



# This Week in State Tax (TWIST)

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## Florida: Telecom Company Entitled to Refund on Electronically Delivered Software

Recently, a Florida circuit court held that a taxpayer's sales of electronically delivered software to an affiliate was not subject to sales tax. The taxpayer acted as a procurement company making centralized purchases of equipment, software, and services for its operating affiliates. The software at issue was electronically delivered to the purchasing company and stored on servers located at a virtual warehouse dedicated to the operating entity. It was then electronically delivered to an individual cell site owned by the operating affiliate. The taxpayer (purchasing company) collected sales tax on the sale of the electronically delivered software and remitted such tax to the Department of Revenue. The taxpayer later filed a refund claim for overpayment. The claim was initially approved in email communication from the Department, and the taxpayer refunded the sales tax back to the operating affiliate that paid the sales tax, as required under Florida law.

Florida does not tax sales of electronically delivered software as it is not considered a sale of tangible personal property or a taxable service. While it was undisputed that electronically delivered software is not taxable, the Department argued that the software was subject to sales tax because it was a service sold with tangible personal property. The circuit court disagreed for two reasons: (1) electronically delivered software is an intangible, not a service, and (2) the software at issue was not sold with tangible personal property. First, the court reviewed numerous authorities from Florida and other states and concluded that electronically delivered software is intangible property that is not subject to sales tax. The Department, the court noted, erroneously relied on a rule providing that *customized* software is a service for sales tax purposes. This was not customized software. Second, the court determined that even if the software was a service, the taxpayer had established that it did not sell any tangible personal property to its affiliate along with the software. The Department also argued that the taxpayer did not produce sufficient documentation to support the refund claim; it appeared to be arguing that the court's review should be limited to evidence presented during the Department's audit of the refund claim and the court should not consider the documents and testimony provided at trial. The court disagreed, noting that as a finder of fact, it must base its decision on the evidence received at trial. That evidence, which included SAP sales tax reconciliation reports and other documentation, sufficiently supported the refund claim, which the court granted. Please contact Amanda Ribeiro with questions on *T-Mobile Resources, LLC v. Florida Dept. of Revenue*.

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