



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

REVENUE LEGAL COUNSEL

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October 15, 2018

██████████
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RE: Taxability of Card Games/██████████ Campaign
Opinion No.: 20180923

Dear ██████████:

You have requested a legal opinion on behalf of ██████████. Your email dated September 14, 2018 states:

I am writing to get clarification on a sales and use tax question.

My Arkansas-based partnership, ██████████ ran a ██████████ crowdfunding campaign this past July. The campaign raised money to product several hundred copies of a card game, so the majority of individual backers were pledging money with the expectation of a physical product (the card game) in return. A few simply donated to the campaign. For the majority of backers—those who pledge to receive a copy of the game—██████████ sees this as roughly equivalent to placing a pre-order.

The campaign completed July 25th, 2018, and ██████████ collected payments from backers during the ensuing two weeks, using the ██████████ payment platform ██████████. After collecting payments, ██████████ collected a 5% service fee and deposited the remaining funds (\$24,745) into our business bank account on August 9th, 2018.

Two other pieces of relevant information: ██████████, only has a physical nexus in the state of Arkansas, no where else. ██████████ anticipates delivering physical copies of the card game to backers in January, 2019.

I would like written confirmation of the state of Arkansas' legal position on the following questions:

- 1. Since ██████████ managed the payment collection process through ██████████, and did not provide ██████████ access to billing addresses or other geographic information about backers, was it ██████████ responsibility to collect sales and use tax at the time ██████████ collected payments? Further, if ██████████ did not collect sales and use tax, would*

- the responsibility for the tax payments then fall to the backers (as buyers), absolving ██████████ of responsibility for collection?*
2. *If, on the other hand, ██████████ is responsible for collecting sales tax, would that tax be collected at the time we received payment from ██████████ (August 2018) or when we ship the physical products (estimated January, 2019).*

Question #2 is particularly significant because, as I mentioned, ██████████ did not provide billing addresses for any backers to ██████████. This means that ██████████ has been responsible for tracking down backers via email survey and collecting their shipping addresses in order to determine whether they reside in Arkansas. This is the only method we have to identify backers' zip codes to properly assess their state and local sales tax burdens.

Not all backers have responded to us yet with their shipping addresses. Thus, if the state determines we are required to pay sales and use tax on backers' behalf, and, further, that the payment should be made the time we received our payment from ██████████ (August, 2018), we literally do not have the information we need to be in compliance, through no fault of our own.

Please let me know any additional information you need to make a determination, and thank you for your time and consideration.

FACTS

██████████ is a for-profit limited liability corporation registered to do business in Arkansas. Based upon the information obtained from your website at ██████████ is "a group of friends from ██████████, Arkansas, USA who love games." The company was formed on ██████████ as a way "to pool our resources and skills in order to bring some of our ideas to life."

Generally speaking, your email provides that on or about July 25, 2018, ██████████ completed a "██████████ crowdfunding campaign to raise money to produce several hundred copies of a card game." Your email further states that a few donors to the campaign made pledges without expectation of the physical product; however, the majority of the donors made pledges for the sole purpose of receiving the physical product. ██████████ anticipates delivering the physical card games to the donors on or about January of 2019.

You have asked whether ██████████ is responsible for collecting sales and use tax on sales of the physical product (the card games); and if so, whether the tax should be collected at the time of payment or at the time the physical product is shipped to the donors (buyers). Before responding to your specific questions, it is necessary to first provide a general discussion of the relevant governing law.

RELEVANT LAW

Gross Receipts (Sales) Tax Generally

Arkansas gross receipts (sales) tax must be collected and remitted on sales of tangible personal property within the State of Arkansas unless a specific exemption applies. *See* Ark. Code Ann. § 26-52-301 (Supp. 2017). “Tangible personal property” means personal property which may be seen, weighed, measured, felt, touched, or is in any manner perceptible to the senses.” *See* Arkansas Gross Receipts Tax Rule GR-3(Q). A “sale” is defined as the *transfer of title* or possession of tangible personal property, specified digital property, specified digital products, or a digital code regardless of the manner, method, instrumentality, or device by which the transfer is accomplished. *See* Ark. Code Ann. § 26-52-103(26)(A). Arkansas Code Annotated § 26-52-103 (Supp. 2017) provides:

(19)(A) “Gross receipts,” “gross proceeds”, or “sales price” means the total amount of consideration, including cash, credit, property, and services, for which tangible personal property, specified digital products, a digital code, or services are sold . . . valued in money , whether received in money or otherwise, without deduction for the following:

- (i) The seller’s cost of the property sold;
- (ii) The cost of materials used, labor or service cost, interest, any loss, any cost of transportation to the seller, any tax imposed on the seller, and any other expense of the seller;
- (iii) *A charge by the seller for any service necessary to complete the sale, other than a delivery charge or an installation charge;*

Emphasis added.

Sourcing

Arkansas Code Annotated § 26-52-521(a) (Supp. 2017) governs sourcing of transactions involving sales of products by an Arkansas vendor to an Arkansas purchaser. Pursuant to Ark. Code Ann. § 26-52-522(a)(5) (Supp. 2017) “[p]roduct” means tangible personal property, specified digital products, a digital code, a product transferred electronically, or a service.” Arkansas Code Annotated § 26-52-521 (Supp. 2017) provides:

(a)(1) This section applies for the purposes of determining a seller’s obligation to pay or collect and remit sales or use tax with respect to the seller’s retail sale of a product or service.

(2) This section does not affect the obligation of a purchaser or lessee to remit tax on the use of the product or service to the taxing jurisdictions of that use and does not apply to the sales or use taxes levied on the retail sale excluding lease or rental, of motor vehicles, trailers, or semitrailers that require licensing.

(b) Excluding a lease or rental, the retail sale of a product or service shall be sourced as follows:

(1) If the product or service is received by the purchaser at a business location of the seller, the sale is sourced to that business location;

(2) If the product or service is not received by the purchaser at a business location of the seller, the sale is sourced to the location where receipt by the purchaser or the purchaser's designated donee occurs, including the location indicated by instructions for delivery to the purchaser or donee known to the seller;

(3) If subdivisions (b)(1) and (2) of this section do not apply, the sale is sourced to the location indicated by an address for the purchaser that is available from the business records of the seller that are maintained in the ordinary course of the seller's business when use of this address does not constitute bad faith;

(4) If subdivisions (b)(1)-(3) of this section do not apply, the sale is sourced to the location indicated by an address for the purchaser obtained during the consummation for the sale, including the address of a purchaser's payment instrument, if no other address is available if the use of this address does not constitute bad faith; or

(5) *If none of the previous rules of subdivisions (b)(1)-(4) of this section apply, including the circumstance in which the seller is without sufficient information to apply the previous rules, the location will be determined by the address from which tangible personal property was shipped, from which the specified digital products or the digital code was first available for transmission by the seller, or from which the service was provided, disregarding for these purposes any location that merely provided the digital transfer of the product sold.*

Emphasis added.

Arkansas Gross Receipts Tax Rule GR-76 provides:

A. Sales transactions shall be sourced in accordance with this rule, unless otherwise provided.

C. RECEIVE AND RECEIPT. For the purposes of this rule, "receive" and "receipt" mean taking possession of tangible personal property or making first use of services. Receive and receipt do not include possession by a shipping company on behalf of the purchaser.

D. RETAIL SALES - EXCLUDING LEASES AND RENTALS.

1. Except as otherwise provided, a retail sale is sourced as follows:
 - a. Over-the-counter. When the purchaser receives tangible personal property or a service at the business location of the seller, the sale is sourced to that business location.

Example: XYZ is a business located in Jacksonville, Arkansas that repairs automobile motors. After repairing the motor, the customer picks-up the motor at the shop in Jacksonville. XYZ will collect the state sales tax, Jacksonville sales tax, and Pulaski County sales tax.

b. *Delivery to a specified address.* When the purchaser does not receive the tangible personal property or service at the business location of the seller, *the sale is sourced to the location of receipt by the purchaser* (or the purchaser's donee, designated as such by the purchaser), including the location indicated by instructions for delivery to the purchaser (or donee), known to the seller. [Emphasis added].

Example 1: XYZ is a business located in Jacksonville, Arkansas that repairs automobile motors. After repairing the motor, XYZ ships the motor by common carrier to Conway, Arkansas. Since the customer took receipt of the service in Conway, XYZ will collect the state sales tax, Conway sales tax, and Faulkner County sales tax.

Example 2: ABC performs a landscaping job in Monticello, Arkansas. ABC will collect the state sales tax, Monticello sales tax, and Drew County sales tax.

c. *Delivery address unknown.* When the purchaser does not receive the tangible personal property or service at the business location of the seller and the delivery address is unknown, the sale is sourced to the first of the following addresses that is known to the seller:

- (1) The address of the purchaser;
- (2) The billing address of the purchaser; or
- (3) *The address from which the tangible personal property was shipped or from which the service was provided.*

Emphasis added.

Arkansas sales tax is not imposed on sales wherein the customer receives the property at a location outside the state.

RESPONSE

With regard to your specific questions, there can be no doubt that the card games sold by █████ qualify as tangible personal property under Arkansas Gross Receipts Tax Rule GR-3(Q). Additionally, the transactions at issue meet the definition of a sale under Ark. Code Ann. § 26-52-103(19(A)) (Supp. 2017). █████ received consideration for the *transfer of title* to the card games on or about August 2018. Therefore, unless an exemption applies, sales tax is due on the entire consideration received by █████ on the sale of the card games. Accordingly, █████ was required to collect the tax on its sales of the card games at the time of purchase by the buyers, and thereafter required to remit such tax to the Department of Finance and Administration no later than the 20th of September 2018. Because tax must be paid on the entire consideration paid by the buyers, █████ is required to remit tax on the \$24,745. deposited into its business bank account in August 2018, as well as tax on the 5% service fee deducted by █████. This, of course, assumes all sales were made to buyers located within the State.

The rate of the tax to be paid is determined based upon the sourcing of sales in accordance with Ark. Code Ann. § 26-52-521 (Supp. 2017) and Arkansas Gross Receipts Rule GR-76, *supra*. As previously stated, Arkansas sales tax is not imposed on sales where the customer receives the property at a location outside the state. You stated that ██████ did not provide billing addresses for any of your buyers and that you have been responsible for tracking them down in order to collect their shipping addresses. I am unable to provide guidance concerning that point other than to refer you to the language set forth in Ark. Code Ann. § 26-52-521(b)(1)-(5) (Supp. 2017) and Arkansas Gross Receipts Rule GR-76(D).

Because ██████ is in the business of selling tangible personal property for profit in Arkansas, it is required, if it has not done so already, to obtain an Arkansas sales tax permit from the Department of Finance and Administration. Pursuant to Ark. Code Ann. § 26-52-201(a), “[i]t shall be unlawful for any taxpayer to transact business within this state prior to issuance and receipt of an Arkansas gross receipts tax permit from the Director of the Department of Finance and Administration.” *See* Ark. Code Ann. § 26-52-201 (Supp. 2017).

Once ██████ has obtained an Arkansas sales tax permit, it will be able to purchase the materials that go into the production of its products tax-free as “sales for resale.” *See* Arkansas Gross Receipts Tax Rule GR-53. ██████ will then collect, from its customers, state, county, and local sales tax on the gross proceeds received from the sale of its products. The tax must be remitted to the Arkansas Department of Finance and Administration once each month along with a copy of a completed sales tax return. I have also enclosed copies of Arkansas Gross Receipts Tax Rules GR-53 and GR-72. If you have any questions with regard to obtaining a sales tax permit or collecting and remitting sales tax, please contact our Sales and Use Tax Section.

To determine the local tax rate and identify other applicable municipal or county taxes, DFA provides a Lookup Tax Tool at:

<https://www.dfa.arkansas.gov/sales-and-use-tax-section-local-tax-lookup-tools/>

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 will only be binding upon the Department for three (3) years from the date of issuance.

Sincerely,

Lisa Ables
Revenue Legal Counsel