

SUMMARY

QUESTION: Whether Taxpayer's sales of prepaid, subscriber, on demand Internet streaming video sold to its customers located in or outside the State of Florida is a taxable event under Florida Sales and Use Tax and Florida Communications Services Tax?

ANSWER: Taxpayer is providing its customers, or subscribers, a digital video programming service that is delivered over a broadband network using Internet protocol for transmission. Taxpayer is providing its customers a communications service. Communications services are subject to communications services tax and gross receipts tax in Florida. When such service is provided to a Florida service address, communications services tax and gross receipts tax apply. Taxpayer's sales of on demand Internet streaming video are not subject to Sales and Use tax.

June 28, 2010

XXX

Re: Technical Assistance Advisement 10A-031
Communications Services Tax – Prepaid Streaming Video Downloads on Demand
Sales and Use Tax – Prepaid Streaming Video Downloads on Demand
XXX (Taxpayer)
FEI#: XXX
Sections 202.11, 202.12, 202.16, 202.19, 203.01, 212.05, 213.22, Florida Statutes (F.S.)

Dear XXX:

This is a response to your letter dated December 28, 2009. You have requested a Technical Assistance Advisement regarding the Department's position on whether Sales and Use Tax, Communications Services Tax, or neither apply to sales of on demand streaming video downloads. Information in your letters and related documents during our telephone calls has established that you meet the requirements for a Technical Assistance Advisement.

FACTS

Taxpayer is a Florida limited liability company, whose principal address is located in Florida. Taxpayer sells on demand Internet streaming video to prepaid customers through its website. Taxpayer's customers prepay a fixed monthly amount to access a certain number of minutes of video per month. Taxpayer offers access to over 20,000 movies. The content is transmitted into and through a converter box. Taxpayer provides customers with the converter box and a remote control, so customers may view video content on their television set. Taxpayer's letter states that customers are provided free use of the box and remote. As the video is transmitted via Internet protocol (IP), the customer must have broadband Internet access. Taxpayer does not provide this access. Taxpayer provides its customers terms and conditions of subscription.

TAXPAYER'S POSITION

Taxpayer believes its sales are not subject to Sales and Use Tax (SUT) or communications services tax. Taxpayer opines that, because its sales are not tangible personal property and do not meet the definitions of services subject to SUT, the sales are not subject to SUT. Taxpayer further opines that its sales are not subject to communications services tax, because the sales are

not sold through a cable provider or direct satellite connection, and the product is delivered via Internet protocol that is not stored on any device under the control of the end user. Taxpayer cites and emphasizes several portions of Ch. 212, F.S. and Ch. 202, F.S., but does not expound upon the statutes referenced. Taxpayer also cites TAA 07A-022, which discusses sales of downloaded software. Taxpayer provides several articles on e-commerce, iTunes, and other digital downloads.

ISSUE

Taxpayer requests advisement on whether its sales of prepaid, subscriber, on demand Internet streaming video sold to its customers located in or outside the State of Florida is a taxable event under Florida Sales and Use Tax and Florida Communications Services Tax.

APPLICABLE AUTHORITY

Section 202.11, F.S., provides, in part:

(1) "Cable service" means the transmission of video, audio, or other programming service to purchasers, and the purchaser interaction, if any, required for the selection or use of any such programming service, regardless of whether the programming is transmitted over facilities owned or operated by the cable service provider or over facilities owned or operated by one or more other dealers of communications services. The term includes point-to-point and point-to-multipoint distribution services by which programming is transmitted or broadcast by microwave or other equipment directly to the purchaser's premises, but does not include direct-to-home satellite service. The term includes basic, extended, premium, pay-per-view, digital, and music services.

(2) "Communications services" means the transmission, conveyance, or routing of voice, data, audio, video, or **any other information or signals**, including cable services, to a point, or between or among points, by or through any electronic, radio, satellite, cable, optical, microwave, or other medium or method now in existence or hereafter devised, **regardless of the protocol used for such transmission or conveyance**. The term includes such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code, or protocol of the content for purposes of transmission, conveyance, or routing without regard to whether such service is referred to as voice-over-

Internet-protocol services or is classified by the Federal Communications Commission as enhanced or value-added. The term does not include:

(a) Information services.

* * *

(Emphasis added.)

(h) Internet access service, electronic mail service, electronic bulletin board service, or similar online computer services.

* * *

(6) "Information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, using, or making available information via communications services, including, but not limited to, electronic publishing, web-hosting service, and end-user 900 number service. **The term does not include any video, audio, or other programming service that uses point-to-multipoint distribution by which programming is delivered, transmitted, or broadcast by any means, including any interaction that may be necessary for selecting and using the service, regardless of whether the programming is delivered, transmitted, or broadcast over facilities owned or operated by the seller or another, or whether denominated as cable service or as basic, extended, premium, pay-per-view, digital, music, or two-way cable service.** (Emphasis added)

* * *

(9) "Prepaid calling arrangement" means the separately stated retail sale by advance payment of communications services **that consist exclusively of telephone calls** originated by using an access number, authorization code, or other means that may be manually, electronically, or otherwise entered, and that are sold in predetermined units or dollars of which the number declines with use in a known amount. (Emphasis added)

* * *

Section 212.05, F.S., provides, in part:

It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state, including the business of making mail order sales, or who rents or furnishes any of the things or services taxable under this chapter....

(1) For the exercise of such privilege, a tax is levied on each taxable transaction or incident, which tax is due and payable as follows:

(a)1.a. At the rate of 6 percent of the sales price of each item or article of tangible personal property when sold at retail in this state, computed on each taxable sale for the purpose of remitting the amount of tax due the state, and including each and every retail sale.

* * *

DISCUSSION

Sales and Use Tax is imposed, in general, on each sale or lease transaction of tangible personal property. Section 212.05, F.S., states that the legislative intent:

that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state, including the business of making mail order sales, or who rents or furnishes any of the things or services taxable under this chapter, or who stores for use or consumption in this state any item or article of tangible personal property as defined herein and who leases or rents such property within the state.

In general, Florida law imposes communications services tax and gross receipts tax on the sale of communications services. See sections 202.12, 202.19 and 203.01, F.S. The term "communications services" is broadly defined under s. 202.11(2), F.S., to mean "the transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals, including cable services, to a point, or between or among points by or through any electronic, radio, satellite, cable, optical, microwave, or other medium or method now in existence or hereafter devised, regardless of protocol used for such transmission or conveyance. . . ." (Emphasis added.)

Based on the Taxpayer's description of its service as reiterated in the FACTS section of this advisement, Taxpayer is not providing its customers Internet access. Internet access is the means by which users connect to the Internet. Internet Service Providers (ISP's) provide Internet access through a point of presence on the Internet network. Internet access is specifically excluded from the definition of a communications service, pursuant to Section 202.11(2)(h), F.S.

Taxpayer's is also not providing an information service. Pursuant to Florida law the definition of an information service specifically excludes "any video, audio, or other programming service that uses point-to-multipoint distribution by which programming is delivered, transmitted, or broadcast by any means, including any interaction that may be necessary for selecting and using the service . . ." Section 202.11(6), F.S. (Emphasis added.)

Florida law defines a "cable service" as "the transmission of video...or other programming service to purchasers, and the purchaser interaction, if any, required for the selection or use of any such programming service.... [The] term includes point-to-point

and point-to-multipoint distribution services by which programming is transmitted or broadcast by microwave or other equipment directly to the purchaser's premises, but does not include direct-to-home satellite service....” Section 202.11(1), F.S. (Emphasis added.)

Taxpayer is providing its customers, or subscribers, a digital video programming service that is delivered over a broadband network using Internet protocol for transmission. Taxpayer is providing its customers a communications service. Communications services are subject to communications services tax and gross receipts tax in Florida.

When such service is provided to a Florida service address, communications services tax and gross receipts tax applies. These taxes apply to the total “sales price,” which means the total amount charged by a dealer for the sale of the right or privilege of using communications services in this state. The sales price includes any property or other services that are part of the sale.

Currently, the state tax rate is 6.8 percent and the gross receipts tax rate is 2.37 percent. **Beginning with bills issued on or after August 1, 2010**, Taxpayer’s sales of communications services are subject to a state tax imposed at the rate of 6.65 percent, a gross receipts tax at the rate of 2.37 percent and an additional gross receipts tax imposed at the rate of .15 percent for an unaffected total Florida communications services tax of 9.17 percent. Dealers may bill, collect, and remit the 6.65 percent state tax and the additional .15 percent gross receipts tax at a combined rate of 6.8 percent provided the taxes are properly reflected on the communications services tax return. (Chapter 2010-149, Laws of Florida (ss. 1, 3 and 5, SB 2024)) There is also a local communications services tax imposed on communications services, pursuant to section 202.19, F.S.

For billing purposes, the statute requires that the state and gross receipts tax rates be combined and billed as a single item on the bill, for a combined Florida communications services tax rate of 9.17%. See Section 202.12(2), F.S. The local tax varies in rate by jurisdiction. The applicable local tax rate is determined based upon the customer’s service address. (See Sections 202.19 and 202.22, F.S.) As Taxpayer is providing its customer’s equipment for receipt of the communications service, the location of such equipment is the service address the Taxpayer should use to determine the correct local taxing jurisdiction. (See Section 202.11(14)(a), F.S.)

Since the local rate varies by jurisdiction, providers of communications services must assign each customer service address to the proper local taxing jurisdiction. Providers that use one or more of the methods listed in Section 202.22(1), F.S., and exercise due diligence in doing so, are held harmless from any liability for tax, penalty, or interest that would normally result from the incorrect assignment of a service address. In addition, the higher collection allowance of .75%, rather than .25%, is permitted to be deducted from the tax that is properly accounted for and remitted (see Sections 202.19, 202.22, and 202.28, F.S.).

Taxpayer’s sales are communication services and are not subject to SUT. However, if at any point Taxpayer makes a charge for either the converter box or the remote, either as a sale or rental, that is not part of the sale of the video programming service such charge

will be subject to SUT if such charge is separately stated. If such charge is included with the monthly fee, the charge is considered to be part of the sales price of the video programming service and therefore subject to communications services tax and gross receipts tax. See Sections 202.11(13)(b)7., 202.12(1)(a), 202.19 and 203.01(1)(a)2., F.S.

CONCLUSION

Taxpayer is providing its customers a communications service. When such service is provided to a Florida service address, communications services tax and gross receipts tax apply. Taxpayer's sales of on demand Internet streaming video are not subject to Sales and Use tax.

This response constitutes a Technical Assistance Advisement under Section 213.22, F.S., which is binding on the Department only under the facts and circumstances described in the request for this advice as specified in Section 213.22, F.S. Our response is predicated on those facts and the specific situation summarized above. You are 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 treatment than expressed in this response.

You are further advised that this response, your request and related backup documents are public records under Chapter 119, F.S., and are subject to disclosure to the public under the conditions of Section 213.22, F.S. Confidential information must be deleted before public disclosure. In an effort to protect confidentiality, we request you provide the undersigned with an edited copy of your request for Technical Assistance Advisement, the backup material and this response, deleting names, addresses and any other details which might lead to identification of the taxpayer. Your response should be received by the Department within 15 days of the date of this letter.

Should you have any questions, please feel free to contact me at 850-717-6315.

Sincerely,

Carla M. Bruce
Tax Law Specialist
Technical Assistance and Dispute Resolution

Record ID: 75993