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## PRIVATE TAXPAYER RULING LR06-006

November 22, 2006

This private taxpayer ruling is in response to your letter dated May 2, 2005, as updated on July 7 and August 26, 2005, in which you request the Arizona Department of Revenue ("Department"), to rule on behalf of . . . on the taxability of gross proceeds or income from . . . auction sales of U.S. government motor vehicles. Pursuant to A.R.S. § 42-2101, the Department may issue private taxpayer rulings to taxpayers and potential taxpayers on request.

### **Statement of Facts**

Your correspondence provides in part the following information:

. . . provides services that facilitate the sale of vehicles by the [U.S. government] . . . , a division of the United States Government, to public buyers. The auction provides these services in strict accordance with its . . . contract relevant provisions enclosed. This contract specifically states, "[u]nless otherwise specified by state law, the contractor shall serve as the Government's sale agent". Other terms of this contract and verbal agreements with the . . .'s Fleet Sales Representative include the following provisions and guidelines:

Vehicles are transported to the auction at the request of the . . . . A vendor hired by either . . . or the auction may transport the vehicles to the auction site prior to the sale. The vehicles are temporarily stored on the auction premises while certain contracted services are performed on the vehicles. These services (i.e., transportation, repairs, detailing, etc.) are authorized specifically by the . . . Fleet Sales Representative and are provided on a fee-per-vehicle basis. The auction never takes title to the vehicles, either before or after the sale.

During each government fleet vehicle sale, the Fleet Sales Representative is on-site at the auction and marshals the sale. The Fleet Sales Representative requires the auctioneer to pass vehicles for sale if the auctioneer does not achieve the Government's lowest acceptable sale price for the vehicle at podium. When an acceptable sales price is obtained, the Fleet Sales Representative

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accepts the high bid and authorizes the auctioneer to award the vehicle to the high bidder. The . . . representative then signs the purchaser's receipt (invoice) and a Form . . . and provides these documents to the purchaser. Note that . . . Form . . . , the certificate for title, passes directly from the Federal Government to the purchaser. A statement is affixed to . . . Form . . . stating that the vehicle is "Sold under the provisions of Section 210(c) of the federal property and administrative services act of 1949, 63 Stat. 384 as amended 40 U.S.C. 481(c) and/or 21 U.S.C. 881".

The auction clerks the sale and collects sales proceeds on behalf of the Federal Government. However, if a buyer pays by credit card, the sale price of the automobile is processed directly to the Government's merchant account. These funds never enter the hands of the auction. In addition, under the . . . contract, the Fleet Sales Representative is responsible for providing any credit card processing equipment and for training the auction staff to process such transactions on behalf of . . . . All taxes are charged separately on the auction's credit card machine or are paid in cash. Only if a purchaser pays by cash or check do auction personnel collect the gross proceeds from the sale. Even in these cases, the sale proceeds are wired directly to the Federal Government via EFT within 48 hours of the sale.

Within twenty-four hours after the sale, the auction provides the Fleet Sales Representative with itemized invoices and other information for each vehicle sold. As required by the . . . contract, the auction also provides a separate invoice for all services approved by the Fleet Sales Representative (i.e., transportation, repairs, detailing, etc.). Under its contract with . . . , the auction may not receive payment for services by deducting these amounts from sales proceeds.

. . . has subsidiaries that operate wholesale automobile auctions in the U.S. and abroad. Each of these auctions, including . . . , facilitates the sale of used vehicles to automobile dealers.

. . . neither purchases nor holds title to the automobiles held for sale – the auction merely provides a platform for used vehicles to be sold to interested wholesale buyers.

. . . also provides additional services to auction buyers and sellers, such as vehicle detailing, reconditioning, financing, inspection, transportation, and

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other related services. These services are provided on a fee-per-vehicle basis, and represent the auction's primary sources of revenue.

While neither . . . nor . . . is an agency or instrumentality of the federal government, the federal government has contracted with . . . to provide auction services (e.g., auction platform, detailing, reconditioning, and inspection) on its behalf. Under the terms of this contract, the auction is considered to be an agent of the federal government with respect to government auction sales. Therefore, it is . . .'s position that the federal government truly functions as the vehicle seller, not the auction.

A statement affixed to the form states that the vehicle is "Sold under the provisions of Section 210(c) of the Federal Property an Administrative Services Act of 1949, 63 Stat. 384 as amended 40 U.S.C. 481(c) and/or 21 U.S.C. 881." The State of . . . recognizes this statement as evidence that the property is sold by the Federal Government, not the auction; therefore, buyers at GSA auctions in that state (and most other states) are not required to pay sales tax on their purchases.

Neither . . . nor . . . is so closely connected to the federal government that the two cannot realistically be viewed as separate entities. However, purchasers would likely not be able to distinguish between the auction and the federal government during the specified sales. . . . From a customer's perspective, the auction functions transparently as a support to this government agent during GSA sales.

The . . . contract provides in part the following:

The U.S. . . . seeks contractors who are regularly engaged in the auction of vehicles. Auctions of Government-owned or leased vehicles must include participation by the general public.

\* \* \*

There is no assurance that any contractor will be the sole agent for the sale of vehicles within any given area. The Government reserves the right to sell its own vehicles at any time and/or relocate vehicles to another area to be sold and/or another contractor, or to a vendor not on schedule.

\* \* \*

Contractors shall have Electronic Funds Transfer (EFT) capability.

\* \* \*

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Contractors shall comply with all state, local, and municipal laws and ordinances. This includes collection and payment of any and all applicable state and local taxes, and compliance with all laws governing vehicle titling for all Groups. Any liabilities or claims resulting from the contractor's failure to do so are their responsibility.

\* \* \*

Unless otherwise specified by state law, the contractor shall serve as the Government's sale agent.

\* \* \*

Auction services will be offered on a fee per vehicle basis.

**Issue**

Are gross proceeds or income from . . .'s auctions of U.S. government motor vehicles subject to Arizona transaction privilege tax under the retail classification?

**Your Position**

. . .'s position as stated in your letter of July 7, 2005:

While neither . . . nor . . . is an agency or instrumentality of the federal government, the federal government has contracted with . . . to provide auction services (e.g., auction platform, detailing, reconditioning, and inspection) on its behalf. Under the terms of this contract, the auction is considered to be an agent of the federal government with respect to government auction sales. Therefore, it is . . .'s position that the federal government truly functions as the vehicle seller, not the auction.

**Applicable Authority**

Arizona Revised Statutes (A.R.S.) § 42-5001(1) provides that "business" "includes all activities or acts, personal or corporate, engaged in or caused to be engaged in with the object of gain, benefit or advantage, either directly or indirectly, but not casual activities or sales."

A.R.S. § 42-5001(4) defines "gross income" as "the gross receipts of a taxpayer derived from trade, business, commerce or sales and the value proceeding or accruing from the sale of tangible personal property or service, or both, and without any deduction on account of losses."

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A.R.S. § 42-5001(5) defines “gross proceeds of sales” as “the value proceeding or accruing from the sale of tangible personal property without any deduction on account of the cost of property sold, expense of any kind or losses, but cash discounts allowed and taken on sales are not included as gross income.”

A.R.S. § 42-5001(13) defines "sale", in part, as any transfer of title or possession, or both, in any manner or by any means, including consignment transactions and auctions, of tangible personal property for a consideration.

A.R.S. § 42-5005 requires every person who receives the gross proceeds of sales or gross income upon which a privilege tax is imposed by this article to obtain a transaction privilege license.

A.R.S. § 42-5023 provides that “it is presumed that all gross proceeds of sales and gross income derived by a person from business activity classified under a taxable business classification comprise the tax base for the business until the contrary is established.”

Arizona Administrative Code (A.A.C.) R15-5-104(B) states that “[g]ross receipts from the sale of tangible personal property, by a person engaged in a professional or personal service occupation or business, shall not be taxable if the property is sold only as an inconsequential element of the nontaxable service provided.”

A.A.C. R15-5-105 provides that “[a] charge in connection with a retail sale is taxable unless the charge for service is shown separately on the sales invoice and records.”

A.A.C. R15-5-112(A) states that “[g]ross receipts from the sales of tangible personal property by an auctioneer are subject to tax under the retail classification.”

A.A.C. R15-5-112(B) provides that “[a]n auctioneer shall obtain a transaction privilege tax license prior to conducting an auction.”

A.A.C. R15-5-181(C) states that “[g]ross receipts from the sale of tangible personal property by the Federal Government are not taxable.”

The U.S. Supreme Court held in *Arizona Dept. of Revenue v. Blaze Constr. Co.*, 526 U.S. 32 (1999), that a state cannot impose a tax directly on the United States. However, in the absence of express preemption by federal law, a state may tax persons doing business with the United States.

In *United States v. New Mexico*, 455 U.S. 720 (1982), the U.S. Supreme Court held that a state generally may impose a nondiscriminatory tax upon a private company's proceeds from contracts with the federal government.

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### Discussion

Arizona's transaction privilege tax differs from the sales tax imposed by most states. Transaction privilege tax is a tax imposed on the privilege of conducting business in the State of Arizona. This tax is levied on the vendor, not the purchaser. The vendor may pass the burden of the tax on to the purchaser. However, the vendor is ultimately liable to Arizona for the tax. The Arizona transaction privilege tax is imposed under 16 separate business classifications, including for example, the *Retail classification*.

A.R.S. § 42-5061 imposes transaction privilege tax on the business of selling tangible personal property at retail. The term "business" includes all activities engaged in for the purpose of gain, benefit or advantage. A.R.S. § 42-5001(1). The tax base for the retail classification is the gross proceeds of sales or gross income derived from the business. A.R.S. § 42-5061(A). "Selling at retail" is defined as a sale for any purpose other than for resale. A.R.S. § 42-5061(V)(3).

The U.S. Supreme Court has stated that in the absence of express preemption by federal law, a state may tax persons doing business with the United States. *Arizona Dept. of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 36 (1999).

Regarding federal tax immunity, the U.S. Supreme Court announced a clear rule in *United States v. New Mexico*:

[T]ax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned. 455 U.S. 720 (1982), at 735.

A finding of constitutional tax immunity requires something more than the invocation of traditional agency notions. 455 U.S. 728-738. Similar to the Court in *New Mexico*, the question here becomes ". . . whether the contractors can realistically be considered entities independent of the United States. If so, a tax on them cannot be viewed as a tax on the United States itself." 455 U.S. at 738.

In *New Mexico* the Court concluded the contractors could not be termed "constituent parts" of the federal government because the contractors were privately owned corporations, that Government officials did not run the contractors' day-to-day operations and that the Government did not have any ownership interest. 455 U.S. at 740. The Court in *New Mexico* concluded that:

The congruence of professional interests between the contractors and the Federal Government is not complete; their relationships with the Government have been created for limited and carefully defined

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purposes. Allowing the States to apply taxes to such entities does not offend the notion of federal supremacy. 455 U.S. at 740, 741.

. . . concedes that “. . . neither . . . nor . . . is an agency or instrumentality of the federal government . . . .” “Neither . . . nor . . . is so closely connected to the federal government that the two cannot realistically be viewed as separate entities.” . . .’s July 7, 2005 correspondence, page 2. Additionally, the federal government has no ownership interest in . . . .

### **Conclusion and Ruling**

The legal incidence of the transaction privilege tax is properly upon . . . and not the United States. . . . is in the business of selling tangible personal property within Arizona. A.R.S. § 42-5001(1); A.R.S. § 42-5061(A). . . . transfers vehicle title, possession or both, for vehicles sold at its Arizona auction facilities. A.R.S. § 42-5001(13).

Gross proceeds or income from auction sales of U.S. government vehicles by . . . including . . .’s per-vehicle contract fees are subject to state transaction privilege tax under the retail classification. A.A.C. R15-5-112(A).

Sales of vehicles to a dealer or wholesaler for resale are not taxable, if properly documented, while sales that are not for resale are taxable unless otherwise provided by statute. A.R.S. § 42-5061(V)(3).

When . . . performs vehicle repairs which include repair parts not considered inconsequential, the sale of the repair parts is subject to transaction privilege tax under the retail classification but the labor involved in making the repair is not taxable if separately stated on the invoice and in the books and records.

The Department’s response is limited to the only issue presented by . . . , a transaction privilege tax question. The conclusions in this private taxpayer ruling do not extend beyond the facts presented in your correspondence dated May 2, July 7 and August 26, 2005 respectively.

**This response is a private taxpayer ruling and the determinations herein are 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 applicable only to the taxpayer requesting the ruling and may not be relied upon, cited nor introduced into evidence**

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**in any proceeding by a taxpayer other than the taxpayer who has received the private taxpayer ruling.**

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