

LR 6159

THIS LETTER RULING SUPERSEDES LR 4157 (DATED OCTOBER 26, 2007), LR 4637 (DATED MARCH 24, 2008), AND LR 5201 (DATED OCTOBER 22, 2008)

April 2, 2010

Dear Applicant:

This is a letter ruling issued by the Director of Revenue under Section 536.021.10, RSMo, and Missouri Code of State Regulations 12 CSR 10-1.020, in response to your letter dated January 12, 2010.

The facts presented in your letter ruling request are summarized as follows:

Applicant is a publisher of a newspaper of general circulation sold throughout the state of Missouri and elsewhere. The newspaper is purchased in a variety of ways. Purchasers may purchase single copies of the newspaper from vendors, retail outlets, or vending machines at various fixed locations and pay the fixed price per issue set by Applicant. Such purchasers do not opt for delivery of the newspaper.

Another option is that the newspaper may be purchased by subscribers who prepay for the newspaper for periods of varying lengths, ranging from one month to one year. The price for the newspaper charged to subscribers is set by Applicant. Generally, the subscription price for the newspaper is lower than the total single issue price paid for a comparable period. Thus, subscribers receive a form of volume discount.

Deliveries of the newspaper are made by contract carriers. The carriers are independent contractors who provide their own equipment. Applicant pays a negotiated per piece delivery charge to the carriers. Applicant bills for the total subscription charge (which includes the price of the newspaper and the delivery charge), collects payment from the subscriber, remits the appropriate delivery charge to the carrier, and remits the proper sales tax to the state of Missouri. Applicant receives no portion of the delivery charge.

Applicant provides subscribers with the option of picking up each issue of the newspaper at a designated pick-up point, having the newspaper delivered by the carrier with whom Applicant has contracted, or having the newspaper mailed. The option is given to the subscribers by notice on the billing statement. The notice states:

Your subscription price includes a charge for the convenience of having the paper delivered. Instead of receiving home delivery service, you have the option to pick up your newspaper at a local distribution point or have it mailed. Prices and delivery charges may vary by location. Call ____ for more information.

With respect to those subscribers who elect to have the newspaper delivered by carrier, the billing statement reflects a charge for the subscription price of the newspaper and a separately-stated charge for the delivery. Sales tax is collected and remitted only on the subscription price for the newspaper.

ISSUE:

Is Applicant required to collect and remit sales tax on the separately-stated charge for the delivery of newspapers purchased by subscribers when subscribers are given the option of foregoing delivery and picking up the newspapers at Applicant's pick-up point?

RESPONSE:

Yes. Applicant is required to collect and remit sales tax on the separately-stated charge for the delivery of newspapers purchased by subscribers when subscribers are given the option of foregoing delivery and picking up the newspapers at Applicant's pick-up point unless Applicant is able to demonstrate that the option to pick up the newspaper is a truly viable option for Applicant's subscribers.

Section 144.020, RSMo, imposes a sales tax on all persons making retail sales of tangible personal property in Missouri. Newspapers are tangible personal property subject to sales tax. *Hearst Corporation v. Director of Revenue*, 779 S.W.2d 557 (Mo. banc 1989).

Section 144.021, RSMo, requires sellers to report their gross receipts and to remit sales tax based upon their gross receipts.

Section 144.010.1(3), RSMo, defines gross receipts as:

the total amount of the sale price of the sales at retail including any services other than charges incident to the extension of credit that are a part of such sales made by the businesses herein referred to[.]

Missouri Regulation 12 CSR 10-110.400(3)(E) explains the application of sales tax to the publication and sale of newspapers:

If the purchaser is required to pay for delivery, handling, postage costs or similar service charges as part of the sale price of the publication, the entire sale price is subject to tax. If the purchaser is not required to pay the service charge as part of the sale price of the publication, the amount paid for the service is not subject to tax if the charge for such service is separately stated. If the charge of the service is not separately stated, the entire sale price is subject to tax.

As set forth by the Missouri Supreme Court in *Southern Red-E-Mix Co. v. Director of Revenue*, 894 S.W.2d 164, 167 (Mo. banc 1995), the fundamental question is whether the parties to the transaction intend the delivery charge to be part of the sale. In determining whether delivery charges are mandatory and intended to be part of the sale, the Court has examined the intent of the parties by reviewing several factors: (1) when title passes from the seller to buyer, (2) whether the delivery charges are separately stated, (3) who controls the cost and means of delivery, (4) who assumes the risk of loss during delivery, and (5) whether the seller derives financial benefit from delivery. *Id.*

Under the facts as given, Applicant should collect and remit sales tax on the delivery charges. Title passes from Applicant to its customer on delivery. Applicant controls the cost and means of delivery. Applicant also has the risk of loss until the newspaper is delivered to its customer. Applicant derives a financial benefit from the delivery because its customers may only subscribe to a newspaper that is actually delivered. Only one of the five factors falls in Applicant's favor, the delivery charges are separately stated.

Applicant asserts that its subscribers control the cost and means of delivery because they have the option to pick up the newspapers at a designated pick-up point or have the newspapers mailed. But the Supreme Court of Missouri has found the need to make special arrangements to avoid delivery charges to be an important factor in determining whether delivery charges are mandatory and subject to tax. *See, e.g., Southern Red-E-Mix Co.*, 894 S.W. at 167. Here, the pick-up option does not appear to be a truly viable option because there is only a single pick-up point and subscribers would have to drive miles to this designated pick-up point to avoid the delivery charge. The option to receive the newspaper by mail is also not a truly viable option because subscribers would receive the newspaper days after its publication. Therefore, the delivery charges are subject to sales tax.

This letter ruling is binding upon the Department of Revenue with respect to Applicant for three (3) years from the date of this letter and is subject only to statutory changes by the General Assembly and to changes in the interpretation of law by the courts or administrative tribunals. If a change occurs, the taxpayer who relies upon an outdated interpretation may be subject to additional taxes, interest and penalties, which may be imposed prospectively from the date of the change. For this reason, the interpretation set forth above should be reviewed on a regular basis. Please note that any change in or deviation from the facts as presented will render this ruling inapplicable.

Should additional information be needed, please contact Legal Counsel Stephen P. Sullivan, General Counsel's Office, Post Office Box 475, Jefferson City, Missouri 65105-0475 (phone 573-751-0961), or me.

Sincerely,

Alana M. Barragán-Scott