Rhode Island Department of Revenue
Division of Taxation

Declaratory Order 2017-03

Request for Ruling Regarding the Taxability of the Use of a Mobile Point of Sale Device in the Restaurant Industry

Request for Ruling

Taxpayer requested a declaratory ruling ("Ruling Request") to determine whether its use of mobile point of sale devices ("Device") in its restaurants is subject to the Rhode Island Sales & Use Tax in the following respects:

(1) Will the monthly service fee ("Service Fee") paid to the Device's vendor ("Vendor") be treated as a rental/lease payment for the use of the Devices? If so, and Vendor is not registered to collect and remit tax, can Taxpayer self-accrue use tax on the amount deemed as rental/lease payments to Vendor?

(2) Are the premium content ("Premium Content") fees collected from restaurant guests and subsequently shared with Vendor, who retains title to the Devices, as commissions, subject to tax as the rental of tangible personal property? If so, and Vendor is not registered to collect and remit tax, can Taxpayer self-accrue use tax on the amount deemed as rental payments to Vendor? Will the result change if the Device is owned by Taxpayer rather than Vendor?

(3a) Whether the fee for unlimited access to games that are stored on the Device is taxable. If taxable, are such fees considered a rental or license to use tangible personal property?

(3b) Whether the fee for unlimited access to current news events and social media is taxable. If taxable, are such fees considered either Internet access or a telecommunications service?

(3c) Whether the fee for songs that are selected to be played in the restaurant is taxable. If taxable, are such fees considered a rental or license to use tangible personal property, a digital product, or a telecommunications service?

(4) If a single Premium Content fee is charged for unlimited access to games stored on the Device and unlimited access to current news events and social media, how will the Division view this charge?

(5) Based on the information provided, would Taxpayer be subject to any additional registration or licensing requirements for each Device, outside that of a general sales and use tax business registration or license?

Facts

The facts set forth below are taken from the statement of facts presented in the Ruling Request dated February 23, 2017.

Taxpayer is a large, full-service casual dining company with restaurant locations in Rhode Island. Taxpayer has initiated a pilot program incorporating the use of Devices at its restaurant locations. The Device accommodates tabletop menu, ordering, and payment in some of its Rhode Island locations.

The Device is a tablet with a touch screen interface that is located at each table. It provides pictures and detailed descriptions of the menu items and allows customers to place drink, appetizer, and entrée orders, and pay their check directly through the Device. Customers have the option to pay their guest checks by credit card, debit card, or gift card on the Device. Alternatively, the bill can be paid through the server/wait staff if preferred.

The Device also allows restaurants the option to enhance the customer experience by providing access to Premium Content located on the Device. This content could include news, sports, access to social media, selecting songs to be played on the restaurant's playlist, and access to interactive games. Taxpayer will charge separate fees for access to games, current news and social media, and song selections. The game application software resides within each Device.

During the pilot phase, Taxpayer will charge only for game fees, and the use of the Device to access news content will be free. This fee structure is intended to be employed solely for the pilot program. Following the conclusion of the program, Taxpayer may elect to charge a fee for access to any Premium Content on the Device. The Premium Content fee will be included as a line item on the customer's food and beverage bill.

The Vendor of the Device has indicated to Taxpayer that at the average restaurant over eighty percent (80%) of the restaurant customers use the Device for ordering and/or payment at the end of the meal, while only twelve to twenty percent (12-20%) of the customers access any Premium Content located on the Device.

The owner of the Devices charges Taxpayer a monthly Service Fee for the use of the Devices. Per the agreement between Vendor and Taxpayer ("Agreement"), Taxpayer will be responsible for the collection of the revenue generated by accessing the Premium Content and collection/remittance of any applicable state or local taxes imposed on the transactions. Additionally, Vendor and Taxpayer will also share monthly commissions, which would be percentages of the Premium Content fee income that was collected from restaurant guests. Taxpayer will be required to pay to Vendor a portion, or potentially all, of the revenue generated by the Premium Content fees that were collected from restaurant guests.

In its statement of facts, Taxpayer posits a possible alternative scenario where Vendor will not charge Taxpayer the monthly Service Fee for use of the Devices but will instead receive from Taxpayer all of the Premium Content fees up to a maximum amount, at which time the fees

in excess of such amount will be shared with Taxpayer. However, the Agreement between Vendor and Taxpayer clearly indicates that Taxpayer must pay the Service Fee, regardless of how much is collected in Premium Content fees.

Taxpayer states that the Device was developed specifically for the restaurant industry. The primary purpose of the Device is to facilitate (1) order placement, (2) order add-ons, (3) checkout/payment, and (4) customer satisfaction surveys. The benefits of the Device to the restaurant industry include increased food and beverage sales, a quicker table turnover, and increased guest loyalty and satisfaction. To achieve these results, Taxpayer will provide one Device at each table in each restaurant. The average restaurant will typically contain fifty (50) tables, and on average fifty (50) Devices would be used at each establishment.

It is the Taxpayer's stated intent that access to Premium Content (including news, videos, sports, educational items, and interactive games) is ancillary to the true purpose of the Device as part of Taxpayer's established point of sale order and payment system.

Ruling Requested

Based on the facts provided, whether Vendor's sale of the Devices to Taxpayer and Taxpayer's sale of Premium Content to its customers are subject to sales and use tax. Also, whether Vendor must register and collect the tax on its sales to Taxpayer.

Pertinent Local Statutory and Regulatory Law

R.I. Gen. Laws § 44-18-18 imposes a sales tax on all "sales at retail" in Rhode Island. Alternatively, the state imposes a use tax under R.I. Gen. Laws § 44-18-20 "on the storage, use, or other consumption in this state of tangible personal property; prewritten computer software delivered electronically or by load and leave; or services as defined in § 44-18-7.3." R.I. Gen. Laws § 44-18-8 defines "retail sales" or "sale at retail" as "any sale, lease or rentals of tangible personal property, prewritten computer software delivered electronically or by load and leave, or services as defined in R.I. Gen. Laws § 44-18-7.3 for any purpose other than resale, sublease or subrent in the regular course of business." Rule 7 of Regulation 12-62 reinforces the taxability of the receipts or proceeds derived from the rental or lease of tangible personal property.

Under R.I. Gen. Laws § 44-18-7(1), the term "sales" means and includes "any transfer of title or possession, exchange, barter, lease, or rental, conditional or otherwise, in any manner or by any means of tangible personal property for a consideration. 'Transfer of possession', 'lease', or 'rental' includes transactions found by the tax administrator to be in lieu of a transfer of title, exchange, or barter." Per R.I. Gen. Laws § 44-18-7(4), "sales" also includes "[t]he furnishing, preparing, or serving for consideration of food, meals, or drinks, including any cover, minimum, entertainment, or other charge in connection therewith." Rule 9(A) of Regulation 09-59 reiterates that entertainment charges in connection with the service of meals and drinks are subject to sales and use tax. Per R.I. Gen. Laws § 44-18-25, all gross receipts are presumed to be taxable until the taxpayer proves otherwise to the Tax Administrator.

Discussion

The transactions at issue in this ruling can be divided into: (1) sales from Vendor to Taxpayer and (2) sales from Taxpayer to its customers. Taxpayer's specific questions relating to each category will be addressed below.

I. Sales from Vendor to Taxpayer

Question 1: Will the monthly Service Fee paid to Vendor be treated as a rental/lease payment for the use of the Devices? If so, and Vendor is not registered to collect and remit tax, can Taxpayer self-accrue use tax on the amount deemed as rental/lease payments to Vendor?

Response 1: The arrangement between Taxpayer and Vendor for the monthly payment for use of the Devices is a taxable lease or rental for a certain period of time under the Agreement. The monthly Service Fee charged by Vendor to Taxpayer for use of the Devices in restaurants is a "sale at retail" under R.I. Gen. Laws § 44-18-8, which includes "any sale, lease or rentals of tangible personal property…" A "sale" is "any transfer of title or possession, exchange, barter, lease, or rental, conditional or otherwise, in any manner or by any means of tangible personal property for a consideration."[1] Sales at retail are subject to sales tax per R.I. Gen. Laws § 44-18-18. All gross receipts are presumed to be taxable under R.I. Gen. Laws § 44-18-25. If Vendor is not currently registered to collect and remit sales tax, Vendor must apply for a retail sales permit and, upon receiving the permit, collect and remit Rhode Island sales tax on the monthly Service Fees.

Question 2: Are the Premium Content fees collected from restaurant guests and subsequently shared with Vendor, who retains title to the Devices, as commissions, subject to tax as the rental of tangible personal property? If so, and Vendor is not registered to collect and remit tax, can Taxpayer self-accrue use tax on the amount deemed as rental payments to Vendor? Will the result change if the Device is owned by Taxpayer rather than Vendor?

Response 2: Commissions are generally not subject to Rhode Island sales and use tax as the rental of tangible personal property unless the commission is directly related to a price reduction or discount on the sale.[2] There is no indication here that the commissions are directly related to price reductions or sales discounts. As was indicated in Response 1, Vendor must register for a retail sales permit if it has not already done so. It is clear from the Agreement between Vendor and Taxpayer that Vendor retains title to the Devices. Regulation DR 03-01 prohibits the Division from issuing declaratory orders "in response to inquiries concerning alternative plans of proposed transactions or concerning hypothetical situations…" Therefore, the Division declines to answer whether the result would change if the Devices were owned by Taxpayer rather than Vendor.

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[1] R.I. Gen. Laws § 44-18-7(1).

[2] R.I. Gen. Laws § 44-18-12(c).

II. Sales from Taxpayer to its Customers

Question 3a: Whether the fee for unlimited access to games that are stored on the Device is subject to the transaction privilege tax. If taxable, are such fees considered a rental or license to use tangible personal property?

Question 3b: Whether the fee for unlimited access to current news events and social media is subject to the transaction privilege tax. If taxable, are such fees considered either Internet access or a telecommunications service?

Question 3c: Whether the fee for songs that are selected to be played in the restaurant is subject to the transaction privilege tax. If taxable, are such fees considered a rental or license to use tangible personal property, a digital product, or a telecommunications service?

Question 4: If a single Premium Content fee is charged for unlimited access to games stored on the Device and unlimited access to current news events and social media, how will the Division view this charge?

Response 3 & 4: Rhode Island does not have a transaction privilege tax. Its closest equivalent is the Sales & Use Tax discussed previously. Fees for unlimited access to games stored on the Device, unlimited access to current news events and social media, and songs are subject to Rhode Island sales tax. R.I. Gen. Laws § 44-18-7(4) includes in the definition of "sales" "[t]he furnishing, preparing, or serving for consideration of food, meals, or drinks, including any cover, minimum, *entertainment*, or other charge in connection therewith." (Emphasis added.) Per R.I. Gen. Laws § 44-18-18, all sales at retail are subject to sales tax. Premium Content fees are charges connected to the furnishing, preparing, and serving of food, meals, or drinks and are therefore subject to Rhode Island sales tax.[3]

Question 5: Based on the information provided, would Taxpayer be subject to any additional registration or licensing requirements for each Device, outside that of a general sales and use tax business registration or license?

Response 5: Based on the information provided, aside from having a retail sales permit to conduct sales at retail in Rhode Island and a litter permit for selling food and beverages, Taxpayer would need no other Rhode Island tax license or permit for each Device.

Ruling

Based on the facts provided, Vendor's lease or rental of Devices to Taxpayer would be subject to Rhode Island sales or use tax. Likewise, Taxpayer's sales of games, news and social media content, and songs to its customers through the Devices are taxable. Vendor must apply for a retail sales permit and collect and remit tax on its sales to Taxpayer.

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[3] *See* Regulation 09-59, Rule 9(A); *Coachman, Inc. v. Norberg*, 397 A.2d 1320 (R.I. 1979).

This ruling is limited to the facts stated herein and may be relied upon by the Taxpayer and shall be valid unless expressly revoked because (1) the applicable statutory provisions of law are amended in a manner that requires a different result; (2) the underlying facts described herein materially change; or (3) a decision on point has been issued by the Rhode Island or Federal courts.

Neena S. Savage
Tax Administrator
August 10, 2017