CITY OF CHICAGO
DEPARTMENT OF FINANCE
PERSONAL PROPERTY LEASE TRANSACTION TAX RULING

Pursuant to Sections 2-32-080, 2-32-096, 3-4-030, 3-4-150 and 3-32-120 of the Municipal Code of Chicago, the City of Chicago hereby adopts and promulgates Personal Property Lease Transaction Tax Ruling #12, effective July 1, 2015.

Dated: June 9, 2015

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Dan Widawsky
Comptroller

Personal Property Lease Transaction Tax Ruling #12

Subject: Nonpossessory Computer Leases - Exemption 11

Effective Date: July 1, 2015

Ordinance Provisions

1.   Section 3-32-030(A) of the Municipal Code of Chicago ("Code") states:

Except as otherwise provided in this chapter, a tax is imposed upon: (1) the lease or rental in the city of personal property, or (2) the privilege of using in the city personal property that is leased or rented outside the city. The incidence of the tax and the obligation to pay the tax are upon the lessee of the personal property.

2.   Code Section 3-32-020(I) states, in pertinent part:

"Lease" or "rental" means any transfer of the possession or use of personal property, but not title or ownership, to a user for consideration, whether or not designated as a lease, rental, license or by some other term, and includes a "nonpossessory lease".

The term "nonpossessory lease" means a lease or rental wherein use but not possession of the personal property is transferred and includes, but is not limited to, leased time on or use of ... computers, computer software, ... or data processing equipment, whether the time is fully or partially utilized, and specifically includes a "nonpossessory computer lease".

The term "nonpossessory computer lease" means a nonpossessory lease in which the customer obtains access to the provider's computer and uses the computer and its software to input, modify or retrieve data or information, in each case without the intervention (other than de minimis intervention) of personnel acting on behalf of the provider. The term "nonpossessory computer lease" includes, but is not limited to, time

sharing or time or other use of a computer with other users. In the case of a nonpossessory computer lease, the location of the terminal or other device by which a user accesses the computer shall be deemed to be the place of lease or rental and the place of use of the computer for purposes of the tax imposed by this chapter.

3.   Code Section 3-32-020(R) provides:

"Use" means the exercise of any right to or power over personal property by a lessee incident to the lease or rental of that property including, but not limited to, the permanent or temporary storage, stationing or garaging of personal property by the lessee. "Use" by a lessee includes not only the use of personal property directly by the lessee but also the use of personal property by the lessee's agents, representatives or other authorized designees.

4.   Code Section 3-32-050(A)(11) ("Exemption 11") provides:

Notwithstanding any other provision of this chapter, the following leases, rentals or uses shall be exempt from the tax imposed by this chapter:

* * *

Under rules to be prescribed by the department, the nonpossessory lease of a computer in which the customer's use or control of the provider's computer is de minimis and the related charge is predominantly for information transferred to the customer rather than for the customer's use or control of the computer, such as the nonpossessory lease of a computer to receive either current price quotations or other information having a fleeting or transitory character.

5.   Code Section 3-32-080(B) states: "If a lessor fails to collect the tax imposed by this chapter from a lessee, then the lessee shall file a return and pay the tax directly to the department ... "

Taxability

6.   The Chicago Personal Property Lease Transaction Tax ("lease tax") applies to charges that are paid for the use of personal property, including charges paid pursuant to a nonpossessory computer lease, unless such charges are exempt under Exemption 11, discussed below. Charges that are not subject to the lease tax may be subject to another tax (such as the City's amusement tax, Code Chapter 4-156). If a lessee (commonly referred to as "customer") pays a lessor (commonly referred to as "provider") primarily for the ability to use the provider's computer to input, modify or retrieve data or information, the charge is primarily for the customer's use or control of the provider's computer and is taxable. Examples of transactions that are subject to lease tax include charges incurred:

a. to perform legal research or similar on-line database searches (*see Meites v. City of Chicago*, 184 Ill. App. 3d 887 (1989));

b. to obtain consumer credit reports (*see* Personal Property Lease Transaction Tax Ruling # 9 (June 1, 2004));

c. to obtain real estate listings and prices, car prices, stock prices, economic statistics, weather statistics, job listings, resumes, company profiles, consumer profiles, marketing data, and similar information or data that has been compiled, entered and stored on the provider's computer; and

d. to perform functions such as word processing, calculations, data processing, tax preparation, spreadsheet preparation, presentations and other applications available to a customer through access to a provider's computer and its software. These last examples are sometimes referred to as cloud computing, cloud services, hosted environment, software as a service, platform as a service, or infrastructure as a service.

Entertainment materials such as copyrighted books, musical and other sound recordings, feature length and episodic films are not "data or information" as those terms are used in the definition of a "nonpossessory computer lease."

7. Charges for services not subject to lease tax: If a customer pays a provider to write a report, article or similar document consisting primarily of the provider's own observations, opinions, ideas or analysis (hereafter collectively referred to as a "report"), the charge is for the service of writing the report for that customer and is not subject to lease tax, even if the report is accessed electronically. Likewise, if a customer pays a provider to create a database, the charge is for the service of creating the database for that customer and is not subject to lease tax, even if the database is accessed electronically.

8. Charges for storage of customer information not subject to lease tax: Pursuant to Personal Property Lease Transaction Tax Ruling # 5 (June 1, 2004), and as continued in Amended Ruling # 5 (September 1, 2013), "charges for the storage of information on the [provider's] computer by the user, which will be used at a later date by the user, and not in the immediate processing of information, shall be deemed a usage of the computer at the computer location and not at the access terminal; because this is not an actual use of the computer by means of an access terminal but instead is a charge for storage at the computer location. If at a later date, a charge is made for accessing the stored information from a terminal located in Chicago, such access charge would be taxable." Thus, charges for storing a customer's data on the provider's computer are not subject to lease tax if the provider's computer is outside of the City, so long as the charges are solely for storage.

9.   Exemption 11 exempts from the application of lease tax a nonpossessory lease of a computer where (a) the customer's use or control of the provider's computer is de minimis and (b) the related charge is predominantly for information transferred to the customer rather than for the customer's use or control of the computer. When the City Council amended the lease tax ordinance to add Exemption 11, it stated in the preamble that "certain so-called price quotation services and news services" would qualify under Exemption 11, whereas "legal research and similar on-line computer database searches" would not. City Council Journal 11/10/95 at 59138-9. As explained below, exempt use may be demonstrated either (a) by access to information or data which is entirely passive (such as streaming data), without interactive use, or, in other cases, (b) by access to materials that are primarily proprietary, such as copyrighted newspapers, newsletters or magazines.

10.   Passive access to information is an exempt use of the provider's computer. In the case of a stock market "ticker-tape," where the customer simply receives the one-way dissemination of a scrolling list of current stock prices for a set group of businesses. In that case, the customer's use of the provider's computer is de minimis, as there is no search function (or at most a single or infrequent "channel" selection), and the charge is predominantly for information transferred to the customer (in the form of one-way "streaming").

11.   Access to materials that are primarily proprietary is also an exempt use of the provider's computer. The customer may pay a subscription fee for the ability to download or otherwise access the desired information or data, and the subscription fee may allow the customer to use a search function to locate the information or data that the customer wishes to download or otherwise access, but the value of the search function is subordinate to the value of the information or data that the customer wishes to download or otherwise access (*i.e.*, the charge is predominantly for the information or data). This will typically apply in the case of a web site or "app" that allows a subscriber to download or otherwise access materials that are primarily proprietary, such as copyrighted newspapers, newsletters or magazines, that the subscriber would have to purchase if the materials were acquired or accessed through other means, such as a purchase at a "bricks and mortar" store.

12.   By contrast, a clear example of a product not covered by Exemption 11 is a legal research database. There, the customer's use of the provider's computer is extensive, as a large part of what the customer does is perform searches by entering terms that are likely to be found in documents (such as case opinions) that are of interest to the customer. Although the customer ultimately wants to find pertinent documents, the charge is predominantly for the ability to perform the searches that are necessary to locate those documents.

13.   Exemption 11 ends with the phrase, "such as the nonpossessory lease of a computer to receive either current price quotations or other information having a fleeting or transitory character." The use of the words "such as" makes clear that this is an example of information for which an exemption may be permitted; it is not a sufficient condition for exemption if the two-pronged test is not otherwise met. As a general rule, this means that a

subscription to an interactive web site will be subject to the lease tax, and will not be exempt, even if most or all of the information available on the web site is fleeting or transitory. This would include, for example, a web site that provides financial research, information and analytical tools.

Bundled Charges

14.   Where a charge is "bundled" by including both taxable and non-taxable/exempt elements for purposes of lease tax, the rules set forth in Personal Property Lease Transaction Tax Ruling #3 (June 1, 2004) will apply. That ruling states, among other things, that "[i]f the lessor fails to separate the lease or rental portion of the price from the non-lease or non-rental portion, the entire price charged shall be deemed taxable, unless it is clearly proven that at least 50% of the price is not for the use of any personal property." *See also* Code Section 3-32-020(K) (providing that the taxable "lease price" does not include charges that are not for the use of personal property, but only if those charges are separately stated and optional). Therefore, if a bundled charge is *primarily* for the customer's use or control of the provider's computer, then the entire charge is taxable.

Sourcing - Collection or Direct Payment

15.   Code Section 3-32-020(I) provides: "In the case of a nonpossessory computer lease, the location of the terminal or other device by which a user accesses the computer shall be deemed to be *the place of lease or rental and the place of use* of the computer for purposes of the tax imposed by this chapter." (Emphasis added). Thus, Code Section 3-32-050(A)(1), which exempts "[t]he use in the city of personal property *leased or rented outside the city* if the property is primarily used (more than 50 percent) outside the city" (emphasis added), does not apply to nonpossessory computer leases.

16.   The Department of Finance ("Department") will utilize the rules set forth in the Mobile Telecommunications Sourcing Conformity Act, 35 ILCS 638, to determine sourcing for the lease tax. In general, this means that the lease tax will apply to customers whose residential street address or primary business street address is in Chicago, as reflected by their credit card billing address, zip code or other reliable information.

17.   Where a customer has some employees or other individuals who use the provider's computer from terminals or devices located in Chicago, and some employees or other individuals who use the provider's computer from terminals or devices located outside of Chicago, a charge that covers both the Chicago use and the non-Chicago use should be apportioned. For any given individual assigned an access code, seat, license or other ability to use the provider's computer, all of that individual's use will be presumed to take place at the individual's principal office location.

18.   If a provider has no information to indicate that any of its customer's use will take place in Chicago, then the provider will not be required to collect the lease tax from its customer.

19.   If a provider has information to indicate that some of its customer's use will take place in Chicago but no information of its own that allows it to perform a reasonable apportionment between the customer's Chicago use and non-Chicago use, then the following rules shall apply:

a. The provider may rely on actual data or estimates provided by the customer. The provider should then collect tax on the charges apportioned to use inside Chicago. If a customer does not supply either actual data or estimates, the provider should collect tax based on the assumption that all use takes place in Chicago.

b. In the alternative, a provider will not be required to collect the lease tax from its customer if (i) the customer has 10 or more employees or other individuals assigned an access code, seat, license or other ability to use the provider's computer, and (ii) the customer supplies the provider with written confirmation, from the Department, that the customer is registered to pay lease tax. In that case, pursuant to Code Section 3-32-080(B), the customer shall file a return and pay the tax directly to the Department.

Nexus

20.   Because the lease tax is imposed on the customer, and applies only to activity that takes place within Chicago (*i.e.*, lease, rental or use), there is no question that the tax applies whenever the customer's lease, rental or use of the provider's computer takes place in Chicago. *See* Code Section 3-32-020(I) ("In the case of a nonpossessory computer lease, the location of the terminal or other device by which a user accesses the computer shall be deemed to be the place of lease or rental and the place of use of the computer for purposes of the tax imposed by this chapter."). The issue of nexus arises, at most, with regard to the question of whether a given provider has an obligation to *collect* the tax from its customer. That issue is beyond the scope of this ruling, and any provider with a question about that topic should consult its attorneys. In addition, a provider may request a private letter ruling from the Department, pursuant to Uniform Revenue Procedures Ordinance Ruling #3 (June 1, 2004).

Implementation

21.   In order to allow affected businesses sufficient time to make required system changes, the Department will limit the effect of this ruling to periods on and after September 1, 2015. This paragraph does not release or otherwise affect the liability of any business that failed to comply with existing law before the effective date of this ruling.