



Opinion of the Tax Commissioner

Date Issued: July 1, 2020

Opinion No: 20-0002

Tax: Sales

XXXX
XXXX
XXXX

Subject: Electronic Information Services

This request for an Opinion of the Tax Commissioner was received on June 7, 2019. It concerns the application of sales and use tax to the provision of survey respondents.

FACTS

The taxpayer is XXXX, who is headquartered in XXXX. The taxpayer is an online provider of market research platforms/services and professional services. The taxpayer provides both software as a service and professional consulting services. The taxpayer also provides a third service, described as “panel” or “survey respondents” service, that is the subject of your inquiry. This service is detailed in the request as follows:

The Survey Respondents service enables the customer to pay for survey respondents to take surveys according to specific demographics that the client selects. For example, a client can dictate that it wants a pool of single mothers, or men between the ages of 35-50, to respond to specific questions that the client provides. Taxpayer has established or finds the pool of survey respondents that fit the client’s prescribed demographics and charges a fee to the client for the survey respondents.

In obtaining the benefits of Survey Respondents, the client provides the survey to taxpayer’s platform, except in cases in which taxpayer provides the survey as a separate professional service. The client can click on and select what they want to define their target survey respondent market and define the survey questions. As such, there is some customer interface with taxpayer’s technology platform, however no more so than a customer accessing any e-commerce retailer’s website to order a song, book or article of clothing, or a bank customer using an ATM.

You also indicate that the taxpayer does not transfer tangible personal property and that there is no fee for software as a service, a license fee or fee for access to or use of an online service. Your letter does not specifically describe how the survey results are delivered to the customer, but it does appear that it is accomplished through the usage of the taxpayer’s computer platform. Based on a review

of XXXX's website, the survey results from the panel respondents are viewable online on the client's dashboard or stats page.¹

REQUESTED OPINION

Given the above facts, you requested the following Opinion of the Tax Commissioner:

1. Is the taxpayer's charge for Panel, or Survey Respondents, subject to Ohio sales tax, and if so, on what basis?
2. To the extent the taxpayer's charge for Panel, or Survey Respondents, is subject to Ohio sales tax, how is the sale sourced (i.e. service address, billing address, multiple service address apportionment)?

APPLICABLE LAW

R.C. 5739.02 provides that an excise tax is levied on retail sales made in Ohio. "Sale" and "selling" include all transactions by which "...electronic information services are or are to be provided for use in business." R.C. 5739.01(B)(3)(e).

"Electronic information services" are defined as "providing access to computer equipment by means of telecommunications equipment for the purpose of either of the following:"

- (i) Examining or acquiring data stored in or accessible to the computer equipment;
- (ii) Placing data into the computer equipment to be retrieved by designated recipients with access to the computer equipment

R.C. 5739.01(Y)(1)(c).

The true object of the transaction must be the receipt of electronic information services and not the receipt of personal or professional services "to which...electronic information services are incidental or supplemental." R.C. 5739.01(B)(3)(e). Electronic information services do not include personal or professional services. R.C. 5739.01(Y)(1)(d).

"Personal and professional services" are defined to include "all services other than...electronic information services, including but not limited to:"

- (a) Accounting and legal services such as advice on tax matters, asset management, budgetary matters, quality control, information security, and auditing and any other situation where the service provider receives data or information and studies, alters, analyzes, interprets, or adjusts such material;
- (b) Analyzing business policies and procedures;
- (c) Identifying management information needs;

¹ See XXXX (last retrieved on September 20, 2019).

- (d) Feasibility studies, including economic and technical analysis of existing or potential computer hardware or software needs and alternatives;
- (e) Designing policies, procedures, and custom software for collecting business information, and determining how data should be summarized, sequenced, formatted, processed, controlled, and reported so that it will be meaningful to management;
- (f) Developing policies and procedures that document how business events and transactions are to be authorized, executed, and controlled;
- (g) Testing of business procedures;
- (h) Training personnel in business procedure applications;
- (i) Providing credit information to users of such information by a consumer reporting agency, as defined in the “Fair Credit Reporting Act,” 84 Stat. 1114, 1129 (1970), 15 U.S.C. 1681a(f), or as hereafter amended, including but not limited to gathering, organizing, analyzing, recording, and furnishing such information by any oral, written, graphic, or electronic medium;
- (j) Providing debt collection services by any oral, written, graphic, or electronic means;
- (k) Providing digital advertising services.

R.C. 5739.01(Y)(2).

In the context of personal and professional services, the Ohio Board of Tax Appeals has determined that calling and mailing lists do not qualify as personal services on multiple occasions. First, in *Burke Marketing Services, Inc. v. Tracy* (Sept. 6, 1996), BTA No. 91-J-377, 1996 WL 764801, the taxpayer was a provider of market research services who developed research methodologies and questionnaires for its customers. The taxpayer specifically conducted telephone research and tabulated and interpreted the data for its customers. *Id.* at *4. In providing this service, the taxpayer purchased a sample base for a custom calling list which contained extensive and detailed requirements including the number to be used in the sample, the geographical location and demographic criteria. *Id.* The taxpayer argued that the purchase of this custom calling list was a personal service transaction. *Id.* at *5. The Board disagreed, reasoning that:

We can not find from the evidence that the suppliers in question provided any cognitive thought or skill in preparing the purchased calling lists. The sample supplier exercises no independent judgment as to the names from its data which go to the appellant’s calling list. Thus, we do not find that the sample suppliers provided personal services...

Id.

Additionally, in *Satisfaction Charter Services, Inc. v. Levin* (Mar. 15, 2011), BTA Nos. 2008-M-940 and 2008-M-1157, 2011 WL 960582, the Board reaffirmed its holding in *Burke*, supra. In that

case, the taxpayer purchased mailing lists from an individual and argued that the purchases were for marketing services and not for the supplying of tangible personal property. *Id.* at *4. The Board disagreed and concluded that the supplier of the mailing list did not perform any intellectual act, and the Tax Commissioner properly assessed the transactions. *Id.* at *5.

DISCUSSION

1. Is the taxpayer's charge for Panel, or Survey Respondents, subject to Ohio sales tax, and if so, on what basis?

Yes, the charge for panel/survey respondents is taxable as “electronic information services.” Specifically, the taxpayer’s customer creates a survey on the taxpayer’s online platform, and the taxpayer provides the customer with a pool of survey respondents to complete to the survey. After the survey is finished, the customer can then view or retrieve the survey results by accessing or utilizing the taxpayer’s online platform.

Thus, the end product is the survey results or data provided to the customer by the panel/survey respondents. This falls squarely within the definition of “electronic information services”, which includes “providing access to computer equipment by means of telecommunications equipment for the purpose of...[e]xamining or acquiring data stored in or accessible to the computer equipment.” See R.C. 5739.01(Y)(1)(c).

The services rendered also do not constitute personal or professional services. They do not fall under any of the categories described in R.C. 5739.01(Y)(2) nor does the selection of a pool of survey respondents based on objective demographic criteria otherwise involve any cognitive thought or intellectual act.

Therefore, these services, as you describe them, are subject to sales and use tax in Ohio.²

2. To the extent the taxpayer's charge for Panel, or Survey Respondents, is subject to Ohio sales tax, how is the sale sourced (i.e. service address, billing address, multiple service address apportionment)?

The sale should generally be sourced to the location where the customer receives the service in Ohio in accordance with R.C. 5739.033.

If the service will be concurrently available for use by the customer in more than one jurisdiction, the taxpayer and its customer may use any reasonable, consistent and uniform method of apportionment supported by the taxpayer and customer’s books and records at the time of the sale. See R.C. 5739.033(D)(2). The taxpayer must obtain a certification from the customer attesting to the accuracy of the apportionment. This does not apply if the customer provides the taxpayer with

² Additional correspondence was received from the taxpayer’s representative on November 22, 2019. The arguments made in that letter did not change the Department’s position on this subject matter.

an exemption certificate claiming multiple points of use³ or is a direct payment permit holder.⁴ In those circumstances, the customer will remit the tax directly to Ohio.

OPINION OF THE TAX COMMISSIONER

Therefore, it is the Opinion of the Tax Commissioner that:

1. The charges for panel and survey respondents are taxable as electronic information services.
2. The sale should generally be sourced to the location where the customer receives the service in Ohio in accordance with R.C. 5739.033.

This Opinion is limited to the legal issue addressed in this Opinion. This Opinion applies only to this Taxpayer and may not be transferred or assigned. In addition, the tax consequences stated in this Opinion may be subject to change for any of the reasons stated in R.C. 5703.53(C). It is the duty of Taxpayer to be aware of such changes. *See* R.C. 5703.53(E).

Jeffrey A. McClain
Tax Commissioner

³ Form STEC MPU, Multiple Points of Use Exemption Certificate, *available at* https://www.tax.ohio.gov/portals/0/forms/fill-in/sales_and_use/exemption_certificates/ST_STEC_MPU_FI.pdf.

⁴ The direct payment permit holder must provide a notice that the tax is being paid directly to the state which includes its direct payment permit number. *See* R.C. 5739.031(F).