APPORTIONMENT OF COLORADO SALES AND USE TAX ON COMPUTER SOFTWARE

39-26-102.13

1)   De Minimis rule

   a)   Standardized software does not include software that is designed or developed to the specifications of a specific purchaser. Software designed and developed to the specifications of a specific purchaser shall not be considered standardized software simply because it includes de minimis standardized software as part of its code.

   b)   De minimis standardized software includes:

      i)   The base language used to write the software

      ii)   Prewritten subroutines whose commercial value is negligible

      iii) Prewritten subroutines the purposes of which are purely incidental to the purpose of the software developed for the specific user.

   c)   Standardized software is not de minimis if:

      i)   its purpose is to principally fulfill one or more specifications of the purchaser

      ii)   except with respect to the language software is to be written in, it is identified prior to the purchase in any way as being part of the software

      iii) its value exceeds 25% of the value of the software designed or developed to the specifications of a specific purchaser.

   d)   If a developer purchases standardized software for inclusion in software designed or developed for a specific user and such software is de minimis, the developer shall pay sales tax on the purchase of such standardized software.

2)   Maintenance agreements

   a)   Standardized software does not include maintenance agreements for the maintenance of standardized software. However, if the price of the maintenance agreement includes the price of standardized software, then §39-26-102(13.5)(a)(II)(B), C.R.S. applies and the maintenance agreement must contain a reasonable, separately stated charge for the standardized software.

   b)   De minimis rule with respect to maintenance agreements – If the value of the standardized software included with the maintenance agreement is less than 25% of the price of the maintenance agreement, then the maintenance agreement shall not be considered to include standardized software.

3)   Apportionment of Use Tax for Multiple Points of Use. Colorado sales and use tax is levied on standardized computer software that is concurrently available for use in multiple jurisdictions without regard to the jurisdiction where the purchaser takes delivery or the location or ownership of any server on which the software is installed. Such software is referred herein as Multiple Point of Use (MPU) software. Colorado sales or use tax that is applicable to MPU software shall be apportioned pursuant to the following:

a) A purchaser, who knows at the time of its purchase of taxable computer software that the software will be MPU software should present to the seller a Multiple Points of Use Exemption Certificate and apportion the applicable tax. If the purchaser pays to the seller the unapportioned tax, the purchaser may submit to the department a claim for refund (Form DR 0137) for that portion of the tax collected by the seller that should be apportioned to jurisdictions other than those administered by the Department.

i) Until the department develops a MPU certificate, and in lieu thereof, a purchaser of MPU software can present to the seller a written statement declaring that: the purchase is for MPU Software, the purchaser shall pay appropriate Colorado sales or use taxes, and, pursuant to Department Regulation 39-26-102.13, the seller shall not collect, and is not liable for, Colorado sales or retailer's use taxes for the MPU software.

b) Upon receipt of a MPU certificate, the retailer is relieved of all obligations to collect, pay, or remit the applicable tax and the purchaser shall be obligated to pay and remit the applicable tax and submit a copy of the MPU certificate to the Colorado Department of Revenue, Field Audit Section, 400 S. Colorado Blvd, Denver, Colorado.

c) A purchaser may use any reasonable, but consistent and uniform, method of apportionment that is supported by the purchaser's business records as they exist at the time of the consummation of the sale; except, an apportionment methodology based on the number or employees or users shall be based on the permanent location of those employees or users. Section 39-26-102(15)(b)(II), C.R.S. prohibits an apportionment formula based solely on the number of employees or user who are not permanently in Colorado. However, this prohibition does not prohibit use of an apportionment formula based on the number of seat or concurrent user licenses used in this state, even though one or more license is used by a temporary employee or user.

Example No. 1. Company, which has offices in Colorado and Utah, purchases standardized software and has ten seat licenses that can be used in either state. Eight licenses are used in Colorado by both permanent and temporary employees. Company may apportion Colorado sales tax using a 8:10 ratio, subject to the requirements of subparagraph d, below.

Example No. 2. Same facts as Example No. 1, but Company proposes to apportion Colorado sales tax using the ratio of the number of permanent and temporary employees working in Colorado to the total number of permanent and temporary employees located in both offices. Subsection 39-26-102(15)(b)(II), C.R.S. prohibits this apportionment formula.

d) The apportionment methodology shall be based on a fair apportionment of the total purchase price paid by the purchaser. For example, an out-of-state purchaser buys taxable software from seller for a base price of $50,000 (which includes one license) and $20,000 for four additional licenses. One of the licenses is used in Colorado and the other four licenses are used in another state. The Colorado user pays Colorado tax based on the price for the license used in Colorado, including an apportionment of the bundled base price: $70,000/5 = $14,000. The purchaser may not assign the price of the first license to any single user and the price of the remaining licenses to other users. A reasonable method must reflect the location of use of the software by the purchaser and not the location of the services where the software is installed. An MPU certificate may not be used for computer software received in person by the business purchaser at a business location of the seller for software that is loaded on computer hardware prior to sale. Examples of situations where use of an MPU is appropriate include, but are not limited to the following:

Example 1: Software is installed on a server located in another state but is concurrently available for use by purchaser's employees in Colorado as well as other states. The purchaser gives the seller a copy of its MPU certificate. Part of the sales price of the software will be apportioned to Colorado for sales/use tax purposes.

Example 2: Software is installed on a server located in Colorado but concurrently available for use by purchaser's employees in other states as well as Colorado. The purchaser gives the seller a copy of its MPU certificate. Part of the sales price will be apportioned to those other states for sales/use tax purposes.

Example 3: A business in Colorado purchases an enterprise license that allows the purchaser to make copies of software (either from a master disk or downloaded copy) and those copies will be concurrently available for use at the purchaser's business locations in various jurisdictions. Part of the sales price of the enterprise license will be apportioned to Colorado for sales/use tax purposes.

e)   A MPU Certificate must be filed for each purchase of taxable software whose tax is subject to apportionment.