Sales/Use/Indirect:
California: Guidance Issued on Software Technology Transfer Agreements and Underlying Refund Claims

Software Technology Transfer Agreements, Cal. Dept. of Tax & Fee Admin. (9/23). In recently posted guidance, the California Department of Tax and Fee Administration (CDTFA) explains that if a taxpayer holds patent or copyright interests in non-custom software and makes retail sales of the software on tangible media, then a portion of the proceeds from such retail sales of the software may be excluded from its gross receipts subject to California sales tax. Conversely, if a taxpayer purchases non-custom software on tangible media in a transaction that is subject to use tax from a retailer who holds patent or copyright interests in the software, then a portion of the price the taxpayer paid for the software may be excluded from the sales price of the software that is subject to California use tax. The CDTFA also explains that, pursuant to state caselaw, the California Court of Appeal determined that an agreement for the sale of non-custom software may qualify as a "technology transfer agreement" (TTA); according to the CDTFA, an agreement for the sale or purchase of non-custom software on tangible storage media may qualify as a TTA when the agreement for the sale or purchase also assigns or licenses the right to make and sell a product or the right to use a process that is subject to a patent or copyright interest. However, because Cal. Rev. and Tax. Code sections 6011(c)(10) and 6012(c)(10) require that the retailer also hold the patent or copyright interests being assigned or licensed, "most agreements for sales of off-the-shelf software will not qualify as technology transfer agreements."
URL: https://www.cdtfa.ca.gov/taxes-and-fees/software-technology-transfer-agreements.htm

Regarding underlying refund claims in TTA transactions, the CDTFA states that if a taxpayer purchased non-custom software from a California retailer under a TTA and paid California sales tax reimbursement to that retailer, then the taxpayer must contact the retailer to apply for a refund of any excess California sales tax reimbursement that the retailer may have collected on the purchase of that software. However, if the taxpayer paid use tax, rather than sales tax, on the purchase and the non-custom software was transferred under a TTA, then such taxpayer may file a refund claim with the CDTFA for any California use tax overpaid. Such claimants must provide documentation that the transaction qualified as a TTA, including that the retailer held the patent and copyright interests at the time the software was purchased, to support the claimed refund amount.

For those selling non-custom software in tangible form and the software is transferred under a TTA, the CDTFA generally recommends:

- Documenting that the sale of software qualifies as a TTA (*i.e.*, there must be a written agreement and the retailer of the software must also be the holder of the patent or copyright interests transferred; otherwise, the transaction does not qualify as a TTA, and the entire sales price of the software is subject to tax); and
- Setting a selling price for the tangible personal property portion of the transaction that is reasonable pursuant to the statutory provisions.

Please contact us with any questions.

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