



FLORIDA

Executive
Director

Leon M. Biegalski

QUESTION: MAY A SELLER OF CAR TRACKING DEVICES ACCEPT, IN GOOD FAITH, A RESALE CERTIFICATE FROM CAR DEALERS UNDER THE FACTS PRESENTED?

ANSWER: NO, SUCH SALES ARE NOT SALES FOR RESALE AND THE RESALE CERTIFICATE CANNOT BE ACCEPTED IN GOOD FAITH UNDER THE FACTS PRESENTED.

June 9, 2016

RE: Technical Assistance Advisement 16A-007

Sales and Use Tax

Sections: 212.02, 212.05, 212.06, 212.07, and 212.18, Florida Statutes (F.S.)

Rules: 12A-1.0092 and 12A-1.039, Florida Administrative Code (F.A.C.)

XXXX (herein "Taxpayer")

Dear XXXX:

This letter is in response to your request dated February 5, 2016, for issuance of a Technical Assistance Advisement ("TAA") pursuant to Section 213.22, F.S., and Rule Chapter 12-11, F.A.C. An examination of your request has established you complied with the statutory and regulatory requirements for issuance of a TAA. Therefore, the Department is hereby granting your request for a TAA.

Facts

Taxpayer's request for issuance of TAA provides, in part:

Taxpayer sells GPS tracking devices and provides tracking information to car dealers and purchasers of automobiles on a subscription basis (i.e., information service). Upon the sale of the GPS tracking device to the car dealer, the car dealer offers, and Taxpayer accepts, a Florida [resale certificate]. The car dealer then takes the GPS tracking device and wires it into the vehicle. The car dealer provides Taxpayer with a resale certificate because the GPS tracking device is integrated into, and sold with, the automobile. In the majority of instances, the GPS unit is not tracked or utilized by the automobile dealer prior to the transfer of the unit's possession to a third party via the purchase of an automobile. Rather, it merely becomes a component of an inventory item maintained for resale by the automobile dealer.

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

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The only right maintained by the car dealer with regard to the GPS unit after it is sold along with the automobile is their ability to access the unit's location When, or if, the automobile dealer transfers this right to a finance company, it is without compensation. The Master Contract of sale between Taxpayer and the automobile dealer indicates that the device may not be resold, reassigned, transferred or used by other parties without the approval of Taxpayer (see Exhibits A- "Terms and Conditions" at Section 3). While the Master Contract does limit the transfer of the device subject the approval of Taxpayer, experience indicates that, in the normal course of business, such approval is granted when the GPS unit is transferred to the purchaser of the automobile.

When a consumer defaults on the car payments, the car dealer accesses Taxpayer's tracking information via the internet so that it can locate the vehicle for repossession purposes. In addition, if the service is transferred to the purchaser of the automobile (i.e., the one who now possesses the GPS unit) the purchaser of the automobile can locate his/her vehicle for their own purposes.

As noted above, Taxpayer also submitted a copy of a Master Agreement, which provides, in part:

STANDARD TERMS AND CONDITIONS (V1.0)

2. AGREEMENT TO PURCHASE: [Car Dealer] agree to purchase from [Taxpayer,] subject to the terms set forth herein, and [Taxpayer] agrees to sell to [Car Dealer], the Offerings identified on an applicable Agreement, or otherwise ordered by [Car Dealer], to be used by [Car Dealer] in accordance with this Agreement....

GPS Device Terms and Conditions (v1.0)

1. DEFINITIONS: ... the term "Device" shall refer to the GPS Tracking Device sold by [Taxpayer], together with all accessories to such Device.

2. DEVICES AND SERVICE PLANS: [Car Dealer] agrees to purchase Devices in accordance with the Device price, Device terms, and Airtime Service Plan ("ASP") in effect at the date of purchase. Each Device requires an ASP. ASP's and Device terms, may change from time to time in the sole discretion of [Taxpayer].

3. RESTRICTIONS: Device may be purchased only from authorized [Taxpayer] employees and may not be resold, reassigned, transferred or used by the other parties without the written approval of [Taxpayer], which approval may be granted or withheld

at the [Taxpayer's] sole discretion. Any attempt at an unauthorized resale, assignment or transfer shall be deemed a default and a material breach of this agreement. [Taxpayer] shall not be obligated to provide services for unauthorized transferees, assignees or users.

7. LIMITED SOFTWARE LICENSE: ... [Car Dealer] is hereby granted a limited, non-transferrable, non-exclusive license to use the Device Software, solely in connection with its use of Devices in accordance with the terms and conditions of this Agreement and any applicable ASP....

Taxpayer's website states the following:

GPS features include live email notifications, text message alerts, programmable geo fence, 24 hour daily heartbeat, safe starter interrupt, snail trail, and Geo markers. Taxpayer's website also includes a video demonstration of the service, which shows the customer interface where the customer can locate the vehicle and disable the ignition.

Requested Advisement

The issue is whether Taxpayer can accept a valid Florida resale certificate on the sale of GPS units to car dealers in good faith, thereby relieving Taxpayer of its duty to collect sales and use tax on such sales.

Applicable Law

Florida law provides that all sales of tangible personal property are subject to sales tax unless an exemption or exclusion from the tax applies. See sections 212.05, 212.06 and 212.18, F.S. Tangible personal property that is purchased for resale can be purchased tax exempt under certain circumstances. See sections 212.02(14)(a), 212.05, and 212.07, F.S.

Rule 12A-1.039, F.A.C., provides guidance regarding sales for resale under Chapter 212, F.S., and provides that the exemption applies only to sales in strict compliance with the Rule. A sale for resale is exempt from tax when the sale is of tangible personal property sold to an active registered dealer when such property will be resold to the dealer's customers, and the purchasing dealer issues the selling dealer a valid Annual Resale Certificate (DR-13). Sales for resale include sales of the tangible personal property ("TPP") directly to dealer's customers, and sales of TPP which become a component part of the TPP resold by the dealer.

Rule 12A-1.039 F.A.C., also provides that selling dealers who accepts a valid copy of a resale certificate, in good faith, will not be held liable for any tax due. Each dealer must make a good faith determination that the resale certificate provided will result in a sale for resale. Rule 12A-1.039(1)(a), F.A.C.

“Good faith” is not defined in Chapter 202, F.S., or in a Rule. However, “good faith” is defined, in Black’s Law Dictionary, as “... an intangible and abstract quality ... encompass[ing], among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage, ... and the freedom from knowledge of circumstances which ought to put the holder upon inquiry.”¹

Dealers owe tax on the cost price of TPP that is used by the dealer (i.e., not resold). See s. 212.05(1)(b), F.S.

Section 212.02(20), F.S., defines the term "use" to include “... the exercise of any right or power over tangible personal property incident to the ownership thereof, or interest therein, except that it does not include the sale at retail of that property in the regular course of business.”

Section 212.07(8), F.S., provides, in relevant part, that "[a]ny person who has purchased at retail, used, consumed, distributed, or stored for use or consumption in this state tangible personal property ... taxable under this chapter ... and cannot prove that the tax levied by this chapter has been paid ... is directly liable to the state for any tax, interest, or penalty due on any such taxable transactions."

Discussion & Conclusion

It is not disputed that Taxpayer’s devices are TPP subject to sales and use tax unless subject to an exemption.

Sales made to active registered dealers extending a valid resale certificate relieve the seller of the duty to collect sales and use tax, when accepted in good faith. As noted above, good faith does not include instances where Taxpayer had knowledge of circumstances where Taxpayer should have questioned the use of the certificate or where Taxpayer knew that the sale was not for resale.

In the instant case, Taxpayer’s contracts include language stating that the devices that the car dealer is purchasing cannot be resold without prior written authorization of the Taxpayer. Taxpayer argues that it has never limited or challenged such transfers, and states that its acceptance of the resale certificate is an approval of the subsequent resale. The contract’s terms, however, require written approval for the device to be resold, not an implicit agreement by accepting the resale certificate, and the failure of Taxpayer to enforce the terms of the contract do not change the nature of the agreement. Therefore, Taxpayer cannot in good faith accept resale certificates from car dealers when the contract states that the [car dealer] cannot resell the device, unless the [car dealer] was simultaneously given written permission to resell.

As noted above, “use” includes the exercise of any right over the TPP except resale. The car dealers install the devices in their vehicles, activate the devices, and track the vehicle using the devices. These devices are used by car dealers to locate and monitor the vehicles’ location or to

¹ See Black’s Law Dictionary, Special Deluxe Fifth Edition p. 623-24 (1979).

render the vehicles inoperable. This is an exercise of control over the device. Car dealers are using the devices to minimize and prevent loss of their property. Please note, this Technical Assistance Advisement does not address issues beyond Taxpayer's ability to accept a resale certificate for its sales of devices. This Technical Assistance Advisement does not make a determination as to the type of services that Taxpayer offers, or the taxability of Taxpayer's services or other products offered.

Conclusion

Taxpayer's sales of TPP are not sales for resale, and Taxpayer cannot accept resale certificates on such sales in good faith. Therefore, Taxpayer's sales are 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.

Sincerely,

Timothy Surface
Senior Attorney
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