



North Carolina Department of Revenue

Roy Cooper
Governor

Ronald G. Penny
Secretary

January 31, 2020

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Attention: ██████████
Senior Manager – State & Local Tax

Re: Request for Private Letter Ruling
FEIN: ██████████
Account #: ██████████

Dear ██████████:

The Department has completed its review of your request for a private letter ruling for ██████████ ("Taxpayer"), updating the Department's previous private letter ruling dated August 21, 2015 ("Prior Ruling"). In making this written determination, the Department has considered the facts presented in your written request dated November 29, 2019 and received by electronic mail on December 6, 2019 ("Written Request"), the information obtained during Taxpayer's sales and use tax examination for the period February 1, 2014 through January 31, 2017 ("Examination Information"), the May 15, 2019 ██████████ ("May 15, 2019 Letter") and the November 18, 2019 meeting between Taxpayer and the Department ("DOR Meeting"). Taxpayer was represented at the DOR Meeting by ██████████

This private letter ruling is a written determination issued under N.C. Gen. Stat. § 105-264.2 and applies the tax law to a specific set of existing facts furnished by you on behalf of Taxpayer as well as the Examination Information, the May 15, 2019 Letter, and the information provided at the DOR Meeting. This written determination is applicable only to Taxpayer and as such has no precedential value except to Taxpayer.

Overview and Relevant Facts

In your November 27, 2019 letter you state Taxpayer is an affiliate of ██████████, and "offers a ██████████ program known as ██████████ (██████████ or ██████████)". The public may sign up for a free one-month trial" ██████████, a monthly paid ██████████, or a ██████████ paid annually. During the ██████████ period, ██████████ have a "right to access certain benefits associated with shopping on ██████████ ('Website')". Participants in the ██████████

- [REDACTED]

Additionally, you indicate that “[w]hile [Taxpayer] does not directly provide the [REDACTED] benefits,

January 31, 2020

Page 4

it is contractually obligated to ensure the benefits *are* provided to [REDACTED]. To meet its contractual obligations, [Taxpayer's] affiliates provide the underlying service related to each benefit. For example, one of [Taxpayer's] affiliates provides the [REDACTED], while another affiliate provides the [REDACTED]."

The Department's Prior Ruling stated that "[t]he sale of a [REDACTED] is a bundled transaction" and that Taxpayer could "allocate the sales price of the Taxable Products included in the sale of each [REDACTED]" if Taxpayer was able to do so. The Prior Ruling provided that Taxpayer "may use its business records kept in the ordinary course of business to determine the portion of the sales price of a [REDACTED] allocable to the Taxable Products. However, if [Taxpayer] is unable to properly determine such allocation, the entire sales price of a [REDACTED] is subject to the general 4.75% State and applicable local and transit rates of sales and use tax for sales sourced to this State."

The Prior Ruling also stated that "[REDACTED] have licenses to use and/or the right or ability to access the Taxable Products by virtue of purchases of [REDACTED]; therefore, any allocation should be determined based on the sales price of the Taxable Products in a [REDACTED] and not determined based on the frequency of use or access of any of the [REDACTED] benefits. In other words, the taxation of the sale of digital property is not contingent on the actual delivery to or access by a purchaser, but includes a license to use or the right or ability to access digital property."

Issue

Whether the full sales price of [Taxpayer's] [REDACTED] is subject to North Carolina sales and use tax and should no longer be allocated between the taxable and nontaxable benefits.

Applicable Statutes and References

Under Chapter 105 of the North Carolina General Statutes, Article 5 ("Article") of the North Carolina Revenue Act ("Act"),¹ N.C. Gen. Stat. § 105-164.1 *et seq.*; Subchapter VIII: Local Government Sales and Use Tax, N.C. Gen. Stat. § 105-463 *et seq.*; and Chapter 1096 of the 1967 Session Laws; State, local, and applicable transit sales and use taxes are levied on a retailer's net taxable sales or gross receipts, as appropriate, of tangible personal property and certain digital property for storage, use, or consumption in this State and services sourced to this State. N.C. Gen. Stat. §§ 105-164.3(23), 105-164.3(195), 105-164.3(201), 105-164.3(219), 105-164.3(223), 105-164.3(233), 105-164.4, 105-164.6, 105-467, 105-468, 105-483, 105-498, 105-507.2, 105-509.1, and 105-537.

N.C. Gen. Stat. § 105-164.3(201) defines the term "sale or selling," in part, as "[t]he transfer for consideration of title, license to use or consume, or possession of tangible personal property or certain digital property or the performance for consideration of a service. The transfer or performance may be conditional or in any manner or by any means. . . ."

Session Law 2019-246 defines the term "retailer"² as "[a] person engaged in business of making sales at retail, offering to make sales at retail, or soliciting sales at retail of items sourced to this State. . . ."

¹ References to the Act and North Carolina General Statutes are based on the laws in effect as of the date of issuance of this private letter ruling except as otherwise noted herein.

² See Session Law 2019-246, s. 4(m), effective February 1, 2020.

January 31, 2020

Page 5

A person engaged in business of making a remote sale, if one of the conditions listed in [N.C. Gen. Stat.] 105-164.8(b) is met. A person required to collect the State tax levied under . . . Article [5] or the local taxes levied under Subchapter VIII of this Chapter and under Chapter 1096 of the 1967 Session Laws. A marketplace facilitator that is subject to the requirements of G.S. 105-164.4J or a facilitator that is required to collect and remit the tax under . . . Article [5].”

N.C. Gen. Stat. § 105-164.3(203) defines the term “sales price,” as “[t]he total amount or consideration for which an item is sold, leased, or rented. The consideration may be in the form of cash, credit, property, or services. The sales price must be valued in money, regardless of whether it is received in money.

- a. The term includes all of the following:
 1. The retailer's cost of the property sold.
 2. The cost of materials used, labor or service costs, interest, losses, all costs of transportation to the retailer, all taxes imposed on the retailer, and any other expense of the retailer.
 3. Charges by the retailer for any services necessary to complete the sale.
 4. Delivery charges.
 5. Installation charges.
 6. Repealed by Session Laws 2007-244, s. 1, effective October 1, 2007.
 7. Credit for trade-in. The amount of any credit for trade-in is not a reduction of the sales price.
 8. The amount of any discounts that are reimbursable by a third party and can be determined at the time of sale through any of the following:
 - I. Presentation by the consumer of a coupon or other documentation.
 - II. Identification of the consumer as a member of a group eligible for a discount.
 - III. The invoice the retailer gives the consumer.
- b. The term does not include any of the following:
 1. Discounts that are not reimbursable by a third party, are allowed by the retailer, and are taken by a consumer on a sale.
 2. Interest, financing, and carrying charges from credit extended on the sale, if the amount is separately stated on the invoice, bill of sale, or a similar document given to the consumer.
 3. Any taxes imposed directly on the consumer that are separately stated on the invoice, bill of sale, or similar document given to the consumer.”

Session Law 2019-246 defines the term “remote sale”³ as “[a] sale of an item ordered by mail, telephone, Internet, mobile phone application, or another method by a retailer who receives the order in another state and delivers the item or makes it accessible to a person in this State or causes the item to be delivered or made accessible to a person in this State or performs a service sourced to this State. It is presumed that a resident of this State who makes an order was in this State at the time the order was made.”

N.C. Gen. Stat. § 105-164.3(7) defines the term “audio work” as “[a] series of musical, spoken, or other sounds, including a ringtone.”

N.C. Gen. Stat. § 105-164.3(9) defines the term “audiovisual work” as “[a] series of related images and any sounds accompanying the images that impart an impression of motion when shown in succession.”

³ See Session Law 2019-246, s. 4.(m), effective February 1, 2020.

January 31, 2020

Page 6

N.C. Gen. Stat. § 105-164.3(23) defines “certain digital property” as “[a]n item listed in this subdivision that is delivered or accessed electronically and that is not considered tangible personal property. The term does not include an information service. The items are:

- a. An audio work.
- b. An audiovisual work.
- c. A book, magazine, a newspaper, a newsletter, a report, or another publication.
- d. A photograph or a greeting card.”

Session Law 2019-246 defines the term “marketplace seller”⁴ as “[a] person that sells or offers to sell items through a marketplace regardless of any of the following:

- a. Whether the person has a physical presence in this State.
- b. Whether the person is registered as a retailer in this State.
- c. Whether the person would have been required to collect and remit sales and use tax had the sales not been made through a marketplace.
- d. Whether the person would not have been required to collect and remit sales and use tax had the sales not been made through a marketplace.”

N.C. Gen. Stat. 105-164.3(39) defines the term “delivery charges” as “[c]harges imposed by the retailer for preparation and delivery of an item to a location designated by the consumer.”

N.C. Gen. Stat. § 105-164.4(a) provides, in part, “[a] privilege tax is imposed on a retailer engaged in business in the State at the percentage rates of the retailer’s net taxable sales or gross receipts listed in this subsection. The general rate of tax is four and three-quarters percent (4.75%).”

N.C. Gen. Stat § 105-164.8(b)⁵ provides, in part, “[a] retailer who makes a remote sale is engaged in business in this State and is subject to the tax levied under this Article if at least one of the following conditions is met:

...

- (9) The retailer makes remote sales sourced to this State, including sales as a marketplace seller, for the previous year or the current calendar year that meet either of the following:
 - a. Gross sales in excess of one hundred thousand dollars (\$100,000).
 - b. Two hundred or more separate transactions.
- (10) The retailer is a marketplace facilitator that makes sales, including all marketplace-facilitated sales for all marketplace sellers, sourced to this State for the previous or the current calendar year that meet either of the following:
 - a. Gross sales in excess of one hundred thousand dollars (\$100,000).
 - b. Two hundred or more separate transactions.”

Ruling

The May 15, 2019 Letter provides “[f]or sales tax purposes, tax is charged at the time of purchase of the [REDACTED] (i.e. when the [REDACTED] is charged for the subscription), not over the life of the subscription.” The May 15, 2019 Letter further provides that “[w]hen a purchase of the [REDACTED] is made, the [REDACTED] usage and [Taxpayer’s] cost of providing the future benefits to the [REDACTED] is unknown. [Taxpayer] . . . is unable to determine in advance how a [REDACTED] will use the future benefits and what the cost of the usage of benefits [will] be.” Based on the

⁴ See Session Law 2019-246, s. 4.(a), effective February 1, 2020.

⁵ See Session Law 2019-246, s. 4.(b), effective February 1, 2020.

January 31, 2020
Page 7

Examination Information and the information obtained at the DOR Meeting, each benefit cost used by Taxpayer in determining the cost allocation of taxable benefits vs. the cost of nontaxable benefits was an *estimate* during the examination. The estimated cost of the benefit at the time the [REDACTED] was purchased was based on the actual cost of the benefit for the *previous* year.

During the DOR Meeting, we discussed the Examination of your firm's records and the allocation method used to determine the cost of the taxable [REDACTED] used. It was determined Taxpayer attempted to comply with the instructions provided in the Prior Ruling regarding the allocation of the taxable vs. nontaxable portion of the [REDACTED] and remitted tax on the allocated taxable portion of the [REDACTED]. Taxpayer computed the taxable allocation percentages in good faith and kept records of such in the ordinary course of business, therefore, the sales tax due on the sale of [REDACTED] for the time period February 1, 2014 through January 31, 2020 will be accepted as reported.

However, upon review of the facts submitted, the Prior Ruling, Examination Information, and information obtained in the DOR Meeting, Taxpayer is unable to properly determine the reasonable taxable allocation for each item in the [REDACTED]. Accordingly, effective February 1, 2020, Taxpayer must collect and remit sales tax on the total sales price of all [REDACTED] sourced to North Carolina.

This ruling is based solely on the facts submitted, the Prior Ruling, Examination Information, and information obtained in the DOR Meeting. If the facts and circumstances given are not accurate, or if they change, then Taxpayer may not rely on it. If Taxpayer relies on this letter ruling and the Department discovers, upon examination, that the fact situation of Taxpayer is different in any material aspect from the facts and circumstances given in this letter ruling, the letter ruling will not afford Taxpayer any protection. It should be noted that this letter ruling is not to be cited as precedent and that a change in statute, regulation, or case law could void this ruling.

Issued on behalf of the Secretary of Revenue
By the Sales and Use Tax Division