



North Carolina Department of Revenue

Roy Cooper
Governor

Ronald G. Penny
Secretary

March 5, 2020

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Re: Private Letter Ruling Request
FEIN: [REDACTED]

Dear [REDACTED]:

The Department has completed its review of your request for a written determination on behalf of your client, [REDACTED] ("Taxpayer"). In making this written determination, the Department has considered the facts presented in your initial request as well as any supplemental information provided to the Department.

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. This written determination is applicable only to the taxpayer addressed herein and as such has no precedential value except to the taxpayer to whom the determination is issued.

Overview and Relevant Facts

You state that Taxpayer "is a [REDACTED] corporation with its principal place of business in [REDACTED] [REDACTED]" that operates a sales office in [REDACTED] North Carolina with one salesperson. The salesperson in North Carolina "solicits customers in [the State] to license the right to use [REDACTED] [REDACTED] software. Orders for this software are submitted to [Taxpayer] in [REDACTED] for acceptance. Invoices for payment are sent from [REDACTED] and payment of all fees are made to [Taxpayer] in [REDACTED]."

You further state that Taxpayer "licenses its customers to use [REDACTED], an enterprise software solution that permits businesses and organizations to build, run and maintain their websites. [REDACTED] is designed to run solely on an enterprise server operating system. [REDACTED] runs only on [REDACTED] . . . which is one of the more common platforms for website hosting."

In addition, you state that "[REDACTED] consist of [REDACTED] standardized software modules, . . . [and] [m]ost modules must be populated with the website owner's ('Owner') content, and . . . customized to meet Owner's needs and website designs. . . . As delivered, [REDACTED] is not useable as a website. It only becomes usable [sic] following the modifications, additions and customizations that result from the website design and implementation meetings. Once customized for the Owner and launched, [REDACTED] allows the [Owners] to continue to create and manage the content and design of the website in order to maintain . . . [the] website."

Your letter also states that "[n]o copy of [REDACTED] is ever delivered to the customer, either by tangible copy or electronically. Rather [REDACTED] is only provisioned to enterprise internet host servers running

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the [REDACTED] enterprise operating system . . . for the high-speed, high-volume, simultaneous access and use by multiple computers. The Owner, its administrators, and end users all access and use [REDACTED] on the enterprise host servers, over the internet.”

Taxpayer “licenses [REDACTED] to customers pursuant to a [Taxpayer] Website Agreement . . . executed by the customer, and an End User License Agreement that is agreed to in a click through box the first time [the] customer accesses its [REDACTED] website. . . .”

Issues

Are the fees charged by Taxpayer exempt from North Carolina sales and use tax?

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; a retail sales tax is imposed on a retailer’s net taxable sales or gross receipts, as applicable, from sales of tangible personal property, certain digital property, and certain services at the applicable State, applicable local, and applicable transit rates of tax. N.C. Gen. Stat. §§ 105-164.4, 105-164.8, 105-467, 105-468, 105-483, 105-498, 105-507.2, 105-509.1, and 105-537.

N.C. Gen. Stat. § 105-164.4 imposes a sales tax on the retail sale of tangible personal property, certain digital property, and other specified transactions. N.C. Gen. Stat. § 105-164.6 imposes a complementary use tax on items in N.C. Gen. Stat. § 105-164.4 that are purchased inside or outside this State for storage, use, or consumption in this State and sourced to this State.

N.C. Gen. Stat. § 105-164.3(223) defines the term “[t]angible personal property” as “[p]ersonal property that may be seen, weighed, measured, felt, or touched or is in any other manner perceptible to the senses. The term includes electricity, water, gas, steam, and prewritten computer software.”

N.C. Gen. Stat. § 105-164.3(151) defines the term “prewritten computer software” as “[c]omputer software, including prewritten upgrades, that is not designed and developed by the author or another creator to the specifications of a specific purchaser. The term includes software designed and developed by the author or another creator to the specifications of a specific purchaser when it is sold to a person other than the specific purchaser.”

N.C. Gen. Stat. § 105-164.13(43) provides an exemption from sales and use tax for “[c]ustom computer software and the portion of prewritten computer software that is modified or enhanced if the modification or enhancement is designed and developed to the specifications of a specific purchaser and the charges for the modification or enhancement are separately stated on the invoice or similar billing document given to the purchaser at the time of the sale.”

N.C. Gen. Stat. § 105-164.13(43a)a. provides an exemption from sales and use tax for the sale at retail and the use, storage, or consumption in this State of computer software “purchased to run on an enterprise server operating system” including “a purchase or license of computer software for high-volume, simultaneous use on multiple computers that is housed or maintained on an enterprise server or end users’ computers.”

Pursuant to N.C. Gen. Stat. § 105-164.26, “all gross receipts of wholesale merchants and retailers are subject to the retail sales tax until the contrary is established by proper records.”

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.

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N.C. Gen. Stat. § 105-164.22 states, in part, “[f]ailure of a retailer [or wholesale merchant] to keep records that establish that a sale is exempt . . . subjects the retailer [or wholesale merchant] to liability for tax on the sale.”

Ruling

Based on the documentation provided, fees charged by Taxpayer on the initial sale of the software to customize the software are exempt from North Carolina sales and use tax pursuant to N.C. Gen. Stat. § 105-164.13(43).

Fees charged by Taxpayer for the license to use that come within the provisions of N.C. Gen. Stat. § 105-164.13(43a) are exempt from North Carolina sales and use tax provided Taxpayer secures from its customers a properly completed Form E-595E, Streamlined Sales and Use Tax Agreement Certificate of Exemption, or the required data elements. If Taxpayer’s fees for license to use do not meet the provisions of N.C. Gen. Stat. § 105-164.13(43a) and/or Taxpayer’s customers do not provide a properly completed Form E-595E or the required data elements, then such sales by Taxpayer would be subject to the general State, applicable local, and applicable transit rates of sales and use tax. As with any exemption claimed, Taxpayer must be able to support upon audit that its fees for license to use its website software are properly exempt from sales and use tax.

Fees charged for the incidental use of the server on which runs are exempt from North Carolina sales and use tax pursuant to N.C. Gen. Stat. § 105-164.13(43a).

This ruling is based solely on the facts submitted to the Department of Revenue for consideration of the transactions described. If the facts and circumstances given are not accurate, or if they change, then the taxpayer requesting this ruling may not rely on it. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material aspect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that this document is not to be cited as precedent and that a change in statute, a regulation, or case law could void this ruling.

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