

TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING # 21-10

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

Application of the Tennessee sales and use tax to charges for services related to the furnishing of remotely accessed software.

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") is a [REDACTED] information technology company headquartered in [CITY, STATE]. The Taxpayer sells a [TYPE] platform (the "Platform") to [CUSTOMERS]. The Platform

delivers [REDACTED] to support [REDACTED] decision-making processes. The Platform contains a [REDACTED] decision tree and is designed to operate within a [SYSTEM].¹

The Platform is hosted on the Taxpayer's servers or on third-party servers. [USERS] access the Platform from their [EMPLOYER'S] electronic software system. The Platform is integrated into the [EMPLOYER'S] system to the degree that there will either be a separate tab for [USERS] to click for access or there will be certain triggers in the [EMPLOYER'S] software system that will produce a pop-up directing the [USER] to the Platform [REDACTED]. Some [EMPLOYERS] make use of the Platform mandatory [REDACTED].

There is a two-way exchange of information between the [CUSTOMER'S] system and the Platform. Basic [REDACTED] information from the [CUSTOMER'S] system is transferred into the Platform, such as [REDACTED]. The [USER] enters the rest of the [INFORMATION] into the Platform. The Platform then creates a decision tree [REDACTED] that the [USER] follows as information is entered. As the [USER] is clicking through the Platform's decision tree, the information being entered is populated back into the [SYSTEM], which helps the [USER] keep accurate documentation. The Platform ultimately suggests [AN OUTCOME] based on the information entered by the [USER].

The Taxpayer charges its [CUSTOMERS] three different fees: Platform Fees,² Implementation Fees, and Content Fees. The fees are part of a single contract, are itemized within the body of the contract, and are stated separately on invoices.

The Platform Fee covers the technology license of the Taxpayer's software Platform and [REDACTED]. It also includes all required configuration, all technology and content integration, and covers all [REDACTED] hosting, customer support, and maintenance of connectivity with the [CUSTOMER'S] system.

The Implementation Fee covers the provision of all resources necessary to assure seamless implementation, onboarding of [EMPLOYEES], on-site user training, and the strategies to drive customer success. Onboarding involves integrating, configuring, and mapping orders with [CUSTOMER'S] system so that it can exchange information properly with the Platform. Onboarding is essential for the operation of the Platform.

Training is conducted either live, by webinar, or by videos. Live training is recorded for future reference. The training services are optional and are not necessary for the operation of the Platform. If the Taxpayer's customer has an internal lead that the customer wants to handle the rollout and the training of [EMPLOYEES], the Taxpayer would not provide any additional training webinars or videos and the implementation fee would be adjusted accordingly.

The Content Fee is the amount charged for access to the Platform's proprietary content and is organized by [REDACTED]. [REDACTED]. Pricing [REDACTED] and covers user licenses to all [CONTENT]. The content includes [REDACTED]. [REDACTED]. The Content Fee is based on the amount and type of content made available to the [CUSTOMER].

¹ [REDACTED]

² The Taxpayer does not dispute that the Platform Fee is subject to Tennessee sales tax as the furnishing of remotely accessed software and has not requested a ruling on the taxability of this charge.

RULINGS

1. Are the Implementation Fees charged to [CUSTOMERS] located in Tennessee subject to Tennessee sales and use tax?

Ruling: Yes. The Implementation Fees are subject to Tennessee sales and use tax.

2. Are the Content Fees charged to [CUSTOMERS] located in Tennessee subject to Tennessee sales and use tax?

Ruling: Yes. The Content Fees are subject to Tennessee sales and use tax.

ANALYSIS

Summary of Applicable Law

Under the Retailers' Sales Tax Act (the "Act"),³ retail sales of tangible personal property and computer software are subject to sales and use tax unless an exemption applies. Tennessee also imposes sales tax on services; however, the tax only applies to those services specifically enumerated as taxable.⁴

Computer software is subject to sales and use tax on a stand-alone basis and under the definition of "tangible personal property," which includes "prewritten software."⁵ In 2015, the Tennessee General Assembly 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.⁶

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, remains subject to sales and use tax regardless of a customer's chosen method of use.

³ 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 & Supp. 2020)).

⁴ TENN. CODE ANN. § 67-6-201 (Supp. 2020).

⁵ TENN. CODE ANN. §§ 67-6-231 (2018) and 67-6-102(95)(A) (Supp. 2020).

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

Additionally, 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 Act.⁷

Finally, a transaction may involve the sale of a combination of items or services. When a transaction involves taxable and nontaxable components and the transaction's true object or a crucial, essential, necessary, consequential, or integral element of the transaction is subject to tax, the entire transaction is subject to sales tax.⁸

Application of the Law

The Platform fee is a charge for access to and use of computer software. The use of the software in Tennessee is taxable under TENN. CODE ANN. § 67-6-231 as remotely accessed software. The Taxpayer does not dispute that Tennessee sales tax applies to its Platform fees.

The Taxpayer has requested guidance as to its Implementation Fees and Content Fees. As described in more detail below, these fees are subject to Tennessee sales tax as part of the sale of the Platform, which is the true object of the transaction.

Under the facts presented, the Taxpayer and its customer enter into a contract for access to the Platform. The contract divides different aspects of the Taxpayer's product into separate categories (i.e., the use of the Platform, implementation of the Platform, and access to Platform content). The Platform Fees, the Implementation Fees, and the Content Fees are separately referenced in the contract and are separately stated on the Taxpayer's invoices to the customer. Because the different categories of services covered by these fees are either necessary to complete the sale or essential and integral to the sale of software and/or remote access to and use of software, the fees are subject to Tennessee sales tax.

IMPLEMENTATION FEE

Included in the Implementation Fee is onboarding, which is mandatory and involves integrating, configuring, and mapping orders with the [CUSTOMER'S] system so that it can exchange information properly with the Platform. The Platform would not operate properly without onboarding. Therefore, these services are necessary to complete the sale and as such charges for these services are included in the sales price of the software, even if separately stated.⁹

The Implementation Fee may also include computer software training services. On a stand-alone basis, computer software training services are not enumerated as taxable. However, charges for computer software training included in the price of computer software will be subject to tax as part

⁷ See TENN. CODE ANN. § 67-6-231(b) (stating that nothing in this subsection shall be construed to impose a tax on any services that are not currently subject to tax.).

⁸ See, e.g., *Thomas Nelson, Inc. v. Olsen*, 723 S.W.2d 621, 624 (Tenn. 1987) (holding that a transaction involving the sale of nontaxable 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).

⁹ TENN. CODE ANN. § 67-6-102(85) (stating that "sales price" includes charges for any services necessary to complete the sale).

of the sale of the computer software if the purchase of such training is required as part of the purchase of the software.¹⁰ Training will also be subject to tax if it is bundled with other taxable products or services.

In order for training to be nontaxable, it must be optional and separately stated from the sale of a taxable product. The information provided by the Taxpayer lists training as included in the implementation fee (not separately itemized).¹¹ Because this training is included in the price of other taxable items, it is subject to Tennessee sales and use tax. If the training is optional, then in order to apply a different tax treatment it must be separately stated on the invoice. Similarly, to the extent the Taxpayer offers additional optional training, the related charges should be separately stated on the invoice so that the appropriate tax treatment can be applied.

CONTENT FEE

The Content Fee is a charge for access to the Taxpayer's proprietary content, which includes [REDACTED]. The Taxpayer's position is that the true object of the Content Fee is the delivery of nontaxable [REDACTED] content.¹² The Taxpayer's propriety content cannot be purchased without purchasing the Platform. The primary purpose of the Platform is to [REDACTED]. This is done through the use of software and the related decision trees. Without the [PROPRIETY CONTENT], the Platform would be of no use to [CUSTOMERS]. As such, the Content Fee is a charge for tools and information that are essential and integral to the operation of the Platform. It is not a charge for an additional and optional product and cannot be separated from the sale of the Platform. Therefore, the Content Fee is subject to Tennessee sales and use tax.

CONCLUSION

In conclusion, the Platform is [REDACTED]. The sale of access to and use of the Platform (computer software) is subject to the Tennessee sales and use tax. The Taxpayer's Implementation Fees and the Content Fees are in turn subject to the Tennessee sales and use tax because the services covered by the fees are necessary to complete the sale and/or an essential and integral part of the taxable sale of the Platform. To the extent the Taxpayer offers optional training services, these services must be separately stated from the Platform, Content, and Implementation Fees to allow for different tax treatment.

APPROVED: David Gerregano
Commissioner of Revenue

DATE: 10/21/2021

¹⁰ TENN. CODE ANN. § 67-6-102(85)(A)(vi).

¹¹ In the example agreement provided, computer software training is included in the Implementation Fees.

¹² See *Prodigy Services Corporation, Inc. v. Johnson*, 125 S.W.3d 413 (Tenn. Ct. App. 2003) (finding telecommunications services were not the true object of the transaction, resulting in the transaction not being subject to tax).