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Georgia Letter Ruling SUT No. 2014-02-20-01 Computers & Software

This letter is in response to your request for guidance on the application of Georgia sales and use tax to transactions involving software, software enhancements, and cloud subscription services.

Facts

Taxpayer sells consulting services and software to customers in Georgia. Taxpayer is a reseller of software, software enhancements, and cloud subscription services. Software sales consist of prepackaged software and prepackaged software enhancements (updates and service packs) provided from the vendor. Software and enhancements are not available on tangible media and must be downloaded from the vendor site.

Taxpayer is also a reseller of cloud subscription services that allow customers to access and use vendor software via the internet.

Issues

1. Are the sales of prepackaged software described above taxable to the end user consumer?
2. Are the sales of prepackaged software enhancements described above taxable to the end user consumer?
3. Are the sales of monthly cloud subscription services described above taxable to the end user consumer?

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 Every purchaser of tangible personal property at retail in Georgia is liable for a tax on the purchase at the rate of 4 percent of the sales price of the purchase, plus any applicable local sales taxes. The dealer making the taxable sale must collect the tax from the purchaser and remit the tax to the Department.² Each dealer shall add the amount of the tax imposed under this article, as far as practicable, to the sale price or charge. Any dealer who neglects, fails, or refuses to collect the tax provided for in this article upon a retail sale of tangible personal property made by him, his agent, or his employee when the sale is subject to the tax shall be liable for and shall pay the tax himself.³

The definition of “dealer” includes a person who “sells at retail, offers for sale at retail, or has in his possession for sale at retail, or for use, consumption, distribution, or storage for use or consumption in this state tangible personal property.”⁴ “Retail sale” or “sale at retail” means any sale, lease, or rental for any purpose other than for resale, sublease, or subrent.⁵ “Retail sale” includes the sale of certain services. “Sale” means any transfer of title or possession, exchange, barter, lease, or rental, conditional or otherwise, in any manner, by any means of any kind of tangible personal property for a consideration.⁶ “Tangible personal property” means personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses. “Tangible personal property” includes prewritten computer software.⁷

“Computer software” means:

any computer data, program or routine, or any set of one or more programs or routines, which are used or intended for use to cause one or more computers, pieces of computer-related peripheral equipment, automatic processing equipment, or any combination thereof, to perform a task or set of tasks. Without limiting the generality of the foregoing, the term “computer software” shall include operating programs, application programs, system programs, and any other subdivisions (such as assemblers, compilers, generators, and utility programs).⁸

“Prewritten computer software,” also known as “canned computer software,” means computer 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,

¹ O.C.G.A. §§ 48-8-1 and 48-8-30(a).

² O.C.G.A. § 48-8-30(b)(1).

³ O.C.G.A. § 48-8-35.

⁴ O.C.G.A. § 48-8-2(8)(G).

⁵ O.C.G.A. § 48-8-2(31).

⁶ O.C.G.A. § 48-8-2(33).

⁷ O.C.G.A. § 48-8-2(37).

⁸ Ga. Comp. R. & Regs. r. 560-12-2-.111(2)(d).

or use.⁹ The sale, lease, rental, license, or use of prewritten computer software is subject to sales and use tax when such software is sold in a tangible medium.¹⁰

Computer software delivered electronically is not a sale of tangible personal property and therefore is not subject to sales and use tax.¹¹ The dealer's invoice, purchase contract, or other documentation must indicate the method of delivery. If the method of delivery is not indicated on the dealer's invoice, purchase contract, or other documentation, delivery will be presumed to have been made through a tangible medium, and the burden will be upon the taxpayer to establish to the satisfaction of the Department that the computer software was delivered electronically.¹² However, if a dealer delivers computer software electronically and also provides the same computer software to the purchaser in a tangible medium, the transaction shall be treated as the taxable sale of tangible personal property unless the software qualifies as custom software.¹³ In the present case, the software and software enhancements are both delivered electronically and both are thus not subject to sales and use tax.

As mentioned above, certain services are subject to sales tax in Georgia (e.g., transportation services, accommodations, fabrication labor). However, cloud subscription services that allow customers to access and use vendor software via the internet are not among the enumerated taxable services. In addition, the cloud subscription services at issue do not include the transfer of tangible personal property. Because cloud subscription services are not among the enumerated taxable services and because such services do not include the transfer of tangible personal property, charges for the services are not subject to Georgia sales and use tax.

Rulings

1. In this case, the software that Taxpayer sells is not available on tangible media. Consequently, sales of such software are not subject to Georgia sales and use tax. The dealer's invoice, purchase contract, or other documentation must indicate the method of delivery.
2. Because the software enhancements that Taxpayer sells are also not available on tangible media, sales of the software enhancements are not subject to Georgia sales and use tax. The dealer's invoice, purchase contract, or other documentation must indicate the method of delivery.
3. Sales of monthly cloud subscription services to the end user consumer are not taxable retail sales for purposes of Georgia's sales and use tax because such transactions do not include the transfer of tangible personal property and are not considered taxable services.

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

¹⁰ Ga. Comp. R. & Regs. r. 560-12-2-.111(3).

¹¹ Ga. Comp. R. & Regs. r. 560-12-2-.111(4)(a).

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

¹³ Ga. Comp. R. & Regs. r. 560-12-2-.111(4)(b).

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.