



Executive Director
Marshall Stranburg

Question: Do the amended/additional benefits for the XXXX XXXX Videos, XXXX Music, XXXX Pantry, and XXXX Pricing change the determinations of tax applications provided in TAA 14A-010?

Response: The amended/additional benefits of the XXXX Instant Video service do not change the determination in TAA 14-010 that the benefit is a communications service and, specifically, a “video service”, and the portion of the XXXX Membership charge attributable to XXXX XXXX Video service, when charged to a Florida service address, is subject to CST.

The XXXX Music service was not addressed in the prior TAA. It is a music service and properly characterized as a “video service” pursuant to Florida law. As such, the portion of the XXXX Membership charge attributable to the XXXX Music service, when charged to a Florida service address, is subject to CST.

Shipping charges related to the XXXX Pantry benefit are separately stated, and the product is shipped F.O.B. origin. Therefore, the determination in the prior TAA that shipping charges are not subject to sales tax does not change.

The addition of the XXXX Pricing benefit does not alter the characterization that the XXXX Membership does not fall under s. 212.02(1), F.S. XXXX Membership charges to Florida customers are not subject to sales tax based on the XXXX Pricing benefit. However, discounts to the sales price allowed by the dealer at the time of sale of the tangible personal property, reduce the taxable sales price.

December 19, 2014

RE: Technical Assistance Advise ment – TAA 14A19-006
Communications Services Tax and Sales and Use Tax
XXXX (Taxpayer)
FEI #: XXXX
Chapters 212 and 202, Florida Statutes

Dear XXXX,

This is a response to your letter dated XXXX. You have requested a Technical Assistance Advise ment (TAA) regarding the Department’s position on whether Florida Communications Services Tax and Gross Receipts Tax (CST) and or Sales and Use Tax (sales tax) applies to certain benefits provided to XXXX Members as part of their XXXX Membership. The information provided with your letter established that you meet the requirements for a TAA.

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

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ISSUE

Do the amended/additional benefits for the XXXX Videos, XXXX Music, XXXX Pantry, and XXXX Pricing change the determinations of tax applications provided in TAA 14A-010?

FACTS

XXXX (Taxpayer) was issued a Technical Assistance Advise ment (TAA) on April 7, 2014. In that TAA, the Taxpayer was advised on the taxability of its XXXX Memberships for Sales and Use Tax (sales tax) and Communications Services Tax (CST). The Taxpayer provided the following information on XXXX Membership (as quoted in pertinent part from TAA 14A-010):

Taxpayer offers a Membership program known as XXXX to the general public for a fee. This fee is in the form of a lump sum charge. Members of the general public may also sign up for a free, one-month trial of the Membership program. With Membership, members receive a number of services. These services currently include:

1. Shipping benefits on certain purchases made from the www.xxxx.com website. XXXX members are entitled to receive free two-day shipping on certain purchases. Items eligible for free shipping are marked as such on the www.xxxx.com website. XXXX members are also eligible for reduced shipping costs for items that are not otherwise XXXX eligible, that have additional shipping costs due to size, bulk, or other special circumstances, or on certain products sold by certain third-party websites.
2. Streaming video services. XXXX members are able to stream movies and television shows that are designated as “XXXX Videos” as many times as they like during the term of their Membership. These videos are viewed on the member's television, computer, tablet computer, or other compatible device. These videos cannot be downloaded or stored on devices.
3. Temporary borrowing or permanent download of certain electronic books. ...

(Emphasis added.)

The Taxpayer was advised, quoted from TAA 14A-010, as follows:

No portion of Taxpayer's XXXX Membership program is subject to sales and use tax in Florida at this time. The portion of the Membership attributable to XXXX Video services (or other communications services) is subject to CST. If that portion is not separately allocable in Taxpayer's books and records, then the entire XXXX Membership fee is subject to CST. The CST must be paid by members when they purchase XXXX Memberships. Furthermore, the CST must be paid by Taxpayer when it purchases XXXX Video services or other communications services that it offers to members in Florida as part of a free trial [Memberships].

After the issuance of the TAA, some of the benefits provided to XXXX Members, as well as terms and conditions, changed. The Taxpayer has provided the following information, explaining that there have been changes to the benefits provided to XXXX Members as part of the XXXX Membership. The Taxpayer provides the following amendments to the XXXX Membership:

XXXX Videos – Previously, as described in the Request, XXXX Members could only *stream* XXXX Video content. Now XXXX Members with XXXX HD and XXXX HDX tablets (“Specific Tablets”) can *download* XXXX Video content to their device. The downloaded videos may be viewed without a wireless connection. Thus, the XXXX Video content is the same, but XXXX Members with Specific Tablets can download, in addition to streaming, the content.

XXXX Music – XXXX Members may listen to music designated as part of “XXXX Music” an unlimited number of times during the course of their XXXX Membership. XXXX Music may be played on the XXXX Member’s computer, XXXX, or other compatible device. XXXX Music may be streamed or downloaded for listening without a wireless connection.

XXXX Pantry – The XXXX Pantry benefit allows XXXX Members to have up to 45 pounds of heavy/bulky items delivered for a shipping fee of \$5.99. The heavy/bulky items in the XXXX Pantry are only available for purchase by XXXX Members.

XXXX Pricing – XXXX Pricing provides discounts to XXXX Members on sales of certain tangible personal property. Currently, XXXX Pricing is limited to discounts on certain televisions and software, but the discounts will likely be expanded to a broader range of tangible personal property.

(Emphasis added.)

As noted in the earlier TAA, the Taxpayer does not directly provide the additional benefits, but is contractually obligated to ensure they are provided. The Taxpayer pays an affiliate to provide the service related to each benefit.

The Taxpayer provided a copy of the “XXXX XXXX Terms and Conditions,”¹ updated as of April 23, 2014. (Online this document was updated June 12, 2014.) In regards to the video service, under the “XXXX Videos and XXXX Owners’ Lending Library” heading, the terms and conditions document refers (and electronically links) to the “XXXX Video Terms of Use.” Updated April 12, 2013, the XXXX Video Terms of Use provides, in part, the following:

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

¹ The Taxpayer’s online documents are quoted in all instances.

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.

5. DIGITAL CONTENT

a. General. The Service may allow you to: (i) rent Digital Content for viewing over a limited period of time ("Rental Digital Content"), (ii) purchase Digital Content for viewing over an indefinite period of time ("Purchased Digital Content"), (iii) access Digital Content on a subscription basis for viewing over a limited period of time during a subscription period (for example, through XXXX Video) ("Subscription Digital Content"), and (iv) access Digital Content on a free or promotional basis for viewing over a limited period of time ("Free Digital Content"). Digital Content may be available on the Service as Rental Digital Content, Purchased Digital Content, Subscription Digital Content, Free Digital Content, or any combination of those. The basis on which Digital Content is available on the Service will be indicated on the product detail page for that Digital Content on the Service. From time to time, we may add or remove Digital Content from the Service and may change the basis on which Digital Content is available on the Service.

b. Usage Rules. Your use of Digital Content is subject to the XXXX Video Usage Rules (the "Usage Rules"). The Usage Rules provide important information regarding your use of Digital Content, including the time period during which you are authorized to view different types of Digital Content (the "Viewing Period" for that Digital Content) and limitations on the number and type of Compatible Devices on which each type of Digital Content may be downloaded, streamed, and viewed.

c. Subscriptions. Our subscription services are dynamic services and the specific Subscription Digital Content available and amount of Subscription Digital Content available will generally change over time. We make no guarantee as to the availability of specific Subscription Digital Content or the minimum amount of Subscription Digital Content available in any subscription. Additional terms applicable to a subscription (such as the applicable cancellation and refund policy) will be indicated on the informational pages for that subscription.

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. ...

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.

f. Downloading and Risk of Loss. If you plan to download Digital Content that you purchase or rent, we encourage you to do so promptly after your purchase or rental. If you are unable to complete a download after having reviewed our online help resources, please contact XXXX customer service. Once you purchase or rent Digital Content and we make the Digital Content available to you, you are responsible for completing the download, if you choose to download, and for all risk of loss of the Digital Content after download.

g. Streaming. When you stream Digital Content, the resolution and quality of the Digital Content you receive will depend on a number of factors, including the type of Compatible Device on which you are streaming the Digital Content and your bandwidth, which may go up and down over the course of your viewing. ...

(Emphasis added.)

The Taxpayer's request states that it does not know whether a member downloads or streams the service and has no way to determine which members may only stream the service.

The "XXXX XXXX Terms and Conditions" also links to the "XXXX Music Terms of Use," updated June 11, 2014. The Music terms of use provide, as quoted in pertinent part,

This is an agreement between you and XXXX Digital Services, Inc. (with its affiliates, "XXXX", "we" or "us") regarding the Store, XXXX Music and the Music Library Service (collectively, the "Services"). The Services allow you to purchase and access digital versions of audio recordings, artwork and information relating to the audio recordings, and other content (collectively, "Music Content"), as described below. Before using the Services, please read these Terms of Use, all rules and policies related to the Services (including any specific rules, usage restrictions and other conditions or procedures that we post or update on or through the Services or on XXXX.com), the XXXX.com Privacy Notice, and the XXXX.com Conditions of Use (collectively, the "Agreement"). If you use any of the Services, you are agreeing to the terms and conditions of the Agreement.

1. THE SERVICES

1.2 XXXX Music. XXXX Music allows you to access certain Music Content from our catalog (“XXXX Music Content”) on a limited basis if you (a) are eligible for the XXXX Music benefit under the XXXX XXXX Terms & Conditions, and (b) opt-in to XXXX Music by playing or downloading XXXX Music Content.

3. RIGHTS AND RESTRICTIONS.

3.1 Rights Granted. You may use the Services only for your personal, non-commercial purposes, subject to the Agreement. You may not use the Services to store, transfer or distribute content of or on behalf of third parties, to operate your own content application or service, to resell any part of the Services or for any form of unlawful file sharing. We grant you a non-exclusive, non-transferable right to use Purchased Music, XXXX Music Content, Matched Music and any additional Music Content we provide you access to through the Music Library Service only for your personal, non-commercial purposes, subject to the Agreement. Except as set forth in the preceding sentence, you may not redistribute, transmit, assign, sell, broadcast, rent, share, lend, modify, adapt, edit, license or otherwise transfer or use Purchased Music. We do not grant you any synchronization, public performance, public display, promotional use, commercial sale, resale, reproduction or distribution rights for Music Content you purchase or access through the Services. You must comply with all applicable copyright and other laws and with the terms of any licenses or agreements to which you are bound in your use of the Services and Music Content you purchase or access through them.

(Emphasis added.)

As with the XXXX Video, the member may stream or download music, and the Taxpayer states it does not know which a customer may do.

XXXX members’ shipping benefits, as described in the prior TAA, included free or reduced shipping prices for certain products and under various conditions. The shipping benefits are amended for XXXX Pantry. The “XXXX XXXX Terms and Conditions” updated June 12, 2014, and accessed online, have a category for “Other Benefits,” with a link for information about additional XXXX benefits. This link provides that XXXX Pantry is,

Access to XXXX Pantry, where members can purchase and ship to addresses in the contiguous U.S. low priced grocery, household, and pet care items for a flat delivery fee of \$5.99 for each XXXX Pantry box. XXXX Pantry orders cannot be shipped to addresses in Alaska, Hawaii, and Puerto Rico.

For XXXX Pantry, as explained on the Taxpayer's website,

... Adding your first XXXX Pantry item to Cart starts a XXXX Pantry box. As you shop, you see that each Pantry item tells you what percentage of a Pantry box it fills based on its size and weight. Pantry boxes are large and can hold up to 45 pounds or four cubic feet of household products. As you check items off your list, we continuously track and show you how full your box is.

XXXX Pantry allows XXXX members to shop a wider range of products, including heavy and bulky items, all in popular pack sizes that are cost prohibitive to ship for free. ...

XXXX Pantry items are shipped F.O.B. origin, and the shipping charges are separately stated, though an example of this was not provided.

No additional information was found or provided for the XXXX Pricing benefit other than what was provided in the Taxpayer's TAA request letter.

TAXPAYER POSITION

In its request for a TAA, the Taxpayer states that in the prior TAA, the Department determined that no portion of the XXXX Membership was subject to sales tax, because it was not a taxable membership and Florida does not currently impose sales tax on the sales of electronic books, streaming video services, or separately stated transportation charges on items sold F.O. B. origin. The Taxpayer opines that the amended or additional benefits do not create a taxable membership or that the benefits are otherwise not subject to sales tax.

For XXXX Pantry, the Taxpayer states that it is a discounted shipping benefit and not a taxable membership pursuant to s. 212.02(1), F.S. In addition, the Taxpayer states that each sale is shipped F.O.B. origin, and shipping and handling fees are separately stated. Therefore, the shipping charges are not subject to sales and use tax.

The Taxpayer states that XXXX Pricing is not subject to tax, because it is a discount that allows members to purchase certain products sold by affiliates at a reduced price. Again, the Taxpayer believes that the charge does not constitute a taxable admission or membership per s. 212.02(1), F.S.

For XXXX Videos and Music, the Taxpayer states that benefits provide members access to (1) movies and television shows that a member may stream or download to specific tablets, and (2) music which a member may stream or download to a compatible device. The Taxpayer opines that these services are not subject to sales tax.

The prior TAA did conclude that the portion of the XXXX Membership attributable to the XXXX Videos benefit is subject to CST when charged to a Florida service address. The Taxpayer opines that because the XXXX Video and XXXX Music services may be streamed on any compatible devices and/or *downloaded* to certain devices, the service should not be subject to CST.

LAW AND DISCUSSION

Communications Services Tax – XXXX Video and XXXX Music Services

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. (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 The term includes basic, extended, premium, pay-per-view, digital video, two-way cable, and music services.” (Emphasis added. See s. 202.11(24), F.S.)

Communications services tax is imposed upon retail sales 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. (See 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.)

CST is charged on the “sales price” of the communications service. The “sales price” of a communications service is “... the total amount charged in money or other consideration by a dealer for the sale of the right or privilege of using communications services in this state, including any property or other service, ... which is part of the sale” The sales price does not include charges that are not for communications services when such charges may be reasonably identified from the Taxpayer’s books and records kept in the regular course of business. (See s. 202.11(13), F.S.)

In the prior TAA, it was determined that the XXXX Video benefit of the XXXX Membership is a communications service and specifically a “video service,” and, therefore, taxable, pursuant to Florida law. The TAA advised, based on s. 202.11(13)(b)8., F.S., that the portion of the XXXX Membership charge attributable to the XXXX Video service is subject to CST. The Taxpayer opines that, because, in addition to streaming the digital content, the XXXX Member may now choose to download the digital content, the service is not a communications service.

The XXXX Video service allows a XXXX Member to select and view digital video content on compatible devices. The member may also choose to download digital video content to a compatible device when that option is available. The member may view the content, streamed or downloaded, as many times as it wishes as long as it has paid its XXXX Member subscription.² If the subscription lapses or is cancelled, the member is no longer able to view the digital video content, even if the digital video content was downloaded. The XXXX Video benefit provided to XXXX Members is a digital video service, which pursuant to Florida law, is a communications service and a “video service” for CST purposes. As in the prior TAA, the portion of the XXXX Membership charge attributable to the XXXX Video service is subject to CST when charged to a Florida service address.

² Subject to the XXXX XXXX Terms and Conditions and the XXXX Video and Music Terms of Use.

The prior TAA did not address the XXXX Music service benefit. The XXXX Music service may be played on a compatible device, such as a computer or tablet, and, like the XXXX Video service, digital music content may be downloaded or streamed. The member may play the content, streamed or downloaded, as many times as it wishes as long as it has paid its XXXX Member subscription. If the subscription lapses or is cancelled, the member is no longer able to play the digital music content, even if the digital audio content was downloaded. The transmission or routing of audio or voice to a point, or between or amount points by any medium or method is a communications service. The definition of “video service” provides that “[the] term includes ... music services.” The XXXX Music service benefit is a music service that falls within the definition of a “video service” pursuant to Florida law. The entire portion of the XXXX Membership charge attributable to the XXXX Music service is subject to CST when charged to a Florida service address.

Communications Services Tax – XXXX Pantry and XXXX Pricing

The XXXX Pantry and XXXX Pricing benefits are not communications services and are not subject to CST.

Sales and Use Tax – XXXX Video and XXXX Music Services

Chapter 212, F.S., imposes sales tax on retail sales in Florida of tangible personal property and certain services. Rule 12A-1.062(5), 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.” Such sales do not constitute the sale of another taxable services. Therefore, such sales are not subject to sales tax.

The XXXX Video service benefit is “...electronic images which appear on [a] ...video display screen...” The XXXX Music benefit is likewise not an information service for sales tax purposes. The Taxpayer does not furnish any tangible personal property for sale or rental to the customer for either service benefit. The XXXX Video and XXXX Music service benefits are not sales of tangible personal property, or other taxable services, and are not subject to sales tax under Florida law.

Sales and Use Tax – XXXX Pantry and XXXX Pricing

Pursuant to Chapter 212, F.S., generally, sales of tangible personal property in Florida are subject to sales tax on the sales price of the property sold. The sales price includes any services that are part of the sale. (See s. 212.02(16), F.S.) Any transportation charges, termed “shipping” charges in the instant case, included as part of the sale are subject to sales tax. If the transportation charges are separately stated and the tangible personal property is shipped F.O.B. origin, then the transportation charges are not subject to sales tax. (See Rule 12A-1.045(1) – (3), and (5), F.A.C.)

The XXXX Pantry is a shipping benefit for XXXX Members. XXXX Members can “fill” a box with eligible items and have it shipped for a flat rate of \$5.99.³ Some items are only available for purchase by XXXX Members. The Taxpayer states that the XXXX Pantry items are shipped F.O.B. origin and the shipping charges are separately stated.

In the prior TAA, the Department was not asked about and did not specifically address the XXXX Pantry benefit. However, the TAA did address discounted shipping benefits, concluding that because the shipping charges were separately stated and the products shipped F.O.B. origin, the shipping charges were not subject to sales tax. The shipping charges for XXXX Pantry are separately stated and shipped F.O.B. origin. Therefore, the shipping charges for XXXX Pantry are not subject to sales tax.

The XXXX Pricing benefit was not addressed in the prior TAA. This benefit provides discounts to XXXX Members on sales of certain tangible personal property, not at the time of membership, but at the time of purchase of the tangible personal property. The XXXX Pricing benefit for XXXX Members does not change the characterization of the XXXX Membership at the time the membership is purchased. In the prior TAA, the Department provided,

As a general matter, XXXX Memberships do not fall under the provisions in s. 212.02(1), F.S., relating to Membership dues. That provision is specifically applicable to membership benefits to “a place of amusement, sport, or recreation” or that provide “recreational or physical fitness facilities” which the XXXX Membership does not.

Therefore, XXXX Membership charges to Florida customers are not subject to sales tax based on the XXXX Pricing benefit.

When a XXXX Member purchases tangible personal property to which the XXXX Pricing benefit applies, the discount would apply to the sales price of the tangible personal property at the time of sale. As the discount is a cash discount provided by the dealer at the time of sale, the discount would be deducted from the taxable sales price. (See Rule 12A-1.018, F.A.C.)

CONCLUSION

The amended/additional benefits of the XXXX Video service do not change the determination in TAA 14-010 that the benefit is a communications service and, specifically, a “video service” and the portion of the XXXX Membership charge attributable to XXXX Video service, when charged to a Florida service address, is subject to CST.

The XXXX Music service was not addressed in the prior TAA. It is a music service and properly characterized as a “video service” pursuant to Florida law. As such, the portion of the XXXX Membership charge attributable to the XXXX Music service, when charged to a Florida service address, is subject to CST.

³ See <http://www.xxxx.com/gp/help/customer/display.html?nodeId=201505420>. XXXX provides that the XXXX Pantry order may be packed in extra boxes to ensure that items arrive intact, but without additional shipping costs.

Shipping charges related to the XXXX Pantry benefit are separately stated, and the product is shipped F.O.B. origin. Therefore, the determination in the prior TAA that shipping charges are not subject to sales tax does not change.

The addition of the XXXX Pricing benefit does not alter the characterization that the XXXX Membership does not fall under s. 212.02(1), F.S. XXXX Membership charges to Florida customers are not subject to sales tax based on the XXXX Pricing benefit. However, discounts to the sales price allowed by the dealer at the time of sale of the tangible personal property, reduces the taxable sales price.

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
Tax Law Specialist
Technical Assistance and Dispute Resolution
(850) 717-6315

Record ID: 180559