



COLORADO

Department of Revenue

Taxation Division

Colorado Department of Revenue
Office of Tax Policy Analysis
P.O. Box 17087
Denver, CO 80217-0087

PLR-20-008

June 23, 2020

XXXXXXXXXX
Attn: XXXXXXXX
XXXXXXXXXX
XXXXXXXXXX

Re: Private Letter Ruling

Dear XXXXXXXXXXXX,

You submitted a request for a private letter ruling on behalf of XXXXXXXXXXXX (Tax ID: XXXXXXXXXXXX) ("Company") regarding the application of Colorado sales and use tax to Company's products to the Colorado Department of Revenue ("Department") pursuant to 1 CCR 201-1, Rule 24-35-103.5. This letter is the Department's private letter ruling. This ruling is binding on the Department to the extent set forth in 1 CCR 201-1, Rule 24-35-103.5. It cannot be relied upon by any taxpayer other than the taxpayer to whom the ruling is made.

Issue

Are sales by Company of the products and services described in the background section subject to Colorado sales or use taxes?

Conclusion(s)

Sales by Company of the products and services described in the background section are not subject to Colorado sales or use taxes.

Background

Company is an information technology provider based in Denver. Company provides support services to clients in Colorado. Company also resells third-party software and "software-as-a-service" (SaaS) products to its clients. Company asserts that there is no tangible personal property, as defined by §39-26-102-(15), C.R.S., associated with the sale of any of the products and services described below. Company describes its products as follows:¹

- XXXXXXXXXXXX. XXXX is productivity software developed and maintained by XXXX. The

¹ The descriptions below of particular items being "software" or "service" reflect the Company's characterization of the items, and may not reflect the Department's reason for concluding they are exempt from or not subject to tax.

subscription-based software is delivered through a web-based application and electronically via downloadable software.

- XXXXXXXXXX. XXXX is a service that provides an added layer of security for accessing various systems, websites, and applications. The subscription-based service is hosted and delivered via a “software-as-a-service” (SaaS) platform by the application service provider.
- XXXXXXXXXX. XXXX is an email security platform that is hosted and delivered via a SaaS platform by the application service provider.
- XXXXXXXXXX. XXXX is a cloud-hosted content and file sharing platform. The subscription-based service is delivered via a SaaS platform by the application service provider.
- XXXXXXXXXX. XXXX is a cloud-based service covering infrastructure as a service, backup as a service and disaster recovery as a service. The subscription-based service is hosted and delivered via a SaaS platform by the application service provider. XXXX servers used for Company clients are located in XXXX.
- XXXXXXXXXX. This is a cloud-based service that provides anti-virus and other security protection to computers and servers. The subscription-based software is delivered through a web-based application (SaaS) and electronically via downloadable software.
- XXXXXXXXXX. This software product provides antivirus and other security protection to computers and servers. The subscription-based software is delivered electronically via downloadable software.
- XXXXXXXXXX. This is a service Company offers its customers for monitoring computers, servers and other devices for faults and errors. The subscription-based service is delivered electronically via a downloadable agent that is deployed on said devices.
- XXXXXXXXXX. XXXX is a software application that enables businesses to create virtual machines on a single physical machine. Customers pay a one-time fee for the software application and license, which includes a set-period support contract. The software is delivered electronically via download. Customers have the option of renewing the support contract, but it is not required for the license to remain active.
- XXXXXXXXXX. XXXX is a product that enables businesses to back up business applications, files, and systems. Customers pay a one-time fee for the software application and license, which includes a set period support contract. The software is delivered electronically via download. Customers must pay to renew the support contract annually for the license to remain active. XXXX software is purchased through Company, but all licensing is assigned to and owned by the client. Company installs XXXX software on client-owned servers/devices at the client’s physical site or, if not onsite, then in the client’s online cloud environment. If backup content is stored onsite, any hardware used to house that data is owned by the client.

Company maintains and supports the software on behalf of clients. Company does all retrievals of backup files. The decision on where the software and backup files are stored is ultimately made by the client under Company recommendation. Any faulty equipment is the financial and management responsibility of the client.

- XXXXXXXXXX. This is a service Company offers its customers for backing up business' critical applications, files, and systems. Company uses a combination of hardware that it owns (and has paid sales tax on) along with a web-based application that it pays a monthly subscription fee for, to deliver these services. The customer owns neither the hardware nor the software. They subscribe only to the backup service Company provides. The physical servers used for this service are located wherever the client is located. Company buys the servers and physically places them at client sites. Only Company staff have access to the content on these devices – the client does not have access to the content. Company staff do all retrievals of backup files based on client requests. Company staff maintain and support the devices. Any faulty equipment is the financial and management responsibility of the Company. Company chooses the type and size of the server based on its assessment of the client's needs. Company agreements state that the equipment belongs to Company and the client has no right to it other than the content contained therein.

Discussion

Colorado imposes a sales tax upon all sales of tangible personal property at retail.² Tangible personal property includes computer software that is prepackaged for repeated sale or license if the use of the computer software is governed by a tear-open nonnegotiable license agreement and the computer software is delivered to the customer in a tangible medium.³ Computer software is not delivered to the customer in a tangible medium if it is provided through an application service provider, delivered by electronic computer software delivery, or transferred by load and leave computer software delivery.⁴

Company characterizes each of the products described above as either “software” or “service.” The Department does not reach the question of whether the Company's characterizations are correct. The Company represents that, with the exception of the “Company Backup Service,” each product is delivered to the customer via either electronic download or application service provider. Based on these representations, the sale and use of these products are not subject to Colorado sales and use taxes.

The final product at issue is the “Company Backup Service.” Company characterizes this as a “service.” Company represents that, as part of providing this service, the Company delivers servers to the customer's location. Colorado imposes sales tax on certain leases of tangible personal

² Section 39-26-104(1)(a), C.R.S.

³ Computer software is excluded from the definition of “tangible personal property” unless it meets all of the conditions described. Section 39-26-102(15)(c)(I), C.R.S.

⁴ Ibid.

property.⁵ The department considered whether the placement of these servers constitutes a taxable lease of tangible personal property to Company's clients.

In general, a transaction in which the seller provides both tangible personal property and nontaxable services or nontaxable property will not be treated as a sale of tangible personal property if the "true object" of the transaction is the nontaxable service or nontaxable property and the use of the tangible personal property is merely incidental to that objective.⁶ The Colorado Supreme Court has articulated a nonexclusive list of factors used to determine the true object of a transaction. No one factor or factors is determinative. Instead, the "true object" analysis depends on the totality of the facts and circumstances. *Id.*

Having considered the totality of facts and circumstances, the department concludes that the true object of the Backup Service is the sale of the nontaxable computer software products and related services and not the use of the servers. Therefore, the sale of the Company's Backup Service is not subject to Colorado sales and use tax.

Miscellaneous

This ruling is premised on the assumption that the Company has completely and accurately disclosed all material facts and that all representations are true and complete. The Department reserves the right, among others, to independently evaluate Company's representations and assumptions. The ruling is null and void if any such assumption and representation is incorrect and has a material bearing on the conclusions reached in this ruling and is subject to modification or revocation in accordance with 1 CCR 201-1, Rule 24-35-103.5.

This ruling is binding on the Department to the extent set forth in 1 CCR 201-1, Rule 24-35-103.5. It cannot be relied upon by any taxpayer other than the taxpayer to whom the ruling is made.

Sincerely,

Office of Tax Policy Analysis
Colorado Department of Revenue

This ruling cannot be relied upon by any other taxpayer other than the taxpayer to whom the ruling is made.

⁵ Leases of tangible personal property of more than three years in duration are subject to sales tax. Section 39-22-102(23), C.R.S. Leases of tangible personal property that are three years or less in duration are also subject to sales tax if the lessor obtains permission to acquire the leased property exempt from tax and to collect sales tax from lessees. Section 39-26-713(1)(a), C.R.S. Leases of tangible personal property for a duration of three years or less are exempt from sales tax if the lessor can show that it paid Colorado sales tax on its acquisition of the leased property. *Id.*

⁶ *Leanin' Tree v. City of Boulder*, 72 P.3rd 361 (Colo. 2003); see also *American Multi Cinema, Inc. v. City of Aurora*, 2020 COA 4 (Colo. App. 2020).