



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>

Nina Carter, Attorney at Law
nina.carter@dfa.arkansas.gov

December 10, 2018

SENT VIA EMAIL

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RE: Tax Liability of Digital Audio Services
Opinion Number 20180512

Dear ██████████;

Your email dated March 6, 2018, to the Department of Finance and Administration (“DFA”), Revenue Legal Counsel, requesting sales tax information has been referred to me for a response. Your inquiry relates to the applicability of sales tax to digital audio services sold by your business. Specifically, you provided:

In October of 2017 I opened a small business called ██████████ in ██████████. I record and produce audio for broadcast, internal business, and social media advertising. (I give more detail of what I do below.)

I am requesting a legal opinion to clarify whether or not I should be collecting sales tax for the services I provide.

On December 28, 2017 I applied on-line for a Sales and Use Tax Permit. A few weeks later I was asked to submit a description of my business, and shortly after January 30, 2018 I received a letter indicating that my application for the permit had been denied because “audio production is not a taxable service”.

* * *

Recently I was hired by a local (in-state) advertising agency to work on a campaign for a local client of theirs. The agency insisted that my estimates and ultimate billing should include sales tax. Today I called the Combined Registration office and talked with a supervisor there named Jeremy Boyd. Although he felt fairly confident that I am not required to collect sales tax, he highly recommended that I contact the Revenue Legal Counsel for an opinion. So here I am!

The work I am doing for the local agency is as follows... (this is very representative of what I do all the time) The recording and editing of professional voice talent to be used on radio, TV and social media. The creation and/or selection of all music and sound effects that are ultimately mixed with the voice to create finished radio spots, sound tracks for TV spots, and sound tracks for videos that run on social media. In the case of radio spots, all produced content is digitally transmitted to the client via e-mail or ftp transfer. In the case of audio for TV or social media, all produced content is digitally transmitted to a local video post company via e-mail or ftp transfer. Nothing that I produce is ever provided in a tangible form.

RESPONSE

As explained more fully below, the facts you have provided demonstrate that you are making sales of digital audio works to an end user, so your sales are subject to tax.

SALES TAX FOR SPECIFIED DIGITAL PRODUCTS GENERALLY

The Arkansas Gross Receipts tax, commonly referred to as “sales tax”, generally applies to all sales of tangible personal property and certain enumerated services unless otherwise exempted. *See Ark. Code Ann. §§ 26-52-301 et seq. (Supp. 2017); see also 2008-3 Arkansas Gross Receipts Tax Rules¹. Arkansas Code Annotated § 26-52-103(30)(A) (Supp. 2017) defines “tangible personal property” as personal property that can be seen, weighed, measured, felt, or touched or that is perceptible to the senses in any other manner. See also Gross Receipts Tax Rule GR-3(Q). You transfer all produced content digitally, so there is no physical product that can be seen, weighed, measured, or touched. The product and service you describe is not classified as a sale of tangible personal property nor is it an enumerated service subject to tax.*

However, effective January 1, 2018, Arkansas sales tax is also imposed on sales of specified digital products and digital codes. Ark. Code Ann. § 26-52-301(1)(B) and (C) (Supp. 2017). Sales and use tax applies to specified digital products that are sold (1) to a purchaser who is an end user, (2) when the seller grants the right of permanent use of the specified digital products to the end user, and (3) that use is not conditioned upon continued payment by the purchaser. *See Ark. Code Ann. § 26-52-301(1)(B). The tax also applies to the sale of a subscription for digital audio-visual work and digital audio work to an end user that does not have the right of permanent use granted by the seller and the use is contingent on continued payments by the purchaser. Ark. Code Ann. § 26-52-301(3)(C)(iii)(a) (Supp. 2017). 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);

¹ The Arkansas Gross Receipts Tax Rules are available online at http://www.dfa.arkansas.gov/offices/policyAndLegal/Documents/et2008_3.pdf.

- (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).

“End user” is defined at Ark. Code Ann. § 26-52-103(16)(A) (Supp. 2017) as a person who purchases specified digital products or the code for specified digital products for his or her own use or for the purpose of giving away the product or code. “End user” does not include a person who receives a product transferred electronically, by contract, for further commercial broadcast, rebroadcast, transmission, retransmission, licensing, relicensing, distribution, redistribution, or exhibition of the product (hereinafter collectively referred to as the “right to redistribute”). Ark. Code Ann. § 26-52-103(16)(B) (Supp. 2017). Unless the contract with the seller includes the specific right to redistribute, the purchaser will be considered an end user.

TAXABILITY OF THE PRODUCTS OR SERVICES AS SPECIFIED DIGITAL PRODUCTS

Products or services must be transferred electronically in order to be digital products. Since you state that all produced content is transferred digitally, the next question is whether your product or service meets the general definitions of digital products. The products and services you have described are transfers of works that result from the fixation of a series of sounds and are, therefore, digital audio works. Thus, the remaining question for determining the taxability of your sales of digital audio works is whether the respective purchaser is an end user.

Finally, some of the transactions you describe are transfers of digital audio works to be used in advertising. Advertising agencies must pay the Arkansas gross receipts or use tax on all tangible personal property or taxable services which they purchase or consume in the process of providing advertising services. *See* Gross Receipts Tax Rule GR-46(B)(2). Therefore, a sale of specified digital products to an advertising agency is subject to tax if the advertising agency is an end user.

IS THE PURCHASER AN END USER?

In your request, you describe your work as recording and producing “audio for broadcast, internal business, and social media advertising.” You then provide that the work you are doing for a local advertising agency falls into two categories.

Recording and Editing Voice Talent

Your first type of audio work is the recording and editing of professional voice talent to be used on radio, TV, and social media. When you provide the audio file, via email or ftp transfer, the purchaser would be an end user unless your contract or agreement specifically gives the purchaser the right to redistribute. The facts you have provided do not indicate that the audio file is

transferred with the right to redistribute. Therefore, the purchaser is an end user, and the sales is subject to tax.

Mix Audio for Radio, TV, or Internet

Your second type of audio work is the creation and/or selection of all music and sound effects that are ultimately mixed with the voice to create finished radio spots, sound tracks for TV spots, and sound tracks for videos that run on social media. Included in the definition of “sale” is the transfer of possession of specified digital products. Ark. Code Ann. § 26-52-103(26)(A) (Supp. 2017). Here, possession of the specified digital product is transferred to you and then transferred back to the creator of the audio or video. However, to the extent that a transfer of possession of a specified digital product occurs, tax is due only to the extent to which the gross receipts are derived from the transfer of possession. *See* Ark. Code Ann. § 26-52-301(1)(B). The creator of the provided audio transfers possession of the audio to you and you transfer possession of the audio back to the creator. However, what the creator of the provided audio pays you for is not to take back possession of the specified digital product but for your services to the specified digital product. Therefore, the gross proceeds of the transaction do not derive from the sale of a specified digital product but merely a nontaxable service provided to a specified digital product.

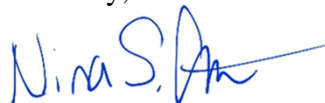
However, when you add music or sound effects – which are digital audio works – to provided audio, the addition of the music or sound effects is the sale of a specified digital product. In such a case, the question again becomes whether the purchaser is an end user. When you sell to a purchaser the added music or sound effects and your contract does not give the purchaser the right to redistribute as set out in Ark. Code Ann. § 26-52-103(16)(B), that purchaser is an end user. The facts you have provided do not demonstrate that the added music or sound effects are being resold with the right to redistribute. Therefore, the purchaser of the added music or sound effects is an end user, and such a sale would be subject to tax.

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 change in the facts or law could result in a different opinion. Please be advised that this opinion may only be binding upon DFA for three (3) years from the date of issuance. *See* Gross Receipts Tax Rule GR-75.

The Gross Receipts Tax Rules cited in this opinion may be viewed on DFA’s website at http://www.dfa.arkansas.gov/offices/policyAndLegal/Documents/et2008_3.pdf.

Sincerely,



Nina Samuel Carter
Office of Revenue Legal Counsel