

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING # 13-12**

Letter rulings are binding on the Department only with respect to the individual taxpayer being addressed in the ruling. This ruling is based on the particular facts and circumstances presented, and is an interpretation of the law at a specific point in time. The law may have changed since this ruling was issued, possibly rendering it obsolete. The presentation of this ruling in a redacted form is provided solely for informational purposes, and is not intended as a statement of Departmental policy. Taxpayers should consult with a tax professional before relying on any aspect of this ruling.

SUBJECT

The application of the Tennessee Retailers' Sales Tax Act to various cloud computing services.

SCOPE

This letter ruling is an interpretation and application of the tax law as it relates to a specific set of existing facts furnished to the Department by the taxpayer. The rulings herein are binding upon the Department, and are applicable only to the individual taxpayer being addressed.

This letter ruling may be revoked or modified by the Commissioner at any time. Such revocation or modification shall be effective retroactively unless the following conditions are met, in which case the revocation shall be prospective only:

- (A) The taxpayer must not have misstated or omitted material facts involved in the transaction;
- (B) Facts that develop later must not be materially different from the facts upon which the ruling was based;
- (C) The applicable law must not have been changed or amended;
- (D) The ruling must have been issued originally with respect to a prospective or proposed transaction; and
- (E) The taxpayer directly involved must have acted in good faith in relying upon the ruling; and a retroactive revocation of the ruling must inure to the taxpayer's detriment.

FACTS

[TAXPAYER] (the "Taxpayer") offers information technology infrastructure services to customers via the Internet. The services allow customers to access applications and platforms, server bandwidth, and storage capacity without significant information technology capital investment.

The Taxpayer is headquartered in [STATE] and has offices in [LOCATIONS]. While the Taxpayer does not own any data centers, it does utilize large data centers located in

[LOCATIONS] to provide its services [REDACTED]. Besides the large data centers, the Taxpayer also utilizes very small clusters of servers [REDACTED] located in [LOCATIONS]. The [REDACTED] data centers and [REDACTED] sites are owned and operated by affiliated entities. Currently, there are no data centers or [REDACTED] sites located in Tennessee.

The Taxpayer's cloud computing services include the [REMOTE STORAGE SERVICE] and the [VIRTUAL COMPUTING SERVICE].

[REMOTE STORAGE SERVICE]

The Taxpayer's [REMOTE STORAGE SERVICE] allows customers to store, retrieve, and maintain content, data, applications, and software on its servers. Customers can store and retrieve large amounts of data at any time and from any location via the Internet. Customers do this by setting up an account via the Internet, which enables them to upload and download their content to servers within the Taxpayer's network. Both companies and individual developers use [THE REMOTE STORAGE SERVICE]. Companies may use it to backup data or store large amounts of data for which they do not have the memory capacity, or to store temporary data used in setting up a website. Individual developers generally utilize the remote storage services to backup and store data in lieu of setting up their own on-premises server infrastructure.

Customers that utilize [THE REMOTE STORAGE SERVICE] retain ownership of the content uploaded to the Taxpayer's network. The Taxpayer does not have the authority to use, sell, or license customer content stored within [THE REMOTE STORAGE SERVICE]. The Taxpayer merely provides access to the infrastructure necessary for customers to store their own digital content. The remote storage services are also scalable such that customers can increase storage space, speed, throughput, and robustness to adapt the service to their evolving storage needs. Customers have the capability to select a specific data center to provide the [REMOTE STORAGE SERVICE]. The customer does not know the exact server hosting its data, and the Taxpayer may also move the customer's data from one server to another without providing notice to the customer.

The Taxpayer makes available, free of charge, certain software development kits and a management console to aid customers in uploading and managing their stored data. [REDACTED]. The free tools are optional, and customers may choose to make use of [REMOTE STORAGE SERVICE] without utilizing these free tools.

Customers are charged both a base fee, determined by the amount of gigabytes used in a given month, as well as an incidental usage fee based on their activity while using the service. The flat fee prices are on a sliding scale, per gigabyte basis. The usage fee is called a [FEE] and is described more fully below. Customers are not charged for Internet access or any other similar means of using the Internet to store or retrieve information through [THE REMOTE STORAGE SERVICE]. They are independently responsible for their own Internet connections and telecommunications services.

[VIRTUAL COMPUTING SERVICE]

The Taxpayer provides a scalable virtual computing environment with its [VIRTUAL COMPUTING SERVICE]. Through [THE VIRTUAL COMPUTING SERVICE], customers can procure computing resources in order to perform a variety of activities typically done using a server, including, but not limited to, running applications, monitoring computers and computer usage, and hosting web domains. The service's core benefit is that it allows customers to obtain computing capacity and control of their computing resources without a significant information technology investment (*e.g.*, customers no longer have to buy their own servers or set up their own on-premises data centers).

In order to use [THE VIRTUAL COMPUTING SERVICE], customers create a virtual server to run specific applications and services. Customers select a configuration of memory, CPU, and storage that is optimal for their choice of operating system and application. This configuration is called a [CONFIGURATION] and is the basis for the fee the customer is charged for [THEIR VIRTUAL COMPUTING SERVICE] usage.

Customers are not required to use specific software for the [VIRTUAL COMPUTING SERVICE] and do not download any software as part of [A CONFIGURATION]. The Taxpayer provides its customers free help in the form of application programming interfaces and software development kits. The free tools are optional, and customers may choose to make use of the [VIRTUAL COMPUTING SERVICE] without utilizing these free tools. Customers can use an operating system to upload the applications that they wish to run and can use application programming interfaces to allow their existing systems to communicate with the [VIRTUAL COMPUTING SERVICE]. Specifically, the Taxpayer makes available either open source or third party operating system software so that customers can make use of the virtual servers. The open source operating system software used in an "Open Source [CONFIGURATION]" is freely accessible by anyone over the Internet. Neither the Taxpayer nor its customers pay a fee to access the open source operating system software. Customers may also opt to use a third party operating system in a "Third Party [CONFIGURATION]."

Whether a customer selects the Open Source or Third Party [CONFIGURATION] option, the operating system software runs on the Taxpayer's servers to provide the [VIRTUAL COMPUTING SERVICE]. Customers cannot download the operating system software for their own use. A customer's use of this operating system software is only in conjunction with the use of the [VIRTUAL COMPUTING SERVICE]. No license is sold or otherwise transferred from the Taxpayer to customers. Moreover, the Taxpayer does not separately license, sell, or distribute any software with its [VIRTUAL COMPUTING SERVICE]. [REDACTED].

Customers retain all intellectual property rights to all data and content sent to the Taxpayer's network. Customers must represent that they own or license the intellectual property and software that they are uploading to use during a computing session. Customers may select a specific data center to provide their computing services. Customers do not know which exact server is hosting their data, and the Taxpayer may move the customer's data from one server to another without providing notice to the customer.

[VIRTUAL COMPUTING SERVICE] charges are based on the computing resources that the customer consumes. Customers are charged both a base fee, determined by the amount of computing power used in a given month, as well as an incidental usage fee based on their activity while using the service. The Taxpayer provides operating system software, application tools, data, and other content are solely for the convenience of the customer, and these costs are built into the per-hour [VIRTUAL COMPUTING SERVICE] charges. The incidental usage fee is called a “[FEE]” and is described more fully below. [REDACTED].

[FEES]

Customers’ usage of services like [THE REMOTE STORAGE SERVICE AND THE VIRTUAL COMPUTING SERVICE] generate incidental usage charges called [FEES], which are separately stated from base fees for [THE REMOTE STORAGE SERVICE AND THE VIRTUAL COMPUTING SERVICE] on their monthly bills. These usage fees are based upon a customer’s activity on the Taxpayer’s network, such as when a customer requests access to resources in a new data center or requests that data be copied or moved within the Taxpayer’s network.

Within the Taxpayer’s network are clusters of data centers in a similar geographic area [REDACTED].

Requests by customers to copy data from one [DATACENTER] to another may trigger a usage fee. [REDACTED].

These fees act as a metering mechanism that tracks a customer’s usage of the Taxpayer’s services and network and are not fees for underlying telecommunications infrastructure. To the contrary, both the Taxpayer and its customers must obtain and pay their own telecommunications access and usage fees to their respective telecommunications service providers outside of and independent from the Taxpayer’s service transaction.

A customer cannot [INCUR A FEE] in isolation. The [FEE] is always a consequence of a customer’s active use of a different and primary service such as [VIRTUAL COMPUTING SERVICE]. [REDACTED].

[REDACTED].

RULINGS

1. Is the Taxpayer’s [REMOTE STORAGE SERVICE] subject to the Tennessee sales and use tax?

Ruling: No. The Taxpayer’s [REMOTE STORAGE SERVICE] is not subject to the Tennessee sales and use tax.

2. Is the Taxpayer’s [VIRTUAL COMPUTING SERVICE] subject to the Tennessee sales and use tax?

Ruling: No. The Taxpayer’s [VIRTUAL COMPUTING SERVICE] is not subject to the Tennessee sales and use tax.

3. Is the Taxpayer's [FEE] subject to the Tennessee sales and use tax?

Ruling: No. The Taxpayer's [FEE] is not subject to the Tennessee sales and use tax.

ANALYSIS

Under the Retailers' Sales Tax Act,¹ the retail sale in Tennessee of tangible personal property and specifically enumerated services is subject to the sales tax, unless an exemption applies. "Retail sale" is defined as "any sale, lease, or rental for any purpose other than for resale, sublease, or subrent."²

TENN. CODE ANN. § 67-6-102(78)(A) (Supp. 2012) defines "sale" in pertinent part to mean "any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever of tangible personal property for a consideration." "Tangible personal property" includes "property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses."³ Tangible personal property also includes "prewritten computer software," which is defined in TENN. CODE ANN. § 67-6-102(68) in pertinent part as "computer software, including prewritten upgrades, that is not designed and developed by the author or other creator to the specifications of a specific purchaser."⁴ Conversely, the sale or use of intangible intellectual property generally is not subject to Tennessee sales and use tax unless stored on a tangible storage media.⁵

In addition to the transfer of tangible personal property, the term "sale" also includes "the furnishing of any of the things or services" taxable under the Retailers' Sales Tax Act.⁶ One of the "things" specifically taxable is:

[t]he retail sale, lease, licensing or use of computer software *in this state*, including prewritten and custom computer software . . . regardless of whether the software is delivered electronically, delivered by use of tangible storage media, loaded or

¹ TENN. CODE ANN. §§ 67-6-101 to -907 (2011 & Supp. 2012).

² TENN. CODE ANN. § 67-6-102(76) (Supp. 2012).

³ TENN. CODE ANN. § 67-6-102(89)(A).

⁴ TENN. CODE ANN. § 67-6-102(68) further provides that "[p]rewritten computer software' or a prewritten portion of the computer software that is modified or enhanced to any degree, where the modification or enhancement is designed and developed to the specifications of a specific purchaser, remains prewritten computer software." Note, however, that "where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for the modification or enhancement, the modification or enhancement shall not constitute prewritten computer software." TENN. CODE ANN. § 67-6-102(68).

⁵ Compare *Crescent Amusement Co. v. Carson*, 213 S.W.2d 27, 29 (Tenn. 1948) (rental films are taxable tangible personal property), with *Commerce Union Bank v. Tidwell*, 538 S.W.2d 405, 407 (Tenn. 1976) (finding a tangible method of data transfer "merely incidental" to the underlying transaction, and thus not subject to sales and use tax).

⁶ TENN. CODE ANN. § 67-6-102(78)(C).

programmed into a computer, created on the premises of the consumer or otherwise provided.⁷

“Computer software” is “a set of coded instructions designed to cause a computer . . . to perform a task.”⁸ Computer software is “delivered electronically” if delivered “by means other than tangible storage media.”⁹

The sales tax also applies to retail sales of services specifically enumerated in the Retailers’ Sales Tax Act.¹⁰ The furnishing of “intrastate, interstate or international telecommunication services” is one such specifically enumerated service.¹¹ “Telecommunications service” is defined by TENN. CODE ANN. § 67-6-102(90)(A) as the “electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points.” TENN. CODE ANN. § 67-6-102(90)(B)(i) excludes from the definition of “telecommunications service,” however, “[d]ata processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by electronic transmission to a purchaser, where such purchaser’s primary purpose for the underlying transaction is the processed data or information.”

There are two ways that non-enumerated services, however, may be included in the sales price of a given transaction, despite not being directly subject to tax. First, a nontaxable service or item may be subject to taxation when charges for the nontaxable service or item are included in the sales price of a taxable good or service. Specifically, TENN. CODE ANN. § 67-6-102(79)(A) provides that the sales price of a good or service equals the “total amount of consideration . . . for which personal property or services are sold.” Thus, if taxable goods or services and nontaxable goods or services are sold together for a single charge, the entire charge is generally subject to taxation, with the bundled sales price as the measure of tax.¹²

The second manner in which a non-enumerated service will be included in the sales price of a transaction is where the service is intertwined with the sale of taxable tangible personal property. The definition of “sales price” provides in pertinent part that there will be no deductions for

⁷ TENN. CODE ANN. § 67-6-231(a) (2011) (emphasis added).

⁸ TENN. CODE ANN. § 67-6-102(18).

⁹ TENN. CODE ANN. § 67-6-102(24).

¹⁰ TENN. CODE ANN. § 67-6-201(3) (Supp. 2012); *see also* TENN. CODE ANN. § 67-6-102(78)(C); *Covington Pike Toyota, Inc. v. Cardwell*, 829 S.W.2d 132, 135 (Tenn. 1992); *Ryder Truck Rental, Inc. v. Huddleston*, No. 91-3382-III, 1994 WL 420911, at *3 (Tenn. Ct. App. Aug. 12, 1994).

¹¹ TENN. CODE ANN. § 67-6-205(c)(3) (Supp. 2012).

¹² *See Tomkats Catering, Inc. v. Johnson*, No. M2000-03107-COA-R3-CV, 2001 WL 1090516, at *2 (Tenn. Ct. App. Sept. 19, 2001); *cf.* TENN. CODE ANN. § 67-6-102(79)(A)(vi) (“Sales price” includes “[t]he value of exempt personal property given to the purchaser where taxable and exempt personal property have been bundled together and sold by the seller as a single product or piece of merchandise.”).

“labor or service” cost by the seller and also includes “[c]harges by the seller for any services necessary to complete the sale, other than delivery and installation charges.”¹³

In addition and as a complement to the sales tax, the Retailers’ Sales Tax Act imposes a use tax at the same rate as the sales tax on “the purchase price of each item or article of tangible personal property when the tangible personal property is not sold, but is used, consumed, distributed, or stored for use or consumption in this state; provided, that there shall be no duplication of the tax.”¹⁴

“Use” is defined in pertinent part as either “the exercise of any right or power over tangible personal property incident to the ownership thereof, except that it does not include the sale at retail of that property in the regular course of business”¹⁵ or “the consumption of any of the services . . . taxable under [the Retailer’s Sales Tax Act].”¹⁶

Accordingly, the Taxpayer’s activities will be subject to the Tennessee sales tax if its charges relate to: 1) the sale of tangible personal property or computer software in Tennessee; 2) the furnishing of a taxable service, including a telecommunications service, in Tennessee; 3) the furnishing of an otherwise nontaxable good or service that is bundled with a taxable good or service; and/or 4) the furnishing of a non-enumerated service that is a “crucial,” “essential”, or “integral” element of a transaction that involves that sale of taxable tangible personal property, or vice versa.

The Taxpayer’s activities will be subject to the Tennessee use tax if its charges relate to: 1) tangible personal property or taxable services; 2) that are used, consumed, distributed, or stored for use or consumption in this state.

¹³ TENN. CODE ANN. § 67-6-102(79)(A)(iii). A line of cases, beginning with *Crescent Amusement Co. v. Carson*, 213 S.W.2d 27 (Tenn. 1948), expand this concept, establishing that where a sale of a non-enumerated service is accompanied by tangible personal property that is a “crucial,” “essential,” or “integral” element of the transaction, the sales price will include the entire cost of the transaction, including the value of the non-enumerated service, *see, e.g., Thomas Nelson, Inc. v. Olsen*, 723 S.W.2d 621, 625 (Tenn. 1987), and conversely, where a sale of tangible personal property is accompanied by a non-enumerated service that are a “crucial,” “essential,” or “integral” element of the transaction, the sales price will include the entire cost of the transaction, including the value of the non-enumerated services. *See, e.g., AT&T v. Johnson*, No. M2000-01407-COA-R3-CV, 2002 WL 31247083, at *7-9 (Tenn. Ct. App. Oct. 8, 2002); *see also Rivergate Toyota, Inc. v. Huddleston*, No. 01A01-9602-CH-00053, 1998 WL 83720, at *4 (Tenn. Ct. App. Feb. 27, 1998). In contrast, where a transfer of tangible personal property or a service is “merely incidental” to a sale of a non-enumerated service, the transaction would not be subject to the sales tax. *See Commerce Union Bank v. Tidwell*, 538 S.W.2d 405, 407 (Tenn. 1976) (citing *Washington Times-Herald, Inc. v. District of Columbia*, 213 F/2d 23 (1954)); *cf. Nashville Mobilphone v. Woods*, 655 S.W.2d 934, 935-37 (Tenn. 1983) (holding that the renting of radio equipment was merely incidental to the taxpayer’s principal business of “furnishing services as a ‘radio common carrier system,’” and therefore the taxpayer’s purchase of the radio equipment was subject to sales or use tax).

¹⁴ TENN. CODE ANN. § 67-6-203(a) (Supp. 2012) (footnote added).

¹⁵ TENN. CODE ANN. § 67-6-102(94)(A).

¹⁶ TENN. CODE ANN. § 67-6-102(94)(B).

1. [REMOTE STORAGE SERVICE]

The Taxpayer's [REMOTE STORAGE SERVICE] is not subject to the Tennessee sales and use tax.

First, no sale, transfer, or electronic delivery of tangible personal property or computer software occurs in Tennessee in conjunction with the Taxpayer's furnishing of remote data storage through its [REMOTE STORAGE SERVICE]. The Taxpayer provides its customers with a web-based interface that it stores on various servers, all of which are located outside of Tennessee. The interface aids customers in uploading and managing their data. After a customer uploads its data to the Taxpayer's server, that customer retains all ownership of the data, and the Taxpayer does not access the data except to store and track for billing purposes. Regardless of whether the interface meets the statutory definition of "computer software" or "prewritten computer software," the Taxpayer prohibits customers from downloading any part of the interface itself. Moreover, the Taxpayer does not transfer title, possession, or control of the interface to the customer at any time. As such, the interface is never delivered to, transferred to, or installed on the customer's computers but remains on the Taxpayer's servers located outside of Tennessee.

Second, the Taxpayer's [REMOTE STORAGE SERVICE] does not constitute the furnishing of a taxable service in Tennessee for purposes of the Tennessee sales and use tax. As stated above, only specifically enumerated services, such as telecommunications services, are subject to the Tennessee sales and use tax. Use of the [REMOTE STORAGE SERVICE] involves the electronic transmission, conveyance, or routing of data between points because the Taxpayer's customers are transferring data from their computer systems to the Taxpayer's servers and back, so [REMOTE STORAGE SERVICE] could potentially be characterized as a telecommunications service under TENN. CODE ANN. § 67-6-102(90)(A). However, [THE REMOTE STORAGE SERVICE] is excluded from the definition of a telecommunications service through the operation of TENN. CODE ANN. § 67-6-102(90)(B)(i). TENN. CODE ANN. § 67-6-102(90)(B)(i) specifically excludes from the definition of "telecommunications service" any "[d]ata processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by electronic transmission to a purchaser, where such purchaser's primary purpose for the underlying transaction is the processed data or information." The Taxpayer's primary purpose of the underlying transaction is the remote storage of digital data, applications, and information. Accordingly, the Taxpayer's [REMOTE STORAGE SERVICE] fits within the category of data processing and information services, which are specifically excluded from the definition of a telecommunications service. Thus, the provision of [THE REMOTE STORAGE SERVICE] does not constitute a taxable telecommunications service.

Third, because the Taxpayer does not make sales of taxable goods or services in conjunction with the sale of [THE REMOTE STORAGE SERVICE], the sale of such service cannot be characterized as the furnishing of an otherwise nontaxable service that is sold as part of the sale of a taxable good or service. Although the Taxpayer makes available and may furnish its customers with software development kits and management consoles to aid in uploading and managing stored data, those tools are free of charge and are not subject to the Tennessee sales and use tax. The Taxpayer's [FEES] may accompany the sale of [REMOTE STORAGE SERVICE], but the [FEES] are separately billed and are otherwise nontaxable as set forth below.

Fourth, analysis under the principles set forth in the *Crescent* line of cases¹⁷ is unnecessary because the Taxpayer does not sell any item of tangible personal property with [REMOTE STORAGE SERVICE].

Finally, the Taxpayer's [REMOTE STORAGE SERVICE] is not subject to the use tax because, as discussed above, even though [REMOTE STORAGE SERVICE] does involve the use of tangible personal property in the form of computer server hard drives, the servers are located outside of Tennessee so there is no use of tangible personal property occurring in this state.

Accordingly, the Taxpayer's [REMOTE STORAGE SERVICE] is not subject to the Tennessee sales and use tax.

2. [VIRTUAL COMPUTING SERVICE]

The Taxpayer's [VIRTUAL COMPUTING SERVICE] is not subject to the Tennessee sales and use tax.¹⁸

First, no retail sale or use of tangible personal property occurs in Tennessee when the Taxpayer provides access to [ITS VIRTUAL COMPUTING SERVICE]. [THE VIRTUAL COMPUTING SERVICE] provides a virtual computing environment where the Taxpayer's customers perform activities on virtual servers. To provide [THE VIRTUAL COMPUTING SERVICE], the Taxpayer gives its customers access to software [REDACTED] on the Taxpayer's servers. No sale or use of tangible personal property occurs in Tennessee when a customer accesses [THE VIRTUAL COMPUTING SERVICE] software on the Taxpayer's servers, because all of the servers are located outside of Tennessee.

Moreover, the Taxpayer does not sell, lease, license, or otherwise provide the use of computer software in Tennessee to its customers in conjunction with [THE VIRTUAL COMPUTING SERVICE]. Customers use this software only in conjunction with [THE VIRTUAL COMPUTING SERVICE] and cannot download this software for their own use. The Taxpayer does not transfer title, possession, or control of [VIRTUAL COMPUTING SERVICE] software to its customers at any time. Moreover, the Taxpayer retains full control over [VIRTUAL COMPUTING SERVICE] software on its out-of-state servers at all times. Thus, [VIRTUAL COMPUTING SERVICE] software is never delivered to, transferred to, or installed on a customer's computers but remains on the Taxpayer's servers located outside of Tennessee.

Second, the Taxpayer's [VIRTUAL COMPUTING SERVICE] does not constitute a taxable service for purposes of the Tennessee sales and use tax. As noted above, only specifically enumerated services, such as telecommunications services are subject to the Tennessee sales and use tax. Use of [THE VIRTUAL COMPUTING SERVICE] involves the electronic transmission, conveyance, or routing of data between points, and [VIRTUAL COMPUTING SERVICE] could

¹⁷ See *supra* note 13.

¹⁸ Whether [THE VIRTUAL COMPUTING SERVICE] is provided as an open source [CONFIGURATION] or a third party [CONFIGURATION] has no bearing on this determination.

potentially be characterized as a telecommunications service under TENN. CODE ANN. § 67-6-102(90)(A). TENN. CODE ANN. § 67-6-102(90)(B)(i), however, specifically excludes from the definition of “telecommunications service” any “[d]ata processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by electronic transmission to a purchaser, where such purchaser’s primary purpose for the underlying transaction is the processed data or information.” The primary purpose of the Taxpayer’s [VIRTUAL COMPUTING SERVICE] is most accurately categorized as a data processing or information service. In most cases, the Taxpayer’s customer utilizes [THE VIRTUAL COMPUTING SERVICE] to expand its computing power to process and store large amounts of data or facilitate heavy web traffic, to eliminate the need to invest in real estate and information technology hardware such as servers, and to reduce information technology overhead.¹⁹ This technology is especially useful for companies in emerging markets that are unable to accurately predict the amount of computing power needed to deliver a reliable product. As such, a customer’s primary purpose in using [THE VIRTUAL COMPUTING SERVICE] is to access processed data or information that it stores on the Taxpayer’s servers, all of which are located outside of Tennessee. Accordingly, the Taxpayer’s [VIRTUAL COMPUTING SERVICE] fits within the exclusion from the definition of a taxable telecommunications service as a data processing and information service. Thus, the provision of [THE VIRTUAL COMPUTING SERVICE] is not a taxable telecommunications service.

Third, because the Taxpayer does not make sales of taxable goods or services in conjunction with the sale of [THE VIRTUAL COMPUTING SERVICE], the sale of such service cannot be characterized as the furnishing of an otherwise nontaxable service that is sold as part of the sale of a taxable good or service. Although, the Taxpayer provides its customers with optional application programming interfaces and software development kits to aid in utilizing computer power, the Taxpayer does not charge its customers for those tools, and the tools are not subject to the Tennessee sales and use tax. The Taxpayer’s [FEES] for incidental usage may accompany the Taxpayer’s sale of [VIRTUAL COMPUTING SERVICE]; however, the [FEES] are separately billed and are otherwise nontaxable as set forth below.

Fourth, analysis under the principles set forth in the *Crescent* line of cases²⁰ is unnecessary because the Taxpayer does not sell any item of tangible personal property with [ITS VIRTUAL COMPUTING SERVICE].

Finally, [THE VIRTUAL COMPUTING SERVICE] is not subject to use tax because, as discussed above, although [THE VIRTUAL COMPUTING SERVICE] does involve the use of tangible personal property in the form of computer servers and software, the servers are located outside of Tennessee so there is no use of tangible personal property occurring in this state.

Accordingly, the Taxpayer’s [VIRTUAL COMPUTING SERVICE] is not subject to the Tennessee sales and use tax.

¹⁹ For example, to keep up with rapid growth in emerging technology and the constant needed to build new data centers, a number of companies have used the Taxpayer’s [VIRTUAL COMPUTING SERVICE] in the cloud as a replacement for their physical data centers.

²⁰ See *supra* note 13.

3. [FEE]

The Taxpayer's [FEES] are not subject to Tennessee sales and use tax.

First, no retail sale or use of tangible personal property, including computer software, occurs in Tennessee when the Taxpayer charges its customers [FEES]. These fees are incidental usage fees separately stated on a customer's monthly bill and track a customer's active usage of the Taxpayer's services and network in adding files, moving files [REDACTED], and retrieving data while actively utilizing [THE REMOTE STORAGE SERVICE AND THE VIRTUAL COMPUTING SERVICE]. When customers take such actions, the Taxpayer never transfers title, possession, or control of any tangible personal property or computer software. The transactions covered by the [FEE] do not cause delivery, transfer, or installation of computer software on a customer's computers. Moreover, these actions take place on or between the Taxpayer's servers, all of which are located outside of Tennessee.

Second, [FEES] do not result from an enumerated taxable service. These fees do not cover services separate and distinct from [THE REMOTE STORAGE SERVICE AND THE VIRTUAL COMPUTING SERVICE], but rather are incidental usage fees that a Taxpayer's customer incurs through the use of [THE REMOTE STORAGE SERVICE AND THE VIRTUAL COMPUTING SERVICE]. Although [FEES] generally meets the definition of a "telecommunications service" set forth in TENN. CODE ANN. § 67-6-102(90)(A) as the "electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points," it falls within the exclusion for "[d]ata processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by electronic transmission to a purchaser, where such purchaser's primary purpose for the underlying transaction is the processed data or information."²¹ The Taxpayer's [FEE] covers the backing up, copying, and retrieving of the customer's data, and these actions can be characterized as actions taken in conjunction with and necessary to employing either [REMOTE STORAGE SERVICE] or [VIRTUAL COMPUTING SERVICE], both of which are document management services. Additionally, [MOVING DATA] is not among those taxable services enumerated under the Retailers' Sales Tax Act.

Third, because the Taxpayer does not make sales of taxable goods or services in conjunction with the sale of [MOVING DATA], the sale of such service cannot be characterized as the furnishing of an otherwise nontaxable service that is sold as part of the sale of a taxable good or service. The Taxpayer's [FEES] are incidental usage fees based on a customer's activity when utilizing [THE REMOTE STORAGE SERVICE] or [THE VIRTUAL COMPUTING SERVICE] and the Taxpayer sells no taxable good or service along with [MOVING DATA]. As previously established, [THE REMOTE STORAGE SERVICE AND THE VIRTUAL COMPUTING SERVICE] are nontaxable services, and the [FEE] is separately billed.

²¹ TENN. CODE ANN. § 67-6-102(90)(B)(i).

Fourth, it is not necessary to analyze the Taxpayer's [FEE] under the principles set forth in the *Crescent* line of cases²² because no transfer of tangible personal property accompanies the [MOVING OF DATA].

Finally, the [FEE] is not subject to use tax because, as discussed above, although the [FEE] is charged as a component of the use of a service that does involve tangible personal property, the tangible personal property is located outside of Tennessee so there is no use of tangible personal property occurring in this state.

Accordingly, the Taxpayer's [FEE] is not subject to the Tennessee sales and use tax.

Jennifer Wilson
Assistant General Counsel

APPROVED: Richard H. Roberts
Commissioner of Revenue

DATE: 9/12/13

²² See *supra* note 13.