



Executive Director
Marshall Stranburg

QUESTION 1: ARE RENTALS OR SALES OF XXXX INSTANT VIDEO CONTENT TO FLORIDA CUSTOMERS SUBJECT TO SALES TAX?

DEPARTMENT RESPONSE: THE TAXPAYER’S SALES AND RENTALS OF DIGITAL VIDEO CONTENT ARE “... ELECTRONIC IMAGES WHICH APPEAR ON [a] ... VIDEO DISPLAY SCREEN...” THE TAXPAYER DOES NOT FURNISH ANY TANGIBLE PERSONAL PROPERTY FOR SALE OR RENTAL TO THE CUSTOMER. THE VIDEO CONTENT IS NOT THE SALE AND RENTAL OF TANGIBLE PERSONAL PROPERTY, OR OTHER TAXABLE SERVICES UNDER CHAPTER 212, F.S., AND IS NOT, THEREFORE, SUBJECT TO SALES TAX UNDER FLORIDA LAW.

QUESTION 2: ARE RENTALS OR SALES OF XXXX INSTANT VIDEO CONTENT TO FLORIDA CUSTOMERS SUBJECT TO CST?

DEPARTMENT RESPONSE: THE RENTAL OF DIGITAL VIDEO CONTENT FALLS WITHIN THE DEFINITION OF A “VIDEO SERVICE” AS A PAY-PER-VIEW OR A DIGITAL VIDEO SERVICE FOR CST PURPOSES. “VIDEO SERVICES” ARE “COMMUNICATIONS SERVICES” AND ARE SUBJECT TO CST WHEN CHARGED TO A FLORIDA SERVICE ADDRESS. THEREFORE, A CHARGE TO RENT DIGITAL VIDEO CONTENT MADE TO A FLORIDA SERVICE ADDRESS IS SUBJECT TO CST ON THE SALES PRICE CHARGED.

WHEN THE TAXPAYER SELLS DIGITAL VIDEO CONTENT, IT IS “. . . OFFERING OF A CAPABILITY FOR . . . ACQUIRING . . . STORING . . . RETRIEVING, USING OR MAKING AVAILABLE” THE DIGITAL VIDEO CONTENT. A CUSTOMER’S PURCHASE OF DIGITAL VIDEO CONTENT, WHETHER DOWNLOADED AND/OR STORED ON THEIR ONLINE LIBRARY, IS THE SALE OF AN INFORMATION SERVICE, PURSUANT TO FLORIDA LAW. IT IS NOT THE SALE OF A COMMUNICATIONS SERVICE AND IS NOT SUBJECT TO CST.

December 18, 2014

RE: Technical Assistance Advisement – TAA 14A19-005
Sales and Use Tax and Communications Services Tax
XXXX (Taxpayer)
FEI #: XXXX
Chapters 202 and 212, Florida Statutes

Child Support Enforcement – Ann Coffin, Director • General Tax Administration – Maria Johnson, Director
Property Tax Oversight – Howard Moyes, Interim Director • Information Services – Damu Kuttikrishnan, Director

www.myflorida.com/dor
Tallahassee, Florida 32399-0100

Dear XXXX,

This is a response to your letter dated XXXX. You have requested a Technical Assistance Advisement (TAA) regarding the Department's position on whether Sales and Use Tax (sales tax) and/or Florida Communications Services Tax (CST) applies to the rental and sales of digital video content through XXXX Video. The information provided with your letter established that you meet the requirements for a TAA.

ISSUES

1. Are rentals or sales of XXXX Video content to Florida customers subject to sales tax?
2. Are rentals or sales of XXXX Video content to Florida customers subject to CST?

FACTS

The Taxpayer, an affiliate of XXXX.com, Inc., provides digital video content through XXXX Video. Digital video content available for sale or rental includes television shows, movies, sporting events, and news events. A customer may view the digital video content from the XXXX Video library by (1) renting the digital content; or (2) purchasing the digital content.

The "XXXX Video Terms of Use" updated April 12, 2013, was provided with the Taxpayer's request. It provides the following about the service:

1. THE SERVICE

The XXXX Video service (formerly known as XXXX Video On Demand) (the "Service") offers digitized versions of movies, television shows, sporting events, news events, and other video content (collectively, "Digital Content") and other services under certain terms and conditions as set forth in this Agreement. The Service allows you to access and view Digital Content in two different ways: by streaming a copy, or by downloading a copy. As indicated on the product detail pages of the Service, some Digital Content may be available for streaming only, some Digital Content may be available for download only, and some Digital Content may be available for streaming and download. (Emphasis added.)

A customer that *rents* the digital video content may watch the content by streaming it or by downloading the content to a compatible device. The content may be streamed through a web browser, an Internet connected TV, a Blu-ray player, or a set-top-box, or on a XXXX device that is compatible with XXXX Video. A customer may also download the rented video content to one compatible device such as a XXXX, personal computer, or TiVo box. If the rented video content is downloaded to a personal computer or TiVo box, the customer cannot watch the content on any other device using the same XXXX.com account. If the rented video content is downloaded to a XXXX, the content may not be downloaded to another device or simultaneously watched on more than one device using the same XXXX.com account. However, the customer may start watching the downloaded content on the XXXX and later stream the content on another compatible device.

The terms of use provide the following information on how the content may be viewed:

2. COMPATIBLE DEVICES

In order to be able to stream or download Digital Content from the Service and to view Digital Content on the Service, you will need to use a personal computer, portable media player, or other device that meets the system and compatibility requirements that we establish from time to time and is otherwise capable of interacting with the Service (each such device, a "Compatible Device"). Some Compatible Devices may be used only to stream Digital Content, some Compatible Devices may be used only to download Digital Content, and some Compatible Devices may be used to stream and download Digital Content....

Digital video content *rented* from XXXX Video service is restricted in two ways regardless of whether the content is streamed or downloaded. First, the customer only has a specified, limited amount of time after payment is made to watch the content (typically 30 days). Second, once the customer starts watching the *rented* content, the customer has only a specified, limited number of hours to finish watching the content, generally 24 hours based on the Taxpayer's website.¹ The Taxpayer does not state whether it knows at the time of *rental*, for digital content available to both download and stream, whether a customer is choosing to download or stream the digital video content.

Purchases of Digital Content

If a customer purchases digital video content, the digital video content is stored or made available through the customer's online video library. The customer may watch it by streaming the digital video content through a compatible device. Or, a customer may download the digital video content onto two compatible devices and then watch the video. Content may be watched through either method or both methods. A customer may still stream digital video content after downloading the content. For purchases, viewing rights are only restricted as follows:

3. DIGITAL CONTENT

d. License to Digital Content. Subject to your payment of any applicable fees (including applicable taxes) to rent, purchase, or otherwise obtain access to Digital Content, and your compliance with all other terms we specify for Digital Content or the Service, XXXX grants you a non-exclusive, non-transferable, non-sublicensable, limited right and license, during the applicable Viewing Period, to access, view, use and display the Digital Content in accordance with the Usage Rules, for Non-Commercial, Private Use. As used herein, "Non-Commercial, Private Use" means a presentation of Digital Content for which no fee or consideration of any kind (other than that which you pay to us to view the Digital Content) is charged or received,

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http://www.xxxx.com/gp/feature.html/ref=amb_link_359558142_3?ie=UTF8&docId=1000739191&pf_rd_m=ATVPDKIKX0DER&pf_rd_s=center-3&pf_rd_r=1CMBW36QJQJHBWAXAGRZ&pf_rd_t=1401&pf_rd_p=1395801862&pf_rd_i=1000739191#WhatIsPIV

which takes place in your private home or apartment or, if outside your private home or apartment (e.g., in a hotel room, dorm room, office, or airport waiting lounge) is limited to a private viewing for you and your invitees. Non-Commercial, Private Use specifically excludes any public presentation (e.g., a presentation in a dorm lounge) and any presentation by a place of public accommodation or other commercial establishment (e.g., a bar or restaurant), even if no fee is charged for viewing the Digital Content....

e. Availability of Purchased Digital Content. Purchased Digital Content will generally continue to be available to you for download or streaming from the Service, as applicable, but may become unavailable due to potential content provider licensing restrictions and for other reasons, and XXXX will not be liable to you if Purchased Digital Content becomes unavailable for further download or streaming. You may download and store your own copy of Purchased Digital Content on a Compatible Device authorized for such download so that you can view that Purchased Digital Content if it becomes unavailable for further download or streaming from the Service.

h. General Restrictions. You may not transfer, copy or display the Digital Content, except as permitted in this Agreement. In addition, you may not: i. sell, rent, lease, distribute, broadcast, sublicense or otherwise assign any right to the Digital Content to any third party; ii. remove any proprietary notices or labels on the Digital Content; iii. attempt to disable, bypass, modify, defeat, or otherwise circumvent any digital rights management system used as part of the Service; or, iv. use the Service or Digital Content for any commercial or illegal purpose. (Emphasis added.)

Otherwise, a customer may watch purchased digital video content by streaming or downloading, as often as wanted for an indefinite period of time.

TAXPAYER POSITION

In its letter, the Taxpayer provides that sales tax is imposed on sales of tangible personal property and certain services. It states that in the past, the Department has determined that streaming video services were not subject to sales and use tax, as they are not sales of tangible personal property. In addition, it states that the Department has previously determined that sales transactions involving only digital transmissions online, via Internet Protocol or electronic mail, to a customer's computer without other evidence of the transfer of something tangible are not sales of tangible personal property and not subject to sales tax. Likewise, the Taxpayer states that neither the rental nor the purchase of the digital video content through the XXXX Video service is subject to sales tax.

For CST, the Taxpayer states that the Department has determined in the past that the temporary or permanent download of an electronic book is not subject to CST, because it is the acquisition or retrieval of information and digital books are considered an "information service," which is specifically excluded from the definition of communications services. While the Taxpayer states

that the Department has not specifically addressed the taxability of other digital content, it opines that the sale of digital video content is not a communications service, but an “information service,” and not subject to CST.

However, for the rental of digital video content, the Taxpayer states that the Department has previously determined that similar services are “video services” and subject to CST. Therefore, the Taxpayer opines that the rental of digital video content through the XXXX Video service is subject to CST.

LAW AND DISCUSSION

Sales and Use Tax

Chapter 212, F.S., imposes sales tax on retail sales in Florida of tangible personal property. Rule 12A-1.062, F.A.C., clarifies that “...furnishing information by way of electronic images which appear on the subscriber's video display screen does not constitute a sale of tangible personal property nor does it constitute the sale of a taxable information service.” Therefore, such sales are not subject to sales tax.

The Taxpayer’s sales and rentals of digital video content are “...electronic images which appear on [a] ...video display screen...” The Taxpayer does not furnish any tangible personal property for sale or rental to the customer. The video content is not the sale and rental of tangible personal property, or other taxable services under chapter 212, F.S., and is not, therefore, subject to sales tax under Florida law.

Communications Services Tax

Chapter 202, F.S., imposes CST on the retail sale of communications services in Florida. “Communications services” are defined, in part, as the transmission, conveyance, or routing of *voice*, data, *audio*, *video*, or any other information or signals to a point or between or among points, regardless of the medium or methods used. Communications services include “video services.” (See s. 202.11(1), F.S.) “Video services” are “... the transmission of video, audio, or other programming service to a purchaser, and the purchaser interaction, if any, required for the selection or use of a programming service” “Video services” include pay-per-view and digital video services. (See s. 202.11(24), F.S.)

Information services are excluded from the definition of communications services. Information services are “... the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, using, or making available information via communications services” Information services do not include video services. (See s. 202.11(5), F.S.)

CST is imposed upon the retail sale of communications services when the services (1) originate and terminate in Florida, or (2) originate or terminate in Florida and are charged to a Florida service address. (s. 202.12(1), F.S.)

A service address is, for video services, the location where the customer receives the services in this state. (See s. 202.11(14)(b), F.S.) Communications services tax is computed on the sales price of the communications services. (See s. 202.11(13), F.S.)

Rentals through XXXX Video Service

The Taxpayer's customers may *rent* digital video content which they may download or stream, or, depending on the types of devices through which the customer views the digital video content, some combination thereof. The customer pays to view the digital video content, and must watch the digital video content within a specified amount of time. After the time period expires, the content becomes unavailable, whether streamed or downloaded, and the customer must pay again to view the digital video content.

This *rental* of digital video content falls within the definition of a "video service" as a pay-per-view or a digital video service for CST purposes. "Video services" are "communications services" and are subject to CST when charged to a Florida service address. Therefore, a charge to *rent* digital video content made to a Florida service address is subject to CST on the sales price charged.

Purchases through XXXX Video Service

The Taxpayer's customers may also purchase digital video content. The digital video content is then stored in the customer's online library. Any digital video content that is purchased and stored in the customer's online library is at the customer's disposal for online streaming, subject to the terms and conditions of use. The customer may also download the digital video content to a compatible device. Once downloaded, the content does not expire and is available for watching as long as the customer retains the digital video content.

When the taxpayer sells digital video content, it is ". . . offering of a capability for . . . acquiring . . . storing . . . retrieving, using or making available" the digital video content. A customer's purchase of digital video content, whether downloaded and/or stored on their online library, is the sale of an information service, pursuant to Florida law. It is not the sale of a communications service and is not subject to CST.

CONCLUSION

The Taxpayer's sales and rentals of digital video content are not subject to Florida sales tax as they are not the sale of tangible personal property, or taxable services under Chapter 212, F.S.

The Taxpayer's *rental* of digital video content is a "video service" pursuant to Florida law. As such, charges made to customers for the *rental* of digital video content to a Florida service address are subject to CST on the sales price.

The Taxpayer's sales of digital video content, whether stored online or downloaded to a customer's device, are sales of information services. Such sales are not the sale of a communications service and are not subject to CST.

This response constitutes a Technical Assistance Advisement under s. 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 s. 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 s. 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.

Sincerely,

Carla M. Bruce
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Technical Assistance and Dispute Resolution
(850) 717-6315

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