with Taxpayer that includes a customer service order, a service description for the offering and a detailed pricing invoice. Under the contract, Taxpayer will charge the customer a monthly user license fee calculated based on the number of users. The fee is denominated as a “license” fee, but Taxpayer does not in fact license or lease any software or tangible personal property to the customer under the contract. The monthly fee charged by Taxpayer covers hardware, software, virtual service, storage and rack space, power and cooling, monitoring and management services, equipment moves, additional equipment, and major version upgrades. To the extent the customer purchases add-on services (including the hosting of customer-owned software applications), separate fees are charged for such services. Charges for maintenance and management of any customer-owned software applications are separately stated on the monthly invoice.

With respect to each of the support services described above, a customer utilizes the Taxpayer-owned and hosted software with the customer’s own equipment and through its own telecommunication, Internet or other network connection. At no time does the customer download or otherwise possess the software that is hosted by Taxpayer. In addition, Taxpayer does not provide the telecommunication, Internet or network connections necessary for the customer to utilize the services.

### **Issues**

1. Does Taxpayer purchase, lease, or license the hardware and software described above for its own use and/or consumption, or does Taxpayer purchase, lease, or license such items for resale?
2. Are the Services nontaxable services, or do the Services constitute a taxable lease or license of hardware or software?
3. If the System constitutes a lease, license or other transfer of software to a customer, are the charges for such a transaction subject to sales and use tax?
4. Are the services provided by the System taxable telecommunications services?
5. For sales and use tax purposes, are the System services provided in another State other than Georgia?

### **Analysis**

All retail purchases and sales of tangible personal property are taxable unless provided for otherwise.<sup>1</sup> Tax is levied and imposed upon the retail purchase, retail sale, rental, storage, use, or consumption of tangible personal property and on services described in this article that occur in this state.<sup>2</sup> However, unlike sales of tangible personal property, which are generally presumed taxable, sales of services are exempted unless specifically designated as taxable.<sup>3</sup> Cloud collaboration services and hosting services are not identified as taxable services in this state. Thus, Taxpayer’s charges for the Services are not subject to the tax as long as the Services do not, in substance, amount to taxable sales of hardware or software.

“Sale” means any transfer of title or possession, transfer of title and 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.<sup>4</sup> “Tangible personal property” means personal property that can be seen, weighed, measured, felt, or touched or is in any other manner perceptible to the senses.<sup>5</sup> Taxpayer’s charges for the Services are not subject to the tax when the customer does not receive tangible personal property as part of the transaction. In the present case, Taxpayer’s customers do not receive title to any hardware or software as part of the relevant transaction, nor do the customers receive use, possession, or control of any hardware or software as part of the transactions. Thus, Taxpayer’s sales of the Services described above do not constitute taxable sales of hardware and/or software.

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<sup>1</sup> O.C.G.A. §§ 48-8-1; 48-8-30(b).

<sup>2</sup> O.C.G.A. § 48-8-30.

<sup>3</sup> O.C.G.A. § 48-8-2(6)(A).

<sup>4</sup> O.C.G.A. § 48-8-2(33)(A).

<sup>5</sup> O.C.G.A. § 48-8-2(37).

In general, “retail sale” means any sale, lease or rental for any purpose other than for resale, sublease, or subrent.<sup>6</sup> More specifically, “retail sale” includes charges made for local exchange telephone service<sup>7</sup> and for cellular telephone services.<sup>8</sup>

Georgia Code § 46-5-163 addresses the sale of telecommunications services by a telecommunications company as follows:

“A telecommunications company including a telecommunications services reseller shall not provide telecommunications services without a certificate of authority issued by the commission. The provisions of Code Section 46-5-45 shall apply in circumstances where a telecommunications company is providing telecommunications services without a certificate issued by the commission.”<sup>9</sup>

Taxpayer does not hold a certificate of authority issued by the Georgia Public Service Commission, and does not sell local exchange telephone service or cellular telephone service. Thus, Taxpayer’s charges for the support services described above are not charges for taxable telecommunications services.

Service providers are end users and consumers of all tangible personal property used by them to provide their service. As end users and consumers, service providers are liable for sales and use tax on the purchase price of all tangible personal property used by them to provide their service.<sup>10</sup> Taxpayer is liable for sales and use tax on its purchase price of all tangible personal property that it purchases or uses in Georgia to provide the Services. Although Taxpayer is generally a service provider, if Taxpayer makes any retail sales of tangible personal property to customers in Georgia, Taxpayer is obligated to collect and remit the appropriate sales and use tax.

### **Rulings**

Georgia does not impose sales and use tax on cloud-based services or hosting services; thus, Taxpayer’s charges for the Services are not subject to the tax. As the end user and consumer, Taxpayer is liable for the tax on all tangible personal property used to provide the Services. Because Taxpayer’s customers do not receive title to, or possession, use or control of the relevant hardware and software, the Services offered by Taxpayer do not constitute taxable retail sales of hardware or software.

As an end user and consumer, a service provider such as Taxpayer is liable for sales and use tax on the purchase price of all tangible personal property it uses to provide its service. Taxpayer is liable for sales and use tax on all tangible personal property it purchases or uses in Georgia to provide its Services.

1. Taxpayer is the end user and consumer of all tangible personal property and software it purchases, leases, or licenses for purposes of providing the Services described above. Taxpayer does not purchase such items for resale.
2. The Services are nontaxable services and do not constitute taxable sales of hardware or software. However, as previously mentioned, if Taxpayer makes sales of tangible personal property, sales tax will generally apply to such transactions.
3. The System does not constitute a lease, license, or other transfer of software.
4. The services provided by the System are not taxable telecommunications services.
5. For sales and use tax purposes, the Services provided by the System are not provided in Georgia.

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<sup>6</sup> O.C.G.A. § 48-8-2(31).

<sup>7</sup> O.C.G.A. § 48-8-2(31)(F).

<sup>8</sup> Ga. Comp. R. & Regs. r. 560-12-2-.24(2).

<sup>9</sup> O.C.G.A. § 46-5-163.

<sup>10</sup> O.C.G.A. § 48-8-63. *See Resourcing Services Atlanta v. Georgia Department of Revenue et. al.*, 288 Ga. App. 532 (2007), cert. denied, 2008 Ga. LEXIS 287 (2008).

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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, then this ruling may become invalid. In addition, please be 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 tax treatment than that expressed in this response.