DEPARTMENT OF STATE REVENUE

Revenue Ruling # 2018-04ST
September 5, 2018

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ISSUES

Sales and Use Tax - Taxability of Charges for Printed Advertising Materials & Coupons and Online Advertising

Authority: IC 6-2.5-1-11.5; IC 6-2.5-1-24; IC 6-2.5-1-26.5; IC 6-2.5-1-27; IC 6-2.5-1-27.5; IC 6-2.5-1-28.5; IC 6-2.5-2-1; IC 6-2.5-2-2; IC 6-2.5-4-1; IC 6-2.5-4-6; IC 6-2.5-4-16.4; IC 6-2.5-4-16.7; 45 IAC 2.2-1-1; 45 IAC 2.2-4-2; *Grand Victoria Casino & Resort, LP v. Indiana Dep't of State Revenue*, 789 N.E.2d 1041 (Ind. T.C. 2003); Letter of Findings 04-20150410 (*20160525 Ind. Reg. 045160195NRA, May 25, 2016); Streamlined Sales and Use Tax Agreement* (May 10, 2018).

A taxpayer ("Company") is seeking an opinion as to whether charges for a mailing program and a separately stated charge that allows a customer to create a profile on a website that offers discounts to prospective customers are subject to sales tax.

STATEMENT OF FACTS

Company is an Indiana company that, amongst other things, prepares and distributes "direct mailers," which include discount coupons and other advertising materials. Company provides the following information regarding its business:

> [Company] provides advertising services to its customers through various means. [Company] offers a mailing program to retailers in Indianapolis. The program involves the distribution of printed coupons and other advertising material from area retailers to a mailing list of prospective customers for a fee.
>
> For restaurant customers, [Company] requires that those customers create a profile and offer digital coupons on the website, [Website]. All other [Company] customers have the option of purchasing the website service and are allowed to create a profile on [Website] to offer digital coupons to users of that website.
>
> [Company] contracts with a printer in Florida to print all of the printed material, insert the material into envelopes, address the envelopes and send the envelopes via U.S. Mail to the addresses [Company] provides to the printer. The printer invoices [Company] for the paper, envelopes, ink, insertion into envelopes, and printing services. The printed materials are sent directly to addresses on the mailing list and the printer does not send any of the printed materials to [Company] or [Company's] customer who has contracted to be part of the mailing program.
>
> [Company] invoices their customer for the mailing program differently depending on the type of customer and whether the customer purchases the ability to use the [Website] website as an advertising medium. [Company] invoices restaurant customers one price for the mailing program. [Company] invoices all other customers stating the price for the mailing program separately from the price for the access to the website.

DISCUSSION

Based on the foregoing facts, Company requests a ruling as to whether charges for its mailing program and a separately stated charge that allows a customer to create a profile on a website that offers discounts to prospective customers would be subject to sales tax.

Pursuant to IC 6-2.5-2-1(a) and IC 6-2.5-2-2(a), sales tax is imposed on retail transactions made in Indiana. IC 6-2.5-4-1(a) provides that "[a] person is a retail merchant making a retail transaction when he engages in selling at retail." A retail transaction is defined in IC 6-2.5-4-1(b) as the transfer, in the ordinary course of business, of tangible personal property for consideration. IC 6-2.5-4-1 goes on to provide in pertinent part:

For purposes of determining what constitutes selling at retail, it does not matter whether:
. . .
(2) the property is transferred alone or in conjunction with other property or services . . .
(e) The gross retail income received from selling at retail is only taxable under this article to the extent that the income represents:
(1) the price of the property transferred, without the rendition of any service; and
(2) except as provided in subsection (g), any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records.
For purposes of this subsection, a transfer is considered to have occurred after delivery of the property to the purchaser.

"Tangible personal property" is defined in IC 6-2.5-1-27 as:

. . . personal property that:
(1) can be seen, weighed, measured, felt, or touched; or
(2) is in any other manner perceptible to the senses.
The term includes electricity, water, gas, steam, and prewritten computer software.

Except for certain enumerated services, sales of services generally are not retail transactions and are not subject to sales or use tax. 45 IAC 2.2-4-2 clarifies the taxability of services as follows:

(a) Professional services, personal services, and services in respect to property not owned by the person rendering such services are not "transactions of a retail merchant constituting selling at retail", and are not subject to gross retail tax. Where, in conjunction with rendering professional services, personal services, or other services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail unless:
(1) The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property;
(2) The tangible personal property purchased is used or consumed as a necessary incident to the service;
(3) The price charged for tangible personal property is inconsequential (not to exceed 10%) compared with the service charge; and
(4) The serviceman pays gross retail tax or use tax upon the tangible personal property at the time of acquisition.
(b) Services performed or work done in respect to property and performed prior to delivery to be sold by a retail merchant must however, be included in taxable gross receipts of the retail merchant.
(c) Persons engaging in repair services are servicemen with respect to the services which they render and retail merchants at retail with respect to repair or replacement parts sold.
(d) A serviceman occupationally engaged in rendering professional, personal or other services will be presumed to be a retail merchant selling at retail with respect to any tangible personal property sold by him, whether or not the tangible personal property is sold in the course of rendering such services. If, however, the transaction satisfies the four (4) requirements set forth in [subsection (a)], the gross retail tax shall not apply to such transaction.

IC 6-2.5-1-1 states that a "'unitary transaction' includes all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated." A unitary transaction is clarified in 45 IAC 2.2-1-1(a) as follows:

Unitary Transaction. For purposes of the state gross retail tax and use tax, such taxes shall apply and be computed in respect to each retail unitary transaction. A unitary transaction shall include all items of property and/or services for which a total combined charge or selling price is computed for payment irrespective of the fact that services which would not otherwise be taxable are included in the charge or selling price.

Regarding the sales of items transferred electronically, IC 6-2.5-4-16.4(b) provides that a person engages in making a retail transaction when the person (1) electronically transfers specified digital products to an end user; and (2) grants to the end user the right of permanent use of the specified digital products that is not conditioned upon continued payment by the purchaser. "Specified digital products," as currently defined by IC 6-2.5-1-26.5, include only digital audio works (e.g., songs, spoken word recordings, ringtones), digital audiovisual works (e.g., movies), and digital books. Products "transferred electronically" are defined at IC 6-2.5-1-28.5 to mean products that are "obtained by a purchaser by means other than tangible storage media."

Pursuant to Section 333 ("Use of Specified Digital Products," effective Jan. 1, 2010) of the *Streamlined Sales and Use Tax Agreement* ("SSUTA;" May 10, 2018), of which Indiana is a signatory, "[a] member state shall not include any product transferred electronically in its definition of 'tangible personal property.'" Section 332 of the SSUTA provides that "[a] member state shall not include 'specified digital products', 'digital audio-visual works', 'digital audio works', or 'digital books' within its definition of 'ancillary services', 'computer software', 'telecommunication services', or 'tangible personal property.' This means prewritten computer software transferred electronically is still taxable. Section 332 also provides that a state is not prohibited from imposing a sales or use tax on specified digital products.

Additionally, IC 6-2.5-1-27.5(c)(8) explicitly excludes ancillary services from the definition of telecommunication services, which are taxable under IC 6-2.5-4-6 when they are intrastate, meaning "that the transmission must originate and terminate within Indiana." *Grand Victoria Casino & Resort, LP v. Indiana Dep't of State Revenue*, 789 N.E.2d 1041, 1045 (Ind. T.C. 2003). Accordingly, ancillary services are not subject to sales tax in Indiana.

Based on the foregoing, Indiana may impose sales tax on products transferred electronically only if the products meet the definition of specified digital products, pre-written computer software, or telecommunication services.

Turning to the request, it is the well settled policy of the Department that the sale and distribution of printed coupons and other advertising material in the form of direct mailers is subject to sales tax, and if the associated services relating to the creation, printing, and mailing of those mailers are invoiced under a total combined amount with the advertising materials, the entire charge is taxable, as the services are bona fide charges for preparation, fabrication, delivery, and other services performed in respect to the mailers before they are transferred pursuant to IC 6-2.5-4-1(e). In fact, the taxability of Company's charge for their mailing program was affirmed by the Department in a Letter of Findings, 04-20150410 (20160525 Ind. Reg. 045160195NRA, May 25, 2016). It is not necessary to elaborate on the reasons that the fees charged for the mailing program are taxable, as the facts and circumstances have not materially changed from those presented in the Letter of Findings. The Department's analysis in the Letter of Findings remains correct:

> The documentation on its face is straightforward as are the transactions between Taxpayer and its customers. Taxpayer sold advertising materials to its Indiana customers at a price based on the per-unit cost of that material, Taxpayer distributed those materials, and Taxpayer billed its Indiana customers one amount for the cost of the materials and any services incurred in preparing the materials. Taxpayer's customers negotiated for and bought the materials, and Taxpayer was required to collect sales tax. Taxpayer may indeed be in the business of providing "services" but the transactions between it and its customers are - on their face - charges for the sale of tangible personal property subject to tax.

Rather, the issue that needs to be addressed in this Ruling is whether a separately stated charge that allows Company's customers to create a profile on a website that offers discounts to the customers of their customers would be subject to sales tax. If the fee for the website profile is separately stated on an invoice, then the fee would not be considered part of a unitary transaction under IC 6-2.5-1-2 because it is not part of a "total combined charge." Further, it would not be considered a "bundled transaction" under IC 6-2.5-1-11.5 because the fee for the website profile and the fee for the other advertising materials is not sold for one nonitemized price. Therefore, the taxability of the printed coupons and advertising materials that are on the same invoice as the separately stated website fee would not on its own subject the website fee to Indiana sales tax.

As to whether the website fee is taxable for any other reason, it should first be noted that digital coupons would not be considered a "specified digital product," because the coupons do not meet the definition of a digital audio work, digital audiovisual works, or digital book. Further, the digital coupons do not meet the definition of prewritten computer software under IC 6-2.5-1-24 or telecommunication services under IC 6-2.5-1-27.5. "Prewritten computer software" is defined in IC 6-2.5-1-24 as follows:

> Subject to the following provisions, "prewritten computer software" means computer software, including prewritten upgrades, that is not designed and developed by the author or other creator to the specifications of a specific purchaser:
> (1) The combining of two (2) or more prewritten computer software programs or prewritten parts of the programs does not cause the combination to be other than prewritten computer software.
> (2) Prewritten computer software includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than the purchaser.
> (3) If a person modifies or enhances computer software of which the person is not the author or creator, the person is considered to be the author or creator only of the person's modifications or enhancements.
> (4) Prewritten computer software or a prewritten part of the software that is modified or enhanced to any

> degree, where the modification or enhancement is designed and developed to the specifications of a specific purchaser, remains prewritten computer software. However, where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for such a modification or enhancement, the modification or enhancement is not prewritten computer software.

Use of the website necessarily involves the use of prewritten computer software. Because the software component of Company's service offering is remotely accessed, a fee for Company's website services would not subject to Indiana sales or use taxes pursuant to IC 6-2.5-4-16.7, which is effective July 1, 2018. IC 6-2.5-4-16.7 provides that prewritten computer software sold, rented, leased, or licensed for consideration that is remotely accessed over the internet, over private or public networks, or through wireless media, is not considered an electronic transfer of computer software and is not considered a retail transaction. In other words, after June 30, 2018, transactions for prewritten computer software remotely accessed from a hosted computer or server or through a pool of shared resources from multiple computers and servers, without having to download the software to the user's computer, are not considered retail transactions, and therefore the purchase, rental, lease, or license of that software is not subject to Indiana sales or use tax.

However, when the charge for the website is not separately stated, as is the case with Company's restaurant customers, and the mailing program and the website fee are sold for one nonitemized price, it would be considered a bundled transaction involving taxable and nontaxable products. IC 6-2.5-1-11.5 defines "bundled transaction" in pertinent part as follows:

> (b) "Bundled transaction" means a retail sale of two (2) or more products, except real property and services to real property, that are:
> (1) distinct;
> (2) identifiable; and
> (3) sold for one (1) nonitemized price.
> (c) The term does not include a retail sale in which the sales price of a product varies, or is negotiable, based on other products that the purchaser selects for inclusion in the transaction.
> (d) The term does **not** include a retail sale that:
> . . .
> (2) includes both taxable and nontaxable products in which:
> (A) the seller's purchase price; or
> (B) the sales price;
> of the taxable products does not exceed ten percent (10%) of the total purchase price or the total sales price of the bundled products . . .

Keeping in mind that the services that represent the preparation, fabrication, delivery, and other services performed in respect to the coupons and advertising materials before they are transferred are taxable services pursuant to IC 6-2.5-4-1(e), the taxable products would exceed ten percent of the total sales price to Company's customers. Therefore, the nonitemized price for the mailing program and the website fee would be a bundled transaction, and as such subject to sales tax pursuant to IC 6-2.5-4-15.

RULING

Company's separately stated charge for its mailing program is subject to Indiana sales tax, but a separately stated charge that allows Company's customers to create a profile on a website that offers discounts to prospective customers is not subject to sales tax. However, when the website fee and the mailing program are sold for one nonitemized price, it is a taxable bundled transaction.

CAVEAT

This ruling is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances as stated herein are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting this ruling may not rely on it. However, other taxpayers with substantially identical factual situations may rely on this ruling for informational purposes in preparing returns and making tax decisions. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material respect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that subsequent to the publication of this ruling a change in statute, regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection.

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