



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

REVENUE LEGAL COUNSEL

Post Office Box 1272, Room 2380
Little Rock, Arkansas 72203-1272
Phone: (501) 682-7030
Fax: (501) 682-7599
<http://www.arkansas.gov/dfa>

December 18, 2015

[REDACTED]

RE: Taxability of DVD sales
Opinion No: 20140807

Dear [REDACTED]:

This letter is sent in response to your July 10, 2014 request for opinion concerning the taxability of certain DVD sales. I apologize for the delay in my response. The facts that you have provided to me are set forth in pertinent part below:

I represent [REDACTED] ([REDACTED]) which is an Arkansas non-profit corporation organized and operated under Section 501(c)(3) of the Internal Revenue Code. Attached is a copy of its federal determination letter.

As part of its exempt function, [REDACTED] provided to the community a multi-part educational series [REDACTED] that was recorded and reproduced on a multi-disk DVD package. [REDACTED] offers these DVD packages for sale on its web site. No other products are offered for sale at this time. [REDACTED] does not collect a gross receipts tax on these sales.

By this letter I request that the Department confirm that the above described transaction falls within the exemption from collection of the Gross Receipts Tax as set forth in ARK. CODE ANN. §26-52-401(2) and amplified by ARK. CODE ANN. §26-52-430.

ARK. CODE ANN. § 26-52-401(2) exempts gross receipts "derived from the sale of tangible personal property or service by charitable organizations, except when the organizations may be engaged in business for profit;..." This exemption is further explained in ARK. CODE ANN. § 26-52-430 which excludes from the exemption sales that compete with sales by for-profit businesses. While [REDACTED]'s sales do not meet all the requirements of ARK. CODE ANN. § 26-52-430(b)(1)-(4), it is my opinion that those requirements merely set forth a safe harbor but do not limit the exemption to other circumstances where sales by the charitable organization do not compete with for-profit businesses. My opinion is based upon these considerations:

1. There is only one product currently being sold;

2. That product was produced by and is offered solely by [REDACTED]; and
3. There is no other source for this product. See also, GR-39.

If the Department concurs in my analysis, I would appreciate a written confirmation of that fact for the files of the [REDACTED]. If there are additional facts or circumstances that the Department would like to have regarding this request, please let me know. I will be glad to promptly provide such additional information.

Response

In Arkansas, sales of tangible personal property, such as the DVD packages you have described, are subject to gross receipts (sales) tax under Ark. Code Ann. § 26-52-301(1) (Repl. 2014) unless an exemption applies. You are asking if [REDACTED]'s sales of DVD packages would be exempt from tax as a sale by a charitable organization under Ark. Code Ann. §26-52-401(2) since [REDACTED] is a non-profit corporation organized and operated under Section 501(c)(3) of the Internal Revenue Code.

As a threshold matter, state law does not provide a blanket exemption from tax for non-profit corporations. To qualify for the exemption under Ark. Code Ann. § 26-52-401(2), [REDACTED] must first qualify as a charitable organization. The term "charitable organization is defined in Arkansas Gross Receipts Tax Rule GR-37(E)(6) as "an organization whose purpose is benevolent, philanthropic, patriotic or eleemosynary **and whose function if performed, and not performed by a private party, would have to be performed at public expense.**" *Emphasis added.*¹ The sale of educational videos to the general public does not encompass a charitable purpose and the function performed by [REDACTED] does not have to be performed at public expense. Therefore, [REDACTED] is not a "charitable organization" for purposes of the exemption from Arkansas sales tax.

Even if [REDACTED] qualified as a charitable organization for purposes of the exemption found at Ark. Code Ann. § 26-52-401(2), its sales of DVD packages would not be exempt from tax. The provisions of Ark. Code Ann. § 26-52-430(a) provide that the exemptions available to charitable organizations shall not extend to sales of new tangible personal property (i.e. the DVD packages) by a charitable organization if the sales compete with sales by for-profit businesses. The provisions of Ark. Code Ann. §26-52-430(b) provide as follows:

- (b) A sale by a charitable organization does not compete with a sale by a for-profit business if:
 - (1) The sales transaction is conducted by a member of the charitable organization and not by any franchisee or licensee;
 - (2) All the proceeds derived from the sales transaction go to the charitable organization;
 - (3) The sales transaction is not a continuing one and is held not more than three (3) times a year; and
 - (4) The dominant motive of the majority of purchasers of the items sold is the making of a charitable contribution, with the purchase of an item

¹ A copy of Rule GR-37 is enclosed for your convenience.

being merely incidental and secondary to the dominant purpose of making a gift to the charitable organization.

The provisions of Ark. Code Ann. § 26-52-430(b) must be considered for purposes of determining whether a sale is competing with for-profit businesses. In order to qualify for the exemption, the sale must meet each of the requirements of the provisions of Ark. Code Ann. § 26-52-430(b). If any one of the requirements of Ark. Code Ann. § 26-52-430(b) are not met, then the exemption will not be available for a sale made by a charitable organization.

You have not provided me with sufficient information to be able to determine whether the provisions of Ark. Code Ann. § 26-52-430(b)(1)-(b)(2) have been met; however, it can be presumed from the facts contained in your letter that the DVD packages are offered for sale all year long (rather than limited to 3 times per year) and that the dominant motive of the purchaser of the DVD package is probably not the making of a charitable donation, but rather the desire to purchase a DVD package. For these reasons, [REDACTED]'s sales of the DVD packages are subject to Arkansas sales tax and [REDACTED] should register with this agency to collect, report, and remit the tax due on those sales.

Conclusion

This opinion is based upon 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. Please be advised that this opinion may only be relied upon by the company and will only be binding upon the Department for three (3) years from the date of issuance. See Arkansas Gross Receipts Tax Rule GR-75, a copy of which is enclosed.

Sincerely,

Michelle L. Baker, Attorney
Revenue Legal Counsel

Enclosures