



STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE

300A Outlet Pointe Blvd., Columbia, South Carolina 29210
P.O. Box 125, Columbia, South Carolina 29211

SC PRIVATE LETTER RULING #19-1

SUBJECT: Data Collection and Analysis Services
(Sales and Use Tax)

REFERENCES: S.C. Code Ann. Section 12-36-60 (2014)
S.C. Code Ann. Section 12-36-910 (2014)
S.C. Code Ann. Section 12-36-1310 (2014)
SC Regulation 117-308
SC Regulation 117-329

AUTHORITY: S.C. Code Ann. Section 12-4-320 (2014)
S.C. Code Ann. Section 1-23-10(4) (2005)
SC Revenue Procedure #09-3

SCOPE: A Private Letter Ruling is an advisory opinion issued to a specific taxpayer by the Department to apply principles of law to a specific set of facts or a particular tax situation. It is the Department's opinion limited to the specific facts set forth, and is binding on agency personnel only with respect to the person to whom it was issued and only until superseded or modified by a change in statute, regulation, court decision, or another Departmental advisory opinion, providing the representations made in the request reflect an accurate statement of the material facts and the transaction was carried out as proposed.

QUESTION

Are charges by ABC Company ("ABC") for its services (developing surveys tailored to each client, conducting surveys, gathering data from other sources, analyzing the data obtained, and providing the results and other information to clients) as described in the facts, which include online access to reporting software, subject to South Carolina sales and use tax?

CONCLUSION

No. The true object of ABC's transactions is its nontaxable professional services (developing surveys tailored to each client, conducting surveys, gathering data from other sources, analyzing the data obtained, and providing the results and other information to clients). The portion of ABC's charges attributable to providing clients online access to its reporting software is incidental to the provision of professional services. ABC is providing professional services, and not a taxable communication service. Therefore, the entire charge for ABC's services, as described in the facts, is not subject to South Carolina sales and use tax.

FACTS

ABC studies its clients' businesses, develops and designs surveys, collects and analyzes data, and delivers the results to its clients, along with insights and solutions derived from the data. ABC's services focus on three major areas: (1) the client's customers and their experience with the client; (2) the client's employees and how engaged they are with the client; and (3) enhancing a client's brand and perceptions of the brand.

ABC's services include (1) data collection and analysis (i.e., developing surveys tailored to each client, conducting surveys, gathering data from other sources, and analyzing the data obtained) and (2) presenting the information with insights and solutions, both in person and through online access to its reporting software.

ABC gathers data from multiple sources including conducting surveys, analyzing e-commerce activity, text messages, and whatever other communication channels the client's customers may utilize (e.g., customer comments submitted through a client's online contact center). Surveys include online surveys, mobile device surveys, and telephone surveys. Surveys may be pushed out over e-mail as well. For certain clients, ABC hires a third party to compile various reviews on social media. Social media results are compared to the survey results, and material differences are investigated.

ABC's services are primarily driven by surveys. ABC consults with clients on all phases of the survey process, from design and implementation to understanding what the results mean, and how the results can be used to improve a client's business. ABC delivers its data and analysis verbally, in writing, and through presentations.¹ The survey data is the client's property.

ABC provides clients access to survey data and configurable reports through its ABC online reporting software ("reporting software"), which is included in the cost of ABC's services. Clients use the reporting software to access their data (including real-time customer feedback), filter the data, generate reports, and review insights.² The reporting software may be accessed through ABC's website or web-based application. ABC grants clients a temporary license to access the reporting software during the contract period.

LAW AND DISCUSSION

Code Section 12-36-910(A) imposes the sales tax and provides:

A sales tax, equal to [six]³ percent of the gross proceeds of sales, is imposed upon every person engaged or continuing within this State in the business of selling tangible personal property at retail.

¹ ABC provides three different levels of service with varying levels of help planning for surveys, insight, and face-to-face (in person or over the Internet) meetings. Clients can select one of the levels and add on services as appropriate.

² While clients typically access their reports through the online reporting software, ABC provides paper copies upon request.

³ Code Section 12-36-1110 increased the state sales tax rate from 5% to 6% beginning June 2007.

Code Section 12-36-1310(A) imposes a complementary use tax and provides:

A use tax is imposed on the storage, use, or other consumption in this State of tangible personal property purchased at retail for storage, use, or other consumption in this State, at the rate of [six]⁴ percent of the sales price of the property, regardless of whether the retailer is or is not engaged in business in this State.

Code Section 12-36-60 defines the term “tangible personal property,” in part, to mean:

[P]ersonal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses. It also includes services and intangibles, including communications, laundry and related services, furnishing of accommodations and sales of electricity, the sale or use of which is subject to tax under this chapter . . . (Emphasis added)

Therefore, the term “tangible personal property” includes by definition certain services and intangibles, such as communications, which are subject to South Carolina sales and use taxes under Chapter 36 of Title 12. Communications are subject to sales and use taxes under Code Sections 12-36-910(B)(3) and 12-36-1310(B)(3), each of which imposes the tax on the:

[G]ross proceeds accruing or proceeding from the charges for the ways or means for the transmission of the voice or messages . . . (Emphasis added)

SC Regulation 117-329.4 lists examples of taxable communication services and includes “charges to access an individual website (including Application Service Providers).” See SC Regulation 117-329.4(k). SC Revenue Ruling #03-5, in describing Application Service Providers, says that “some Internet websites . . . allow a customer use of software on that website. Companies that provide customers access or use of software in this manner are generally referred to as Application Service Providers (ASP).”

Since ABC provides clients online access to its reporting software through its website and web-based application, the issue is whether ABC provides a taxable communication service or nontaxable professional services.

ABC’s services include (1) data collection and analysis (i.e., developing surveys tailored to each client, conducting surveys, gathering data from other sources, and analyzing the data obtained), and (2) presenting the information with insights and solutions, both in person and through online access to its reporting software. SC Regulation 117-308, regarding professional, personal, and other services, provides further guidance on this issue. This regulation provides, in part:

The receipts from services, when the services are the true object of the transaction, are not subject to the sales and use tax, unless the sales and use tax is specifically imposed by statute on such services (i.e., accommodation services, communication services). . . . (Emphasis added)

⁴ Code Section 12-36-1110 increased the state use tax rate from 5% to 6% beginning June 2007.

The so-called "true object" test is generally used to delineate sales of services from sales of tangible personal property. The "true object" test is best described in 9 Vanderbilt Law Review 231 (1956), wherein it is stated:

The true test then is one of basic purpose of the buyer. When the product of the service is not of value to anyone other than the purchaser, either because of the confidential character of the product, or because it is prepared to fit the purchaser's special need - a contract or will prepared by a lawyer, or the accident investigation report prepared for an insurance company this fact is evidence tending to show that the service is the real purpose of the contract. When the purpose of a contract is to produce an article which is the true object of the agreement, the final transfer of the product should be a sale, regardless of the fact that special skills and knowledge go into its production. Under this analysis, printing work, done on special order, and of significant value only to the particular customer, is still a sale. The purchaser is interested in the product of the services of the printer, not in the services per se. Similarly, it would seem that contracts for custom-produced articles, be they intrinsically valuable or not, should be classified as sales when the product of the contract is transferred.

The Vanderbilt Law Review article, in quoting Snite v Department of Revenue, 398 Ill. 41, 74 N.E.2d. 877 (1947), also establishes the following general rule:

If the article sold has no value to the purchaser except as a result of services rendered by the vendor, and the transfer of the article to the purchaser is an actual and necessary part of the services rendered, then the vendor is engaged in the business of rendering service, and not in the business of selling at retail. If the article sold is the substance of the transaction and the service rendered is merely incidental to and an inseparable part of the transfer to the purchaser of the article sold, then the vendor is engaged in the business of selling at retail, and the tax which he pays ... [is measured by the total cost of article and services]. If the service rendered in connection with an article does not enhance its value and there is a fixed or ascertainable relation between the value of the article and the value of the service rendered in connection therewith, then the vendor is engaged in the business of selling at retail, and also engaged in the business of furnishing service, and is subject to tax as to the one business and tax exempt as to the other.

While the above quotes do not establish rigid rules, they do provide general guidance in determining the purpose of a transaction, and are particularly helpful in addressing the issue at hand.

If the true object of ABC's transactions is a taxable communication service (online access to the reporting software), then any professional services provided as part of the transaction are incidental to the sale of the taxable communication service, and the entire charge is subject to tax. If, on the other hand, the true object is nontaxable professional services (developing surveys tailored to each client, conducting surveys, gathering data from other sources, analyzing the data obtained, and providing the results and other information to clients), then the communication service provided as part of the transaction is incidental to the provision of professional services, and the entire charge is not subject to the sales or use tax.

Based on the above, ABC is in the business of providing nontaxable professional services (developing surveys tailored to each client, conducting surveys, gathering data from other sources, analyzing the data obtained, and providing the results and other information to clients). The true object of ABC's transactions is its nontaxable professional services. The portion of ABC's charges attributable to providing clients online access to its reporting software is incidental to the provision of professional services. ABC is providing professional services, and not a taxable communication service. Therefore, the entire charge for ABC's services, as described in the facts, is not subject to South Carolina sales and use tax.

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/W. Hartley Powell
W. Hartley Powell, Director

June 13, 2019
Columbia, South Carolina

CAVEAT: This advisory opinion is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances, as stated, are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting the advisory opinion may not rely on it. If the taxpayer relies on this advisory opinion, and the Department discovers, upon examination, that the facts and circumstances are different in any material respect from the facts and circumstances given in this advisory opinion, then the advisory opinion will not afford the taxpayer any protection. It should be noted that subsequent to the publication of this advisory opinion, changes in a statute, a regulation, or case law could void the advisory opinion.