Date Issued: October 17, 2014
Georgia Letter Ruling: LR SUT-2014-15
Topic: Service Provider-Information Technology Services

This letter is in response to your request for guidance on the application of Georgia's sales and use tax to certain charges made by Taxpayer.

Facts as provided by the Taxpayer

Taxpayer is a provider of information technology services. Taxpayer entered into an Information Technology Services Agreement (the "Agreement") with [Redacted Client Name] ("the Client"). The agreement provides that Taxpayer will be providing "the information technology services and related services" outlined in the Agreement. Some of these services are provided to the Client at the Client's Georgia facility.

The Agreement describes the services as follows: server, storage, backup services, disaster recovery services, supporting services including remote access, active directory services, domain naming services, lightweight directory access protocol, and virtualization. The Agreement provides that it is Taxpayer's responsibility to purchase, at Taxpayer's cost and expense, the equipment used for purposes of furnishing the services. Taxpayer may charge the Client the amortized cost of acquiring equipment and software used to provide the services to the Client. All technology resources are owned by Taxpayer. Under certain circumstances, the Client can cause Taxpayer to assign title to the technology resources to the Client. Taxpayer selects the equipment and software used to provide services to the Client. Taxpayer has sole possession and custody of the equipment and software used to provide services to the Client, including any equipment and software located on the Client's premises in Georgia.

The pricing methodology detailed in the agreement requires Taxpayer to provide the Client monthly invoices for service fees and amortized cost for server and storage management services. Notwithstanding any other provisions of the agreement, if the agreement is terminated in a manner requiring the Client to pay contractual asset charges, at the Client's request Taxpayer must assign or cause to be assigned ownership of all equipment, associated with these charges to the Client.[1]

Taxpayer believes that it is not selling tangible personal property to the Client when billing for contractual asset charges for server and storage management services and that these charges are not subject to the tax. Taxpayer has paid and is prepared to pay sales and use tax on the purchase of such tangible personal property.

Issue

Are Taxpayer's invoice charges for contractual asset charges which are in connection with the equipment and software owned by Taxpayer and used by Taxpayer to provide data processing and server services subject to sales and use tax?

Analysis

All retail purchases and sales of tangible personal property are taxable unless provided for otherwise.[2] Tax is levied and imposed upon the retail purchase, retail sale, rental, storage, use, or consumption of

[1] Information Technology Services Agreement By and Between the Client and Taxpayer.
[2] O.C.G.A. §§ 48-8-1; 48-8-30(b).

tangible personal property and on services described in this article that occur in this state.[3] However, unlike sales of tangible personal property, which are generally presumed taxable, sales of services are exempted unless specifically designated as taxable. Server and storage management services are not taxable services in Georgia.

"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.[4]

Although "sale" includes "lease" and "lease" generally includes any transfer of possession or control of tangible personal property for consideration,[5] "lease" does not include "[p]roviding tangible personal property along with an operator . . . A condition of this exclusion is that the operator is necessary for the equipment to perform as designed . . . an operator must do more than maintain, inspect, or install the tangible personal property."[6] In the case at hand, an operator is required in order for the relevant equipment to perform as designed, and Taxpayer provides the operator during the term of the agreement.

In a case addressing whether sales tax should be collected when the Georgia Ports Authority ("GPA") provided dock cranes and operators to Southeastern Maritime Client ("SEM") for use of dock cranes and operators, the Georgia Supreme Court held as follows:

> The GPA operators have total control over the cranes. All SEM can do is direct the crane operators to the task that SEM wants accomplished. The task is performed by the crane which is owned by the GPA and operated exclusively by the GPA operators. SEM is not responsible for repairs if a crane becomes inoperable. The real test as to exclusive control is this, if a crane operator refuses to operate the crane for any reason, who gets the crane operating again? Only the GPA can. SEM cannot replace the operator nor force him to go back to work. The only thing SEM has the authority to do is to point out the task to be accomplished. Thus the cranes, through its operators, are under the exclusive control of the GPA. The above was accepted by the Federal Maritime Commission in a case involving virtually the same parties. The case involved a tort claim, but the "control" question was predominate. The Commission held:
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> > The stevedore has to accept the operator offered by GPA, and GPA retains total operational control over the cranes during the entire rental period because GPA, alone, decides who may operate the crane and the conditions which may give rise to operator removal and discipline.

Likewise, in the present case, taxpayer retains operationel control of the relevant equipment. Thus, invoiced charges (from Taxpayer) for contractual asset charges do not rise to the level of a "sale" because the Client does not receive title and at no time has any rights of possession or control of the tangible personal property for which the charge is made. A sale would occur when the Client receives title or obtains rights of possession or control of the tangible personal property for which a charge is made.

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[3] O.C.G.A. § 48-8-30.
[4] O.C.G.A. § 48-8-2(33)(A).
[5] O.C.G.A. § 48-8-2(17).
[6] O.C.G.A. § 48-8-2(17)(C).

Furthermore, even when tangible personal property ultimately passes to the customer, the transaction may be for services and not for the retail sale of such property. O.C.G.A. § 48-8-63(b) specifically provides that:

> [e]ach person who orally, in writing, or by purchase order contracts to furnish tangible personal property and to perform services under the contract within this state shall be deemed to be the consumer of the tangible personal property and shall pay the sales tax imposed by this article at the time of the purchase. Any person so contracting who fails to pay the sales tax at the time of the purchase or at the time the sale is consummated outside the limits of this state shall be liable for the payment of the sales or use tax.

Thus as a general rule, service providers, in the same manner as contractors, are end users and consumers of the tangible personal property used to provide their services and are liable for the tax on all such property.[7]

Taxpayer must collect the tax on any itemized charge it makes for tangible personal property when in exchange for the consideration the Client pays to Taxpayer, the Client will receive either a) title to the property or b) sufficient rights of possession or control of the tangible personal property for the transaction to constitute a lease in exchange for its payments. However, in the present case, the Client does not automatically receive title to the equipment, nor does the Client receive sufficient rights over the equipment for the transaction to be considered a lease. Both parties appear to consider Taxpayer to be a service provider. Further, Taxpayer has expressly provided that it "has paid and is prepared to pay sales tax/use tax on the purchases", which is the appropriate tax treatment for a service provider. Although title to the relevant equipment might ultimately pass to the Client, it only passes to the Client at the Client's request, i.e., the contract does not provide for title to pass automatically to the Client.

Ruling

Charges made by Taxpayer for contractual asset charges do not rise to the level of a "sale" when the customer does not receive title and at no time have any rights of possession or control of the tangible personal property for which the charge is made. Thus, Taxpayer's itemized invoice charges for, contractual asset charges, which are in connection with the equipment and software owned by Taxpayer and used by Taxpayer to provide data processing and server services are not subject to sales and use tax. Instead, Taxpayer owes sales and use tax upon its purchase price of the equipment. Note that if Taxpayer stops providing its service to the Client but the Client pays any amount to obtain title or possession to equipment, such amount is subject to sales tax.

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.

[7] *Resourcing Services Atlanta v. Georgia Department of Revenue et. al*., 288 Ga. App. 532 (2007).