



Douglas A. Ducey  
Governor

Carlton Woodruff  
Interim Director

## TAXPAYER INFORMATION RULING LR 19-004

April 2, 2019

Thank you for your letter dated October 1, 2018, requesting a private taxpayer ruling (“PTR”) on behalf of the \*\*\* (“Taxpayer”), a federal 501(c)(3) nonprofit organization. Specifically, you requested a determination of whether Taxpayer’s sales of memberships and subscription fees, publishing periodicals, live education video streaming, and \*\*\* conferences, are exempt from taxation pursuant to the Arizona transaction privilege tax (“TPT”) statutes.

Pursuant to Arizona Revised Statutes (“A.R.S.”) § 42-2101, the Arizona Department of Revenue (“Department”) may issue private taxpayer rulings to taxpayers and potential taxpayers on request.

### ISSUE:

1. Whether Taxpayer’s gross income derived from the sale of memberships and subscriptions to \*\*\* publications is subject to TPT pursuant to A.R.S. § 42-5061?
2. Whether Taxpayer’s gross income derived from the publication and sale of periodicals is subject to TPT pursuant to A.R.S. § 42-5065?
3. Whether Taxpayer’s gross income derived from live education video streaming, and \*\*\* conferences is subject to TPT pursuant to A.R.S. § 42-5073?
4. Whether Taxpayer is required to continue filing TPT returns?

### RULING:

1. Taxpayer’s gross income derived from the sale of memberships and subscriptions is not subject to Arizona’s TPT pursuant to A.R.S. § 42-5061(A)(4).
2. Taxpayer’s gross income derived from the publication and sale of periodicals and open access magazines published and distributed from a point outside the state is not subject to Arizona’s TPT pursuant to the Arizona Administrative Code (“A.A.C.”) R15-5-1303.<sup>1</sup>

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<sup>1</sup> Gross income under the publication classification includes publishing fees paid by authors to Taxpayer for publication in Taxpayer’s open access magazine.

3. Taxpayer's gross income derived from the sale of admissions to live education video streaming and in-person \*\*\* conferences is not subject to Arizona's TPT pursuant to A.R.S. § 42-5073(A)(2).
4. Because Taxpayer's gross income is not subject to Arizona's TPT under A.R.S. §§ 42-5061, 42-5065 and 42-5073, Taxpayer is not required to continue filing TPT returns under these classifications.

### **SUMMARY OF FACTS:**

The following facts are a summary based on your ruling request dated October 1, 2018, as well as additional information provided November 20, 2018, January 17, 2019, January 31, 2019 and March 6, 2019:

Taxpayer is a nonprofit corporation, organized under Internal Revenue Code ("I.R.C.") § 501(c)(3), as \*\*\* membership group with a core purpose to \*\*\*. Taxpayer is incorporated and headquartered in \*\*\* with an operational center in \*\*\* and additional offices in \*\*\*. Taxpayer does not have a location in Arizona. Taxpayer's gross income is derived from the sales of membership fees (16% of total revenue) and subscriptions to \*\*\* publications delivered electronically or by common carrier (49% of total revenue), fees paid to Taxpayer by authors to be published in Taxpayer's periodicals (3% of total revenue); and \*\*\* conferences and meetings (32%).

Taxpayer's membership fees grant a member subscriptions to Taxpayer published magazines and newsletters as well as:

"[E]lectronic access to \*\*\*, \*\*\*, inclusion in the \*\*\* Directory, members-only \*\*\* programming, an exclusive \*\*\* email account, discounts on products and services, continuing education, philanthropic opportunities, and ...communications about local networking opportunities, meetings, and special events."<sup>2</sup>

Additionally, membership provides members the ability to purchase, at a discount, additional subscriptions or items of tangible personal property (i.e., Taxpayer published magazines, newsletters and \*\*\* publications as well as non-Taxpayer published books, journals and magazines, member pins, t-shirts, etc.).

Taxpayer's publication revenue is generated through two streams: (1) subscriptions to \*\*\* periodicals; and (2) publication fees paid by authors who would like to be published in

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<sup>2</sup>\*\*\*

Taxpayer's open access magazine. Both periodicals and open access magazines are available to both members and nonmembers alike. All publications are manufactured and published from Taxpayer's locations \*\*\*, \*\*\*, or \*\*\*.

Lastly, Taxpayer hosts educational and \*\*\* conferences and meetings at various sites around the country, including Arizona. \*\*\* conferences are instructional in nature including facilitators and guest speakers and do not include display booths like a tradeshow. For example, upcoming conferences in Arizona include: the latest developments in \*\*\*; the latest discoveries in \*\*\*; and \*\*\*.<sup>3</sup>

Taxpayer's physical presence in Arizona consists of (1) a single Arizona resident employee; (2) renting a backup database facility within Arizona; and (3) holding various \*\*\* conferences and meetings at Arizona venues. Taxpayer has been filing monthly TPT returns with the Department since 2003, but now believes their sales are not subject to TPT, and would like to cancel their license.

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

## **DISCUSSION & LEGAL ANALYSIS:**

Arizona imposes TPT on the privilege of conducting business in the State of Arizona. The authority to levy the TPT tax is found in A.R.S. § 42-5008. The TPT is a tax on the seller, not the purchaser. The seller may pass the burden of the tax on to the purchaser; however, the seller is ultimately liable for the tax. The Arizona TPT is imposed under sixteen separate business classifications. A.R.S. § 42-5023 states that it is "presumed that all gross proceeds of sales and gross income derived by a person from business activity classified under a taxable business classification comprise the tax base for the business until the contrary can be established." All sales that are subject to the TPT are also subject to applicable county excise taxes.

### Retail Classification

A.R.S. § 42-5061 imposes TPT under the retail classification. The retail classification is comprised of the business of selling tangible personal property at retail. The tax base for the

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<sup>3</sup> \*\*\*.

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 TPT under the retail classification unless a specific statutory deduction or exclusion exists.

When a taxpayer conducts retail selling activity, membership fees are subject to TPT under the retail classification. A.C.C. R15-5-157 *Membership Fees*, provides the following rules:

- A. Membership, admission, or other fees charged by a limited-access retail business shall be considered part of the taxable gross income of the business activity.
- B. For purposes of this rule, "a limited-access retail business" means a business which does not sell to the general public but which charges a membership fee or a membership due in order to obtain access to the business or to obtain discounts or preferential treatment in the purchase or rental of tangible personal property from or through the business.
- C. Gross income shall not include separately billed amounts paid to secure ownership interests or rights in the business which can be transferred or assigned.

Sales by a 501(c)(3) nonprofit organization are exempt from TPT under A.R.S. § 42-5061(A)(4). Specifically, A.R.S. § 42-5061(A)(4) states that TPT imposed under the retail classification does not apply to the gross proceeds of sales or gross income derived from “[s]ales of tangible personal property by any nonprofit organization organized and operated exclusively for charitable services and recognized by the United States Internal Revenue Service under section 501(c)(3) of the Internal Revenue Code.”

Pursuant to A.R.S. § 42-5061(A)(4) companies recognized as nonprofit organizations by the Internal Revenue Service (“IRS”) under I.R.C. § 501(C)(3), may exclude the sale of tangible personal property from their tax base. This exclusion applies to Taxpayer’s sale of tangible personal property in the regular course of business, and exempts the Taxpayer from the imposition of TPT upon sales of membership fees, subscriptions and the sale of any tangible personal property (for example books, industry specific magazines, back issues of previously published periodicals, organization pins or other paraphernalia, etc.). Accordingly, Taxpayer’s gross income derived from the sale of membership fees and tangible personal property is excluded from the tax base and not subject to TPT.

### Publication Classification

A.R.S. § 42-5065 imposes TPT on the gross income derived from “the business of publishing newspapers, magazines or other periodicals and publications if published in this state.” A.R.S. § 42-5065 offers no deductions or exemptions for nonprofit organizations. However, A.A.C. R15-5-1303 defines a “publisher” as one who manufactures and distributes a publication from a point within Arizona. The term “publication” includes books, newspapers, magazines, music, periodicals, and any other literary work.<sup>4</sup> The term “publication” specifically excludes books.<sup>5</sup> Direct sales of books to a final consumer are classified under retail.

There are no deductions for a nonprofit organization in the publishing of periodicals. However, as directed by the rules, publishing and distributing periodicals from a point outside of Arizona is not subject to TPT under A.R.S. § 42-5065. Taxpayer does not manufacture and distribute periodicals and open access magazines from a point within Arizona, thus, the gross income derived of publication subscription fees and published author fees are not subject to TPT.

### Amusement Classification

A.R.S. § 42-5073 imposes TPT under the amusement classification. This classification is comprised of the business of operating or conducting various amusement activities including contests, games, sports events, or any other business which charges admission or user fees for exhibition, amusement or entertainment. The tax base for this classification is the gross proceeds of sales or gross income derived from the business. A.R.S. § 42-5073(B). All gross income under the amusement classification is subject to the TPT unless a statutory deduction or exemption applies.

A.R.S. § 42-5073 provides exclusions in certain limited circumstances for nonprofit organizations exempt from taxation under I.R.C. § 501(c)(3).<sup>6</sup>

Additionally, A.R.S. § 42-5073(A)(2) excludes from the tax base gross income derived from private or group instructional activity. The term “instructional” is not defined in Title 42.

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<sup>4</sup> A.A.C. R15-5-1303(B)

<sup>5</sup> A.A.C. R15-5-1303(C)

<sup>6</sup> A.R.S. § 42-5073 offers exclusions for 501(c)(3) organizations under the following circumstances: Musical, dramatic or dance groups performances; botanical gardens; museums or zoos; exhibition events for organizations associated with major league baseball teams or a national touring professional golf association; operating or sponsoring rodeos; intercollegiate football contests; and events consisting of a run, walk, swim or bicycle ride.

Nevertheless, the Arizona Supreme Court held in construing a tax statute with no statutory definition, words must be given their “plain and ordinary meaning.”<sup>7</sup> *Webster’s Third International Dictionary, Unabridged* as defines the term “instructional” as:

1: relating to, serving for, or promoting instruction : EDUCATIONAL <~ methods> <used for ~ purposes> <the director of ~ services> 2 : containing or conveying instruction or information <an ~ film>.<sup>8</sup>

Taxpayer’s \*\*\* conferences and meetings do not qualify for the narrow deductions offered to nonprofit organizations in A.R.S. § 42-5073. However, in keeping with the plain and ordinary meaning of the term, Taxpayer’s \*\*\* conferences and meetings, covering topics such as \*\*\*, \*\*\*, and \*\*\*, are instructional and informative in nature. Therefore, the gross income derived under the amusement classification qualifies for the group instruction activity exclusion and is not subject to TPT.

### City Taxes

It is important to note, the imposition of city privilege taxes is separate and distinct from the state’s TPT and accompanying county excise taxes. As with the state’s TPT, city privilege taxes are imposed on the vendor for the privilege of engaging in business in the city. The Model City Tax Code (“MCTC”) was created in order to impose and administer city privilege taxes. Similar to Arizona’s TPT, city privilege taxes are imposed “upon persons on account of their business activities”. See MCTC § 400(a)(1). All Arizona cities follow the MCTC in their imposition of their privilege tax based upon their local ordinances. However, certain options exist, allowing each city to alter or qualify the imposition of its privilege tax. The MCTC can be found online at [www.modelcitytaxcode.az.gov/](http://www.modelcitytaxcode.az.gov/).

MCTC § -270(a) provides for the exclusion of gross income of persons deemed not engaged in business. MCTC § -270(a)(1) provides that “Federally Exempt Organization,” means an organization that has received a determination of exemption, or qualifies for such exemption, under 26 U.S.C. Section 501(c) and rules and regulations of the Commissioner of Internal Revenue pertaining to same. As a result Taxpayer is not subject to city privilege tax on any of its activities as it is deemed not to be engaged in business.

**This response is a private taxpayer ruling and the determinations herein are 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**

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<sup>7</sup> *Wilderness World, Inc. v. Arizona Dep’t of Revenue*, 182 Ariz. 196, 198, 895 P.2d 108, 110 (1995).

<sup>8</sup> WEBSTER’S THIRD INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 2204 (1993).

**facts were substantial or material to the Department's making of an accurate determination, this private taxpayer 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.**

**The determinations in this private taxpayer ruling are only applicable to the taxpayer requesting the ruling and may not be relied upon, cited nor introduced into evidence in any proceeding by a taxpayer other than the taxpayer who has received the private taxpayer ruling. In addition, this private taxpayer ruling only applies to transactions that occur or tax liabilities that accrue from and after the date the taxpayer receives the ruling.**