Date Issued: November 10, 2016
Georgia Letter Ruling: LR SUT-2016-24
Topic: Retail Sales, Sourcing and Professional Services

This letter is in response to your request for guidance on the application of Georgia sales and use tax to certain sales made by [Redacted] ("Seller") to [Redacted] ("Customer") (collectively referred to as "Taxpayers").

Facts as Presented by Taxpayers

[Redacted] Seller, located in [Redacted], is registered as a Georgia dealer. On [Redacted Date], Seller entered into a Sales Agreement ("Agreement") to sell "a technology solution, comprised of the license of Software, sale of Hardware and performance of Services" to [Redacted] Customer.[1] Seller and Customer's representative, [Redacted], noted in email correspondence on [Redacted Date] the following:

- the equipment in question can be, and often is, purchased without the additional professional services;
- the separately stated charges for travel and expenses relate to the professional services; and
- as the products can be purchased separately without the services, so too can the services be purchased independently of the products.

The Agreement provides in pertinent part:

> **6.7 Shipping and Delivery.** All Products shall be shipped to Customer's shipping address or as agreed and specified in the applicable PO[2] and the Products shall then be deemed to have been delivered the Products [sic] to Customer. Any loss of, or damage to, the Products shall be at the risk of the Customer from the date of delivery of the Products to the carrier point of shipment (Seller's location unless expressly agreed otherwise in writing by Seller). Customer shall insure the Products against loss or damage as may be appropriate.
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> **6.8 Title.** Subject to Sections 3 and 4.3, title to, property [sic] in, and ownership of, the Products (including demonstration Products) shall remain with Seller and shall not pass to Customer unless and until the entire purchase price (together with any interest or taxes applicable) for the Products has been fully paid to Seller.[3]

Seller's Statement of Work for Buyer ("Statement of Work"), [Redacted Date], explains that a third party company named [Redacted] ("Assembler") was engaged to assemble the products:

> Seller will provide routing, baseband ingest, file ingest, playout, asset management, signal processing and monitoring equipment . . . Seller is partnering with Assembler to design and integrate the facility. Construction of the system will be done at the Assembler facility at [Redacted] ("Assembler's Location"), where it will be assembled, commissioned and acceptance tested.[4]

In [Redacted Date], Seller shipped products to Assemblers Location. At its Georgia location, Assembler accepted delivery of the products on behalf of Customer.[5] Working on behalf of Seller, Assembler then constructed and assembled the equipment and shipped the equipment to various locations both inside and outside of Georgia.

Seller invoiced Customer on [Redacted Date] "for 50% of PO # [Redacted]."[6] At no time did ownership of the equipment pass from Customer to Assembler. Seller accrued and remitted tax on the equipment at the rate in effect in Gwinnett County during the month of [Redacted Date].[7]

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[1] Agreement, p. 1.
[2] Taxpayer did not submit a purchase order with the request for a letter ruling.
[3] Agreement, p. 7.
[4] Statement of Work, p. 9.
[5] Request for Letter Ruling, p. 3.
[6] Invoice, final page.
[7] Request for Letter Ruling, p. 6.

Issue

Does Georgia sales and use tax apply to the sale of products and related services sold by Seller, a Georgia dealer, to out-of-state Customer and delivered to and received by a third party in Georgia on behalf of Customer for assembly prior to shipment to its final destination?

Analysis

O.C.G.A. § 48-8-30 provides in part as follows:

> (c.1) (1) Every purchaser of tangible personal property at retail outside this state from a dealer, as defined in Code Section 48-8-2, when such property is to be used, consumed, distributed, or stored within this state, shall be liable for a tax on the purchase at the rate of 4 percent of the sales price of the purchase. It shall be prima-facie evidence that such property is to be used, consumed, distributed, or stored within this state if that property is delivered in this state to the purchaser or agent thereof. The tax shall be paid by the purchaser to the retailer making the sale, as provided in this article. . . Every person who is a dealer, as defined in Code Section 48-8-2, and who makes any sale of tangible personal property at retail outside this state which property is to be delivered in this state to a purchaser or purchaser's agent shall be a retailer and a dealer for purposes of this article and shall be liable for a tax on the sale at the rate of 4 percent of such sales price or the amount of tax as collected by that person from purchasers having their purchases delivered in this state, whichever is greater.
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> (g) Whenever a purchaser of tangible personal property under subsections (b) or (c.1) of this Code section, a lessee or renter of the property under subsection (d) or (e.1) of this Code section, or a purchaser of taxable services under subsection (f) of this Code section does not pay the tax imposed upon him or her to the retailer, lessor, or dealer who is involved in the taxable transaction, the purchaser, lessee, or renter shall be a dealer himself or herself and the commissioner, whenever he or she has reason to believe that a purchaser or lessee has not so paid the tax, may assess and collect the tax directly against and from the . . .

In the case at hand, the products at issue are sold by Seller, addressed to Customer, and delivered to a Georgia location where Assembler receives the products on behalf of Customer and assembles the products. While paragraph 6.8 of the Agreement does provide that title to the products shall not pass to Customer until the entire purchase price has been paid, it appears that the reference to "title" is a reference to unencumbered title, as the remainder of paragraph 6.8 provides that Customer's obligation to pay Seller shall be secured by a security interest in the products. Seller's retention of a security interest suggests that title in and ownership of the products at issue has otherwise passed to Customer. Customer's ownership of the products is further supported by paragraph 6.7 of the Agreement which provides that Customer bears the risk of loss on the products from the date of delivery of the products to the carrier point of shipment.

Paragraph 6.7 also provides that items delivered to the specified address are deemed to have been delivered to Customer. Thus, taken together, the contractual provisions indicate that the parties effectuated a sale of tangible personal property from Seller to Customer. Although the products were not delivered to Customer's office or billing address, Assembler received the products on behalf of Customer. While Assembler and Customer might not have been parties to a written agency agreement, Assembler acted as the agent for Customer when it accepted delivery of the products on behalf of Customer at Assembler's Georgia location. The relation of principal and agent arises wherever one person, expressly or by implication, authorizes another to act for him or subsequently ratifies the acts of another in his behalf.[8]

[8] O.C.G.A. § 10-6-1.

Sales are sourced to Georgia when the purchaser receives the item in Georgia.[9] In this case, the relevant sales are sourced to Georgia because Customer's agent receives the products in Georgia on behalf of Customer. Thus, because Seller is a Georgia dealer and sold products to Customer that were delivered to Customer's agent in Georgia, O.C.G.A. § 48-8-30(c.1) requires Seller to collect and remit sales tax on the transaction. Even if Seller does not collect such tax, Customer is still liable for the tax pursuant to O.C.G.A. § 48-8-30(g).

"Sales price" is the amount subject to sales tax and means 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;
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> (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;
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> (iii) Charges by the seller for any services necessary to complete the sale; and
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> (iv) Delivery charges.[10]

In determining which services are necessary to complete the sales, the Department generally considers multiple factors, including the following:

> (i) The extent of the relationship between the product and service;
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> (ii) Whether a customer may purchase the service without the product;
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> (iii) Whether a customer may purchase the product without the service; and
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> (iv) Any difference in the cost of the service or the cost of the product when the service and products are purchased separately as opposed to together.

In this case, it appears that the services performed in Georgia are related to the product. However, the equipment may be purchased without the services, the services may be purchased without the equipment, and the charges for the services and the equipment are separately stated on bills provided to Customer.[11] The charges for such services are not considered to be necessary to complete the sale and are, thus, not subject to tax.

Even if Seller were not a Georgia dealer and thus were not obligated to collect and remit sales tax in Georgia, by virtue of owning the products at issue, Customer nonetheless incurs a use tax liability. Use tax attached to the equipment upon its first use in this state. O.C.G.A. § 48-8-30(c)(1) specifically provides as follows:

> Upon the first instance of use, consumption, distribution, or storage within this state of tangible personal property purchased at retail outside this state, the owner or user of the property shall be a dealer and shall be liable for a tax at the rate of 4 percent of the purchase price[12] [plus applicable local tax] . . .

"Use" means the exercise of any right or power over tangible personal property incident to the ownership of the property.[13] In the present case, Customer owns the products and directs the seller to ship the products to a third party

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[9] O.C.G.A. § 48-8-77(b)(1).
[10] O.C.G.A. § 48-8-2(34).
[11] E-mail correspondence from [Redacted] dated [Redacted Date], [Redacted Date] and [Redacted Date].
[12] "Purchase price" applies to the measure subject to use tax and has the same meaning as sales price. O.C.G.A. §48-8-2(30).
[13] O.C.G.A. § 48-8-2(40).

agent in Georgia for assembly (while Customer continues to own the products), and such exercise of rights and powers over the property constitutes a taxable use by Customer.

Ruling

Sales and use tax applies to the sale described above of certain products that are sold by a Georgia dealer to an out-of-state purchaser and delivered to a third party who receives the products in Georgia on behalf of the purchaser for assembly prior to shipment to their final destination. Separately stated charges for professional services in this case are not subject to tax nor are the separately stated charges for travel and expenses subject to tax as these charges relate to the charges for nontaxable professional services and not to the charges for equipment.

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.