



STATE OF ARKANSAS
**Department of Finance
and Administration**

REVENUE LEGAL COUNSEL

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October 22, 2019

[REDACTED]

via email: [REDACTED]

RE: Sales Tax- digital subscriptions
Opinion 20191008

Dear [REDACTED]:

I am writing in response to your October 8, 2019 request for a revenue legal opinion:

We are requesting an opinion regarding sales tax being collected by our vendor [REDACTED] and their product [REDACTED]. We are under the impression that our business with [REDACTED] is not taxable. We have no rights to the digital content titles or the digital media platform under the attached agreement. We are paying for access in the same manner as a subscription database.

Additionally, we are not sure if our business with them can be considered a "Sale" as defined in ACA 26-52-103, nor are we sure that we would be considered the "End user" as defined in the same.

RESPONSE

The sale of digital versions of subscriptions to newspapers, journals, periodicals, and academic databases is exempt from Arkansas sales and use tax because these items are neither "tangible personal property" nor "specified digital products" as defined by state tax law. However, the sale of digital subscriptions to ebooks, streaming audio, and streaming video services is taxable as a sale of "specified digital products." A library is the "end user" of a subscription to specified digital products that it purchases for the benefit of its patrons.

Discussion

Arkansas Gross Receipts Tax, also referred to as Sales Tax, is generally applicable to the sale of tangible personal property and certain specifically enumerated taxable services. *See generally* Ark. Code Ann. §§ 26-52-301 *et seq.* (Supp. 2017); *see also* 2008-3 Arkansas Gross Receipts Tax Rules. The tax is computed based on the total value of compensation paid for the taxable property or service. Ark. Code Ann. § 26-52-103(19)

(Supp. 2017); *see also* Arkansas Gross Receipt Tax Rule GR-3(H). When a sale of tangible personal property or the performance of such an enumerated service occurs in Arkansas, a taxable transaction occurs, and the tax should be collected and remitted. Arkansas Gross Receipts Tax Rule GR-5. The gross receipts derived from the sale of newspapers and from the sale of publications through regular subscription are exempt from state sales tax. Ark. Code Ann. § 26-52-401(4), (14); Arkansas Gross Receipts Tax Rule GR-48.

The Arkansas Compensating (Use) Tax is due on the purchase of any tangible personal property that is purchased out of state and brought into Arkansas for use, storage, consumption, or distribution. Ark. Code Ann. § 26-53-106 (Supp. 2017). “Use,” with respect to tangible personal property, means the exercise of any right or power over tangible personal property incident to the ownership or control of that tangible personal property. Ark. Code Ann. § 26-53-102(30)(A) (Supp. 2017). The Compensating (Use) Tax is assessed when the transportation of the property has come to rest or when the property has become commingled with the general mass of property in the state. Ark. Code Ann. § 26-53-106(b) (Supp. 2017); *see also Martin v. Riverside Furniture Corp.*, 292 Ark. 399, 401-02, 730 S.W.2d 483, 485 (1987). Once the transportation has ceased or the property is commingled, the property is no longer in the stream of interstate commerce and is subject to the Compensating (Use) Tax. *See Martin*, 292 Ark. at 402, 730 S.W.2d at 485; *see also Skelton v. Federal Express Corp.*, 259 Ark. 127, 131, 531 S.W.2d 941, 94 (1976). There is a presumption that tangible personal property shipped, mailed, expressed, transported, or brought to this state by a purchaser was purchased from a vendor for storage, use, distribution, or consumption in this state. Ark. Code Ann. § 26-53-106(d)(2) (Supp. 2017). The tax shall be paid at the rate of the location of delivery. Ark. Code Ann. § 26-52-521(b)(2) (Supp. 2017).

The Arkansas Code defines “tangible personal property” as “personal property that can be seen, weighed, measured, felt or touched or that is in any other manner perceptible to the senses.” Ark. Code Ann. § 26-52-103(30)(A) (Supp. 2017). Although a user can “see” digital versions of newspapers, journals, periodicals, academic databases, ebooks, and digital video and can “hear” digital video and digital audio when the user opens a file on a computer or other electronic device, when the library purchases these digital materials, what the library actually purchases is data in electronic form. Data in electronic form cannot be seen, weighed, measured, felt, or touched. Accordingly, these products are not taxable as tangible personal property.

Some types of electronic data, even though they are not tangible personal property,¹ are nevertheless taxable as “specified digital products.”² The State of Arkansas imposes a tax on the gross receipts derived from the sale of specified digital products to an end user with the right of permanent use or less than permanent use granted by the seller, regardless of whether the use is conditioned on continued payment by the purchaser. Ark.

¹ *See* Ark. Code Ann. § 26-52-103(29)(C) (Supp. 2017): “‘Tangible personal property’ does not include specified digital products or a digital code.”

² *See* Act 141, now codified in part as Ark. Code Ann. § 26-52-301(1)(B) (Supp. 2017).

Code Ann. § 26-52-301(1)(B) (Supp. 2017). The tax also applies to the sale of a subscription for digital audio-visual work and digital audio work to an end user who does not have the right of permanent use granted by the seller and for which the use is contingent on continued payments by the purchaser. *Id.* at § 26-52-301(3)(C)(iii)(a). “End user” means a person who purchases specified digital products or the code for specified digital products for his or her own use or for the purpose of giving away the product or code. Ark. Code Ann. § 26-52-103(16)(A) (Supp. 2017). The term “end user” does not include a person who receives by contract a product transferred electronically for further commercial broadcast, distribution, redistribution, or exhibition of the product, in whole or in part, to another person or persons. *Id.* at § 26-52-103(16)(B).

The statute defines “specified digital products” to mean, when transferred electronically, digital audio works, digital audio-visual works, and digital books. *Id.* at § 26-52-103(29). The term “digital audio works” means works that result from the fixation of a series of musical, spoken, or other sounds, including ringtones. *Id.* at § 26-52-103(9). “Digital audio-visual works” means a series of related images that, when shown in succession, impart an impression of motion, together with accompanying sounds. *Id.* at § 26-52-103(10). “Digital books” means works that are generally recognized in the ordinary and usual sense as “books.” *Id.* at § 26-52-103(11).

When a library purchases a subscription to specified digital products, a sale occurs. This is because the statute specifically taxes “the sale of a subscription for digital audio-visual work and digital audio work to an end user that does not have the right of permanent use granted by the seller and the use is contingent on continued payments by the purchaser.” Ark. Code Ann. § 26-52-301(3)(C)(iii)(a) (Supp. 2017).

Further, a library that purchases a subscription to specified digital products for distribution to its patrons is an end user within the meaning of the statute. This is because the statute defines “end user” as a person who purchases specified digital products or the code for specified digital products for his or her own use or for the purpose of giving away the product or code. Ark. Code Ann. § 26-52-103(16)(A) (Supp. 2017). When a library purchases specified digital products or the code for specified digital products, it does so for its own use – *i.e.*, the use of making the specified digital products available to the library’s patrons. The patron is not an end user within the meaning of the statute because the patron is not the person who purchases the specified digital product.

A library would not pay sales tax on the purchase of online subscriptions to newspapers, journals, periodicals, or academic databases because those products are not “specified digital products” within the meaning of the statute. Applying the definitions above, online subscriptions to newspapers, journals, periodicals, and academic databases are not “digital audio works” because they are not works that result from a series of musical, spoken, or other sounds, including ringtones. They are not “digital audio-visual works” because they are not a series of related images that, when shown in succession, impart an impression of motion, together with accompanying sounds. And they are not “digital books” because they are not works that are generally recognized in the ordinary and usual

sense as “books.” Because these items are not “digital audio works,” “digital audio-visual works,” or “digital books,” they are not taxable as “specified digital products.”

However, the library would pay sales and use tax for access to digital audio, digital video, and ebooks because those items are “specified digital products” within the meaning of the statute and, therefore, taxable. Specifically, digital audio files are “digital audio works,” digital video files are “digital audio-visual works,” and ebooks are “digital books.” These items are taxable as specified digital products, regardless of whether the library purchases them outright or purchases access to these materials through a streaming service. *See* Ark. Code Ann. § 26-52-301(3)(C)(iii)(a) (Supp. 2017) (levying sales tax on sale of subscription for digital audio-visual work and digital audio work to end user who does not have the right of permanent use granted by seller and for which use is contingent on continued payments by purchaser).

This opinion is based on my understanding of the facts as set out in your inquiry and as current Arkansas laws and rules govern those facts. Any changes in the facts or law could result in a different opinion. Only the requestor and its vendors may rely on this opinion, and only to the extent that all material facts relative to the sale or transaction in question are contemplated by your legal opinion request and this legal opinion. Pursuant to Arkansas Gross Receipts Tax Rule GR-75(B), this opinion only will be binding on the Department for three (3) years from the date of issuance.

A copy of the Arkansas Gross Receipts Tax Rules referenced in this letter is available online at http://www.dfa.arkansas.gov/offices/policyAndLegal/Documents/et2008_3.pdf.

Sincerely,

A handwritten signature in blue ink that reads "Brad Young". The signature is written in a cursive style with a large, looping "Y" at the end.

Brad Young, Attorney
Revenue Legal Counsel