Rhode Island Department of Revenue
Division of Taxation

Declaratory Order 2020-03

Request for Ruling Regarding the Taxability of Vendor-Hosted Prewritten Computer Software

Request for Ruling

The Taxpayer requested a ruling to determine whether the software it sells is exempt from the Rhode Island Sales and Use Tax pursuant to R.I. Gen. Laws § 44-18-7.1(z)(i)(G)(1).

Facts

The facts set forth below are taken from the statement of facts presented in the Ruling Request received by the Tax Division on December 13, 2019 and supplemental information provided to the Tax Division. The Taxpayer is a company that electronically provides marketing analytic services using proprietary software and an online dashboard ("Software") to help its customers develop advertising strategies and evaluate the effectiveness of advertisements and advertising campaigns. Customers access the Taxpayer's Software through the Internet. The Taxpayer states in the Ruling Request that it provides the following services through its Software:

1. Media Measurement

The Taxpayer provides real-time advertising data for clients to use in monitoring and evaluating reach and frequency to determine the effectiveness of advertising campaigns. The Taxpayer states that its advertising data metrics are comprised of television ("TV") metrics, engagement metrics, and audience metrics. TV metrics consist of units called "creative",[1] "airing",[2] "spend",[3] and related data around national TV advertising activity on monitored networks. Engagement metrics consist of video plays, votes, comments, search activity, and social shares and conversations. Audience metrics consist of TV impression and attention (view rate) data. The Taxpayer balances its metrics against U.S. census information to account for geographical and demographical skews. Customers may look at and compare data metrics with their competitors via the online dashboard. For example, a customer can compare its data metrics with other companies within the same industry or to a brand with a similar advertising strategy within a different industry.

2. Attribution

The Taxpayer's customers can measure the influence of their ad campaigns against business outcomes by "conversion type and incremental lift of exposed vs. unexposed." For

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[1] "Creative" is a measure to help marketers understand the degree of their ad's allure.

[2] "Airing" is the number of national and regional airings within the selected criteria.

[3] "Spend" is the estimated dollar amount on TV media for this spot.

example, customers can examine metrics via the online dashboard to determine how their campaigns drive website visits, product page visits, online or offline sales, or other conversion types that they want to track as well as compare incremental lift across TV networks, shows, dayparts,[4] and pod positions.[5] Having these conversion analytics allows customers to measure their return on advertising spending.

Customers can also retrieve metrics from the online dashboard to measure the online conversion[6] events that matter to consumers and discover how TV is contributing to the customer's business outcomes in real-time. The goal is to allow customers to gain insight into which of their target segments are converting best with TV, gain a better understanding of the impact of TV on the customer's experience, and identify where TV and digital campaigns are working better together. With the ability to identify which target segments are responding to advertising campaigns, the Taxpayer's customers can make data-driven decisions on how to optimize their customer's experience with TV.

3. Marketing Stack Integration/Technology Subscription Fee

The Taxpayer's Software can integrate with a customer's existing marketing technology tools. The Taxpayer can also integrate custom first-party data (i.e., existing custom segments, attribution, and conversion data from websites and apps, or offline transactions) into the Taxpayer's dashboard for attribution services. Finally, a customer can upload and combine different third-party data sources into the Taxpayer's platform to further refine its marketing analytics. The Taxpayer integrates with common marketing stacks.[7]

4. Professional Services

The Taxpayer provides custom reports and analyses, powered primarily by its Software. The Taxpayer typically delivers these services by third-party software licensed either as software-as-a-service or as an installed software product or a custom Excel report, on either a weekly or monthly basis.

All of the services mentioned above are accessible through an online dashboard provided on the Taxpayer's website, which allows customers to view, download, and filter the Taxpayer's metrics. Also, customers can obtain the Taxpayer's data by sending requests through the

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[4] A "daypart" is a block of time that divides the day into segments for purchase, scheduling, and delivery (e.g., primetime) in a typical broadcast day.

[5] A "pod" refers to a group of commercials airing during a commercial break within a show (first, second, third). "Pod position" refers to the sequential location of an individual commercial within a pod or series of commercials during a broadcast break (i.e. first, middle, last).

[6] Conversion is a point at which a recipient of a marketing message demonstrates intent by performing a desired action. For example, measurable conversions may include when customers visit a particular website, store location, or make a purchase as a result of the marketing message.

[7] A marketing stack is a group of technology-based tools that marketers use to effectively execute marketing strategies.

Taxpayer's Application Programming Interfaces ("API").[8] The Taxpayer's API is a set of programming instructions that enables its customers' websites or software to retrieve marketing metrics processed by the Taxpayer, such as track product page visits or click impressions.

The Taxpayer does not provide its customers with any of the software necessary to perform API requests, nor does it provide any electronically downloaded software to its customers. Instead, the Taxpayer's customers pay a TV ad measurement and analytics enterprise license fee that provides the above-mentioned services. The Taxpayer may either state the fees separately by product or as a component of the purchase price. The Taxpayer's customers sign a licensing agreement ("Agreement") with the Taxpayer indicating which aspects of the software the customer seeks to purchase.

Ruling Requested

The Taxpayer requests confirmation that the real object of its customers' purchases of the Software is to obtain data processing and information services that are not subject to tax pursuant to R.I. Gen. Laws § 44-18-7.1(z)(i)(G)(1).

Pertinent Statutory and Regulatory Law

I.   Tangible Personal Property and Services

R.I. Gen. Laws § 44-18-18 imposes a seven percent (7%) tax on all sales at retail in the state of Rhode Island. R.I. Gen. Laws § 44-18-20 imposes a complementary use tax on all tangible personal property that is stored, used, or otherwise consumed in Rhode Island. R.I. Gen. Laws § 44-18-8 defines "sale at retail" as "any sale, lease, or rentals of tangible personal property, prewritten computer software delivered electronically or by load and leave, vendor-hosted prewritten computer software, specified digital products, or services as defined in § 44-18-7.3 for any purpose other than resale, sublease, or subrent in the regular course of business." R.I. Gen. Laws § 44-18-25 presumes that the gross receipts and use of tangible personal property in Rhode Island are subject to tax until the taxpayer proves otherwise.

R.I. Gen. Laws § 44-18-7.1(g)(vii) defines vendor-hosted prewritten computer software as "prewritten computer software that is accessed through the internet and/or a vendor-hosted server regardless of whether the access is permanent or temporary and regardless of whether any downloading occurs." R.I. Gen. Laws § 44-18-7(9)(i) includes within the definition of "sales" "[t]he furnishing for consideration of intrastate, interstate, and international telecommunications service sourced in this state in accordance with §§ 44-18.1-15 and 44-18.1-16 and all ancillary services, and any maintenance services of telecommunication equipment other than as provided for in § 44-18-12(b)(ii)."

R.I. Gen. Laws § 44-18-7.1(z)(i)(G) defines "telecommunications service" as "the electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points." The term "telecommunications

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[8] An API is a set of programming instructions that enable computer programs to communicate with each other to perform a specific function.

service" "includes such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code, or protocol of the content for purposes of transmission, conveyance, or routing without regard to whether such service is referred to as voice over internet protocol services or is classified by the Federal Communications Commission as enhanced or value added." R.I. Gen. Laws § 44-18-7.1(z)(i)(G)(1) adds that "telecommunications service" does not include "[d]ata processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by an electronic transmission to a purchaser where such purchaser's primary purpose for the underlying transaction is the processed data or information…"

II.   Bundled Transactions

Per R.I. Gen Laws § 44-18-7.1(c), a "bundled transaction" is defined as "the retail sale of two or more products, except real property and services to real property, where (1) The products are otherwise distinct and identifiable, and (2) The products are sold for one non-itemized price." A bundled transaction "does not include the sale of any products in which the 'sales price' varies, or is negotiable, based on the selection by the purchaser of the products included in the transaction."

The real object test determines whether mixed transactions (in general, those containing both taxable products and nontaxable services) are taxable. *New Eng. Tel. and Tel. Co. v. Clark* defines three (3) categories by which property and services are typically organized. 624 A.2d 298, 300-01 (R.I. 1993). If the real object of the transaction is tangible personal property, then the transaction is taxable. If the real object instead is a nontaxable service, then the transaction is not taxable. When the property and service aspects of the transaction are readily separable, but each is consequential, then the property and service elements must be analyzed as separate transactions for tax purposes. *See also White v. Clark*, 823 A.2d 1125, 1126, 1128 (R.I. 2003)*; Hasbro Indus. v. Norberg*, 487 A.2d 124, 125, 127 (R.I. 1985); *Statewide Multiple Listing Serv. v. Norberg*, 392 A.2d 371, 372 (R.I. 1978).

Taxpayers claiming statutory tax benefits must demonstrate not only that a tax exemption or deduction exists but that they clearly and unequivocally come within the ambit of its provisions. *Cookson v. Clark*, 610 A.2d 1095, 1098 (R.I. 1992); *Rhode Island Lithograph Corp. v. Clark*, 519 A.2d 589, 591 (R.I. 1987). Furthermore, statutes conferring such tax benefits must be strictly and narrowly construed, *Fleet Credit Corp. v. Frazier*, 726 A.2d 452, 454 (R.I. 1999); *Rice Machinery Co. v. Norberg*, 391 A.2d 66, 70 (R.I. 1978); *Red Fox Gingerale Co. v. Norberg*, 217 A.2d 466, 467 (R.I. 1966), with all doubts and ambiguities resolved against the taxpayer and in favor of the taxing authorities. *Roger Williams Gen. Hosp. v. Littler*, 566 A.2d 948, 950 (R.I. 1989); *American Hoescht Corp. v. Norberg***,** 462 A.2d 369, 371 (R.I. 1983).

Discussion

The Taxpayer admits at the outset that its Software is vendor-hosted prewritten computer software, which is subject to tax. However, the Taxpayer argues that sales of the Software are exempt pursuant to R.I. Gen. Laws § 44-18-7.1(z)(i)(G)(1) as data processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by

an electronic transmission to a purchaser where the purchaser's primary purpose for the underlying transaction is the processed data or information. The Taxpayer states that its customers use the Software to access real-time advertising data.

The Taxpayer further argues that its vendor-hosted prewritten computer software and the services provided through the Software are distinct and identifiable products that are sold together for one subscription fee, implying that it is a bundled transaction. The Taxpayer claims that the real object of its Software is to obtain data processing and information services; the Software itself is allegedly incidental to the real object of the transaction, which is to obtain data processing and information services, and the Software and services it provides are allegedly separate and distinct products. However, unlike the equipment and engineering services in *New England Telephone* that were clearly separate and distinct purchases, the Software and the services it provides are clearly intertwined and inseparable. One cannot exist without the other and the Software is what provides the services through its various functions.

The Taxpayer's Software is taxable vendor-hosted prewritten computer software. Even if the Software also fit the definition under R.I. Gen. Laws § 44-18-7.1(z)(1)(G), the Software remains taxable pursuant to R.I. Gen. Laws § 44-18-18, which imposes a tax on sales at retail in Rhode Island. R.I. Gen. Laws § 44-18-8 expressly includes the sale of vendor-hosted prewritten computer software as a sale at retail. Additionally, sales to Rhode Island customers are taxable as Rhode Island-sourced transactions pursuant to R.I. Gen. Laws § 44-18.1-11 and 280-RICR-20-70-46.9.

Since the Software at issue is taxable vendor-hosted prewritten computer software, there is no need for further analysis.

Ruling

Based on the facts provided by the Taxpayer, the Taxpayer's Software is subject to Rhode Island sales and use tax.

This ruling is limited to the facts stated herein and may be relied upon by the Taxpayer and shall be valid unless (1) expressly revoked, (2) the applicable statutory provisions of law are amended in a manner that requires a different result, (3) the underlying facts described herein materially change, or (4) a decision on point has been issued by the Rhode Island or Federal courts.

Neena S. Savage
Tax Administrator
December 29, 2020