

SUMMARY

QUESTION: Are the Service Plans purchased at the same time as the equipment and related warranties taxable as a sale of tangible personal property, or do they constitute a professional service exempt from sales tax?

ANSWER – Based on the Facts Below:

Based on the information reviewed from the audit file and the information provided from the Taxpayer, it is the Department's position that when the Taxpayer provides Service Plans in conjunction with the sale of a computer server, it is selling tangible personal property and should collect sales tax on all charges that would be part of the "sales price," as defined in Section 212.02(16), F.S.

July 22, 2010

XX

Re: Subject: Technical Assistance Advise ment (TAA) 10A-035
Sales and Use Tax – Service Plans
Sections 212.02, 212.05, 212.08, and 212.21, Florida Statutes (F.S.)
XX (Taxpayer)
FEI # XX

Dear XX:

This is in response to your letter dated January 7, 2010, requesting this Department's issuance of a Technical Assistance Advise ment ("TAA") pursuant to section 213.22, F.S., and Rule Chapter 12-11, F.A.C., concerning the taxability of a service plan (Service Plan) offered by your client. An examination of your letter has established you have complied with the statutory and regulatory requirements for issuance of a TAA. Therefore, the Department is hereby granting your request for a TAA.

Facts

The Department conducted an audit of the Taxpayer's books and records for the period November 1, 2003, through October 31, 2006, audit #XX. The Department determined that the Service Plan offered by the taxpayer was taxable and assessed additional tax due for sales of the Service Plan. The Taxpayer is requesting a TAA regarding the taxability of the Service Plan.

Along with the request for a TAA, the Taxpayer provided a general description of the Service Plan. The general description included with the request for a TAA, which is available from "XX.com," provided the following in part:

. . . System Service Plans for the [Software] provide fully-integrated hardware and [software] service coverage to help keep your systems running smoothly and meet your demands for availability. . . . [A] combination of hardware service coverage, telephone

and online technical support, and [software] updates, . . . can help you resolve technical issues quickly and effectively. . . .

Key Benefits:

- The value and ease of integrated hardware and OS support, for one price per product per year

The following documents were included in the referenced audit file and were reviewed in providing the Department's response:

- Invoice #XX, dated September 20, 2005, billing the Taxpayer's customer and detailing the purchase of, among other things, "XX Server," and "XX Support . . .[Server]."
- Purchase order # XX, dated August 31, 2005, issued by the customer which lists "Warranty Upgrade to 3 Years of XX & 7x24 On-Site Support for XX Server" in the amount of \$11,372.00 each.
- Information regarding the "XX Server," obtained from "XX.com." This information provides the following regarding a "warranty upgrade" for the XX Server:

[Our] support program provides various levels of support . . . from proactive, mission-critical service to basic self-maintenance support. You receive support for all . . . system components including hardware, the . . . Operating Environment, and . . . supported software that comes bundled with or embedded in your system. A minimum of XX level support is recommended for this product. . . .

- Information regarding the "Warranty vs. [Service Plan] Support," obtained from "XX.com." This information provides the following regarding "What level of Support is Right For Your Products?":

systems . . . Ensuring your coverage provides you with the continuity and essential support you need often means selecting support which extends beyond the traditional product warranty.

. . .1.Q. If my product comes with a warranty, why should I purchase [Service Plan] Support?

A. While [our] products are among the most reliable in the world, and [our] warranties are very competitive, the standard warranty is limited in its ability to properly support customers. Warranties provide a basic assurance of product quality for a finite amount of time, but don't include many of the essential support services you need. Unlike . . . Service Plans, warranty is limited in terms of type of response, response times and coverage hours.

. . . 4. Q. What types of Service Plans are available for my products?

A. Our comprehensive Service Plan options provide you with everything you could possibly need – integrated hardware and OS support for your systems, hardware and firmware support for your data storage, OS-specific coverage, and options for your production systems software.

* * *

The Taxpayer's letter dated January 7, 2010, provides the following in part:

. . . The taxpayer is primarily engaged in the information technology business. The taxpayer provides consulting services, sale of hardware, software, software support, and related warranties on the products sold. The taxpayer does not provide the actual warranty services. The taxpayer sells the products and services which are provided by the manufacturer.

The single issue relates to the treatment of a Service Plan sold by the taxpayer on behalf of XX. Anytime the taxpayer sells a computer server, a warranty is included from the manufacturer. The warranty covers the parts, repairs, maintenance, and service time related to any repairs needed for the repair of that server. In addition to this warranty, a separate service plan can be purchased.

The Service Plan when purchased with a warranty provides that the customer of the taxpayer will receive service on-site within two or four hours depending on the type of plan purchased. The Service Plan is an upgrade to the timing of the service provided to a customer but does not provide any additional tangible parts or other items that are not covered by the existing warranty.

The warranty and Service Plan referenced above expire at the same time. The customer can then renew the Service Plan going forward and it will be bundled into a single product which includes parts, repairs, and maintenance warranty contract (See Exhibit A). Exhibit A provides a detail of the various levels of Service Plans as sold by the taxpayer on behalf of XX.

The Sale of the Service Plan is separately stated on the customer invoice and is considered a non taxable sale of services by the taxpayer on the original sale of the plan. The renewal of the Service Plan is considered a sale of a taxable warranty.

* * *

The taxpayer agrees that any service plan that meets the definition as provided in section 212.0506 of the Florida Statutes is a taxable transaction. In the fact pattern listed above the taxpayer agrees that the **renewals** constitute a taxable transaction because the plan meets the definition . . . of a service warranty. The taxpayer disagrees that the original sale of time of service plans constitutes a service warranty.

* * *

The taxpayer believes that the sales constitute nothing more than a non taxable service. The Service Plan is a separate and discrete transaction that is separately stated on the customer invoice. The purchase of the plan is optional and is not required in any way to complete the customer's purchase of the tangible property. The plans as sold provide a promise to show up at the customer's office within a prescribed period of time. There are no tangible goods exchanged and the transaction does not qualify as a service warranty transaction as part of this transaction there it should be exempt under [section 212.08(7)(v), F.S.]

Requested Advisement

Are the Service Plans purchased at the same time as the equipment and related warranties taxable as a sale of tangible personal property, or do they constitute a professional service exempt from sales tax?

Applicable Authority and Discussion

Section 212.21(2), F.S., provides the legislative intent to tax "each and every sale, admission, use, storage, consumption, or rental levied and set forth in this chapter, except as to such sale, admission, use, storage, consumption, or rental as shall be specifically exempted therefrom by this chapter subject to the conditions appertaining to such exemption"

Section 212.08(13), F.S., further states that "No transactions shall be exempt from the tax imposed by this chapter except those expressly exempted herein" Florida courts have consistently held that exemptions must not be expanded beyond their express terms and must be strictly and narrowly construed against the taxpayer. Under Florida law, the burden is upon the taxpayer, as the party claiming an exemption, to establish from its actual books and records that it is clearly entitled to the exemption.

Section 212.05(1)(a)1.a., F.S., imposes a tax on the ". . . sales price of each item or article of tangible personal property when sold at retail in this state" Section 212.02(15)(a), F.S., defines the term "sale" to mean and include "[a]ny transfer of title or possession, or both, exchange, barter, license, lease, or rental, conditional or otherwise, of tangible personal property for a consideration." "Tangible personal property" is defined under section 212.02(19), F.S., to mean and include ". . . personal property which may be seen, weighed, measured, or touched or is in any manner perceptible to the senses"

Under section 212.02(16), F.S., "sales price" means "the total amount paid for tangible personal property, including any services that are a part of the sale, [and as] consideration for a transaction which requires both labor and material to alter, remodel, maintain, adjust, or repair tangible personal property." Accordingly, services sold with a computer server, as part of that transaction, would be part of the sale and would be subject to tax.

The Taxpayer cites the exemption provided in section 212.08(7)(v), F.S., and claims the transaction should be exempt as a professional service. The exemption cited applies to "professional, insurance, or personal service transactions that involve sales as inconsequential elements for which no separate charges are made."

However, the Service Plans are sold with computer servers, which are items of tangible personal property subject to sales tax. Therefore, the Service Plans are considered “services” subject to sales tax when sold as “part of the sale,” of tangible personal property. The identity of a service that is “part of the sale” as required under section 212.02(16), F.S., has been clarified in American Telephone and Telegraph Company v. Department of Revenue, 25 F.L.W. D1216, 764 So.2d 665 (Fla. 1DCA 2000).

In that case, the court of appeal affirmed the conclusion of the trial court that certain engineering services were “inextricably intertwined” with the sales of the telecommunication equipment. American Telephone and Telegraph, Id., at page 3. Also, the court found that there is no requirement that the purchases of services must be linked with tangible personal property. The court, referring to section 212.02(16), F.S., which defines the term “sales price,” said that “. . . the Legislature chose not to limit the sales tax to services that must be purchased with tangible personal property. . . .” American Telephone and Telegraph, Id., at page 3. The court concluded that the intent of the statute did not limit the services in such a manner and that the court would “. . . have no authority to do so.”

Further, the appeals court held that services were not separate or discrete transactions but were “a part of the sale” even when the sales prices of the services and of the tangible personal property were separately stated and separately billed. American Telephone and Telegraph, Id., at page 4.

Conclusion

Based on the information reviewed from the audit file and the information provided from the Taxpayer, it is the Department’s position that when the Taxpayer provides Service Plans in conjunction with the sale of a computer server, it is selling tangible personal property and should collect sales tax on all charges that would be part of the “sales price,” as defined in Section 212.02(16), F.S.

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 that expressed in this response.

You are further advised that this response, 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 an edited copy of your request for Technical Assistance Advisement, 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 15 days of the date of this

Technical Assistance Advisement

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letter.

Sincerely,

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Technical Assistance and Dispute Resolution
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