Tax *Alert*

Massachusetts Sales and Use Tax on Computer and Software Services: New Law Effective July 31, 2013

As explained by the Massachusetts Department of Revenue in Technical Information Release 13-10, under recently-enacted legislation, certain "computer/software services" performed on or after July 31, 2013 will be subject to the Massachusetts sales and use tax. This *Tax Alert* summarizes the Department's initial guidance found in the Technical Information Release.

Which "Computer/Software Services" Are Subject to the Sales and Use Tax?

"Computer/software services" now subject to the sales and use tax include:

1. computer system design services; and

2. software modification services.

Computer system design services are defined as "the planning, consulting or designing of computer systems that integrate computer hardware, software or communication technologies and are provided by a vendor or a third party."

Software modification services include "the modification, integration, enhancement, installation or con-figuration of standardized software," i.e., customization services with respect to prewritten software.

Taxable "computer/software services" do not include data access, data processing or information management services. Also excluded are personal or professional services that do not constitute computer system design services or software modification services and that are not directly related to a particular systems integration project involving the sale of computer hardware or software, such as (a) services to assess existing computer systems; and (b) training services on the use of modified software.

When Must a Vendor Collect Sales Tax on "Computer/Software Services"?

A vendor must collect Massachusetts sales tax on "computer/software services" on sales sourced to Massachusetts. The following sourcing rules apply in the order of priority listed:

a. If the purchaser receives the service at a business location of the vendor, the retail sale is sourced to that business location of the vendor.

b. If the vendor knows the location where the service is received by the purchaser based on instructions for delivery as provided by the purchaser, tax is due based on that location, when use of this address does not constitute bad faith.

c. If the purchaser does not specify a location for the service to be delivered, the vendor must collect tax based on the purchaser's address that is known to the vendor as provided by the purchaser or based on information known to the vendor (*e.g.*, as collected to complete the sale), such as address information from a payment instrument or credit card, when use of this address does not constitute bad faith.

d. If neither the delivery location nor the purchaser's address can be determined, then the vendor must collect tax based on the address of the vendor from which the sale was made.

In its Technical Information Release, the Department provides the following example: if customized software is downloaded to the purchaser's server, which may be inside or

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outside Massachusetts, and (a) and (b) above do not apply, the sale is sourced to the purchaser's address on the vendor's books and records under (c) above (assuming such information is available and use of the address does not constitute bad faith).

Are There Exceptions to Collection by the Vendor of the Sales Tax on Computer/Software Services?

As is the case with a transaction involving the sale of prewritten computer software, if the purchaser provides the vendor with a Multiple Points of Use Certificate (Form ST-12) with respect to the computer/software services, the vendor is relieved of liability for collecting the sales tax. Instead, the purchaser is required to pay use tax on such computer/software services apportioned to Massachusetts using a reasonable, but consistent and uniform, method of apportionment based on location of use. In addition, the statutory exemptions to the application of the sales and use to tax (for example, sales to exempt purchasers) also apply.

How Are Existing Contracts Treated?

Payments invoiced or billed (or due under the terms of the contract) under existing contracts on or after July 31, 2013 are taxable only to the extent the payment relates to services performed on or after July 31, 2013. The Department of Revenue instructs that computer/software services transaction for July 31, 2013

must be reported and paid with August 2013 transactions by September 20, 2013.

Who May Be Liable If a Vendor Does Not Collect and Remit Sales Taxes?

If a vendor is not required or fails to collect the Massachusetts sales tax, the purchaser must remit the corresponding use tax.

Importantly, officers, members of a partnership or an LLC or employees whose duty it is to pay over the sales and use tax may be personally and individually liable for any unpaid sales and use taxes.

Please contact one of this *Tax Alert*'s authors, Robert M. Finkel or Diana C. Española, to learn more about the implementation of this new legislation.

This Tax Alert provides general information only. It is not intended to provide advice with respect to any specific set of facts, nor is it intended to advise on all developments in the law.

The **MBBP tax practice** focuses on guiding our clients through the minefields of federal and state tax that may impact their transactions, and helping them to structure their transactions in the most tax efficient manner.

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