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May 17, 2017
Pennsylvania Sales and Use Tax
No. SUT-17-002
Tangible Personal Property/
Information Retrieval Products

ISSUE:

Are the information retrieval products, as described below, subject to Pennsylvania Sales and Use Tax as tangible personal property?

CONCLUSION:

The information retrieval products, as described below, are subject to Pennsylvania Sales and Use Tax as tangible personal property.

FACTS:

Taxpayer develops and sells information retrieval products in the form of subscriptions to specialized internet-based research services. These information retrieval products are used by professionals in a variety of industries including accounting, tax, finance, and law. The information retrieval products are accessed electronically over the internet using an ID and password. The information retrieval products are provided on a subscription-fee basis for monthly, quarterly or annual periods, with the subscription fees generally being based upon the number of users and/or resources to which a subscriber requests access. Subscribers are subject to certain terms and conditions of an agreement such as “a non-exclusive, non-transferrable, limited license...to use” the ordered information retrieval product. Further, in addition to the agreement, certain general terms and conditions are also applicable to provide certain limitations on the use of the information accessed within the information retrieval products.

Each information retrieval product provides access to resources from primary and secondary sources. Primary sources are sources including Federal, state and local statutes, court opinions, regulatory filings with or from governmental bodies, regulatory guidance from non-governmental bodies, and full-text patents. Secondary sources are sources including information from various non-governmental entities such as businesses, industry associations, and similar organizations.

The information retrieval products are maintained on servers which are located outside of Pennsylvania and accessed by a web browser previously existing on a subscriber’s computer or device. As an alternative means of access, the information retrieval products are also available via a mobile phone application available for download free of charge. Such mobile phone application is available to the general public whether or not the person accessing and downloading the application has a subscription to the information retrieval product. The mobile phone application permits access with limited functionality on mobile devices, however no research content or related resources are included within the free mobile application download.

Subscribers typically interact with the information retrieval products through an advanced search function whereby search commands are transmitted by the subscriber's web browser to Taxpayer's servers. Application software on these servers processes the queries and returns the results to the subscriber. Results may be presented, according to the user's preference, in chart or spreadsheet format to make comparisons and facilitate further research. In addition to the above-described access to basic functionality, occasionally, a server hosting an information retrieval product returns information including "executable code" in a programming language designed to be executed by the subscriber's web browser. This executable code is used to provide a more graphically sophisticated user interface.

DISCUSSION:

Article II of the Tax Reform Code (TRC) imposes a six percent tax on "each separate sale at retail of tangible personal property or services, as defined herein, within this Commonwealth." 72 P.S. § 7202(a). The term sale at retail is defined, as "any transfer, for a consideration, of the ownership, custody or possession of tangible personal property, including the grant of any license to use or consume whether such transfer be absolute or conditional and by whatsoever means the same shall have been effected." 72 P.S. § 7201(k)(1). This statutory language demonstrates that not all sales in Pennsylvania are subject to Pennsylvania Sales and Use Tax. Rather, such tax is only imposed upon transactions for tangible personal property unless specifically exempted, services constituting a sale at retail, and services made taxable because of the broad definition of purchase price. 72 P.S. § 7201(g) and (k).

The Pennsylvania sales tax law was recently updated by expanding the statutory definition of "tangible personal property" to expressly include certain specified items including video, books, applications, games, music, audio, canned software, and other specified items. *See* Act 84 of 2016 (pertinent section at 72 P.S. § 7201(m)(2) *effective* August 1, 2016). Act 84 of 2016 provides that such items constitute tangible personal property whether "electronically or digitally delivered, streamed or accessed" and "whether purchased singly, by subscription or in any other manner." *Id.* The statement of policy on computer software, hardware and related transactions which the Department adopted on January 7, 2000, does not address all aspects of tangible personal property as that term is now defined under Act 84 of 2016. *See* 61 Pa. Code § 60.19. For example, tangible personal property now expressly includes "maintenance, updates and support." 72 P.S. § 7201(m)(2). To the extent the statute and the statement of policy at 61 Pa. Code § 60.19 are inconsistent, the provisions of the statute apply. Where consistent however, the statement of policy provides additional guidance including, as relevant to the instant request, the definitions of "canned" and "custom" software. *See* 61 Pa. Code § 60.19(b).

In applying the above statutory and regulatory provisions to the information retrieval products, both the functionality and the resource content are relevant. When a subscriber interacts with the information retrieval products through an advanced search function, search commands are transmitted by the subscriber's web browser to Taxpayer's servers then application software processes the queries and returns the results to the subscriber. In utilizing the search function of the information retrieval product, the subscriber is exercising a license to access canned computer software. Furthermore, by entering inputs to obtain a certain desired output, the subscriber is exercising power and control over the software. *See* 72 P.S.

§ 7201(m)(2)(ix); *Graham Packaging Company L.P. vs. Commonwealth*, 882 A.2d 1076 (Pa.Cmwlth. 2005).

Moreover when a subscriber is accessing content of the information retrieval products, the subscriber is accessing tangible personal property as that term is defined under Act 84. 72 P.S. § 7201(m)(2)(iii), (iv) and (x). The resource content constitutes electronic access to taxable tangible personal property such as case reporters and statutory codifications, as well as to periodical articles such as law journals, loose leaf services, and other similar items. 61 Pa. Code § 31.29. Whether or not access to resource content may be limited by the search function is not outcome-determinative because the grant of a conditional license to use tangible personal property is nonetheless a sale at retail under the TRC.

Accordingly, the information retrieval products constitute tangible personal property in that the transactions are comprised of both (i) a license to electronically access and use canned computer software and (ii) the right to electronically access tangible personal property. The transactions are therefore subject to the imposition of Pennsylvania Sales and Use Tax.