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PRIVATE TAXPAYER RULING LR05-010

September 26, 2005

The Department issues this private taxpayer ruling in response to your letter of April 27, 2005, in which you request a ruling on behalf of your company . . . ("Company") . . . on the applicability of Arizona transaction privilege tax to certain revenue attained from Company's business operations. You provided supplemental information requested by the Department in a letter dated May 12, 2005 and e-mail correspondence dated May 27, 2005.

Statement of Facts:

The following facts are excerpted from your May 12 letter:

[Company] is a business that provides homebuilders with various web-based services. We have developed a web database tool to manage and display photos of key stages of a new home being constructed. This tool will be customized to each homebuilder[,] enabling them to offer this distinctive service to their customers in a seamless integration with their current website and identity. Customers will have the ability to login to the homebuilders' website to watch the progress of their new home being constructed and will be provided a CD with all their photos.

[Company] will engage the services of professional photographers as independent contractors to take photos at various stages of construction. [Company] will post those photographs to the customers['] websites, post advertising, and/or messages. Invoices to the homebuilders will include the cost of maintaining the website for each customer. . . . [W]e will pay the independent contractors for the digital photographs we purchase for use in the website

As a secondary source of potential income, our business may have the opportunity to bill homebuilders for advertising on the web pages we design. This would include selling pop-up ads that we would place on the web page.

A sample advertisement for the business that you attached to your May 12 letter provided the following information:

SOLUTION

[Company] can support you by providing unique and valued-added services to you and your customers. Our innovative web tool and complete photo service solution enables each of your new homeowners to continue to enjoy their buying experience . . . [and] see their dreams taking shape . . . !

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. . . You have the option to routinely display promotional messages, informational notices, customer satisfaction surveys and much more! Since our solution encourages new homeowners to share their dream building experience with family and friends, you have opportunity to expand your marketing opportunities.

We can offer our solution with or without our photography staff taking the photos, providing you maximum flexibility to select the level of service that fits your budget.

WE DELIVER

Premier Services

- Quality photos are taken at the key stages of construction of each home.
- Photos are organized and posted in a timely manner on each homeowner's personalized web page.
- Homeowners can email family and friends a special link to allow them the opportunity to view their photos and to share in their new home building experience.
- Each homeowner will receive a CD of their photos to remember their buying experience.
- Web pages are properly secured with a unique login/password.
- Our web tool is tailored to ensure a seamless extension of your existing website identity.
- We perform all the software and photo management and website maintenance.

Low-Cost Target Marketing

- Your logo and name will be prominently displayed on each web page promoting your brand each time the site is visited.
- You will have the ability to distribute routine communications and/or marketing messages.
- Customer satisfaction surveys can be automatically scheduled and their results easily accessible.
- A separate photo web link allows you to separately market to each homeowner's web guest.

You provided the following additional facts in your May 27 e-mail correspondence:

[O]ur base service includes website creation, database creation, maintenance and management of the website, taking the digital photos, and loading the digital photos. [Customers] do, however, have the option to take their own photos and then we would do everything else.

In addition to the base service, they have the option to add advertising or messages or surveys[,] etc[.] for an additional cost. They must however have the base service since these other add-on services don't work without our base service.

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The base fee is priced per new home. Optional services, surveys and messages are also priced per new home. Only the advertising posting is a monthly fee per number of advertisements.

Your Issues:

You presented the following three issues in your request:

1. Are Company's gross proceeds of sales or gross income derived from sales to Company's clients of photographs originally taken and sold by professional photographers that Company hires subject to Arizona transaction privilege tax? If so, under what classification?¹
2. Are Company's gross proceeds of sales or gross income derived from website maintenance for its clients subject to transaction privilege tax? If so, under what classification?
3. Are Company's gross proceeds of sales or gross income derived from sales of pop-up ads subject to transaction privilege tax? If so, under what classification?

Your Positions:

Your positions on the above-mentioned three issues are as follows:

1. Company's gross proceeds of sales or gross income derived from sales of the photographs are not subject to transaction privilege tax.
2. You did not state a position on this issue.
3. You did not state a position on this issue.

Conclusion and Ruling:

Based on the information Company has provided, Company appears to provide its clients with sales of photography, delivered as tangible personal property in both physical (*i.e.*, on

¹ The original question posed in your May 12 correspondence was whether professional photographers are liable for transaction privilege tax on the gross proceeds of sales or gross income derived from sales of photographs to Company. Because the taxpayer at issue in this request is Company, the Department is unable to answer questions related to the photographers' transaction privilege tax liability. This question has been restated as shown to address Company's liability.

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a CD) and web-based forms. Company also provides clients with sales of various web-based services that enable clients to post and manipulate advertising and marketing data on websites “branded” with the clients' own names and identification (e.g., logos).

Pursuant to Arizona Revised Statutes (“A.R.S.”) § 42-5061, Arizona imposes transaction privilege tax under the retail classification for sales at retail of “tangible personal property,” which, as broadly defined in A.R.S. § 42-5001(16), means “personal property which may be seen, weighed, measured, felt or touched or is in any other manner perceptible to the senses.” In relevant part, “selling at retail” means “a sale for any purpose other than for resale in the regular course of business in the form of tangible personal property.”² Sales of “photography”—the “operation of taking, developing, processing, or printing pictures, prints, or images on or from film, video, or other similar media”—are subject to transaction privilege tax under the retail classification.³ Generally, all gross proceeds of sales or gross income derived by a person subject to transaction privilege tax under a tax classification are presumed to be taxable unless the taxpayer establishes the contrary (e.g., the taxpayer's qualification for a statutory exemption).⁴

Under the retail classification, the gross proceeds of sales or gross income derived from “[s]ervices rendered in addition to selling tangible personal property at retail” is exempt from transaction privilege tax, although charges for such services are taxable unless the charge for service is shown separately on the sales invoice and records.⁵

Based on the facts and law provided, the Department rules as follows:

1. Company's gross proceeds of sales or gross income derived from sales of photography to its clients is subject to tax under the retail classification, unless such Company's clients produce valid certificates that the property was purchased for resale in the ordinary course of business. The gross receipts from sales of photography include charges for the taking *and* printing, by any method or means, of the photographs described in the facts provided.
2. To the extent that Company separately shows on its sales invoices and records the gross proceeds of sales or gross income derived from Company's sales of website maintenance services, the services are exempt from tax under the retail classification as those rendered in addition to selling tangible personal property at retail.

² A.R.S. § 42-5061(V)(3). See also Arizona Administrative Code (“A.A.C.”) R15-5-101(A) (“Gross receipts from the sales of tangible personal property to be resold by the purchaser in the ordinary course of business are not taxable under the retail classification.”).

³ A.A.C. R15-5-150.

⁴ A.R.S. § 42-5023.

⁵ A.R.S. § 42-5061(A)(2); A.A.C. R15-5-105.

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3. To the extent that Company separately shows on its sales invoices and records the gross proceeds of sales or gross income derived from Company's sales of pop-up advertising services, the services are exempt from tax under the retail classification as those rendered in addition to selling tangible personal property at retail.⁶

The conclusions in this private taxpayer ruling do not extend beyond the facts presented in your correspondence of April 27, May 12 and May 27, 2005.

This response is a private taxpayer ruling and the determination herein is based solely on the facts provided in your request. The determinations are subject to change should the facts prove to be different on audit. If it is determined that undisclosed facts were substantial or material to the department's making of an accurate determination, this taxpayer ruling shall be null and void. Further, the determination is subject to future change depending on changes in statutes, administrative rules, case law, or notification of a different department position.

The determinations in this private taxpayer ruling are only applicable to the taxpayer requesting the ruling and may not be relied upon, cited, nor introduced into evidence in any proceeding by a taxpayer other than the taxpayer who has received the private taxpayer ruling.

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⁶ Regarding advertising services specifically, Arizona Session Laws 1985, Ch. 298, § 40 repealed the imposition of transaction privilege tax on advertising, effective January 1, 1986. The repeal applied to tax that was levied on:

[T]he gross proceeds of sales or gross income from the business of every person engaging or continuing in this state in the business of *local* advertising by billboards, direct mail, radio, television, newspapers, magazines, other periodicals and publications or by any other means.

For businesses that derive income from advertising through these methods, such income is not subject to the state's transaction privilege tax, use tax, or corresponding county excise taxes.