

Georgia Letter Ruling: LR SUT-2016-01
Dated: January 4, 2016
Topic: Sales of Architectural Materials & Services

This letter is in response to your request for guidance on the application of Georgia sales and use tax to certain sales by [Redacted] (“Taxpayer”).

Facts Presented By Taxpayer

Taxpayer is a residential design company in the new home construction industry with revenue streams as described below.

a. Residential Home Plans/Designs

Taxpayer designs and sells residential home plans. Taxpayer’s customers include individuals and builders. Taxpayer does not maintain a tangible inventory of home plans/designs. Rather, Taxpayer fills customer orders individually and sends the home plans/designs to customers either in hard copy format or by electronic media. For all home plans/designs, the customer obtains only a license. The home plans/designs are intellectual property, and the customer may not reproduce the home plan/design.

When Taxpayer provides “modification and design” services (as described below), Taxpayer’s invoice to its customer may contain a separate line-item charge for the underlying basic home plan/design.

b. Web-Based Media Licenses

Taxpayer also generates revenues from royalty fees paid by web-based media companies that market and sell Taxpayer’s home plans/designs. Web-based media outlets host websites on which customers can search, view, and select different home plans from various designers (the same way that a potential home owner may have reviewed a home plan in a printed home design book purchased from a bookstore or newsstand). Through a license agreement, Taxpayer allows the web-based media company to display and offer for sale Taxpayer’s home plans/designs.

When the customer, who may be a developer, searches the web-based media company’s website, the customer may buy one of Taxpayer’s home plans/designs as well as other items (discussed below), such as materials workbooks or marketing products for use in selling the home. The customer submits the order on the website and pays the web-based media outlet for the purchase and delivery of the home plan/design. The web-based media outlet accepts the order and sends it to Taxpayer. Taxpayer then fills the order and sends the home plan/design (and any other products ordered) directly to the customer either in hard copy format or by electronic media. Taxpayer includes a copy of the invoice issued by the web-based media outlet.

c. Materials Workbooks

In conjunction with home plans/designs, Taxpayer sells detailed specifications showing the items needed to build a particular home. Taxpayer compiles the specifications in workbooks and spreadsheet format. The spreadsheet lists each item and the quantity needed of each item. Taxpayer compiles the materials workbook only after a customer orders the workbook. Taxpayer does not keep an inventory of already prepared materials workbooks. The workbooks can be delivered to the customer by electronic media, disk, or hard copy. The materials workbook and its contents are copyrighted. The customer purchases only a license to the information in the materials workbook, and the information may not be reproduced by the customer.

d. Marketing Materials for Home Builders

Home builders use marketing materials to promote home sales. Specifically, at the home site or in the trailer at the entrance to a development, the home builder distributes handouts and brochures that contain information about the subdivision and the particular home. The home builder may also place a small sign on the home site to identify the type of home being built on the site and dimensions for the home. The potential home buyer can read the sign on the

home site and can take a free brochure that provides the home type, the layout for each floor of the home, the dimensions of the home, and information about the builder.

Taxpayer prepares the marketing materials to order. The materials can be specific to the builder, the home site, and/or the development. Taxpayer uses its computer-assisted drafting software to design the marketing materials for the home builder. Taxpayer sends the materials by electronic media. The home builder then prints the materials and distributes the materials at home sites and developments.

In addition to the marketing materials, Taxpayer also sells construction site signs. These signs are found at the entrance to a development and/or at the home site. Taxpayer ships the signs to its customers. Taxpayer retains a third party to manufacture the signs, and that third party ships the finished signs directly to Taxpayer's customer. The third party has been charging sales tax on its invoices to Taxpayer.

e. Modifications and Design

Taxpayer can modify a home plan/design to meet the customer's needs. The customer must buy the original (basic) home plan/design before buying a modification. Home plan/design modifications that Taxpayer can make include, but are not limited to

- a "mirror image" of a home plan/design,
- a "true reverse" of the home plan/design,
- a change of the front entry to side entry garage and vice versa, and/or
- a change in framing from 2-inch-by-4-inch construction to 2-inch-by-6-inch construction (usually in colder climates to allow for more insulation).

All modifications involve design work. Taxpayer prepares the modified home plan after a customer orders the modified plan and gives details of the modifications needed. The modification process involves separate phases:

1. A prospective client contacts Taxpayer with interest in Taxpayer's home plans. An employee consults with the prospective client about the client's preferences and/or needs, such as whether the client wants (1) a complete custom home from concept through construction documents, (2) a minor adjustment/modification to a pre-designed (stock) plan, (3) major adjustments/modifications to a pre-designed (stock) plan, or (4) a renovation to the client's existing residence.
2. After the scope of the design job is confirmed, Taxpayer sends a proposed quote for the job. The prospective client then reviews and accepts the quote. At that point, Taxpayer asks the client for a deposit. Upon receipt of the deposit, Taxpayer puts the job on the production schedule.
3. Almost without exception, Taxpayer performs design services to illustrate the client's needs and preferences. This requires listening to the client and illustrating artistically and architecturally what is gleaned from the conversation. Taxpayer must also use its natural ability, intuitiveness, education, and experience to create the unique design based on the client's needs and preferences.
4. Taxpayer presents the design to the client. The team member who creates the design confers with the client to discuss the design concept. The client then either approves or disapproves the design. If the client disapproves, the team member creates another design until the client approves. Occasionally, the team member must create multiple design concepts before the client approves.
5. After the client approves the design concept (and no earlier), Taxpayer begins drafting the construction documents. In this phase, Taxpayer produces the documents (blue prints) needed to build the building/home.
6. After Taxpayer completes the construction document phase, the client pays the remaining fees. Taxpayer then releases the drawings/documents/pdf files to the client.

Each phase involves ongoing interaction between the client and the designers and/or draft persons to ensure that the client is informed of the status of the project. The interaction also ensures that the client is getting what the client wants. The entire process can take a couple of weeks to more than a year to complete. Most jobs are completed in five to eight weeks.

Taxpayer bills by the hour for home plan modifications. On the customer's invoice, Taxpayer shows a separate line-item charge for "modifications and design." Thus, the customer invoice shows two separate charges, one charge for the basic plan/design and another charge for the modification to the plan. Taxpayer sends the modified design to the customer by electronic media or in hard copy format, depending on the customer's order. As with its sales of basic home plans, Taxpayer sells only a license to the customer, and the customer may not reproduce the modified designs, which are Taxpayer's copyrighted intellectual property.

f. Custom Design

Taxpayer provides custom design architectural services to customers. Taxpayer bills by the hour for this service. Taxpayer offers this service to customers seeking home designs to meet specific criteria. Custom design involves two phases: the design phase and the construction-document phase. In the design phase, Taxpayer consults with the client on the layout and design. This consultation can be done face-to-face, by phone, or by email. In the construction-document phase, Taxpayer generates the drawings that the client needs (or that the contractor needs) to build the home.

g. Builder/Developer Services

Taxpayer advises home builders and developers on selecting home plans/designs for a development. Taxpayer charges an hourly fee for this service.

Issue

Are Taxpayer's sales of the following subject to sales and use tax?:

- a. Residential Home Plans/Designs
- b. Web-Based Media Licenses
- c. Materials Workbooks
- d. Marketing Materials for Home Builders
- e. Modifications and Design
- f. Custom Design
- g. Builder/Developer Services

Analysis

Georgia levies and imposes a tax (subject to certain specific exemptions) on the retail purchase, retail sale, rental, storage, use, or consumption of tangible personal property and on certain enumerated services.¹ A retail sale is "any sale, lease, or rental for any purpose other than for resale."² A sale is "any transfer of title and [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."³ The measure subject to tax is the "sales price," which means

¹ O.C.G.A. §§ 48-8-1, -30.

² O.C.G.A. § 48-8-2(31).

³ O.C.G.A. § 48-8-2(33)(A).

the total amount of consideration, including cash, credit, property, and services, for which personal property or services are sold, leased, or rented, valued in money, whether received in money or otherwise without any deduction for the following:

- (i) The seller's cost of the property sold;
- (ii) The cost of materials used, labor, or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller;
- (iii) Charges by the seller for any services necessary to complete the sale; and
- (iv) Delivery charges.⁴

Thus, delivery charges are included in the taxable sales price when the underlying sale is taxable.

Unlike sales of tangible personal property, which are generally presumed taxable, sales of services are not subject to the tax unless specifically designated as taxable.⁵ Furthermore, O.C.G.A. § 48-8-3(22) provides an exemption from sales and use tax for “[p]rofessional, insurance, or personal service transactions which involve sales [of tangible personal property] as inconsequential elements for which no separate charges are made.” This exemption applies only when:

- the transaction is in substance a professional, insurance, or personal service transaction,
- the transaction entails the transfer of tangible personal property that is inconsequential to the overall transaction, and
- there is no separate charge for the tangible personal property that is transferred.

If a transaction is in substance the sale of tangible personal property, the exemption in O.C.G.A. § 48-8-3(22) will not apply. In determining whether a particular transfer of tangible personal property falls under O.C.G.A. § 48-8-3(22), the main consideration is the purpose of the customer.⁶ Taxability turns on whether the customer is primarily interested in buying the services provided or the tangible personal property transferred in conjunction with the services. If a customer primarily wishes to purchase the skilled services of the service provider, the sale or transfer of tangible personal property by the service provider is incidental to and but a means of providing the services that the customer wants, and the exception in O.C.G.A. § 48-8-3(22) would apply. On the other hand, if a customer is primarily interested in acquiring the tangible personal property, the sale is subject to sales and use tax.

While the Department generally considers architectural services to be professional services, charges for which are not subject to the tax, each transaction by an architect (or any other seller) must be analyzed on a case-by-case basis. When a customer pays an architect for the architect’s professional skill and labor, the transaction is not subject to the tax. However, if a customer pays an architect for a “canned” product, such as a previously designed and prepared blueprint, the customer is not paying for the professional skill and labor of the architect but is purchasing a copy of a work that the architect has already prepared. For purposes of analogy, the purchase of a copy of software that is either “canned”⁷ or that was at one time “custom”⁸ but is subsequently sold to a different purchaser is subject to the tax if the software

⁴ O.C.G.A. §§ 48-8-30(b)(1), -2(34).

⁵ Services subject to tax include, but are not limited to, certain utilities, fabrication labor, and transportation. O.C.G.A. § 48-8-2(37), (33)(A), (31)(A), (31)(F).

⁶ See *Craig-Tourial Leather Co. Inc. v. Reynolds*, 87 Ga. App. 360, 365 (1952).

⁷ Software that is designed, prepared, or held for general distribution or repeated use, or software programs developed in-house and subsequently held or offered for repeated sale, lease, license, or use. Ga. Comp. R. & Regs. 560-12-2-.111(2)(i).

⁸ Software which is designed and developed by the author to the specifications of a specific purchaser. Ga. Comp. R. & Regs. 560-12-2-.111(2)(e).

is delivered in a tangible format.⁹ Software, like a blueprint or other similar design prepared by an architect or music or a book, is copyrighted work. These items are all the result of significant labor and skill, but when a copy of the end product is sold in a tangible form, the transaction is subject to tax.

Rulings

- a. Charges to customers for residential home plans/designs are subject to sales and use tax when the plan/design is delivered to a Georgia customer in a tangible (hard copy) format.
- b. Royalties received from web-based media outlets are not subject to Georgia sales and use tax, because Taxpayer's transactions with the web-based media outlets are not "sales." Taxpayer need not collect Georgia sales and use tax on any royalties received from web-based media outlets. The web-based media outlets are making sales and must collect any applicable Georgia sales and use tax.
- c. For materials workbooks in disk or hard-copy format that Taxpayer sends to Georgia customers, Taxpayer must collect Georgia sales and use tax on the line-item charge for the items (as shown on the invoice) as well as the charge for shipping. Sales of materials workbooks that Taxpayer delivers to the customer by electronic media are not subject to Georgia sales and use tax.
- d. Sales of marketing materials that Taxpayer delivers to the customer by electronic media are not subject to Georgia sales and use tax, because the sale does not include the transfer of tangible personal property. For marketing materials, including construction-site signs, that Taxpayer sends by hard copy to Georgia customers, Taxpayer must collect Georgia sales and use tax on the line-item charge for the item as shown on the invoice as well as the charge for shipping.
- e. Charges for modifications and design are exempt from sales and use tax under O.C.G.A. § 48-8-3(22) as charges for professional services. Taxpayer is not required to collect Georgia sales and use tax on any line item charges for modifications and designs.
- f. Charges for custom design are exempt from sales and use tax under O.C.G.A. § 48-8-3(22) as charges for professional services. Taxpayer is not required to collect Georgia sales and use tax on any line item charges for custom design. It should be noted that Taxpayer owes sales and use tax on all items taxpayer purchases for its own use in Georgia (with a credit allowed for sales and use tax paid in another state when the taxable incident occurs first in that other state).
- g. Charges for builder/developer services are either (1) services not specifically enumerated as taxable under Georgia law or (2) exempt from sales and use tax under O.C.G.A. § 48-8-3(22) as charges for professional services. Taxpayer is not required to collect Georgia sales and use tax on any line item charges for builder/developer services.

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. Subsequent statutory or administrative rule changes or judicial interpretations of the statutes or rules upon which this ruling is based may subject similar future transactions to different tax treatment than that expressed in this ruling.

⁹ Ga. Comp. R. & Regs. 560-12-2-.111(3).