



TAXPAYER INFORMATION RULING LR17-011

June 26, 2017

Douglas A. Ducey
Governor

David Briant
Director

Thank you for your letter requesting a taxpayer information ruling on behalf of your unnamed client. ("Company"). Specifically, you requested a ruling regarding whether Company is required to collect and remit transaction privilege tax on products sold on the Marketplace or on the services the Company provides to its vendors. Pursuant to Arizona Revised Statutes (A.R.S.) § 42-2101, the Arizona Department of Revenue ("Department") may issue taxpayer information rulings to taxpayers and potential taxpayers on request.

ISSUE:

Whether the Company is required to collect and remit transaction privilege tax on products sold on the Marketplace?

RULING:

Based on the facts and documentation provided, the Department rules as follows:

The Company is a retailer making sales of tangible personal property on the Marketplace subject to Arizona's transaction privilege tax under the retail classification.

FACTS ASSERTED BY COMPANY:

The following are facts excerpted from your letter.

The Company is engaged in the business of developing and operating a website ("Marketplace") that enables various unrelated persons ("Vendors") to offer their products for sale to Consumers located within Arizona and in other states. The Company's Vendors are located within and outside Arizona.

In a typical transaction, a Consumer visits the Marketplace for [a] product that he or she desires to purchase. The Vendor is identified on the Marketplace. Once the Consumer places his or her order, the Company is responsible for processing the order, providing the Vendor with the purchase order information, and processing the payment from the Consumer. The Company charges a fee for providing these services, which is *** of the product's purchase price ("Processing Charge"). As a result, the Company remits *** of the purchase price collected from the Consumer to the Vendor. The Company remits to the Vendor 100 percent of any funds received from the Consumer for shipping and handling.¹

¹ Generally, the Vendor bears the cost of shipping their products to the Consumers. Consequently, the Company infrequently collects a separate shipping and handling charge from the Consumer.

The Vendor is responsible for developing, designing, and manufacturing the products listed on the Marketplace. In addition, the Vendor is responsible for shipping its products to the Consumer. The Vendor ships its products to the Consumer via a third party carrier. The Company does not have any inventory.

If the Consumer has an issue with his or her purchase on the Marketplace, the Company will process the returned item and refund to the Consumer any funds collected at the time that the product was purchased (e.g., purchase price, shipping charges, handling charges). The Company charges the Vendor for any refunds paid to the Consumer and records the amount previously paid out to the Vendor as a receivable. The Company will collect these funds back once the Vendor runs another deal through the Company's website.

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The Company is a limited liability company organized outside Arizona. It is headquartered in a state other than Arizona.

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Based on the activities performed by the Company's employees in Arizona the Company may have a transaction privilege and use tax filing obligation ("nexus") in Arizona. For purposes of this ruling request, we assume that the Company has nexus with Arizona for transaction privilege and use tax purposes.

DISCUSSION & LEGAL ANALYSIS:

Arizona imposes a transaction privilege tax on the privilege of conducting business in the State of Arizona. The authority to levy the transaction privilege tax is found in Arizona Revised Statutes (A.R.S.) § 42-5008. The tax is levied on the seller, rather than the purchaser. However, the seller is ultimately liable to Arizona for the tax. In other words, the tax is not one levied on the sale itself, but on the privilege of engaging in business in Arizona, measured by the gross receipts from sales or volume of business attributable to the taxable activity.²

A.R.S. § 42-5061 imposes the transaction privilege tax under the retail classification. The retail classification is comprised of the business of selling tangible personal property at retail. The tax base for the retail classification is the gross proceeds of sales or gross income derived from the business. All sales of tangible personal property are subject to the transaction privilege tax under the retail classification unless specifically exempted or excluded by statute.

² *Arizona Department of Revenue v. Mountain States Telephone and Telegraph Co.*, 113 Ariz. 467, 556 P.2d 1129 (1976); *Tower Plaza Investments, Limited v. DeWitt*, 109 Ariz. 248, 508 P.2d 324 (1973); *State Tax Commission v. Quebedeaux Chevrolet*, 71 Ariz. 280, 226 P.2d 549 (1951).

A.R.S. § 42-5001(13) provides that a “retailer”

includes every person engaged in the business classified under the retail classification pursuant to section 42-5061 and, when in the opinion of the department it is necessary for the efficient administration that definition includes dealers, distributors, supervisors, employers and salesmen, representatives, peddlers or canvassers as the agents of the dealers, distributors, supervisors or employers under whom they operate or from whom they obtain the tangible personal property sold by them, whether in making sales on their own behalf or on behalf of the dealers, distributors, supervisors or employers.

A.R.S. § 42-5001(14) defines a “sale” as

any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatever, including consignment transactions and auctions, of tangible personal property or other activities taxable under this chapter, for consideration . . .

As provided in Arizona Transaction Privilege Tax Ruling TPR 16-3, in addition to the e-commerce infrastructure provided by online marketplace businesses, such businesses ordinarily do the following on behalf of their third-party merchants:

- Provide a primary point of contact for general customer service including providing customers with information on their orders (confirmation of orders, shipment notification, delivery notification, refund status, etc.);
- Provide payment processing services, including any refund processing;
- Provide marketing of the online marketplace under a single brand (i.e. the brand itself is marketed rather than each merchant listed on the marketplace).

In this case, a Consumer visits the Marketplace to make a purchase. Once a Consumer places an order, the Company processes the order by providing the Vendor with the purchase order information and processing the payment from the Consumer. The Company remits *** of the purchase price to the Vendor and retains *** of the purchase price as its fee.³ In addition, the Company processes any returned items and refunds the Consumer. Because of the activities undertaken by the Company on behalf of the third-party Vendors, the Marketplace is considered to be representing the Vendors collectively and should be treated as the “retailer” for Arizona transaction privilege tax purposes under A.R.S. § 42-5001(13).

³ The Company remits to the vendor 100% of any funds received from the consumer for shipping and handling.

In addition to meeting the definition of a retailer, to be liable for Arizona's transaction privilege tax, there must be a "sale" of tangible personal property. As provided in A.R.S. § 42-5001(14), a "sale" includes transfer of title or possession "in any manner and by any means whatever." Although an online marketplace does not ordinarily take title to goods sold by third-party vendors on its website, it may have possession of such goods or otherwise be able to transfer or authorize transfer of possession of those goods to the purchaser. Possession in this sense would include actual possession as well as constructive possession of goods.

Black's law dictionary (10th ed. 2014) defines "constructive possession" as having "control or dominion over a property without actual possession or custody of it." In the online marketplace context, this means that possession is established where the online marketplace has control or dominion over tangible personal property such that it is able to direct the person with actual custody or physical possession of the property to deliver that property to the purchaser by means of a common carrier. It does this as agent for the third-party vendor on its marketplace website. Control over the property is also evidenced by the ability of the online marketplace to accept returns and issue refunds as agent for the third-party vendor. In such cases, the online marketplace may not physically take possession of the property but directs that is satisfactory for the custodian to accept the returned goods and put them back in the third-party vendor's inventory. Thus, although the online marketplace does not have physical possession of the goods, it has as much control over the goods as if it were the seller itself.

In this case, the Vendor is responsible for shipping its product to the Consumer via a third-party carrier. The Company does not maintain an inventory. However, the Company has constructive possession of products as it has control or dominion over the tangible personal property such that it is able to direct the Vendor, the party with actual custody or physical possession of the products, to deliver that property to the Consumer by means of a common carrier. The Company also has control as shown by its ability to accept returns and process refunds.

An online marketplace with nexus to Arizona that derives gross receipts from acting as agent for third-party vendors by providing customer service, processing payments and refunds and exercising control over the fulfillment process is deemed to be a retailer for transaction privilege tax purposes. Therefore, in this case, the Company is a retailer making sales of tangible personal property on the Marketplace subject to Arizona's transaction privilege tax under the retail classification. The tax base is the gross receipts from the sale without any deduction for services performed.

A.R.S. § 42-5040 states that retail sales of tangible personal property are sourced to the seller's business location if the seller receives the order at a business location in this state. However, retail sales are sourced to the purchaser's location in this state if the seller receives the order at a business location outside this state.

This response is a taxpayer information ruling (TIR) and the determination herein is based solely on the facts provided in your request. The determinations are subject to change should the facts prove to be different on audit. If it is determined that undisclosed facts were substantial or material to the Department's making of an accurate determination, this taxpayer information ruling shall be null and void. Further, the determination is subject to future change depending on changes in statutes, administrative rules, case law, or notification of a different Department position.

If the Department is provided with required taxpayer identifying information and taxpayer representative authorization before the proposed publication date (for a published TIR) or date specified by the Department (for an unpublished TIR), the TIR will be binding on the Department with respect to the taxpayer that requested the ruling. In addition, the ruling will apply only to transactions that occur or tax liabilities that accrue from and after the date the taxpayer receives the ruling. The ruling may not be relied upon, cited, or introduced into evidence in any proceeding by a taxpayer other than the taxpayer who has received the taxpayer information ruling. If the required information is not provided by the specified date, the taxpayer information ruling is non-binding for the purpose of abating interest, penalty or tax.