
Lessons Learned from the Short-Lived Computer Services Tax

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As has been widely reported, the newly enacted statute expanding the Massachusetts sales tax to cover certain computer and software services (the "Computer Services Tax") has been repealed after a substantial outcry from businesses, the Massachusetts Taxpayers Foundation and others. The appeal is retroactive.¹ During the short-lived life of the Computer Services Tax, the Department of Revenue (DOR) issued several documents intended to provide guidance on the application of the tax, including a list of frequently asked questions.

What is notable about the questions is the apparent lack of knowledge among many existing businesses that their product may already be subject to the sales and use tax prior to the enactment of the Computer Services Tax. Based on the DOR's responses to a number of frequently asked questions, it appears that some businesses may not have been aware of the following:

- Under existing law, sales and licenses of prewritten software are subject to Massachusetts sales and use tax. Since April 1, 2006, they have been subject to tax even if the prewritten software is electronically transferred or accessed through the Internet. Consequently, an online seller of software would be required to collect the sales and/or use tax from Massachusetts consumers of their prewritten software product even if not downloaded by the consumer.
- The sale of prewritten software and upgrades is taxable under existing law, although installation is not subject to tax when billed for separately.
- In general, sales by Software-as-a-Service vendors are treated as sales of access to prewritten software, which is taxable under existing law.
- Licensing of software is treated as a sale subject to the sales and use tax.
- The sales tax applies to all vendors, whether they are sole proprietors, corporations or other forms of business entity.
- Installation of firewalls and spam filtering services for which the vendor charges a monthly fee is subject to tax under existing law.

Conclusion

Despite the repeal of the Computer Services Tax, many vendors need to determine whether their existing product is subject to sales and use tax. This requires the sometimes difficult determination

of whether the vendor's software is being sold or just used by the vendor in providing a nontaxable service. For more information regarding this determination, [see our prior client alert](#).² In TIR 13-7, the Massachusetts DOR indicated it will be issuing additional guidance in the near future on this determination. In the meantime, the determination may require obtaining expert advice from the vendor's tax advisor or seeking a ruling from the Massachusetts DOR.

¹ In light of the retroactive repeal, the Massachusetts DOR provided guidance in TIR 13-7 to vendors who may have collected and/or remitted the tax on Computer Software Services, filed returns and remitted the tax or filed returns and not remitted the tax. Among other things, the TIR provides for an abatement period expiring on December 31, 2013.

² WilmerHale Client Alert, "[Massachusetts DOR Issues Draft Directive on 'Cloud Computing,'](#)" February 21, 2013.

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