Ohio Department of TAXATION

P.O. Box 530
Columbus, Ohio 43216-0530

Opinion of the Tax Commissioner

Date Issued: June 20, 2005

Opinion No: 05-0001

Tax: Sales

XXXX
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Subject: Software

Dear XXXX:

On behalf of your client, TAXPAYER, you requested an Opinion of the Tax Commissioner pursuant to the provisions of Ohio Revised Code ("R.C.") section 5703.53.

FACTS

In your request, you provided the following facts:

TAXPAYER entered into a purchase agreement with SELLER to acquire new software licenses and renew existing licenses. All of the software resides in Ohio but the license to use the software is granted to users throughout the United States. The software in question was either delivered on a disk or CD, or delivered electronically through downloads from a SELLER website.

ISSUES

Given the above facts, you asked about five situations and how Ohio tax would apply to each. The five fact patterns are:

- Designated licenses delivered by disk or electronically used exclusively in Ohio
- Software without designated licenses that is not delivered electronically
- Software without designated licenses that is delivered electronically
- Designated licenses delivered by disk or electronically used exclusively outside of Ohio
- Designated licenses apportioned based on the number of users within and without Ohio

LAW

Pursuant to R.C. 5739.02(A), the Ohio sales tax applies to all retail sales in this state. R.C. 5739.01(B) defines "sale" for Ohio sales tax purposes to include any transfer of title, possession, or a right to use tangible personal property in this state or the provision of a designated taxable service in this state for a consideration. "Prewritten computer software" is deemed to be tangible personal property for sales tax purposes under R.C. 5739.01(YY).

R.C. 5741.02(A) levies the Ohio use tax on any storage use or consumption of tangible personal property or receipt of the benefit of a taxable service in Ohio.

R.C. 5739.035 provides the traditional sourcing rules for Ohio sales tax. [This section was formerly R.C. 5739.033.] Under this statute, a sale of tangible personal property is sourced to the location of the vendor where the sale is made.

Current R.C. 5739.033 also provides sourcing rules for Ohio sales tax. Generally, that section provides that sales are sourced to the location of the consumer's receipt of the taxable tangible personal property or service, if that location is known to the vendor. The language in this section reflects Ohio's participation in the Streamlined Sales Tax Project.

Under current law, some vendors will have to begin sourcing under these provisions beginning May 1, 2006. All vendors will have to convert their sourcing by January 1, 2008. However, vendors that wish to may convert to the new sourcing method at any time prior to their mandatory conversion date.

Division (D) [formerly division (B)] of R.C. 5739.033 involves a procedure for sales of services and computer software delivered electronically that will be available to a business purchaser for use in more than one location concurrently. Purchasers of such services and software delivered electronically must provide their sellers with a form claiming "multiple points of use." This will relieve the seller of the obligation to collect the tax and the consumer must apportion and pay the tax on the use of the service or computer software delivered electronically to the states where that use occurs on a direct pay basis. While this provision has a delayed effective date, as does the rest of R.C. 5739.033, vendors and consumers that wish to take advantage of this provision may currently do so.

On April 16, 2005, the Streamlined Sales Tax Agreement was amended to allow the multiple points of use provisions to be used for all software purchased by a business consumer that will be available for use in multiple locations concurrently. The limitation that the software had to be "delivered electronically" was removed. All states that wish to be members of the Streamlined System, including Ohio, must adopt this provision by January 1, 2008. Ohio proposes to remove the "delivered electronically" limitation in the current budget bill, H.B. 66.

However, as a consumer, TAXPAYER is responsible for the Ohio use tax on its storage, use or consumption of any tangible personal property in Ohio. See R.C. 5741.02(A).

DISCUSSION

Your questions deal with TAXPAYER'S liability as a consumer of tangible personal property (prewritten computer software).

With regard to the first issue, designated licenses delivered by disk or electronically used exclusively in Ohio, you indicate that you believe these licenses would be fully taxable in Ohio. This is correct.

Your second and third issues both deal with software that does not have designated licenses but is usable by employees of TAXPAYER located both inside and outside Ohio. The only difference in these two issues is that in one case the software is not delivered electronically and in the other case it is. You indicate that your understanding that in the first case the entire transaction would be sourced to Ohio while in the second case the software can be apportioned based on the number of users in Ohio compared to total users.

Under current law, your conclusion would be correct. The software [that is] delivered electronically and is available for use in more than one taxing jurisdiction concurrently falls under the "multiple points of use" provisions of R.C. 5739.033. However, software that is not delivered electronically is not currently subject to the multiple points of use provision. However, as noted above, the Streamlined Sales and Use Tax Agreement has been amended to remove the "delivered electronically" limitation on software from the multiple points of use provision. Ohio proposes to adopt that change in H.B. 66 of the 126th General Assembly. If that change is adopted, the multiple points of use provisions of R.C. 5739.033 will apply to software that can be used concurrently in multiple locations regardless of the means by which that software is delivered.

Your fourth issue involves a case where there are "designated licenses delivered by disk or electronically used exclusively outside of Ohio." You indicate your understanding that this would not be taxable in Ohio regardless of the method of delivery. To the extent your question deals with charges for the licenses themselves, your understanding is correct. However, if your question deals with a charge for the acquisition and loading of the software onto TAXPAYER'S computer equipment in Ohio, see the application of the "multiple points of use" provision discussed above.

Your final issue deals with designated licenses both within and without Ohio. As in the previous paragraph, if the question refers only to license charges then you are correct that they should be apportioned based on the location of the licenses within and outside Ohio. Again, however, if the charge in question is for the acquisition and loading of the software onto TAXPAYER'S servers, see the "multiple points of use" provisions discussed above would apply.

OPINION OF THE TAX COMMISSIONER

Therefore, based upon the information provided, it is the Opinion of the Tax Commissioner that:

1. Charges for designated software licenses that are concurrently available for use in more than one jurisdiction should be apportioned among the appropriate jurisdictions by some reasonable and verifiable means. This may be by the percentage of users in a jurisdiction as compared to all users or some other method supported by the taxpayer's records.

2. Prewritten computer software without designated licenses that is delivered electronically and that can be accessed or used by multiple individuals in an organization from multiple locations concurrently should be apportioned among the jurisdictions from which the use occurs. The consumer should provide the vendor or seller with an exemption certificate claiming multiple points of use.

3. Prewritten computer software that is delivered by means other than electronic, under current law, to a location in Ohio is taxable to Ohio in its entirety. However, pending legislation may alter this result by eliminating the "delivered electronically" limitation from the "multiple points of use" provision in R.C. 5739.033.

This Opinion is limited to the legal issue addressed in this Opinion. This Opinion only applies to the taxpayer and it may not be transferred or assigned. In addition, the tax consequences stated in this Opinion may be subject to change for any of the reasons stated in R.C. 5703.53(C). It is the duty of the taxpayer to be aware of such changes. See R.C. 5703.53(E).

This Opinion will only be made available to the public on a redacted basis pursuant to R.C. 5703.53(I).

Sincerely,

William W. Wilkins
Tax Commissioner