



QUESTION: DO THE AMENDED/ADDITIONAL BENEFITS OF XXXX MEMBERSHIP, WHICH INCLUDE EXCLUSIVE ACCESS TO XXXX XXXX PRODUCTS, XXXX XXXX ACCESS, XXXX PHOTOS, AND XXXX XXXX BUTTONS, CHANGE THE DETERMINATIONS OF TAX APPLICATIONS PROVIDED IN TAA 14A-010 AND TAA 14A19-006?

ANSWER: THE AMENDED/ADDITIONAL BENEFITS OF THE OF XXXX MEMBERSHIP, WHICH INCLUDE EXCLUSIVE ACCESS TO XXXX XXXX PRODUCTS, XXXX XXXX ACCESS, XXXX PHOTOS, AND XXXX XXXX BUTTONS DO NOT CHANGE THE DETERMINATION IN TAA 14-010 AND TAA 14A19-006. THE TAXPAYER SHOULD PAY SALES TAX OR ACCRUE USE TAX FOR THE XXXX BUTTONS IMPORTED INTO FLORIDA.

ADDITIONALLY, ONLY THE PORTIONS OF THE XXXX MEMBERSHIP CHARGES ATTRIBUTABLE TO XXXX INSTANT VIDEO SERVICE AND XXXX MUSIC SERVICE, AS THESE SERVICES WERE PREVIOUSLY DESCRIBED IN TAA 14A19-006, ARE SUBJECT TO CST WHEN CHARGED TO A FLORIDA SERVICE ADDRESS. IF THAT PORTION OF THE CHARGE IS NOT SEPARATELY ALLOCABLE IN TAXPAYER'S BOOKS AND RECORDS, THEN THE ENTIRE XXXX MEMBERSHIP FEE IS SUBJECT TO CST.

October 16, 2015

Re: Technical Assistance Advise ment – 15A-014
Communications Services Tax and Sales and Use Tax
XXXX (Taxpayer)
FEI #: XXXX
Chapters 212, 202, and 203, Florida Statutes (F.S.)

Dear XXXX:

This is in response to your letter dated April 20, 2015, requesting this Department's issuance of a Technical Assistance Advise ment ("TAA") pursuant to section 213.22, F.S., and Rule Chapter 12-11, F.A.C., regarding the Department's position on whether Communications Services Tax and Gross Receipts Tax (CST) and or Sales and Use Tax (sales tax) apply to certain benefits provided to XXXX Members as part of their XXXX Membership. An examination of your letter has established you have complied with the statutory and regulatory requirements for issuance of a TAA. Therefore, the Department is hereby granting your request for a TAA.

Facts

XXXX (Taxpayer) was issued a TAA on April 14, 2014. In that TAA, the Taxpayer was advised on the taxability of its XXXX Memberships for Sales and Use Tax (sales tax) and CST. In its request for advise ment, the Taxpayer provided the following information on XXXX Membership (as quoted in TAA 14A-010):

Child Support – *Ann Coffin, Director* • General Tax Administration – *Maria Johnson, Director*
Property Tax Oversight – *Dr. Maurice Gogarty, Director* • Information Services – *Damu Kuttikrishnan, Director*

<http://dor.myflorida.com/dor/>
Florida Department of Revenue
Tallahassee, Florida 32399-0100

Taxpayer offers a Membership program known as XXXX 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 Instant 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. . . .

The Department provided the following conclusion, as quoted from TAA 14A-010:

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 Instant 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 Instant Video services or other communications services that it offers to members in Florida as part of a free trial Memberships.

* * *

After the issuance of TAA# 14A-010, some of the benefits provided to XXXX Members, as well as terms and conditions, changed. The Taxpayer provided the additional following information, explaining that there had been changes to the benefits provided to XXXX Members as part of the XXXX Membership. The Taxpayer provided the following amendments to the XXXX Membership (as quoted from TAA 14A19-006) dated December 19, 2014:

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

* * *

The Department provided the following in part, as quoted from TAA 14A19-006:

* * *

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 Instant 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, reduces the taxable sales price.

* * *

After the issuance of TAA 14A19-006, the benefits associated with the XXXX Membership were expanded to include benefits not described in the first or second request for a TAA (the “Additional Benefits”). The Taxpayer has provided the following information, explaining that the benefits described in the Request and Second Request continue to be available to XXXX Members as part of the XXXX Membership. Your letter of April 20, 2015, states that the Taxpayer’s Additional Benefits will include:

- Exclusive Access to XXXX XXXX . . . a line of premium everyday essential products such as baby wipes. XXXX XXXX products are only available for purchase by XXXX Members.
- XXXX Early Access - XXXX Members receive 30 minute early access to select [Lightning] Deals on the Website and sales events on XXXX. The deals and sales events are designated as such on the product detail page or on the website.
- XXXX Photos - XXXX Members receive unlimited storage for photos in the XXXX Cloud Drive (“Cloud Drive”) and 5GB of storage for videos and files. XXXX Members must have a Cloud Drive account registered to the same XXXX.com account as their XXXX Membership. As long as the XXXX Membership is active, photos uploaded to the XXXX Member’s Cloud Drive will not count against the XXXX Member’s 5GB’s of fixed storage capacity in the Cloud Drive for files and videos.
- XXXX XXXX Button — Currently, XXXX Members can request an invitation to receive up to 3 XXXX Buttons. XXXX Buttons allow customers to simply press the button when the customer needs to reorder a product. Upon pressing the button, an order is placed through the customer’s XXXX.com account for the product. Each button works for a single product. For example, a customer could obtain a button for XXXX laundry detergent and, upon running out of laundry detergent, the customer can press the button and an order will automatically be placed for the product and shipped to the customer. While XXXX Buttons are currently only available to select XXXX Members that receive an invitation, they may be available to all XXXX.com customers in the future.

* * *

Your letter of April 20, 2015, indicates that additional information regarding the XXXX is available on <http://www.XXXX.com/oc/dash-button>. The webpage provides, in part:

. . . XXXX XXXX Button is a Wi-Fi connected device that reorders your favorite item with the press of a button. To use XXXX Button, simply download the XXXX App from the XXXX XXXX Store or XXXX XXXX Store. Then, sign into your XXXX XXXX account, connect XXXX to Wi-Fi, and select the product you want to reorder. Once connected, a single press on XXXX Button automatically places your order. XXXX will send an order confirmation to your phone, so it’s easy to cancel if you change your mind. Also, the XXXX Order Protection doesn’t allow a new order to be placed until the prior order ships, unless you allow multiple orders.

The XXXX Members XXXX Offer -Terms and Conditions, available online at XXXX, provides the following, in part:

- . . . Only XXXX XXXX members who receive an email from XXXX with an invitation to receive a free XXXX Button are eligible for this offer. . . .
- Offer is non-transferable and may not be resold. . . .

Requested Advisement

The Taxpayer requests a TAA that addresses whether the Additional Benefits change the determinations of tax applications provided in TAA 14A-010 and TAA 14A19-006. Additionally, the Taxpayer requests confirmation that only the portion of the sales price allocable to the XXXX Instant Videos and XXXX Music are subject to CST.

Applicable Authority and Discussion

Chapter 212, F.S., imposes a sales tax on the sale and use of tangible personal property and some services in the state of Florida. Sections 212.04 and 212.05, F.S., specifically impose a tax collection obligation on persons engaged in the business of making sales of tangible personal property and specified services. Chapter 202, F.S., imposes a communications services tax on the retail sale of communications services in Florida and a collection obligation for sellers of communications services in Florida. Gross receipts tax also applies to sales of communications services, pursuant to Chapter 203, F.S., and is collected with and administered as the communications services tax. Taxpayer has requested advisements on whether sales tax and/or CST apply to XXXX Memberships under Florida law. As these taxes are in different chapters of the Florida Statutes and cover different types of transactions, they will be addressed separately, below.

Sales and Use Tax

Section 212.05, F.S., provides that the sale of tangible personal property is subject to sales tax. All sales of tangible personal property in the State of Florida are subject to tax, unless specifically exempt by Chapter 212, F.S. The term “sale” is defined in s. 212.02(15)(a), F.S., to mean “[a]ny transfer of title or possession, or both . . . of tangible personal property for a consideration.” Pure service transactions that do not involve the sale of tangible personal property are generally not subject to tax under Florida law, unless the taxation of the service is specifically authorized by Chapter 212, F.S. When tangible personal property and services are sold as part of the same sale, the entire sales price is subject to tax. Section 212.02(16), F.S., defines “sales price” to include “any services that are sold as part of the sale” of tangible personal property.

Exclusive Access to XXXX Elements and XXXX Early Access:

The Exclusive Access to XXXX Elements and XXXX Early Access by themselves do not constitute the sale of tangible personal property, as defined in s. 212.02(19), F.S., or other taxable services, but rather constitute intangible benefits of XXXX Membership not taxed by Chapter 212, F.S. The Taxpayer should collect sales tax at the time of purchase of taxable tangible personal property by the XXXX Member, not at the time of membership.

XXXX Photos:

A cloud infrastructure is made up of hardware and software. The hardware resources typically include items such as servers and network components. The software is deployed through the use of the computer hardware. In most cases, the consumer does not manage or control the underlying cloud infrastructure, but may have control over the deployed software applications.¹

¹ National Institute of Standards and Technology, U.S. Department of Commerce, Special Publication 800-145, p. 2.

Your letter provides that “XXXX Members receive unlimited storage for photos in the XXXX Cloud Drive (Cloud Drive) and 5GB of storage for videos and files.” XXXX Photos does not provide a XXXX Member with access to deployed software applications. The electronic storage of photos, videos, and files does not constitute the sale of tangible personal property, as defined in section 212.02(19), F.S., or other taxable services, and is not subject to sales tax.

XXXX XXXX Button:

XXXX Buttons are tangible personal property. Sales of XXXX Buttons in Florida are taxable absent a specific exemption. The Terms and Conditions regarding XXXX Buttons provide that free XXXX Buttons are currently available to XXXX XXXX members by invitation only. It does not appear that a XXXX Member is currently charged for the XXXX Button.

Section 212.06(4), F.S., provides that use tax is due on “tangible personal property imported or caused to be imported . . . and used, the same as if such articles had been sold at retail for use or consumption in this state.” Section 212.06(6), F.S., provides that the “use, the consumption, the distribution, and the storage” of tangible personal property “to be used or consumed” in Florida is subject to tax after the property “has come to rest in this state and has become a part of the mass property of this state.” Under the facts presented, the Taxpayer causes XXXX Buttons to be imported into Florida for use when providing XXXX Buttons to the XXXX Member. Section 212.12(12), F.S., provides that it is the legislative intent that the “end consumer, or last retail sale” is “the sale intended to be taxed.” In this instance, the last retail sale of the XXXX Buttons is the sale to the Taxpayer to be consumed in Florida. The Taxpayer should remit sales tax to its vendors when it purchases these items. If the vendor does not charge the Taxpayer sales tax, the Taxpayer should accrue and remit use tax for the XXXX Buttons that are imported into Florida.

Communications Service Tax

Chapter 202, F.S., imposes communications services tax on the retail sale of communications services in Florida. Gross receipts tax is also imposed on these services, pursuant to Chapter 203, F.S. “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 by or through any medium or method, regardless of the protocol used for such transmission or conveyance. (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.” (See s. 202.11(24), F.S.)

CST 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.) The service address, for video services, is 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 are separately stated or 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.)

The definition of communications services excludes “information services.” “Information services” are defined as the “. . . 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 The term includes data processing and other services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by an electronic transmission to a purchaser whose primary purpose for the underlying transaction is the processed data or information. The term does not include video service.” (See s. 202.11(5), F.S.)

Exclusive Access to XXXX XXXX and XXXX Early Access:

Exclusive Access to XXXX XXXX and XXXX Early Access benefits are not communications services and are not subject to CST.

XXXX Photos:

The offering of the capability to merely store and retrieve photos, videos or other files is an information service per s. 202.11(5), F.S. Information services are specifically excluded from the definition of “communications services” under s. 202.11(1)(a), F.S.

XXXX XXXX Button:

The XXXX Member initiates a product order with the use of the wi-fi enabled XXXX Button that is (wirelessly) connected to the member’s smart phone or other device. XXXX Members must have Internet access to use the XXXX Button. By a press of the button, a signal is transmitted through the Internet to XXXX via the XXXX shopping app (XXXX.com) on the member’s device. When the signal is transmitted, the order is placed. The facts do not indicate that Taxpayer is charging XXXX Members for the ability to transmit, convey, or route voice, text or email communications when XXXX Members use the XXXX Buttons. Under the facts provided, the XXXX Button benefit is not subject to CST or gross receipts tax in Florida.

Conclusion

The Additional Benefits of Exclusive Access to XXXX Elements, XXXX Early Access, XXXX Photos, and XXXX Buttons do not change the determinations of tax applications provided in TAA 14A-010 and TAA 14A19-006. The Taxpayer should pay sales tax or accrue use tax for the XXXX Buttons imported into Florida.

Additionally, only the portion of the XXXX Membership charges attributable to XXXX Instant Video service and XXXX Music service, as these services were previously described in TAA 14A19-006, when charged to a Florida service address, are subject to CST. If that portion of the charge is not separately allocable in Taxpayer’s books and records, then the entire XXXX Membership fee is subject to CST.

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 that 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.

Sincerely,

Brinton Hevey
Tax Law Specialist
Technical Assistance and Dispute Resolution
850/717-6839

Record ID: 195311