

Date Issued: October 20, 2016
Georgia Letter Ruling: LR SUT-2016-21
Topic: Professional Services

This letter is in response to your ruling request dated November 21, 2013, concerning the correct application of Georgia sales and use tax to certain sales made by your company.

Facts as presented by Taxpayer

[Redacted] (“Taxpayer”) is a creative services agency. A significant portion of Taxpayer’s business income is derived from producing corporate videos. Each product is made to the specifications of a single customer. Taxpayer does not sell any pre-produced or canned videos.

Most videos are delivered to the customer wholly in an electronic format. On occasion, Taxpayer will deliver videos to the customer on tangible storage media. When a tangible storage medium is delivered, Taxpayer itemizes charges on the customer’s invoice for the video production services and the separate tangible storage medium on which the video is delivered.

Issues

1. Are Taxpayer’s charges for video production services taxable when Taxpayer produces a corporate video and delivers it only in an electronic format and not by tangible media?
2. Are Taxpayer’s charges for video production services taxable when Taxpayer produces a corporate video and delivers it as an electronic file on a tangible storage medium, such as a portable hard drive, thumb drive, or DVD?
3. If Taxpayer produces a corporate video through an intermediary (an advertising agency or public relations firm) that is located and billed in Georgia but the end product is delivered outside Georgia to the intermediary’s client, are the charges for video production services subject to Georgia sales and use tax?

Analysis

Georgia levies and imposes a tax (subject to certain specific exemptions) on the retail purchase, retail sale, storage, use, or consumption of tangible personal property and on certain enumerated services.¹ Unlike sales of tangible personal property, which are generally presumed taxable, sales of services are not taxable unless specifically designated as such. While Georgia law does not specifically address the taxability of video, it does address the taxability of software, which, like video, is nontangible property that can be stored on tangible media.²

Rule 560-12-2-.111, explaining the taxability of software, provides insight into the taxability of video under Georgia law. The rule states, “Computer software delivered electronically is not a sale of tangible personal property and therefore is not subject to sales or use tax.”³ Just as software delivered electrically is not taxable, videos delivered electronically are not taxable.

Sometimes, however, software and videos are delivered on tangible storage media, such as a hard drive, disc, or thumb drive. In determining the taxability of software delivered on tangible storage media, Rule 560-12-2-.111 distinguishes between “prewritten computer software” and “custom computer software,” the former being taxable tangible property while the latter is a nontaxable professional service.⁴ The regulation defines “custom computer software” as “computer software, including custom updates, which is designed and developed by the author to the specifications of a specific purchaser.”⁵ Prewritten or “canned” computer software, on the other hand, is not custom-made, but rather is “designed, prepared, or held for general distribution or repeated use . . . or developed in-house and subsequently held or offered for repeated sale, lease, license, or use.”⁶

¹ O.C.G.A. §§ 48-8-1, 48-8-30(a).

² O.C.G.A. § 48-8-3(91), Ga. Comp. R. & Regs. r. 560-12-2-.111.

³ Ga. Comp. R. & Regs. r. 560-12-2-.111(4)(a).

⁴ Ga. Comp. R. & Regs. r. 560-12-2-.111(3).

⁵ Ga. Comp. R. & Regs. r. 560-12-2-.111(2)(e) (internal punctuation omitted).

⁶ Ga. Comp. R. & Regs. r. 560-12-2-.111(2)(i).

Like custom software, Taxpayer's videos are not canned products made for general distribution, but rather are customized to each customer's specifications. Applying the principles for the taxation of software, Taxpayer is accordingly engaged, not in the sale of taxable tangible personal property, but in the sale of nontaxable custom video production services.

Furthermore, O.C.G.A. 48-8-3(22) specifically provides that sales and use tax does not apply to "[p]rofessional, insurance, or personal service transactions which involve sales as inconsequential elements *for which no separate charges are made.*"⁷ Applying this general rule to software, Rule 560-12-2-.111 explains that the transfer of custom software to a purchaser in a tangible medium is merely an incidental part of the nontaxable sale of custom software service.⁸ As the storage media for video and software cannot be logically distinguished, the storage media used for transfer of custom videos to purchasers are also an inconsequential, incidental element of the sale of the custom video production services. Just as the transfer of custom software to a purchaser in a tangible medium does not render taxable the charges for the professional service of creating the custom software, the transfer of Taxpayer's custom videos by tangible storage media does not render taxable Taxpayer's charge for the custom video production service.

Additionally, sales of multiple copies of a custom video to the original customer are likewise not subject to sales and use tax.⁹ However, just as with software, custom video becomes pre-produced or canned video, and consequently taxable tangible property, when sold to someone other than the customer for whom the custom video was produced.¹⁰

As a service provider, Taxpayer is the consumer of the tangible personal property it uses during the provision of its service when Taxpayer does not separately charge its customers for such property.¹¹ Thus, in the case at hand, if Taxpayer does not separately charge for a tangible storage medium, Taxpayer, as the consumer of such items, owes sales and use tax on the purchase price of the item. If, on the other hand, Taxpayer separately charges for a tangible storage medium, Taxpayer may purchase said tangible storage medium tax free for resale. Subsequent to purchasing a tangible storage medium for resale, Taxpayer must remit sales tax on the sales price of that medium when it is sold to the customer. However, if Taxpayer delivers the medium to a customer outside of Georgia, the medium is not subject to Georgia tax because the sale of the medium would be sourced to the location where receipt by the customer occurs.¹²

Rulings

1. Charges for the production of a custom video, one produced to the specification of a single customer, are not subject to sales and use tax, regardless of whether the custom video is delivered to the customer electronically or by a tangible storage medium as such charges are for professional services that include tangible personal property only as an inconsequential element.
2. If Taxpayer does not make an itemized charge for a tangible storage medium in addition to its charge for custom video production services, Taxpayer is liable for the sales and use tax on the tangible storage medium provided to the customer. If Taxpayer makes itemized charges for both custom video production services and the tangible storage medium on which the video is delivered, Taxpayer must collect tax only on the charge made for tangible storage medium. In such a case where Taxpayer makes itemized charges for both custom video production services and the tangible storage medium on which the video is delivered, Taxpayer may purchase the tangible storage medium tax free for resale.
3. If Taxpayer delivers tangible storage media to a customer outside of Georgia, its sale of the media (assuming the charge for the media is separately itemized) is not subject to Georgia sales and use tax. If Taxpayer does not make an itemized charge for the tangible storage medium, Taxpayer, as the end user and consumer of the tangible medium, is liable for Georgia sales and use tax on the tangible storage medium provided to its customer if Taxpayer purchases or uses the tangible storage medium in Georgia.

⁷ O.C.G.A. § 48-8-3(22) (emphasis added).

⁸ Ga. Comp. R. & Regs. r. 560-12-2-.111(3)(b)(1).

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

¹⁰ *Id.*

¹¹ Ga. Comp. R. & Regs. 560-12-1-.14(7)(d).

¹² O.C.G.A. § 48-8-77.

The opinions expressed in this ruling are based upon the information contained in your request and limited to the specific transactions 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 those expressed in this response.