



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

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[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

**RE: Taxability of Specified Digital Products
Opinion #20180217**

Dear [REDACTED]:

Your request for a legal opinion on behalf of the [REDACTED] [REDACTED] has been referred to me for response.

Your letter of February 8, 2018 states that [REDACTED] provides technical assistance and training to public schools throughout the State of Arkansas. You are considering offering online educator professional development (PD) to teachers employed by the [REDACTED]. The PD will be in the form of written text, recorded video, and recorded audio content, and will be available for purchase on the [REDACTED] website. The PD sessions will be offered to the teachers for purposes of improving their educational practice and for meeting state requirements for public school accreditation. Each individual PD session will be paid for by the public school employing that teacher. Based upon the foregoing facts, you have asked the following three questions, which will be addressed in turn below:

1. *Will the proposed educator PD constitute a “specified digital product” as that term is defined by Act 141 of 2017?*
2. *Will the proposed educator PD be exempt from tax as “Instructional Material” as that term is defined by Ark. Code Ann. § 26-52-437 and Revenue Rule GR-69? In other words:*
 - a. *May “Student” as used in the definition of “Instructional Material” include a professional teacher who is receiving instruction in the form of professional development?*
 - b. *Does the PD described above constitute “instructional information designed to be presented to students as part of a course of study”?*
3. *If the above-described online PD is sold to out-of-state schools for the use of out-of-state teachers, with the transaction occurring over the Internet, will such sales be exempt from the gross receipts tax as interstate sales that occur outside of Arkansas, under Revenue Rule GR-5?*

RESPONSE

SALES AND USE TAX GENERALLY

The “Arkansas Gross Receipts” tax, also referred to as “sales and use tax” is generally applicable to the sale of tangible personal property, specified digital products sold to a purchaser who is an end user, digital codes, and certain enumerated services within the State of Arkansas unless a specific exemption applies. Ark. Code Ann. § 26-52-301 (Supp. 2017).

1. Will the proposed educator PD constitute a “specified digital product” as that term is defined by Act 141 of 2017?

Yes. Arkansas Code Annotated § 26-52-103(29) (Supp. 2017) provides that when transferred electronically, “Specified digital products” include:

- (1) “Digital audio works,” which means works that result from the fixation of a series of musical, spoken, or other sounds. Ark. Code Ann. § 26-52-103(9) (Supp. 2017);
- (2) “Digital audio-visual works,” which means a series of related images that, when shown in succession, impart an impression of motion, together with accompanying sounds, if any. Ark. Code Ann. § 26-52-103(10) (Supp. 2017); and
- (3) “Digital books,” which means works that are generally recognized in the ordinary and usual sense as “books.” Ark. Code Ann. § 26-52-103(11) (Supp. 2017).

Your letter stated that the PD will be delivered electronically through the internet in the form of written text, recorded video, and recorded audio content. The PD sessions will be available for purchase online by [REDACTED]. Based on the information provided, the PD meets the definition of “specified digital products” as the term is defined under Ark. Code Ann. § 26-52-103 (Supp. 2017).

2. Will the proposed educator PD be exempt from tax as “Instructional Material” as that term is defined by Ark. Code Ann. § 26-52-437 and Revenue Rule GR-69? In other words:

- a. **May “Student” as used in the definition of “Instructional Material” include a professional teacher who is receiving instruction in the form of professional development?**
- b. **Does the PD described above constitute “instructional information designed to be presented to students as part of a course of study”?**

No. Arkansas Code Annotated § 26-52-437 (Supp. 2017) provides a tax exemption for “[t]extbooks, library books, and other **instructional materials**” purchased by public schools in Arkansas. *See also* Arkansas Gross Receipts Rule GR-69.

Arkansas Code Annotated § 26-52-437(a)(1) (Supp. 2017) defines “instructional materials” to include “technology-based educational materials and electronic software that require the use of electronic equipment **in order to be used in the learning process.**” Ark. Code Ann. § 26-52-437(a)(1)(D) (Supp. 2017). It is important to note that the materials must be used as part of the learning process; that is, they must be utilized as part of the classroom curricula in order to qualify as instructional materials. *See also* Ark. Code Ann. § 26-52-437(a)(1)(G) (Supp. 2017), which defines “instructional materials” to include “specified digital products and a digital code that contain instructional information **designed to be presented to students as part of a course of study.**” [Emphasis added].

The PD meets a portion of the definition of “instructional materials” under Ark. Code Ann. § 26-52-437(a)(1)(D) (Supp. 2017) to the extent that it qualifies as “[t]echnology-based educational materials and electronic software that requires the use of electronic equipment” However, the PD does not meet that portion of that definition requiring that such materials “be used in the learning process.” The “learning process” refers to the learning by students in the public schools, not the learning by teachers for purposes of improving their educational practices, and for meeting state requirements for accreditation. Likewise, the PD meets the definition of “instructional materials” under Ark. Code Ann. § 26-52-437(a)(1)(G) (Supp. 2017) to the extent that it qualifies as “digital code that contains instructional information” However, the PD does not meet that portion of the definition requiring that the instructional information be “designed to be presented to students as part of a course of study.”

As noted above, only those materials actually used in the learning process by students in [REDACTED] qualify as instructional materials. Therefore, PD designed to improve the educational practices of teachers employed by [REDACTED], and for purposes of meeting state requirements for state accreditation, will not qualify for the exemption. Accordingly, the term “Student” as used in the definition of “Instructional Materials” will not include a professional teacher who is receiving instruction in the form of professional development.

3. If the above-described online PD is sold to out-of-state schools for the use of out-of-state teachers, with the transaction occurring over the Internet, will such sales be exempt from the gross receipts tax as interstate sales that occur outside of Arkansas, under Revenue Rule GR-5?

Yes. Arkansas Gross Receipts Tax Rule GR-5 draws a distinction between sales to Arkansas customers, i.e. “intrastate” sales, and sales to customers outside Arkansas, i.e. “interstate” sales. Interstate sales are not subject to Arkansas gross receipts tax, provided that certain conditions of GR-5(C) are met. GR-5(C)(1) provides:

When tangible personal property is sold by a seller that is engaged in an established business, or sells in an established manner, within Arkansas, and the contract of sale or order requires the seller to deliver the property by common

carrier, contract carrier, U.S. Postal Service, or in the seller's own conveyance to a point outside Arkansas for consumption or use, **the transaction is an interstate transaction and is not subject to Arkansas gross receipts tax.** [Emphasis added].

See also Ark. Code Ann. § 26-52-521 (Supp. 2017), which governs sourcing of transactions involving sales of products by an Arkansas vendor to an Arkansas purchaser. "Product" means tangible personal property, **specified digital products**, a digital code, **a product transferred electronically**, or a service." Ark. Code Ann. § 26-52-522(a)(5) (Supp. 2017).

Arkansas Code Annotated § 26-52-521(b) provides that if a seller's retail sale of a product or service is received by the purchaser at a business location of the seller, the sale is sourced to that business location. If the sale of a product or service is not received by the purchaser at the business location of the seller, the sale is sourced to the location where receipt by the purchaser occurs. Therefore, in cases where the customer receives the property or service in Arkansas, Arkansas state and local sales tax will be due at the rate of tax applicable to that location. In cases where the customer receives the property at a location outside the state, Arkansas tax will not be imposed on those sales. *See also* Arkansas Gross Receipts Tax Rule GR-76.

This opinion is based on my understanding of the facts as set out in your inquiry as those facts are governed by current Arkansas laws, rules and regulations. Any change in the facts or law could result in a different opinion. A letter opinion may not be relied on if more than three (3) years old, but may be renewed on request. *See* Arkansas Gross Receipts Tax Rule GR-75.

Regards,

Lisa Ables
Revenue Legal Counsel