

SUMMARY

QUESTION:

Are Taxpayer's charges to contributing firms to participate in the publication of financial / legal books subject to sales tax?

ANSWER – Based on the Facts Below:

Based on the information provided, the Taxpayer is providing an advertising service as defined in Rule 12A-1.072(1)(g), F.A.C. However, review of the included agreement provides that the Taxpayer is not separately stating the printing charges when billing its clients. Therefore, the entire charge to the contributing firms would be subject to tax when the promotional goods are delivered to a Florida location.

October 9, 2009

XXX

Re: Subject: Technical Assistance Advise ment (TAA) 09A-052
Sales and Use Tax – Publication Agreement
Sections 212.02, 212.05, 212.06, and 212.18, Florida Statutes (F.S.)
Rule 12A-1.072, Florida Administrative Code (F.A.C.)
XXX (Taxpayer)
FEI # XXX

Dear XXX:

This is in response to your letter dated July 9, 2009, requesting this Department's issuance of a Technical Assistance Advise ment ("TAA") pursuant to section 213.22, F.S., and Rule Chapter 12-11, F.A.C., concerning the taxability of certain publication agreements. An examination of your letter has established you have complied with the statutory and regulatory requirements for issuance of a TAA. Therefore, the Department is hereby granting your request for a TAA.

Facts

Your letter dated July 9, 2009, provides the following in part:

I am in the business of publishing financial / legal books. The first book that my company will be publishing is a book in cooperation with the New York Stock Exchange, entitled XXX. My role [as] publisher is to work with the NYSE and all other contributing firms in devising the content[;] I then oversee all aspects of the book[']s editing, design, production, printing and distribution.

For this book, I am working with nine additional firms, including firms like XXX ("Accounting Firm"), XXX ("Bank") etc. . . .

My books are distributed free of charge. For a book like this, all contributing firms pay to participate in the guide. Meaning, they pay to write content (usually in the form of a chapter) that goes in the guide. Sometimes they also get their logo on the cover of the guide. The guide itself is a way for these firms to promote themselves.

So, on a book like this I will reach out to the various firms and offer them an opportunity to be involved in the book and we then come to an agreement on how much they will pay.

So, to be clear, the transaction is for participation in the book. That said, and at a later date, they are offered copies of the guide for their own distribution, but this is not part of the transaction. They can request 2,000 books, or they can request zero books; it has no influence on the price they have already agreed to pay.

* * *

Included with your request for technical advice is a copy of an agreement between your company, Taxpayer (Publisher), and Accounting Firm (Client), one of the contributing firms for the XXX.

The Agreement, dated July 7, 2009, provides the following in part:

. . . The Publisher intends to publish a guide with a working title of “XXX” (the ‘Publication’) which [Client] agrees to sponsor on the following terms and conditions:

1. The Publisher will prepare, edit, design and produce the Publication with an intended publication date of January 2010
2. [Client] will provide content detailing the role which an accounting firm plays in helping companies to list on the NYSE. . . .

* * *

7. The Publisher confirms that the [Client] name/logo will appear on the outside front cover of the Publication. [Client] will also provide the Publisher with contact details and 150-word biographies of the authors of its chapter.

* * *

9. The Publisher will provide [Client] with up to 2,000 free copies of the Publication, delivered to one address in the United States, free of any delivery or other charges, costs or expenses.

* * *

Requested Advisement

You request an advisement regarding the taxability of the charge to a contributing firm to participate in the publication.

Applicable Authority and Discussion

Section 212.02, F.S., provides in part:

(14)(a) “Retail sale” or a “sale at retail” means a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property or services taxable under this chapter, and includes all such transactions that may be made in lieu of retail sales or sales at retail. . . .

(15) “Sale” means and includes:

(a) Any transfer of title or possession, or both, exchange, barter, license, lease, or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration.

* * *

(16) “Sales price” means the total amount paid for tangible personal property, including any services that are a part of the sale

* * *

Section 212.05, F.S., which levies tax on the sale, use, or consumption of tangible personal property, provides, in part, the following:

It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state

(1) For the exercise of such privilege, a tax is levied on each taxable transaction or incident, which tax is due and payable as follows:

(a)1.a. At the rate of 6 percent of the sales price of each item or article of tangible personal property when sold at retail in this state

* * *

Section 212.06(5)(a)1., F.S., provides in part:

. . . [I]t is not the intention of this chapter to levy a tax upon tangible personal property imported, produced, or manufactured in this state for export, provided that tangible personal property may not be considered as being imported, produced, or manufactured for export unless the importer, producer, or manufacturer delivers the same to a licensed exporter for exporting or to a common carrier for shipment outside the state or mails the same by United States mail to a destination outside the state

Section 212.08(7)(vv), F.S., provides in part:

1. As used in this paragraph, the term “advertising agency” means any firm that is primarily engaged in the business of providing advertising materials and services to its clients.
2. The sale of advertising services by an advertising agency to a client is exempt from tax imposed by this chapter. Also exempt from the tax imposed by this chapter are items of tangible personal property such as photographic negatives and positives, videos, films, galleys, mechanicals, veloxes, illustrations, digital audiotapes, analog tapes, printed advertisement copies, compact discs for the purpose of recording, digital equipment, and artwork and the services used to produce those items if the items are:
 - a. Sold to an advertising agency that is acting as an agent for its clients pursuant to contract, and are created for the performance of advertising services for the clients;
 - b. Produced, fabricated, manufactured, or otherwise created by an advertising agency for its clients, and are used in the performance of advertising services for the clients; or
 - c. Sold by an advertising agency to its clients in the performance of advertising services for the clients, whether or not the charges for these items are marked up or separately stated.

* * *

Rule 12A-1.072, F.A.C., provides in part:

(1)(a) “Advertising” is the expression of an idea created and produced for reproduction and distribution through means such as television, radio, Internet, newspapers, newsletters, periodicals, trade journals, publications, books, magazines, standardized outdoor billboards, direct mail, point-of-sale displays, leaflets, brochures, fliers, or package design, and which is designed to promote sales of a particular product or service or to enhance the image of the advertiser. . . .

* * *

(1)(b)2.a. Firms that are primarily engaged in consulting with their clients about marketing and advertising products or services, formulating a marketing plan intended to improve their image or increase their market share, and executing those plans, are considered to be advertising agencies.

* * *

(d)1. “Primarily engaged in the business of providing advertising materials and services” means more than 50 percent of its gross receipts in the firm's previous tax year were, or the first tax year are budgeted to be, from receipts for the sale of advertising materials and services to clients. For purposes of determining whether the firm qualifies under this definition, there shall be deducted from gross receipts amounts paid by the agency on behalf of its client to a third party for charges such as printing, imprinting, reproduction, publishing of tangible personal property, broadcasting advertisements, media placement,

or other out-sourced activities before applying the 50 percent test.

* * *

(e) "Advertising materials" means tangible personal property sold to an advertising agency, created by an advertising agency, or sold by an advertising agency during the course of providing advertising services. . . .

(f) "Raw materials" means materials or media used to create advertising materials. . . .

(g) "Advertising services" means services rendered by an advertising agency when designing and/or implementing an advertising campaign to promote a product, service, idea, concept, issue, or the image of a person. This includes services rendered to design and produce advertising materials

(h) "Promotional goods" means tangible personal property used for promotional purposes. Examples of promotional goods include displays, display containers, exhibits, newspaper inserts, brochures, catalogues, direct mail letters or flats, shirts, hats, pens, pencils, key chains, audio tapes, videotapes, compact discs, business cards, or other printed goods or materials.

* * *

(2) Sales of Services. The sale of advertising services by an advertising agency is exempt from tax. The professional service fee charged by an advertising agency for services is exempt from tax. An advertising agency's professional fee includes agency time or hourly charges, retainer fees, agency mark-up on exempt advertising materials, and media commissions.

(3) Sales of Advertising Materials.

(a)1. The charge by an advertising agency to clients for advertising materials is exempt from sales tax. The exemption applies regardless of the advertising agency's method of billing, whether the contract reflects a lump sum or separately states the costs of exempt advertising materials and other services and professional fees.

2. When an advertising agency sells promotional goods along with exempt items or services, the taxable items must be separately stated in order for the exempt items to receive the exemption.

(b) Example: The advertising agency prepares and prints a brochure for its client. The preparation of the brochure includes the concept development, design and layout, preparation of advertising materials, including photographs, artwork, and mechanicals, and the printing of the copies of the brochure. The advertising agency pays sales tax on all raw materials used in creating advertising materials. The following are examples of the proper tax treatment for each method of contracting with the charges to the client:

as: 1. The advertising agency contract separately itemizes the components of the brochure design, advertising materials, and printing. Sales tax is due only on the charge for printing, including any mark-up. The sales tax must be separately stated.

2. The advertising agency contract combines the charges for the design services and advertising materials into a single charge, but separately states the printing charge, including the mark-up. Sales tax is due only on the charge for printing, including the mark-up. The sales tax must be separately stated.

3. The advertising agency contract combines the charges for the design services, advertising materials, and printing in a single charge. Sales tax is due on the lump sum charge to the client. The sales tax must be separately stated.

* * *

Section 212.18(3)(a) F.S., provides in part:

(3)(a) Every person desiring to engage in or conduct business in this state as a dealer, as defined in this chapter, . . . must file with the department an application for a certificate of registration

* * *

Section 212.05, F.S., provides that tax is imposed on the sales price of each item of tangible personal property sold at retail in this state. Section 212.02(16), F.S., provides the sales price includes any services that are sold as part of the sale of tangible personal property. Section 212.02(14), F.S., defines “retail sale” to include any sale, for any purpose other than for resale. The sale of a book is a sale of tangible personal property. A transfer of tangible personal property occurs as a result of the agreement. Section 212.18(3)(a), F.S., provides you are required to register with the Department for purposes of collecting and remitting sales tax on sales of taxable tangible personal property delivered in this state.

Section 212.08(7)(vv)1., F.S., defines an “advertising agency” as “any firm that is primarily engaged in the business of providing advertising materials and services to its clients.” Your business must come within this definition of an “advertising agency” in order to take advantage of the exemptions provided in section 212.08(7)(vv), F.S. Advertising materials would include items of tangible personal property, created during the course of providing advertising services to your clients, such as artwork.

Assuming that your company qualifies as an advertising agency, your company is able to take advantage of the exemptions provided above. Your company would not be required to charge your clients sales tax on charges for advertising services. See Section 212.08(7)(vv)2., F.S. In addition, advertising materials and the creative services used by an advertising agency to design the advertising for promotional items are not subject to tax. See Section 212.08(7)(vv)3., F.S. However, the statute specifies two situations that are taxable. First, the purchase of raw materials used to create advertising materials for sale to an advertising agency or produced in-house by an advertising agency for its client is taxable. See Section 212.08(7)(vv)2., F.S. Second, when promotional goods are produced or reproduced for distribution, sales tax applies to the sales price charged to the client for the promotional items. See section 212.08(7)(vv)3., F.S.

Based on the information provided, you are providing an advertising service as defined in Rule 12A-1.072(1)(g), F.A.C. The books that you publish would be considered promotional goods as

defined in Rule 12A-1.072(1)(h), F.A.C. As provided, the sale of a promotional good from an advertising agency is subject to tax. When an advertising agency sells promotional goods along with exempt items or services, the taxable items must be separately stated in order for the exempt items to receive the exemption.

Your letter indicates that your clients are offered books for their own distribution, subsequent to contracting to contribute to the publication. However, review of the included agreement provides that the Client agrees to pay “\$XXX + any applicable taxes,” and your company agrees to provide up to 2,000 “free” copies of the Publication, at the time of the agreement. This indicates that you are not separately stating the printing charges when billing your clients. Therefore, the entire charge to your customers would be subject to tax.

However, you would not be required to collect Florida sales tax, if at the time of the sale you agree to deliver the books to a location outside Florida. Section 212.06(5)(a)1., F.S., provides that tangible personal property that is produced in this state for export is not subject to tax when the dealer delivers the property to a licensed exporter or common carrier for delivery outside Florida.

Conclusion

Based on the information provided, you are providing an advertising service as defined in Rule 12A-1.072(1)(g), F.A.C. However, review of the included agreement provides that you are not separately stating the printing charges when billing your clients. Therefore, the entire charge to your customers would be subject to tax when the promotional goods are delivered to a Florida location.

This response constitutes a Technical Assistance Advisement under section 213.22, F.S., which is binding on the Department only under the facts and circumstances described in the request for this advice as specified in section 213.22, F.S. Our response is predicated on those facts and the specific situation summarized above. You are advised that subsequent statutory or administrative rule changes, or judicial interpretations of the statutes or rules, upon which this advice is based, may subject similar future transactions to a different treatment than that expressed in this response.

You are further advised that this response, your request and related backup documents are public records under Chapter 119, F.S., and are subject to disclosure to the public under the conditions of section 213.22, F.S. Confidential information must be deleted before public disclosure. In an effort to protect confidentiality, we request you provide the undersigned with an edited copy of your request for Technical Assistance Advisement, the backup material, and this response, deleting names, addresses, and any other details which might lead to identification of the taxpayer.

Technical Assistance Advisement
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Your response should be received by the Department within 15 days of the date of this letter.
Sincerely,

Brinton Hevey
Tax Law Specialist
Technical Assistance and Dispute Resolution
850/488-7157

Record ID: 67725