
Opinion of the Tax Commissioner

Date Issued: July 22, 2008

Opinion No: 08-0006

Tax: Sales/Use

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Subject: Technology Consulting Services

XXXX (“Taxpayer”) has requested an Opinion of the Tax Commissioner (“Opinion”) pursuant to section 5703.53 of the Ohio Revised Code (“R.C.”).

FACTS

In support of its request for an Opinion, Taxpayer provided the following facts.

Taxpayer is a technology consulting firm offering a range of professional services to its clients. The following is the detail of its process and support options.

Consulting Process:

Technology assessment – All of Taxpayer’s clients are initially engaged through Taxpayer’s “Technology Assessment Process.” Taxpayer sends a team of consultants possessing years of industry knowledge directly to its clients’ facilities. Once on-site, Taxpayer’s consultants conduct staff and management interviews designed to identify inefficiencies within many areas. As interviews are being conducted, additional consultants are conducting a technical assessment of the client’s infrastructure. A computer belonging to Taxpayer containing software belonging to Taxpayer is used in the technical portion of this assessment. The technical assessment is designed to identify inefficiencies in many areas. Upon completion, corollaries between interview findings and technical findings are identified, and targeted as areas to increase efficiency. Findings and recommendations are reported to client in a Technology Assessment Report. In addition to reporting and recommending suggestions, Taxpayer offers on-going consulting services and support.

On-going Consulting Services and Support: Managed Services

Many of Taxpayer’s clients lack the internal skills to make and maintain the changes Taxpayer recommends. The managed services are offered to these clients. Managed service is a collaborative pro-active approach to infrastructure managements. Clients have the option of a one, two, or three year managed service agreement (MSA). These MSAs typically include services offered in three areas; remote monitoring (24x7x365), vendor management

(infrastructure vendors), and help desk (direct access to Taxpayer's consultants). Each agreement is tailored to the needs of the specific client.

Pursuant to the terms of the MSA, clients pay a fixed monthly fee based on the complexity of the services provided. Pursuant to the agreement, Taxpayer becomes an additional resource for the client. Taxpayer places computers that it owns containing software belonging to Taxpayer on clients' networks to conduct on-going monitoring and alerting to infrastructure related issues. Alerts are set according to clients' needs for identifying service and hardware failures. When a failure is identified, Taxpayer will notify the client immediately and take ownership for resolving the failure.

Taxpayer provided the following example of how its service operates:

One of the CPA firms we do business with lost phone service last week. Part of our agreement with them was to monitor this service. Prior to this service being active our clients send a "Letter of Agency" to all of their vendors that we are supporting under their MSA. The LOA gives [Taxpayer] permission to make decisions for our clients, up to and including termination of said services. [Taxpayer] was alerted from our on-site device to the phone outage at 2:00AM, clients can also notify us directly by contacting our helpdesk. Using remote means through our device, we confirmed the outage was not the client's responsibility. We immediately responded by contacting our client's provider to report said outage and schedule repair services. After said outage was reported to service provider, and a response time for resolution was given, we notified our client. We then continued to work with their provider until outage was resolved. In the case the service vendor dispatched a technician, and phone services were restored prior to the next business day.

Taxpayer indicates that it is selling its knowledge of technology and the application of that technology to increase efficiencies and avoid downtime. Taxpayer renders technical services in this process and it does make hardware and software recommendations. Taxpayer does not sell, resell or distribute any hardware or software. Taxpayer has no formal relationships with any hardware or software vendor other than for its own internal use, which allows it to offer impartial opinions on the proper technology solutions for its clients.

QUESTION FOR WHICH OPINION IS REQUESTED

Are the services provided by Taxpayer as described above subject to sales or use tax in Ohio?

DISCUSSION

The law in Ohio provides that sales tax applies to all retail sales in this state, R.C. 5739.02. 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. Accordingly, a service is not subject to sales or use tax in Ohio unless there is a specific provision in the law listing it as taxable.

You provided in your Opinion request reference to the definition of “computer services” found in Ohio Adm. Code Rule 5703-9-46(A)(2) and indicated that you are confused as to whether the service provided by Taxpayer would fall within the definition of this taxable service.

R.C. 5739.01(Y)(1)(b) defines taxable “computer services” as:

* * * providing services consisting of specifying computer hardware configurations and evaluating technical processing characteristics, computer programming, and training of computer programmers and operators, provided in conjunction with and to support the sale, lease, or operation of taxable computer equipment or systems.

However, this statute also provides:

R.C. 5739.01(Y)(1):

* * *

(d) * * * computer services * * * shall not include personal or professional services.

(2) As used in divisions (B)(3)(e) and (Y)(1) of this section, “personal and professional services” means all services other than * * * computer services * * * including but not limited to:

(a) Accounting and legal services such as advice on tax matters, asset management, budgetary matters, quality control, information security, and auditing and any other situation where the service provider receives data or information and studies, alters, analyzes, interprets, or adjusts such material;

(b) Analyzing business policies and procedures;

(c) Identifying management information needs;

(d) Feasibility studies, including economic and technical analysis of existing or potential computer hardware or software needs and alternatives;

(e) Designing policies, procedures, and custom software for collecting business information, and determining how data should be summarized, sequenced,

formatted, processed, controlled, and reported so that it will be meaningful to management;

(f) Developing policies and procedures that document how business events and transactions are to be authorized, executed, and controlled;

(g) Testing of business procedures;

(h) Training personnel in business procedure applications;

* * *

The services listed in divisions (Y)(2)(a) to (j) of this section are not * * * computer services.

The services you have identified in your letter as consulting and managed services are of a type that all fit within those services considered to be personal or professional services as listed in R.C. 5739.01(Y)(2), and they are not subject to sales or use tax in Ohio. However, Taxpayer is cautioned that while the “technical assessment” charges as described in the Opinion request are considered to be a personal or professional service, any deviation in facts from those presented in this area of rapidly changing technology and services may change the answer given in this Opinion.

OPINION

Based upon the foregoing, it is the Opinion of the Tax Commissioner that the services provided by Taxpayer as described above in this Opinion are not subject to sales or use tax.

This Opinion is limited to the legal issue addressed in this Opinion. This Opinion only applies to Taxpayer and 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 Taxpayer to be aware of such changes. See R.C. 5703(E).

Richard A. Levin
Tax Commissioner