

ATTORNEY GENERAL OF THE STATE OF NEW YORK
WESTCHESTER REGIONAL OFFICE

In the Matter of an investigation by
LETITIA JAMES
New York State Attorney General of

AOD No. 21-018

MICROSOFT CORPORATION,

Respondent,

ASSURANCE OF DISCONTINUANCE

The Office of the Attorney General of the State of New York (the “OAG”) commenced an investigation pursuant to Executive Law § 63 (12) and General Business Law (“GBL”) Article 22-A, § 349 into certain business practices regarding the collection of New York sales tax for Xbox products by Microsoft Corporation (“Microsoft”). This Assurance of Discontinuance (“Assurance”) contains the findings of the OAG’s investigation and sets forth the good faith resolution agreed to by Microsoft and the OAG (collectively, “the Parties”)

FINDINGS

1. Microsoft is a corporation formed in the state of Washington whose principal address is One Microsoft Way, Redmond, Washington 98052. Microsoft’s internet address is <http://www.microsoft.com>.
2. On its website, Microsoft offers for sale, *inter alia*, a variety of Xbox products including consoles, games, accessories and gear.
3. When consumers attempt to purchase an Xbox product online via Microsoft’s website, they are asked to enter their zip code as part of the sold to address. Microsoft uses the

zip code to determine the amount of New York sales tax that should be charged in connection with the purchase. Prior to the remediation described in paragraph 12 below, some consumers in New York were charged an incorrect amount of New York sales tax.

4. Specifically, consumers are asked to input their entire zip code +4. However, prior to the remediation by Microsoft described in paragraph 12 below, if a consumer only entered the zip code, without the +4, Microsoft nonetheless processed the transaction.

5. If a consumer entered their zip code without the +4, and lived within a zip code where more than one New York sales tax rate is charged depending on the specific address within the zip code, Microsoft charged the highest New York sales tax charged within the zip code.

6. As a result, if a consumer entered their zip code without the +4, and lived within a zip code where more than one New York sales tax is charged, Microsoft charged the highest New York sales tax rate within the zip code even if that consumer lived within a portion of the zip code where a lower New York sales tax rate was applicable. Microsoft did not retain the amount of New York sales tax overcharge; the entire amount of New York sales tax collected by Microsoft was remitted to tax authorities. The total amount of New York sales tax overcharge was approximately \$150,000.

7. In January 2019 the OAG received a complaint from a consumer who lives in Bronxville, NY. The consumer's address has a zip code of 10708. The zip code 10708 includes Bronxville, NY and parts of Yonkers, NY.

8. The consumer did not include the zip code +4 in his online order.

9. Microsoft charged the consumer the sales tax rate applicable in Yonkers, NY, even though the consumer lives in Bronxville, NY and should have paid the lower sales tax rate

that is applicable there. Presently, the sales tax rate in Bronxville, NY is 8.38%, while the sales tax rate in Yonkers, NY is 8.88%.

10. In response to the complaint, Microsoft issued a refund to the consumer in the amount of the New York sales tax overcharge.

11. After further inquiry by the OAG, Microsoft explained its method of handling consumer orders that do not include the zip code +4, as described above.

12. Microsoft has now instituted a new procedure for handling consumer orders that do not include the zip code +4 to reasonably ensure that the proper New York sales tax rate is applied to the purchase, not necessarily the highest New York sales tax rate charged within the zip code.

13. New York Executive Law § 63(12) prohibits persons or businesses from engaging in repeated fraudulent or illegal acts or otherwise demonstrating persistent fraud or illegality in the carrying, conducting or transaction of business.

14. New York General Business Law (“GBL”) § 349 prohibits deceptive acts or practices.

15. By reason of the foregoing, the OAG finds that Microsoft’s conduct as described above constitute repeated violations of Executive Law § 63(12) and GBL § 349.

16. Microsoft admits to the OAG’s factual findings contained in paragraphs 1-12 above but does not admit that its conduct was in violation of law.

17. Microsoft has fully cooperated with the OAG’s investigation.

18. The OAG finds the relief and agreement contained in this Assurance of Discontinuance (“the Assurance”) appropriate and in the public interest.

THEREFORE, the OAG is willing to accept this Assurance pursuant to Executive Law § 63(15) in lieu of commencing a statutory proceeding for violations of GBL § 349 and Executive Law § 63(12) based on the conduct described above.

IT IS HEREBY UNDERSTOOD AND AGREED, by and between the Parties:

RELIEF

19. This Assurance binds Microsoft and corporate successors and assigns

20. Microsoft shall reasonably ensure that the applicable and correct New York sales tax is charged in connection with substantially all Xbox purchases, regardless of whether the consumer provides their full zip code +4.

21. Microsoft shall not engage, or attempt to engage, in conduct in violation of GBL § 349 and Executive Law § 63(12). Microsoft expressly agrees and acknowledges that a default in the performance of any obligation under this Assurance is a violation of the Assurance, and that the OAG thereafter may commence a civil action or proceeding for violations of GBL § 349 and Executive Law § 63(12) based on the conduct described above, in addition to any other appropriate investigation, action, or proceeding.

22. In connection with this Assurance, Microsoft shall provide the OAG, within 30-days of the date of execution of this Assurance, with proof that it has implemented procedures which reasonably ensure that the correct New York sales tax rate is applied to all online Xbox purchases made through its website.

23. If a consumer files a complaint with the OAG demonstrating that Microsoft charged the consumer the incorrect New York sales tax on an online Xbox purchase made through its website, Microsoft shall promptly refund the overcharge and provide written proof to the OAG that it has done so.

Payment to City of Yonkers School District

24. In consideration of the making and execution of this Assurance, Microsoft shall make a payment to City of Yonkers School District in the amount of \$150,000. The payment shall be made in full upon execution of this Assurance. The funds will be used by the City of Yonkers School District to promote remote learning by homeless students through provision of supplemental resources such as iPads, laptops, Wi-Fi connectivity and assistive technology for communication.

25. Payment shall be made by attorney check, corporate check or certified check, or bank draft, which shall be made payable to the “City of Yonkers School District”, and shall reference Assurance No. 21-018; payment shall be addressed to the attention of Assistant Attorney General Gary Brown, State of New York, Office of the Attorney General, Westchester Regional Office, 44 S. Broadway, 5th Floor, White Plains, NY 10601.

MISCELLANEOUS

Subsequent Proceedings:

26. In any subsequent investigation, civil action, or proceeding by the OAG to enforce this Assurance, for violations of the Assurance, or if the Assurance is voided pursuant to paragraph 32, *supra*, Microsoft agrees and acknowledges that in such event:

- a. the OAG may use statements, documents or other materials produced or provided by Microsoft prior to or after the effective date of this Assurance;
- b. waives any objection based upon inconvenient forum or venue;
- c. evidence of a violation of this Assurance shall constitute prima facie proof of a violation of the applicable law pursuant to Executive Law § 63(15).

27. If a court of competent jurisdiction determines that Microsoft has violated the Assurance, Microsoft shall pay to the OAG the reasonable cost, if any, of obtaining such determination and of enforcing this Assurance.

28. All terms and conditions of this Assurance shall continue in full force and effect on any successor, assignee, or transferee of Microsoft. Microsoft shall include any such successor, assignment or transfer agreement a provision that binds the successor, assignee or transferee to the terms of the Assurance

29. Nothing contained herein shall be construed as to deprive any person of any private right under the law.

30. Any failure by the OAG to insist upon the strict performance by Microsoft of any of the provisions of this Assurance shall not be deemed a waiver of any of the provisions hereof. The OAG, notwithstanding that failure, shall have the right thereafter to insist upon the strict performance of the provisions of this Assurance to be performed by Microsoft.

Communications:

31. All notices, reports, requests, and other communications pursuant to this Assurance must reference Assurance No. 21-018, and shall be in writing and shall, unless expressly provided otherwise herein, be given by hand delivery; express courier; or electronic mail at an address designated in writing by the recipient, followed by postage prepaid mail, and shall be addressed as follows:

If to the Respondent, to:

Microsoft Corporation
One Microsoft Way
Redmond, Washington 98051
Attention: Melissa Daniels Zaineb, Esq.

If to the OAG, to:

New York Attorney General
Westchester Regional Office
44 South Broadway-5th Floor
White Plains, New York 10601
Attention: Gary Brown,
Assistant Attorney General-in-Charge
Westchester Regional Office

Representations and Warranties:

32. The OAG has agreed to the terms of this Assurance based on, among other things, the representations made to the OAG by Microsoft and their counsel and the OAG's own factual investigation as set forth in Findings, paragraphs 1-12 above. Microsoft represents and warrants that neither it nor its counsel has made any material representations to the OAG that are inaccurate or misleading. If any material representations by Microsoft or its counsel are found later to be inaccurate or misleading, this Assurance is voidable by the OAG in its sole discretion.

33. No representation, inducement, promise, understanding, condition, or warranty not set forth in this Assurance has been made to or relied upon by Microsoft in agreeing to this Assurance.

34. Microsoft represents and warrants, through the signatures below, that the terms and conditions of this Assurance are duly approved. Microsoft further represents and warrants that Jon Palmer, as the signatory to this Assurance, is a duly authorized officer acting at the direction of the Board of Directors of Microsoft.

General Principles:

35. Microsoft agrees not to take any action or to make or permit to be made any public statement denying, directly or indirectly, any finding in the Assurance or creating the impression that the Assurance is without legal or factual basis.

36. Nothing contained herein shall be construed to limit the remedies available to the OAG in the event Microsoft violates the Assurance after its effective date.

37. This Assurance may not be amended except by an instrument in writing signed on behalf of the Parties to this Assurance.

38. In the event any one or more of the provisions contained in this Assurance shall for any reason be held by a court of competent jurisdiction to be invalid, illegal, or unenforceable in any respect, in the sole discretion of the OAG, such invalidity, illegality, or unenforceability shall not affect any other provision of this Assurance.

39. Microsoft acknowledges that it has entered this Assurance freely and voluntarily and upon due deliberation with the advice of counsel.

40. Microsoft shall be governed by the laws of the State of New York without regard to any conflict of laws principles.

41. This Assurance may be executed in multiple counterparts by the parties hereto. All counterparts so executed shall constitute one agreement binding upon all parties, notwithstanding that all parties are not signatories to the original or the same counterpart. Each counterpart shall be deemed an original to this Assurance, all of which shall constitute one agreement to be valid as of the effective date of this Assurance. For purposes of this Assurance, copies of signatures shall be treated the same as originals. Documents executed, scanned and transmitted electronically and electronic signatures shall be deemed original signatures for purposes of this Assurance and all matters related thereto, with such scanned and electronic signatures having the same legal effect as original signatures.

42. This assurance is not intended for the use of any third party in any other proceeding.

43. This assurance is not intended, and should not be construed, as an admission of liability by Microsoft.

44. The effective date of this Assurance shall be March 8, 2021.

LETITIA JAMES
New York Attorney General
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New York, NY 10005

By: G. S. Brown
GARY S. BROWN, ESQ.
Assistant Attorney General-in-Charge
Westchester Regional Office
44 South Broadway
White Plains, NY 10601

MICROSOFT CORPORATION

By: [Signature]
Jon Palmer
Assistant Secretary
Microsoft Corporation
One Microsoft Way
Redmond, WA 98052