

201801006L [Tax Type: Sales] [Document Type: Letter/Memo]

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Texas Comptroller of Public Accounts STAR System

201801006L

January 4, 2018

RE: Private Letter Ruling No. 20170921152222

Dear *****:

We issue this private letter ruling in accordance with Rule 3.1, Private Letter Rulings and General Information Letters. [ENDNOTE 1] We are responding to your request dated September 27, 2017, and your supplemental submission dated October 4, 2017. Detrimental reliance relief is provided in accordance with Rule 3.10, Taxpayer Bill of Rights.

You requested guidance on the taxability of subscription services.

Facts Presented

***** (Taxpayer) provides an internet-based platform for users to access and view real-time and on demand streaming videos, which Taxpayer licenses from third-parties referred to as “broadcasters.” Specifically, users can watch broadcasters engage in numerous activities including playing video games, playing music, painting, cooking, and competing in live eSports competitions. Users can also view other streamed content like marathons of certain television shows.

Users can view the content live or on demand. Although a user can register and create an account, users do not need to register or pay to access the online content. Taxpayer offers the following services and items free to all users:

- access to all broadcaster channels;
- access to all streaming video content;
- access to all broadcaster on-demand content;
- a chat tool; and
- basic chat colors and emoticons.

Users who set up a free account can also post their own videos on demand (VOD). To do this, users save their VODs and post them for others to watch. As part of Taxpayer's free service, the platform stores these VODs for 14 days.

Taxpayer provides each registered user with a broadcast channel page where the user can post its VODs. This page has a built-in chat room for viewers to chat with each other and the broadcaster.

Users who want enhanced features may purchase a monthly subscription. Taxpayer offers two types of subscriptions, the Channel and Turbo subscriptions.

A Channel subscription allows a user to subscribe to specific channels. In addition to the basic features offered free of charge, Taxpayer's Channel subscription includes the following additional services and items:

- ad-free streaming video on the specific channel;
- a special user icon;
- a set of chat emoticons; and
- access to a specialized, and faster, chat mode.

The Channel subscription has three subscription tiers: the standard channel subscription is \$4.99/month; and two higher tier subscriptions are \$9.99/month and \$24.99/month. Higher tier subscriptions include more chat emoticons to use in the chat feature and users can send the community a custom message when they first subscribe.

While the Channel subscription provides enhanced features for the selected channel(s), the Turbo subscription provides enhanced features for all channels on the platform. Specifically, Taxpayer's Turbo subscription includes the following additional services and items:

- ad-free streaming video on all channels;
- customized set of emoticons for use during chat;
- an icon that represents the subscriber as a Turbo subscriber;
- additional chat colors;
- increased video storage time from 14 to 60 days for broadcasters to store VOD content;
- and priority access to customer support.

Question, Ruling, and Analysis

Our restatement of your question is shown below, followed by our response and analysis.

Question: Are Taxpayer's Channel and Turbo subscriptions subject to Texas sales and use tax?

Ruling: Yes. Taxpayer provides taxable cable television and amusement services through its Channel and Turbo subscriptions.

Analysis:

Sales tax is imposed on each sale of a taxable item in this state. Section 151.051 (Sales Tax Imposed). The term "taxable item" means tangible personal property and taxable services. Section 151.010 (Taxable Item). Section 151.0101 (Taxable Services) lists services that are taxable in Texas and includes cable television and amusement services. *See* Section 151.0101(1) and (2).

While Taxpayer does not initially charge users to access its services through its platform, it is still providing taxable services. When Taxpayer begins charging for subscriptions, there is a sale of these taxable services and Taxpayer must collect and remit sales tax.

Section 151.005(3) (Sale or Purchase) defines a "sale" or "purchase" to include the performance of a taxable service for consideration, and, in the case of an amusement service, the collection of an admission fee, whether by individual performance, subscription series, or membership privilege. Therefore, when a user buys a subscription from Taxpayer, Taxpayer performs the taxable services for consideration, which makes it a sale for which Taxpayer must collect sales and use tax.

Cable Television Service

Section 151.0033 (Cable Television Service) defines cable television service as, "the distribution of video programming with or without use of wires to subscribing or paying customers." Rule 3.313(a)(4), in relevant part, further describes it as, "streaming video programming provided via the Internet or other technology, regardless of the type of device used by the purchaser to receive the service; video on demand services or subscription services that allow purchasers to choose from a library of available content; and any other video programming provided in exchange for consideration."

In STAR Accession No. 201207532L (July 31, 2012), the taxpayer provided an annual subscription membership in a customer loyalty program. For a yearly membership fee, the taxpayer provided its customers unlimited viewing of streaming movies and television shows. The Comptroller determined that providing instant videos through the streaming service constituted a taxable cable television service. Although the membership included some nontaxable components, the entire charge was taxable because the taxpayer charged a single lump-sum membership fee.

Similarly, Channel and Turbo subscribers set up an account, pay a subscription fee, and receive access to enhanced streaming video content. While there are other components to the Channel and Turbo subscriptions, Taxpayer provides services that meet the definition of cable television services in statute and rule when it charges a lump sum subscription fee for Channel and Turbo subscriptions. Taxpayer's entire charge for Channel and Turbo subscriptions are taxable.

Amusement Services

Section 151.0028 (Amusement Services) defines an amusement service as the provision of amusement, entertainment, or recreation other than educational or health services prescribed by a doctor for the primary purpose of education or health maintenance or improvement.

In addition to the ad-free streaming of video content, the Channel and Turbo subscriptions offer enhanced features some of which allow users to engage with other users. Taxpayer provides users with user icons, specialized or customized chat emoticons, and faster and specialized chat functions. Taxpayer contends this engagement is what differentiates it from other streaming video services. The chat function allows viewers to interact directly in real time with broadcasters and is similar to instant messaging.

Broadcasters may provide additional playing opportunities to users and subscribers who donate to the broadcasters through Taxpayer's chat function. The additional playing opportunities include playing a video game with the broadcaster on a live stream, or, at the viewer's request, the broadcaster playing with a particular character, item, or an in-game setting.

In STAR Accession No. 201405957L (May 28, 2014), the Comptroller stated that, "In general, existing statutes, rules, and policy decisions dictate that electronic games and associated content are subject to Texas sales and use tax as an amusement service." Furthermore, "Electronic games and associated content also include subscriptions or membership fees for access to games or game communities such as chat rooms, forums, discussion boards, and similar areas where game players comment, interact, find information, or communicate generally regarding games and game-play whether or not specific to a particular game." *Id.*

The letter also noted that membership fees, subscription fees, or other charges for access are cover charges for "other entertainment" under Rule 3.298(a)(1)(F)(i) (Amusement Services), regardless of whether they are for initial, premium, exclusive, or additional access. These charges may also be one-time only or single-use admission, whether hourly, by-the-game, season pass, or subscription.

Although Taxpayer does not provide electronic games as described in STAR Accession No. 201405957L, all of its services, paid and unpaid, provide access to game communities with chat functions and similar areas where game players comment, interact, find information, or communicate generally regarding games and game-play whether or not specific to a particular game. The Comptroller has consistently found this to be providing taxable amusement services.

In addition to providing streaming video game playing and gaming chats; Taxpayer provides other entertainment and recreation streaming videos and content including live and recorded musical performances and eSports competitions. These are included as taxable amusement services under Rule 3.298(a)(1).

While there are other components to the Channel and Turbo subscriptions, Taxpayer provides services that meet the definition of amusement services in statute and rule through the lump-sum Channel and Turbo subscription fees. Taxpayer's entire charge for Channel and Turbo subscriptions are taxable.

STAR documents cited can be found on the Comptroller's State Tax Automated Research (STAR) system. The Texas Tax Code, Texas Administrative Code, and the STAR system are accessible at www.comptroller.texas.gov/taxes/.

If you have questions about this private letter ruling, please email us through our website at <https://comptroller.texas.gov/web-forms/tax-help/> and reference Private Letter Ruling No. 20170921152222.

Sincerely,

Tax Policy Division – Indirect Taxes
Texas Comptroller of Public Accounts

ENDNOTE

1. Unless otherwise indicated, all references to "Section" are to the Texas Tax Code, and all references to "Rule" are to Title 34 of the Texas Administrative Code.

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