

TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING # 18-09

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 sales and use tax to data analytics 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”) provides mobile and web data analytics services. The Taxpayer collects data about users of a customer’s website or mobile application and provides the customer with reports about such use. The Taxpayer obtains customer data one of two ways: (1) a customer installs the Taxpayer’s code within its website or mobile application, or (2) a customer sends its data to the Taxpayer using Taxpayer-generated code. Customers determine what user interactions or metrics they want to track, such as user location, type of device and browser used to access the website, and how the user was directed to the customer’s website. Only those metrics a customer chooses to track are included in the Taxpayer’s code and subsequently tracked.¹

Once the Taxpayer has collected the raw data, it is streamed to the Taxpayer’s servers. The data is then made available to customers on the Taxpayer’s web-based dashboard. Customers are granted a limited, non-exclusive, non-transferrable software license to the Taxpayer’s web-based dashboard to access their user data and reports. Customers access the dashboard through their own internet browser or the Taxpayer’s mobile application. While the Taxpayer automatically generates some reports in the dashboard, customers are able to create their own reports as well. The Taxpayer-generated reports include the [REDACTED] report, which shows how users move through the customer’s website; the [REDACTED] report, which looks at how often users return to the customer’s website; and the [REDACTED] report, which provides a comprehensive analysis of all user and event data.

The Taxpayer offers two types of plans: [USER INTERACTION] plans and [USER DATA] plans (collectively, the “Taxpayer’s Plans”). Customers may have both types of plans, as each serves a different purpose. [USER INTERACTION] plans track user interactions with a customer’s website or mobile application. The Taxpayer offers three levels of [USER INTERACTION] plans, which vary in the amount of data available to customers and whether customers can download such data.

The [FIRST TIER PLAN], the lowest-tier plan, offers customers full analytics of current data and up to one year of historical data. Customers are able to save reports within the dashboard. Pricing for the [FIRST TIER PLAN] uses a base monthly, quarterly, or annual rate, with additional fees for increased data capabilities. The [FIRST TIER PLAN] allows unlimited access to the Taxpayer’s dashboard for up to 10 customer accounts.

The [SECOND TIER PLAN] differs from the [FIRST TIER PLAN] in a few key ways. There are no monthly data limits and dashboard access is not limited to a certain number of customer accounts. Additionally, [SECOND TIER PLAN] customers can access up to five years of historical data in the dashboard. [SECOND TIER PLAN] customers are also able to export data from the dashboard in CSV format. Pricing for the [SECOND TIER PLAN] is at an annual rate.

The [THIRD TIER PLAN] is the top-tier plan. [THIRD TIER PLAN] customers are able to access their complete data history in the dashboard and also have access to additional Taxpayer-generated reports that other [USER INTERACTION] plans do not offer. [THIRD TIER PLAN] customers can also export their data from the dashboard in CSV format.

¹ The Taxpayer also offers a codeless tracking option for website tracking. If a customer chooses this option, all user interactions on a customer’s website are tracked once the Taxpayer’s code has been installed.

[USER DATA] plans, on the other hand, collect and analyze user data, rather than interactions. Customers using [USER DATA] plans are able to determine the demographics and use history of their website and mobile application users. Customers use the [USER DATA] plan to categorize users, such as those from a certain region or with a certain purchase history, and target emails or mobile application messages to those individual groups. Additionally, the Taxpayer uses the [USER DATA] plan platform to send notifications to customers. Pricing for [USER DATA] plans is based on the number of user profiles a customer maintains.

RULING

Are the Taxpayer's data analytics services subject to Tennessee sales and use tax?

Ruling: No, the Taxpayer's data analytics services are not subject to Tennessee sales and use tax. Although the Taxpayer's services involve the use of remotely accessed computer software, the true object of the services is the nontaxable data analytics service.

ANALYSIS

Under the Retailers' Sales Tax Act, the retail sale in Tennessee of tangible personal property and specifically enumerated services is subject to the sales tax, unless an exemption applies.² "Retail sale" is defined as "any sale, lease, or rental for any purpose other than for resale, sublease, or subrent."³

TENN. CODE ANN. § 67-6-102(78)(A) (2018) 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."⁴ 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."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:

² Tennessee Retailers' Sales Tax Act, Ch. 3, §§ 1-18, 1947 Tenn. Pub. Acts Ch. 22, §§ 2254 (codified as amended at TENN. CODE ANN. §§ 67-6-101 to -907 (2018)).

³ TENN. CODE ANN. § 67-6-102(76) (2018).

⁴ TENN. CODE ANN. § 67-6-102(89)(A).

⁵ 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."

⁶ TENN. CODE ANN. § 67-6-102(78)(C).

[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.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 Tennessee Supreme Court has stated that the fabrication of, or customized modification or enhancement to, computer software is considered a taxable sale of computer software.¹⁰

Additionally, 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.¹¹

In response to advances in technology that allow the remote access and use of software over the Internet, the Tennessee General Assembly adopted into law 2015 Tenn. Pub. Acts Ch. 514, § 22. This law effectively treats all uses of computer software in this state equally, regardless of how a person accesses the software. It amended TENN. CODE ANN. § 67-6-231 to include a new subdivision (b), which states in pertinent part that:

[f]or purposes of subdivision (a), “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.¹²

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, which has generally been subject to tax since 1977,¹³ remains subject to sales and use tax regardless of a customer’s chosen method of use.

⁷ TENN. CODE ANN. § 67-6-231(a) (2018). 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).

⁸ TENN. CODE ANN. § 67-6-102(18).

⁹ TENN. CODE ANN. § 67-6-102(24).

¹⁰ See *Creasy Sys. Consultants, Inc. v. Olsen*, 716 S.W.2d 35, 36 (Tenn. 1986).

¹¹ TENN. CODE ANN. § 67-6-102(78)(K).

¹² 2015 Tenn. Pub. Acts Ch. 514, § 22 (codified at TENN. CODE ANN. § 67-6-231(b) (2018)).

¹³ The General Assembly amended the definition of “tangible personal property” in 1977 to specifically include computer software in response to the Tennessee Supreme Court’s holding to the contrary in *Commerce Union Bank*, 538 S.W.2d 405,

The sales tax also applies to retail sales of services specifically enumerated in the Retailers' Sales Tax Act.¹⁴ 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. As reassurance of this fact, the General Assembly included language in Section 22 stating that nothing in the new subdivision (b) 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.¹⁵

Therefore, while TENN. CODE ANN. § 67-6-231(b) (2018) 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.¹⁶ When a transaction involves taxable and nontaxable components and the transaction's true object or a "crucial,"¹⁷ "essential,"¹⁸ "necessary,"¹⁹ "consequential,"²⁰ or "integral"²¹ element of the

408. 1977 Tenn. Pub. Acts Ch. 42 (defining "tangible personal property" to include computer software); *see also Univ. Computing Co. v. Olsen*, 677 S.W.2d 445, 447 (Tenn. 1984) (detailing the General Assembly's actions taken to subject computer software to sales and use tax).

¹⁴ *See* TENN. CODE ANN. § 67-6-205(c) (2018).

¹⁵ 2015 Tenn. Pub. Acts Ch. 514, § 22 (codified at TENN. CODE ANN. § 67-6-231(b) (2018)).

¹⁶ *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).

¹⁷ *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).

¹⁸ *Id.*; *see also AT&T Corp. v. Johnson*, No. M2000-01407-COA-R3-CV, 2002 WL 31247083, at *9 (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).

¹⁹ *See supra* note 17.

²⁰ *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").

transaction is subject to tax, the entire transaction is subject to sales tax.²² 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.²³

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(b) requires the access and use of the computer software by a customer from a location within Tennessee. However, TENN. CODE ANN. § 67-6-231(b) clarifies that the application of the sales and use tax to remotely accessed software does not make otherwise nontaxable services subject to tax. TENN. CODE ANN. § 67-6-231(b) specifically states that “information or data processing services” and “the storage of data” remain nontaxable for Tennessee sales and use tax purposes.²⁴ To utilize the Taxpayer’s Plans, customers must either install the Taxpayer’s code within their mobile or web application or send the Taxpayer their data for processing and analysis. Customers who opt to install the Taxpayer’s code within their own applications have access to the Taxpayer’s software that collects the customer’s data. Although this constitutes computer software for Tennessee sales and use tax purposes,²⁵ and some of the Taxpayer’s customers use the software from locations within Tennessee, a customer’s use of the software is merely incidental to the true object of the Taxpayer’s Plans. Customers do not purchase the Taxpayer’s Plans to gain access to the Taxpayer’s software; rather, customers do business with the Taxpayer for its data analytics services. The Taxpayer’s software is a tool to collect raw data. This raw data is meaningless to customers without the Taxpayer’s subsequent analysis. Accordingly, the data analytics service is the true object of the Taxpayer’s Plans.

Similarly, the Taxpayer provides customers with access to a web-based dashboard that stores the customer’s data and reports. Although the web-based dashboard also constitutes computer software for Tennessee sales and use tax purposes,²⁶ the storage of the customer’s data and capability of the Taxpayer’s customers to access and analyze its historical data via the dashboard from locations within Tennessee, is merely incidental to the true object of the Taxpayer’s services. The web-based dashboard is merely a tool to view the end result of the data analytics services that customers purchase from the Taxpayer.

²¹ See *AT&T Corp. v. Johnson*, 2002 WL 31247083, at *8.

²² See generally *Ltr. Rul. No. 14-10*, *supra* note 16.

²³ See generally *id.*

²⁴ TENN. CODE ANN. § 67-6-231(a)(2).

²⁵ See TENN. CODE ANN. § 67-6-102(18).

²⁶ *Id.*

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 data analytics services, which are the true object of the Taxpayer's Plans, are not specifically enumerated in TENN. CODE ANN. § 67-6-205. Accordingly, the Taxpayer's data analytics services are not subject to Tennessee sales and use tax.

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APPROVED: David Gerregano
Commissioner of Revenue

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