

**TENNESSEE DEPARTMENT OF REVENUE
REVENUE RULING # 17-17**

Revenue rulings are not binding on the Department. 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 sales and use tax to instructor-led webinars and self-study online courses.

SCOPE

Revenue Rulings are statements regarding the substantive application of law and statements of procedure that affect the rights and duties of taxpayers and other members of the public. Revenue Rulings are advisory in nature and are not binding on the Department.

FACTS

The Taxpayer is a limited liability company domiciled outside of Tennessee. The Taxpayer provides professional licensing education & test preparation services through continuing education courses and online courses to individuals in various fields of study, such as real estate, home inspection, nursing, cosmetology, land surveying, engineering, and others. The Taxpayer's online product offerings (collectively "online training courses") include self-study online courses and instructor-led webinars with the target audience of individual persons striving to advance or start a new career. All online training courses are designed to be a substitute for in-person live training and achieve the same results.

Online self-study courses provide written material and interactive knowledge checkpoints without live communication with an instructor. These checkpoints involve a question and answer and take the form of multiple-choice, concepts matching, and short answer. The content of the online self-study course is only available online and may not be downloaded on the purchaser's computer. The content is provided in the form of a written text on the computer screen that may be accompanied by an audio recording explaining the concepts. Additionally, certain online self-study courses contain video clips of pre-recorded conversations or staged videos guiding the learner through the concepts of the online self-study course. During the online self-study course, a student has an option to collaborate with other students through the chat function. In addition, experienced professionals are available at the request of the student to discuss specific areas of the online self-study course through email or over the phone. Once the online self-study course has been completed, the student receives a certificate of completion and may not retake the online self-study course unless he or she enrolls again.

The webinars are typically conducted in real time with students connecting remotely to the virtual classroom where a live instructor is presenting the material to the audience through the Taxpayer's platform. There is a direct interaction and information exchange between students and the instructor, the attendance is recorded, and a completion certificate is issued at the end of the course.

To take any online training course, a prospective student has to create an account on the Taxpayer's server, sign up for the chosen course, and pay a specific fee based on the type of course.

RULINGS

1. Are the Taxpayer's self-study online training courses subject to the Tennessee sales and use tax?

Ruling: Yes, the Taxpayer's self-study online training courses are subject to Tennessee sales and use tax because the student is paying for the use of computer software.

2. Are the Taxpayer's live instructor-led webinars subject to Tennessee sales and use tax?

Ruling: No, the Taxpayer's live instructor-led webinars are not subject to Tennessee sales and use tax because the student is paying to participate in a live class.

ANALYSIS

Legal Background

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. 2016) 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 "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."³

¹ Tennessee Retailers' Sales Tax Act, ch. 3, §§ 1-18, 1947 Tenn. Pub. Acts Ch. 22, 22-54 (codified as amended at TENN. CODE ANN. §§ 67-6-101 to -907 (2013)).

² TENN. CODE ANN. § 67-6-102(76) (Supp. 2016).

³ 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." TENN. CODE ANN. § 67-6-102(89)(A).

With regard to prewritten computer software, TENN. CODE ANN. § 67-6-102(68) 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

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.⁴ 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 programmed into a computer, created on the premises of the consumer or otherwise provided.⁵

“Computer software” is “a set of coded instructions designed to cause a computer . . . to perform a task.”⁶ Computer software is “delivered electronically” if delivered “by means other than tangible storage media.”⁷

In 2015, the Tennessee General Assembly adopted into law 2015 Tenn. Pub. Acts Ch. 514, § 22 (effective July 1, 2015). This law effectively treats all purchases of computer software in this state equally, regardless of how the software is provided to and used by a purchaser in this state. It amends TENN. CODE ANN. § 67-6-231(a) to include subdivision (2), which states in pertinent part that

[f]or purposes of subdivision (a)(1), “use of computer software” includes the access and use of software that remains in the possession of the dealer who provides the software or in the possession of a third party on behalf of such dealer. If the customer accesses the software from a location in this state as indicated by the residential street address or the primary business address of the customer, such access shall be deemed equivalent to the sale of licensing of the software and electronic delivery of the software for use in the state.⁸

As a result, effective for all billing periods beginning on or after July 1, 2015, the access and use of computer software in this state is subject to sales and use tax regardless of a customer’s chosen method of use.

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),

⁴ TENN. CODE ANN. § 67-6-102(78)(C).

⁵ TENN. CODE ANN. § 67-6-231(a)(1) (Supp. 2015). The term “sale” specifically includes the transfer of computer software, including the creation of computer software on the premises of the consumer and any programming, transferring, or loading of computer software onto a computer. TENN. CODE ANN. § 67-6-102(78)(K).

⁶ TENN. CODE ANN. § 67-6-102(18).

⁷ TENN. CODE ANN. § 67-6-102(24).

⁸ 2015 Tenn. Pub. Acts Ch. 514, § 22 (codified at TENN. CODE ANN. § 67-6-231(a)(2) (Supp. 2016)).

The sales tax also applies to retail sales of services specifically enumerated in the Retailers' Sales Tax Act.⁹ However, the application of the sales tax to retail sales of services in Tennessee remains unaffected by the enactment of 2015 Tenn. Pub. Acts Ch. 514, § 22. The sales tax remains applicable only to those services specifically enumerated in the Retailers' Sales Tax Act.¹⁰ As reassurance of this fact, the General Assembly included language in Section 22 stating that nothing in the new subdivision (a)(2) of TENN. CODE ANN. § 67-6-231

shall be construed to impose a tax on any services that are not currently subject to tax under this chapter, such as, but not limited to, information or data processing services, including the capability of the customer to analyze such information or data provided by the dealer; payment or transaction processing services; payroll processing services; billing and collection services; Internet access; the storage of data, digital codes, or computer software; or the service of converting, managing, and distributing digital products.¹¹

Therefore, while the new TENN. CODE ANN. § 67-6-231(a)(2) modernizes taxation of computer software in this state, it has no effect on the taxation of services.

Additionally, whenever two or more items are sold for a single sales price and at least one of the items is subject to sales tax, the entire sales price is subject to sales tax as a bundled transaction.¹² When a transaction involves taxable and nontaxable components and the transaction's true object or a "crucial,"¹³ "essential,"¹⁴ "necessary,"¹⁵ "consequential,"¹⁶ or "integral"¹⁷ element of the

⁹ The Retailers' Sales Tax Act imposes the sales tax only on services specifically enumerated in the Act. *See, e.g.*, TENN. CODE ANN. § 67-6-205 (2013); *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) (sales tax does not apply to all services; rather, it only applies to retail sales of services specifically enumerated by the statute).

¹⁰ The Retailers' Sales Tax Act imposes the sales tax only on services specifically enumerated in the Act. *See, e.g.*, TENN. CODE ANN. § 67-6-205; *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) (sales tax does not apply to all services; rather, it only applies to retail sales of services specifically enumerated by the statute).

¹¹ 2015 Tenn. Pub. Acts Ch. 514, § 22 (codified at TENN. CODE ANN. § 67-6-231(a)(2) (Supp. 2016)).

¹² *See generally* Tenn. Dept. of Rev. Ltr. Rul. 14-10 (Oct. 14, 2014) [hereinafter "Ltr. Rul. 14-10"] (discussing Tennessee law regarding bundling and the "true object" test), *available at* <http://www.tennessee.gov/assets/entities/revenue/attachments/14-10.pdf>.

¹³ *See, e.g., Thomas Nelson, Inc. v. Olsen*, 723 S.W.2d 621, 624 (Tenn. 1987) (holding that a transaction involving the sale of non-taxable intangible advertising concepts was nevertheless subject to sales tax on the entire amount of the transaction because advertising models, which were tangible personal property, were an "essential," "crucial," and "necessary" element of the transaction).

¹⁴ *Id.*; *see also AT&T Corp. v. Johnson*, No. M2000-01407-COA-R3-CV, 2002 WL 31247083, at *8 (Tenn. Ct. App. Oct. 8, 2002) (holding that a transaction involving the sale of engineering services along with separately itemized tangible telecommunications systems was subject to sales tax on the entire amount of the contract because "equipment, engineering, and installation combine in this instance to produce BellSouth's desired result: a functioning item of tangible personal property assembled on the customer's premises," and further describing the engineering services as "essential" and "integral" to the sale of tangible personal property).

¹⁵ *See supra* note 18.

transaction is subject tax, the entire transaction is subject to sales tax.¹⁸ Only if the true object of the transaction is not independently subject to sales tax and the items that would be subject to sales tax are “merely incidental” to the true object of the transaction will the transaction not be subject to sales tax.¹⁹

Application

I. Self-study Online Courses

The Taxpayer’s self-study online training courses are remotely accessed software and subject to Tennessee sales and use tax under TENN. CODE ANN. § 67-6-231(a).

The self-study online training courses provide the user with the ability to study or learn a new skill by accessing computer software via the internet. With respect to the taxable use of computer software in this state that remains in possession of the dealer, TENN. CODE ANN. § 67-6-231(a)(2) requires the access and use of the computer software by a customer within this state. Here, as part of its self-study online training courses, the Taxpayer provides Tennessee users with web-based access to its platform where the users can select and pay for a specific program.

The platform provides access to the self-study online training course material where the user interacts with a computer program by reading the online text and interacting with knowledge checkpoints by answering questions formatted as either multiple-choice, concepts matching, or short answer. Based upon the user’s interactions, the computer program provides the user with feedback in the form of a narrative explanation and plays pre-recorded audio or video. This is analogous with taxable pre-packaged software accessed via a tangible medium, such as a DVD or compact disk that users purchase to study for career advancement, college entrance exams, or learning a new skill, such as a new language.

Therefore, the online training courses are subject to Tennessee sales tax when sold to a Tennessee customer because they are remotely accessed software.

II. Instructor-led Webinar

The Taxpayer’s live instructor-led webinars are not subject to Tennessee sales and use tax because the student is purchasing access to a live class, and the software platform is merely incidental to the transaction.

¹⁶ See *Rivergate Toyota, Inc. v. Huddleston*, No. 01A01-9602-CH-00053, 1998 WL 83720, at *4 (Tenn. Ct. App. Feb. 27, 1998) (holding that a transaction involving the commission and distribution of advertising brochures was subject to sales tax on the “entire cost of the transaction” because, although the transaction involved a number of services, the brochures themselves “were not inconsequential elements of the transaction but, in fact, were the sole purpose of the contract”).

¹⁷ See *AT&T Corp. v. Johnson*, 2002 WL 31247083, at *8.

¹⁸ See generally *Ltr. Rul. No. 14-10*, *supra* note 16.

¹⁹ See generally *id.*

The live instructor-led webinars provide the customer with access to live lectures via a computer. With respect to the taxable use of computer software in this state that remains in possession of the dealer, TENN. CODE ANN. § 67-6-231(a)(2) requires the access and use of the computer software by a customer within this state. Here, as part of its webinar, the Taxpayer provides its students with web-based access to its platform where the students can select and pay for a specific course. The Taxpayer's platform constitutes computer software for Tennessee sales and use tax purposes,²⁰ and the platform is accessed by the Taxpayer's students from locations within Tennessee. A student's use of the platform software, however, is merely incidental to participating in the live class.

The platform software simply provides access to a real time presentation where the student can interact with the instructor and view course material. After gaining access, the student is not interacting with a computer program, but instead interacts with the instructor and other students. The platform only facilitates course instruction between the students and instructor, and it is merely incidental to the webinar.

Consequently, the student is not purchasing use of the software, but is, instead, purchasing access to a training class. With respect to the sale of services in Tennessee, only specifically enumerated services are subject to tax under the Retailers' Sales Tax Act. The Taxpayer's training services are not specifically enumerated as taxable under TENN. CODE ANN. § 67-6-205.

Accordingly, the Taxpayer's instructor-led webinars are not subject to the Tennessee sales and use tax.

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APPROVED: David Gerregano
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DATE: 10/31/17

²⁰ See TENN. CODE ANN. § 67-6-102(18).