



QUESTION:

Whether Taxpayer's XXX subscriptions are subject to sales tax or communications services tax

ANSWER:

Taxpayer's sales of subscriptions that include communications services, such as video services that originate and terminate in Florida, or originate or terminate in Florida and are charged to a Florida service address, are subject to CST.

August 7, 2019

XX

Re: Technical Assistance Advise ment 19A19-001
Communications Services Tax
Chapter 202, Florida Statutes
Sales and Use Tax
Chapter 212, Florida Statutes
Taxpayer: X
Business Partner Number: X
FEIN: X

Dear X:

This letter is a response to your petition for the Department's issuance of a Technical Assistance Advise ment ("TAA"), regarding the taxability of Taxpayer's subscriptions. Your petition has been carefully examined, and the Department finds it to be in compliance with the requisite criteria set forth in Rule Chapter 12-11, Florida Administrative Code ("F.A.C."). This response to your request constitutes a TAA and is issued to you under the authority of section 213.22, Florida Statutes ("F.S.).

REQUESTED ADVISEMENT

Whether Taxpayer's XXX subscriptions are subject to sales tax or communications services tax.

FACTS PROVIDED

Taxpayer provides an Internet-based platform where viewers can watch real-time streaming videos licensed by third parties, commonly referred to as “broadcasters,” on the internet. Specifically, viewers who visit Taxpayer’s website can watch broadcasters playing a variety of different video games, playing music, painting, playing in live e-sports events, or other activities. Viewers can also comment using the chat tool. In addition to live streaming of video, broadcasters can save their past videos and post them for viewers to watch on demand (“VOD”). Once enabled by broadcasters, VODs are saved by default for 14 days.

According to Taxpayer, all video content can be viewed free of charge, with viewers receiving a basic free tier of engagement on Taxpayer’s website. The following benefits are available to all viewers for free:

- X

Viewers wanting an enhanced experience on Taxpayer’s website can purchase a subscription. Taxpayer indicates that there are two types of subscriptions available for purchase and neither subscription provides subscribers with any additional viewing content. Paying Subscribers generally receive the following additional benefits:

X Subscription:

- X

X Subscription:

- X

Although the benefits referenced above are included as part of Taxpayer’s subscriptions, Taxpayer indicates that the primary reason viewers purchase Taxpayer’s X subscriptions or Taxpayer’s X subscriptions is to support the broadcaster community. The cornerstone of the Taxpayer’s platform is the relationship between the broadcasters and their viewers, and Taxpayer has taken steps over the years to foster the development of such relationships. Unlike other platforms where visitors passively view streaming video, Taxpayer’s platform is one designed with the intent of encouraging engagement among the broadcaster and the viewer community.

According to Taxpayer there are multiple avenues for engagement available on broadcaster pages. One of the primary methods of engagement, the chat function, allows viewers to interact directly and in real time with broadcasters. Taxpayer indicates that non-paying viewers can use the chat tool, as well; the only difference for subscribers is that they receive an

emoticon next to their name in chat, representing that they are a subscriber. Taxpayer equates the chat tool to instant messaging, rather than a form of telecommunication.¹

Broadcaster pages also often contain links and information about how viewers can further engage with and financially support them. This includes links to x pages, buttons to donate via x, and other similar services. Donating to broadcasters is so popular that Taxpayer recently implemented a system for all viewers, not just subscribers, to donate to broadcasters through Taxpayer's X function. Broadcasters frequently provide additional playing opportunities to subscribers and viewers who donate, including the opportunity to play a video game with the broadcaster on a Taxpayer stream playing with a character, item, or other-in-game settings as requested by a viewer, providing feedback, etc. These benefits vary among the broadcaster community.

Additionally, Taxpayer recently rolled out a beta program to allow certain broadcasters to offer different tiers of subscriptions to their subscribers. While a standard subscription costs \$X per month, two new tiers have been added at \$X and \$X. These two new tiers offer the same benefits as the basic subscription one subscription, plus the following additional benefits:

- 1) X
- 2) X

The other benefits of higher tier subscriptions inure directly to broadcasters; specifically, the broadcasters receive additional revenue from the higher-tier subscriptions, and the higher-tier subscriptions count as multiple subscribers for purposes of unlocking additional emoticons (an incentive for broadcasters to build larger and more active communities).

Taxpayer explains that the relationship and level of engagement between the viewers and broadcasters make Taxpayer's subscriptions fundamentally different from other streaming subscription services, such as X or X. Not only do subscribers not pay for streaming video content, as it is available for free to all visitors to Taxpayer, but they are actively paying for subscriptions to obtain the community aspects that come from supporting favorite broadcasters. The intangible benefits that come from supporting broadcasters are the primary reason that viewers pay to subscribe, and are a unique aspect of Taxpayer.

Taxpayer's Terms of Service provides in part:

5. Use of Devices and Services

¹ According to Taxpayer's website, chat is built into every stream. See XXXXXXXXXXXXXXXXXXXX.

Access to the X Services may require the use of your personal computer or mobile device, as well as communications with or use of space on such devices. You are responsible for any Internet connection or mobile fees and charges that you incur when accessing the X Services.

8. User Content

X allows users to distribute streaming live and pre-recorded audio-visual works, to use services, such as chat, bulletin boards, forum postings, wiki contributions, voice interactive services, and to participate in other activities in which you may create, post, transmit, perform, or store content, messages, text, sound, images, applications, code or other data or materials on the X Services ("User Content").

In response to questions regarding Taxpayer's service offering and the facts provided in the initial TAA request, Taxpayer provided the following:

X primarily refers to text messaging-type X (Taxpayer also noted that XX was briefly offered, but it was deprecated it as of X).

Regarding an update to the facts, there has been a slight change. Originally, we believed that subscribers were not entitled to any additional or special video content access over-and-above that available to non-subscribers. However, we discovered in May 2018, that broadcasters have the ability to offer Video On Demand (VOD) exclusively to subscribers (as distinguished to VOD that is available to all viewers). This is controlled by the Broadcasters, not X; a Broadcaster can elect to put videos behind a subscription paywall at any time and can change their mind and make them available to everyone (i.e. subscribers and non-subscribers) at any time. X has no visibility or direct control over this.

While this exclusive VOD option is available, experience shows that Broadcasters do not use it very frequently. It is not a well-known feature, nor is it a primary element of a subscription benefit. It is arguably inconsequential to the subscription benefit of enjoying an advertisement-free experience.

LAW AND DISCUSSION

Sales Tax

All sales of tangible personal property in the State of Florida are subject to tax, unless specifically exempt by Chapter 212, F.S. The term “sale” is defined in s. 212.02(15)(a), F.S., to mean “[a]ny transfer of title or possession, or both . . . of tangible personal property for a consideration.” Pure service transactions that do not involve the sale of tangible personal property are generally not subject to tax under Florida law, unless the taxation of the service is specifically authorized by Chapter 212, F.S. However, when services are sold as part of the same sale as tangible personal property, the services are part of the sales price on which sales tax is computed. Section 212.02(16), F.S., defines “sales price” to include “any services that are sold as part of the sale” of tangible personal property.

Based upon the facts provided, Taxpayer is not selling tangible personal property or a service subject to tax under Chapter 212, F.S.

Communications Services Tax

Chapter 202, F.S., imposes Communications Services Tax (“CST”) on the retail sale of communications services. Communications services tax is comprised of the Florida communications services tax and the local communications services tax. The Florida communications services tax includes the state tax, as well as the gross receipts tax imposed by Chapter 203, F.S. (See ss. 202.12 and 202.35(4), F.S.)

The term “communications services” is defined broadly and means, in pertinent part, “... the transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals, including video services, to a point, or between or among points, by or through any electronic, radio, satellite, cable, optical, microwave, or other medium or method now in existence or hereafter devised, regardless of the protocol used for such transmission or conveyance....” (See s. 202.11(1), F.S.) The term “video services” means the transmission of video, audio, or other programming service to a purchaser, and the purchaser interaction, if any, required for the selection or use of a programming service The term includes basic, extended, premium, pay-per-view, digital video, two-way cable, and music services.” (Emphasis added). (See s. 202.11(24), F.S.)

Despite the broad definition of the term “communications services,” there are some services that are excluded from the definition of communications services, such as Internet access service, electronic mail service, electronic bulletin board service, and similar online computer services.

A sale of communications services occurs when communications services are provided for a consideration. Communications services tax applies, generally, to the retail sales price of

communications services that (1) originate and terminate in Florida, or (2) originate or terminate in Florida and are charged to a Florida service address. (See s. 202.12(1), F.S.) Service address generally means the location of the equipment from which communications services originate or are received by the customer. For video services, the service address is the location where the customer receives the service in Florida. (See s. 202.11(14), F.S.)

As stated above, communications services tax is computed on the "sales price," which is defined in s. 202.11(13), F.S., and means in part:

... the total amount charged in money or other consideration by a dealer for the sale of the right or privilege of using communications services in this state, including any property or other service, not described in paragraph (a), which is part of the sale and for which the charge is not separately itemized on a customer's bill or separately allocated under subparagraph (b)8. The sales price of communications services may not be reduced by any separately identified components of the charge which constitute expenses of the dealer, including, but not limited to, sales taxes on goods or services purchased by the dealer, property taxes, taxes measured by net income, and universal-service fund fees.

(a) The sales price of communications services includes, whether or not separately stated, charges for any of the following:

1. The connection, movement, change, or termination of communications services.
2. The detailed billing of communications services.
3. The sale of directory listings in connection with a communications service.
4. Central office and custom calling features.
5. Voice mail and other messaging service.
6. Directory assistance.
7. The service of sending or receiving a document commonly referred to as a facsimile or "fax," except when performed during the course of providing professional or advertising services.

(b) The sales price of communications services does not include charges for any of the following:

7. Charges for property or other services that are not part of the sale of communications services, if such charges are stated separately from the charges for communications services.

8. Charges for goods or services that are not subject to tax under this chapter, including Internet access services but excluding any item described in paragraph (a), that are not separately itemized on a customer's bill, but that can be reasonably identified from the selling dealer's books and records kept in the regular course of business. The dealer may support the allocation of charges with books and records kept in the regular course of business covering the dealer's entire service area, including territories outside this state. (Emphasis Added.)

Based upon the facts provided, Taxpayer provides video services, as well as other services, to viewers (nonpaying customers) and to subscribers (paying customers). Viewers receive video services, use of the chat function, and other services. CST applies when consideration is paid in exchange for supplying or providing communications services at retail. The provision of **free** communications services by Taxpayer does not constitute a sale of communications services since the services are not being offered by Taxpayer in exchange for a consideration. Since Taxpayer does not receive any consideration from viewers (nonpaying customers), there is no sale of communications services by Taxpayer to viewers.

Conversely, subscribers receive *ad free* video services, special chat functionality, and other services, in exchange for payment of the respective subscription fee(s) to Taxpayer. Here, a sale of communications services is occurring, as Taxpayer is receiving consideration in exchange for the provision of video services. Taxpayer sales of subscriptions that include communications services, such as video services that originate and terminate in Florida, or originate or terminate in Florida and are charged to a Florida service address, are subject to CST. CST is computed on the sales price, which based upon the facts provided is the amount of the respective subscription fees² charged by Taxpayer.

This response constitutes a Technical Assistance Advisement under section 213.22, F.S., which is binding on the Department only under the facts and circumstances described in the request for this advice, as specified in section 213.22, F.S. Our response is predicated on those facts and the specific situation summarized above. You are advised that subsequent statutory or administrative rule changes, or judicial interpretations of the statutes or rules, upon which this advice is based, may subject similar future transactions to a different treatment than expressed in this response.

You are further advised that this response and your request and related backup documents, are public records under Chapter 119, F.S., and are subject to disclosure to the public under the conditions of section 213.22, F.S. Confidential information must be deleted before public disclosure. In an effort to protect confidentiality, we request you provide the undersigned with

² Taxpayer does not separately state and itemize any components of the subscription, nor has Taxpayer indicated that it separately allocates any of the charges in its books and records.

an edited copy of your request for Technical Assistance Advisement and the backup material and this response, deleting names, addresses and any other details which might lead to identification of the taxpayer. Your response should be received by the Department within 10 days of the date of this letter.

Sincerely,

Heather Miller

Heather Miller
Technical Assistance & Dispute Resolution

AMS# 7000227913