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PRIVATE TAXPAYER RULING LR05-012

December 20, 2005

This private taxpayer ruling is in response to your letter dated June 15, 2005, in which you requested a private taxpayer ruling on behalf of your client . . . ("Taxpayer"). You request a ruling concerning sales made by Taxpayer to certain common carriers temporarily within this state. Pursuant to Arizona Revised Statutes ("A.R.S.") § 42-2101, the Department may issue private taxpayer rulings to taxpayers and potential taxpayers on request.

Statement of Facts:

Your June 15, 2005 letter presents the facts relating to Taxpayer's business as follows:

[Taxpayer] intends to become engaged in the business of selling [tangible personal property]. [Taxpayer] is an Arizona company which anticipates having offices and inventory in Arizona and in one other state. [Taxpayer] believes that [the] majority of [Taxpayer's] Arizona sales will be to persons for resale or release. However, some sales will be retail sales [Taxpayer] believes that the majority of its Arizona retail sales will be to nonresident common carriers engaged in interstate business.

That letter articulates additional facts necessary for purposes of this ruling:

[Taxpayer] sells at retail tangible personal property consisting of [tangible personal property] to a nonresident common carrier engaged in interstate business [that] is temporarily within Arizona [T]he tangible personal property is purchased for use outside of Arizona [Taxpayer] prepays the freight charge to the nonresident common carrier purchaser to have the tangible personal property transported by the nonresident common carrier purchaser to a location outside of Arizona [The] [t]angible personal property consist[s] of

Issue:

The issue as presented in your June 15, 2005 letter is as follows:

Can the shipping requirements in A.A.C. [Arizona Administrative Code] R15-5-175(B) be satisfied in situations where the nonresident purchaser is also a common carrier by the vendor complying with the shipping requirements in A.A.C. R15-5-171[?]

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More specifically, if [Taxpayer] sells at retail tangible personal property consisting of [tangible personal property] to a nonresident common carrier engaged in interstate business who is temporarily within Arizona, are the gross receipts from the sale of such tangible personal property exempt from Arizona transaction privilege tax if (1) the tangible personal property is purchased for use outside of Arizona, and (2) [Taxpayer] prepays the freight charge to the nonresident common carrier purchaser to have the tangible personal property transported by the nonresident common carrier purchaser to a location outside of Arizona?

Your Position:

Your position as stated in your June 15, 2005 letter is as follows:

The shipping requirements of A.A.C. R15-5-175(B) can be satisfied in situations where the nonresident purchaser is also a common carrier by the vendor complying with the shipping requirements in A.A.C. R15-5-171.

More specifically, if [Taxpayer] sells at retail tangible personal property to a nonresident common carrier engaged in interstate business who is temporarily within Arizona, the gross receipts from the sale of such tangible personal property are exempt from Arizona transaction privilege tax if (1) the tangible personal property is purchased for use outside of Arizona, and (2) [Taxpayer] prepays the freight charge to the nonresident common carrier purchaser to have the tangible personal property transported by the nonresident common carrier purchaser to a location outside of Arizona.

Conclusion and Ruling:

Based on the information provided, Taxpayer is subject to transaction privilege tax under the retail classification as per A.R.S. § 42-5061 when it sells the above described tangible personal property at retail. Under the facts presented, there are two deductions in A.R.S. § 42-5061 that may be applicable to Taxpayer. One applies to sales to nonresidents and the other applies to sales made in interstate commerce that would violate the United States or State of Arizona Constitutions.

A.R.S. § 42-5061(A)(14) allows a deduction for sales made to “nonresidents of this state for use outside this state if the vendor ships or delivers the tangible personal property out of this state.” Arizona Administrative Code (“A.A.C.”) R15-5-175(B) further clarifies that:

Gross receipts from the sale of tangible personal property to a nonresident of Arizona who is temporarily within this state are exempt from the tax if:

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1. The vendor ships or delivers the tangible personal property out of this state by common carrier, United States mail, or the vendor's own conveyance; and
2. The tangible personal property is not used in Arizona.

A.R.S. § 42-5061(A)(24) allows a deduction for sales made in interstate commerce "if prohibited from being so taxed by the Constitution of the United States or the constitution of this state." A.A.C. R15-5-170 provides that gross receipts from such sales are exempt if: (1) "the order is received from a location outside of Arizona;" and (2) "the retailer ships or delivers the tangible personal property to a location outside of Arizona for use outside of Arizona." A.A.C. R15-5-170(A)(1), (2).

In conjunction with the A.R.S. § 42-5061(A)(24) exemption, A.A.C. R15-5-171 provides that sales to common carriers engaged in interstate business are exempt from transaction privilege tax provided that: (1) the delivery is made by the common carrier, (2) to a location outside of Arizona, (3) for use outside of Arizona, (4) the order is received from a location outside of Arizona, and (5) the Arizona retailer prepays the freight charge.

Taxpayer attempts to qualify for the exemption in A.R.S. § 42-5061(A)(14) by arguing that the vendor can satisfy the shipping requirement in A.A.C. R15-5-175(B)(1) (*i.e.*, ship or deliver the tangible personal property out of this state by common carrier) when it sells to a common carrier who decides to pick up the property pursuant to A.A.C. R15-5-171.

A.A.C. R15-5-171 cannot be combined with the requirements of A.A.C. R15-5-175 as Taxpayer suggests. The documented history of the rules indicates that both rules formerly fell under the old A.A.C. R15-5-1814 entitled "Interstate and foreign sales." A.A.C. R15-5-1814 (Supp. 87-2). They were separated from that rule, in part, because A.A.C. R15-5-175 clearly applied to A.R.S. § 42-5061(A)(14), whereas A.A.C. R15-5-170 and 171 both applied to A.R.S. § 42-5061(A)(24). Even though some of the requirements of these two exemptions are similar, each exemption is viewed independently of the other.

The plain language of the rules also demonstrates how they cannot be combined as Taxpayer suggests. A.A.C. R15-5-171 qualifies the exemption only for common carriers engaged in an interstate business. Residency of the common carrier is irrelevant for purposes of this rule. Similarly, A.A.C. R15-5-171 requires that the order is received from a location outside of Arizona, that the common carrier deliver the property, and that the vendor prepay the freight charge, none of which are required for the exemption for sales made to nonresidents. A.A.C. R15-5-175 also contains elements unique to that exemption. Specifically, it requires that the purchaser be a nonresident of Arizona.

If Taxpayer's sales truly meet the requirements imposed under A.A.C. R15-5-171, it does not need A.A.C. R15-5-175 to apply in order for the sales to be exempt from transaction privilege tax. The sales would be exempt under A.R.S. § 42-5061(A)(24). However, nothing in the facts presented to the Department indicate that the order is received from a

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location outside of Arizona, preventing A.A.C. R15-5-171 from applying to Taxpayer's contemplated sales.

Taxpayer similarly does not meet the requirements of A.R.S. § 42-5061(A)(14) and A.A.C. R15-5-175. That rule requires that the vendor ship or deliver the tangible personal property out of state. Taxpayer presents no facts showing where delivery or transfer of ownership takes place. A.R.S. § 47-2401(2) states that, unless the parties otherwise agree, "title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods." Even though Taxpayer is prepaying the freight charge, actual physical delivery to the property takes place in Arizona, and there is no indication that Taxpayer has any responsibility with respect to the goods after that point. Absent an agreement to the contrary, delivery takes place in Arizona where the common carrier purchaser physically picks up the goods.¹

Although the Department does not rule on this issue, the facts presented also create doubt as to whether these common carrier purchasers are nonresidents for purposes of these transactions. A.A.C. R15-5-175(A) defines "nonresident" as either (1) an individual who is not a resident for Arizona income tax purposes or (2) an entity which has no business location or business nexus in Arizona. When a common carrier purchaser comes into Arizona to consummate a sale of tangible personal property, that out-of-state common carrier business may have nexus with the State of Arizona because the transaction itself has nexus with this state. This result is because of a long recognized United States Supreme Court holding that "a sale of tangible goods has a sufficient nexus to the state in which the sale is consummated to be treated as a local transaction taxable by that state." *Okl. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184 (1995); *Interlott Technologies, Inc. v. Arizona Dept of Revenue*, 205 Ariz. 452, 456, 72 P.3d 1271 (Ariz. App. 2003).

Accordingly, the Department rules that Taxpayer's sales of [tangible personal property] are not exempt under A.R.S. § 42-5061(A)(14) and A.A.C. R15-5-175. These sales are also not exempt under A.R.S. § 42-5061(A)(24) and A.A.C. R15-5-171.

The conclusions in this private taxpayer ruling do not extend beyond the facts presented in your correspondence dated June 15, 2005.

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 facts were substantial or material to the Department's making of an accurate determination, this taxpayer ruling shall be null and void. Further, the

¹A.A.C. R15-5-170(B), a provision that makes the common carrier an agent of the seller, does not apply to our analysis of A.A.C. R15-5-175 because it is specifically limited to that rule and the exemption for sales in interstate commerce.

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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 applicable only 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.

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