



North Carolina Department of Revenue

Pat McCrory
Governor

Lyons Gray
Secretary

August 21, 2015

[Redacted]

Attention: [Redacted]

Re: Sales and Use Tax Private Letter Ruling Request
FEIN#: [Redacted]
Account#: [Redacted]

Dear [Redacted]:

The Department received Form NC-PLR, Request for Private Letter Ruling, remittance of \$500.00, [Redacted] letter dated January 16, 2014, email communication of August 26, 2014 from [Redacted] and your letter dated May 19, 2015. Additionally, the Department received documents identified as Exhibit A, [Redacted] Terms & Conditions (“[Redacted] Terms”), last updated April 30, 2015, and Exhibit B, [Redacted] Terms of Use (“[Redacted] Terms”), last updated April 12, 2013.

[Redacted] General Counsel, [Redacted] Director of the Sales and Use Tax Division, and [Redacted] former Revenue Administration Officer III, discussed the private letter ruling request with you and [Redacted] by phone on April 21, 2015. The phone call was in response to the Department’s letter (“DOR Letter”) of September 17, 2014 requesting additional information.

Overview

[Redacted] (“Company”), an affiliate of [Redacted], offers a membership program known as [Redacted] (“[Redacted]” or “[Redacted]”). The general public may sign up for a free trial or paid [Redacted] Membership and receive certain membership benefits associated with shopping on [Redacted] (the ‘Website’) during the membership period. The free trial is one month and the paid membership period is one year. Participants in the membership program are referred to as [Redacted] Members.”

The letter of January 16, 2014 indicates that the [Redacted] Membership benefits provided to [Redacted] Members included the following initial benefits (“Initial Benefits”): Shipping, [Redacted] Videos, [Redacted] Library, and [Redacted]. Your letter of May 19, 2015 listed the current benefits (“Current Benefits”) available to [Redacted] Members as of the date of the letter. Current Benefits include the Initial Benefits and the following benefits: [Redacted] Exclusive Access to [Redacted], [Redacted], [Redacted], [Redacted] Music, [Redacted] Photos, and [Redacted].

The letter of January 16, 2014 states, “[w]hile Company does not directly provide the membership benefits to [Redacted] Members, it is contractually obligated to ensure the benefits are

provided. To meet its contractual obligations, Company pays its affiliates to provide the underlying service related to each benefit. For example, an affiliate of Company provides the shipping service and another affiliate provides ebooks." Additionally, the [REDACTED] Terms state, in part, "[t]hese terms are between you [REDACTED] Member] and [REDACTED] and/or its affiliates ([REDACTED] or 'Us')."

By DOR Letter, the Department requested clarification and details of the activities between Company and [REDACTED] Inc. ("[REDACTED]"). By DOR Letter, the Department also requested a copy of the intercompany agreement ("Agreement") between Company and [REDACTED] that was referenced in the email communication received from [REDACTED] of August 26, 2014.

During the phone call of April 21, 2015, the Department was advised that corrections to information previously communicated would be forthcoming. Your letter of May 19, 2015 states, in part, [REDACTED] "provides the digital content, including the [REDACTED] Videos, to [REDACTED] Members. Company does not provide any payment or portion of the [REDACTED] revenue it receives to [REDACTED] . . . [REDACTED] procures the digital content and allows [REDACTED] Members to access and view the content."

To date, a copy of the Agreement has not been provided as requested by the Department. This response is based on the information provided to date which does not take into consideration any agreement between Company and [REDACTED] or between Company and any other party relative to the [REDACTED] Membership benefits.

Explanation of Specific Membership Benefits

The following [REDACTED] Membership benefits and explanations are from your May 19, 2015 letter:

- **Shipping** - [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].
- **[REDACTED] Videos** - [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].
- **[REDACTED] Library** - The [REDACTED] Library allows [REDACTED] Members who own [REDACTED] devices to choose from thousands of electronic books ("ebooks") to borrow for free, [REDACTED]
[REDACTED]
[REDACTED].
- **[REDACTED]** - The [REDACTED] feature allows [REDACTED] Members who own [REDACTED] devices to select and receive one free e-book per month from [REDACTED] e-books selected by [REDACTED]

Publishing editors. [REDACTED]
[REDACTED]
[REDACTED].

- [REDACTED] - The [REDACTED] benefit allows [REDACTED] Members to have [REDACTED] pounds of heavy/bulky items delivered for a flat shipping fee of [REDACTED]. [REDACTED]
[REDACTED].
- **Exclusive Access to [REDACTED]** - [REDACTED] is a line of [REDACTED] everyday essential products [REDACTED]. [REDACTED]
[REDACTED].
- [REDACTED] provides discounts to [REDACTED] Members on sales of certain tangible personal property. [REDACTED]
[REDACTED].
- [REDACTED] - [REDACTED] Music provides [REDACTED] Members with unlimited, ad-free access to more than a million songs and albums. [REDACTED]
[REDACTED].
- **[REDACTED] Photos** - [REDACTED] Members receive unlimited storage for photos in the [REDACTED] Drive ("[REDACTED]") and [REDACTED] of storage for videos and files. [REDACTED]
[REDACTED].
- [REDACTED] - Currently, [REDACTED] Members can request an invitation to receive up to [REDACTED]. [REDACTED] allow customers to simply [REDACTED] when the customer needs to reorder a product. [REDACTED]
[REDACTED].

While [REDACTED] are currently only available to select [REDACTED] Members that receive an invitation, they may be available to all [REDACTED] customers in the future.

Request for Rulings

The following rulings were requested on behalf of Company in the letter of January 16, 2014:

- A. Is Company's sale of [REDACTED] Membership to North Carolina customers subject to sales and use tax?
- B. Is Company's provision of the free, one-month trial period of the [REDACTED] Membership to North Carolina customers subject to sales or use tax?

There are a number of arguments noted in the letter of January 16, 2014 as to why Company is of the opinion that its sales of [REDACTED] Memberships to North Carolina customers are not subject to sales or use tax in this State. Additionally such letter states, "[t]he free, one-month trial period

of a [REDACTED] Membership provided to North Carolina customers is not subject to North Carolina sales and use tax.”

Statutory References

N.C. Gen. Stat. § 105-164.3(36) defines, in part, the term “sale or selling” as “[t]he transfer for consideration of title, license to use or consume, or possession of tangible personal property or digital property or the performance for consideration of a service. The transfer . . . may be conditional or in any manner or by any means.”

N.C. Gen. Stat. § 105-164.3(33) defines “purchase price” as “[t]he term has the same meaning as the term ‘sales price’ when applied to an item subject to use tax.”

N.C. Gen. Stat. § 105-164.3(32) defines “purchase,” as “[a]cquired for consideration, regardless of any of the following:

- a. Whether the acquisition was effected by a transfer of title or possession, or both, or a license to use or consume.
- b. Whether the transfer was absolute or conditional regardless of the means by which it was effected.
- c. Whether the consideration is a price or rental in money or by way of exchange or barter.”

N.C. Gen. Stat. § 105-164.3(35) defines the term “retailer, in part, as “[a] person engaged in business of making sales at retail, offering to make sales at retail, or soliciting sales at retail of tangible personal property, digital property, or services for storage, use, or consumption in this State. . . . A person . . . required to collect the tax levied under G.S. 105-164.4(a).”

N.C. Gen. Stat. § 105-164.3(37) defines the term “sales price” as “[t]he total amount or consideration for which tangible personal property, digital property, or services are sold, leased, or rented. The consideration may be in the form of cash, credit, property, or services. The sales price must be valued in money, regardless of whether it is received in money.

a. The term includes all of the following:

1. The retailer's cost of the property sold.
2. The cost of materials used, labor or service costs, interest, losses, all costs of transportation to the retailer, all taxes imposed on the retailer, and any other expense of the retailer.
3. Charges by the retailer for any services necessary to complete the sale.
4. Delivery charges.
5. Installation charges.
6. Repealed by Session Laws 2007-244, s. 1, effective October 1, 2007.
7. Credit for trade-in.
8. Discounts that are reimbursable by a third party and can be determined at the time of sale through any of the following:
 - I. Presentation by the consumer of a coupon or other documentation.
 - II. Identification of the consumer as a member of a group eligible for a discount.
 - III. The invoice the retailer gives the consumer.

b. The term does not include any of the following:

1. Discounts that are not reimbursable by a third party, are allowed by the retailer, and are taken by a consumer on a sale.
2. Interest, financing, and carrying charges from credit extended on the sale, if the amount is separately stated on the invoice, bill of sale, or a similar document given to the consumer.
3. Any taxes imposed directly on the consumer that are separately stated on the invoice, bill of sale, or similar document given to the consumer.”

N.C. Gen. Stat. § 105-164.4(a) provides, in part, “[a] privilege tax is imposed on a retailer engaged in business in the State at the percentage rates of the retailer’s net taxable sales or gross receipts, listed in this subsection. The general rate of tax is four and three-quarters percent (4.75%).”

N.C. Gen. Stat. § 105-164.8(c) provides “[a] retailer who is required to collect the tax imposed by . . . Article [5 of Chapter 105] must collect a local use tax on a transaction if a local sales tax does not apply to the transaction. . . . A ‘local sales tax’ is a tax imposed under Chapter 1096 of the 1967 Session Laws or by Subchapter VIII of . . . Chapter [105], and a local use tax is a use tax imposed under that act or Subchapter.”

N.C. Gen. Stat. § 105-164.4(a)(6b) provides, in part, “[t]he general rate applies to the sales price of digital property that is sold at retail . . . is delivered or accessed electronically, is not considered tangible personal property, and would be taxable . . . if sold in a tangible medium. The tax applies regardless of whether the purchaser of the item has a right to use it permanently or to use it without making continued payments. . . . The tax does not apply to a service that is taxed under another subdivision of this subsection or to an information service. The following property is subject to tax under this subdivision:

- a. An audio work.
- b. An audiovisual work.
- c. A book, a magazine, a newspaper, a newsletter, a report, or another publication.
- d. A photograph or a greeting card.”

N.C. Gen. Stat. § 105-164.3(1f) defines “audio work” as “[a] series of musical, spoken, or other sounds, including a ringtone.”

N.C. Gen. Stat. § 105-164.3(1g) defines “audiovisual work” as “[a] series of related images and any sounds accompanying the images that impart an impression of motion when shown in succession.”

N.C. Gen. Stat. § 105-164.4D states, in part, that “[t]ax applies to the sales price of a bundled transaction” except if certain specific scenarios apply or “[t]he bundle includes a service, and the retailer determines an allocated price for each product in the bundle based on a reasonable allocation of revenue that is supported by the retailer’s business records kept in the ordinary course of business. In this circumstance, tax applies to the allocated price of each taxable product in the bundle.”

N.C. Gen. Stat. § 105-164.3(1i) defines the term “bundled transaction” as “[a] retail sale of two or more distinct and identifiable products, at least one of which is taxable and one of which is exempt, for one nonitemized price. Products are not sold for one nonitemized price if an invoice or another sales document made available to the purchaser separately identifies the price of each product. A bundled transaction does not include the retail sale of any of the following:

- a. A product and any packaging item that accompanies the product and is exempt under G.S. 105-164.13(23).
- b. A sale of two or more products whose combined price varies, or is negotiable, depending on the products the purchaser selects.
- c. A sale of a product accompanied by a transfer of another product with no additional consideration.
- d. A product and the delivery or installation of the product.
- e. A product and any service necessary to complete the sale.”

N.C. Gen. Stat. § 105-164.6(a) provides, in part, “[a]n excise tax at the applicable rate set in G.S. 105-164.4 is imposed on . . . [t]angible personal property or digital property purchased inside or outside this State for storage, use, or consumption in this State.”

Rulings

Paid [REDACTED] Membership Ruling

As stated previously, Company is contractually obligated to ensure the [REDACTED] Membership benefits are available to each [REDACTED] Member. The term “sale” is defined, in part, as “[t]he . . . license to use or consume . . . digital property.” With the sale of a [REDACTED] Membership, a [REDACTED] Member has a license to use and/or the right or ability to access audio works, audiovisual works, and ebooks which are digital properties subject to tax pursuant to N.C. Gen. Stat. § 105-164.4(a)(6b).

N.C. Gen. Stat. § 105-164.4(a)(6b) provides, in part, “the sales price of digital property that is sold at retail . . . is delivered or accessed electronically, is not considered tangible personal property, and would be taxable . . . if sold in a tangible medium” is subject to sales or use tax. “The tax applies regardless of whether the purchaser of the item has a right to use it permanently or to use it without making continued payments.”

The [REDACTED] Terms state, in part, “[t]his is an agreement between you and [REDACTED], Inc. (With its affiliates, [REDACTED] or ‘We’). The [REDACTED] Terms further state, in part, [REDACTED] grants you a non-exclusive, non-transferable, non-sublicensable, limited right and license, during the applicable Viewing Period, to access, view, use and display the Digital Content in accordance with the [REDACTED].”

The Department obtained the [REDACTED] Terms of Use (“[REDACTED] Terms”), last updated June 11, 2014 from [REDACTED]. The [REDACTED] Terms state, in part, “[t]his is an agreement between you and [REDACTED], Inc. (with its affiliates, [REDACTED], ‘we’ or ‘us’) regarding the [REDACTED] (collectively, the ‘Services’). The Services allow you to purchase and access digital versions of audio recordings, artwork and information relating to the audio recordings, and other content (collectively, [REDACTED] Content’).”

[REDACTED].” The [REDACTED] Terms further state “[w]e grant you a non-exclusive, non-transferable right to use [REDACTED] and any additional [REDACTED] Content we provide you access to through the [REDACTED] Library.”

The Department was unable to find any formal terms, licenses information, or agreements through the footnote references provided in your letter of May 19, 2015 for either the [REDACTED] Library or the [REDACTED]. However, as previously stated above, a [REDACTED] Member has electronic access to digital books under both the [REDACTED] Library and the [REDACTED] benefits.

The following [REDACTED] Membership benefits are digital products subject to sales and use tax:

- [REDACTED] Videos
 - [REDACTED] Library
 - [REDACTED]
 - [REDACTED]
- (collectively, “Taxable Products”)

Article 5 of Chapter 105 of the N.C. General Statutes does not expressly impose sales or use tax on the following [REDACTED] Membership benefits available to each [REDACTED] Member; therefore, such are generally nontaxable products. Please note the additional comments included below for certain [REDACTED] Membership benefits that are generally nontaxable products.

- **Shipping** – Shipping is included in the definition of “delivery charges” which is a part of the definition of “sales price.” The term “delivery charges” is defined in N.C. Gen. Stat. § 105-164.3(6) as “[c]harges imposed by the retailer for preparation and delivery of personal property or services to a location designated by the consumer.”
- [REDACTED] – See response for shipping.
- **Exclusive Access to [REDACTED]**
- [REDACTED] – Nontaxable. However, the discounts may be a part of the sales price of another retailer (Affiliate or Third-Party) and subject to tax if the discount is not offered by the retailer of the product. See definition of sales price.
- [REDACTED]
- [REDACTED] **Photos**
- [REDACTED]
(collectively, “Nontaxable Products”)

The sale of a [REDACTED] Membership is a “bundled transaction” as defined in N.C. Gen. Stat. § 105-164.3(1i). Under the provisions of N.C. Gen. Stat. § 105-164.4D(a)(2), if Company is able to allocate the sales price of the Taxable Products included in the sale of each [REDACTED] Membership (bundled transaction), tax is due on the allocated price of the Taxable Products in the [REDACTED] Membership and tax is not due on the allocated price of the Nontaxable Products.

Company may use its business records kept in the ordinary course of business to determine the portion of the sales price of a [REDACTED] Membership allocable to the Taxable Products. However, if Company is unable to properly determine such allocation, the entire sales price of a [REDACTED] Membership is subject to the general 4.75% State and applicable local and transit rates of sales and use tax for sales sourced to this State pursuant to the sourcing provisions established in N.C. Gen. Stat. § 105-164.4B.

[REDACTED] Members have licenses to use and/or the right or ability to access the Taxable Products by virtue of purchases of [REDACTED] Memberships; therefore, any allocation should be determined based on the sales price of the Taxable Products in a [REDACTED] Membership and not determined based on the frequency of use or access of any of the [REDACTED] Membership benefits. In other words, the taxation of the sale of digital property is not contingent on the actual delivery to or access by a purchaser, but includes a license to use or the right or ability to access digital property.

One-Month Trial [REDACTED] Membership (“Trial Membership”) Ruling

Without a copy of the Agreement between Company and [REDACTED] the Department cannot provide a definitive response as to the application of sales or use tax to a Trial Membership. While you state in your letter of May 19, 2015 that the “Company does not provide any payment or portion of the [REDACTED] revenue it receives to [REDACTED] access to and licenses to use digital property are provided to trial members (“Trial Members”). It is unclear if Company as part of the Agreement performs certain activities for [REDACTED] and in exchange [REDACTED] provides Trial Members the right or ability to access or licenses to use digital property on behalf of Company’s Trial Memberships. Additionally, as the discussion of the facts regarding the transactions between Company and [REDACTED] in your letter differs from the facts provided in the initial letter of January 16, 2014, it appears changes in the Agreement or the transactions between the parties have occurred.

If something is given or performed by Company in exchange for [REDACTED] providing licenses to use and/or the right or ability to access Taxable Products to Trial Members on behalf of Company, pursuant to the definition of “purchase” in N.C. Gen. Stat. § 105-164.3(32), use tax is due on the purchase price associated with the Taxable Products at the general 4.75% State and applicable local and transit rates of tax unless [REDACTED] elects to collect and/or remit the sales or use tax.

[REDACTED]

[REDACTED]

[REDACTED], Company is liable for sales and use tax plus applicable interest on its sales on or after [REDACTED] Memberships as discussed herein sourced to this State. Additionally, Company may owe tax on Trial Memberships. Interest at the rate of five percent (5.00%) per annum or any part thereof is due on the delinquent liability. If you need assistance calculating the interest liability, feel free to contact me.

This ruling does not offer any guidance as to discounts or other products sold by another affiliate or retailer or whether specific items included in the definition of sales price do or do not affect the tax measure of a transaction for another party. This ruling is based solely on the facts submitted to the Department of Revenue for consideration of the transactions described herein. If the facts and circumstances given are not accurate, or if they change, then the taxpayer requesting this ruling may not rely on it. 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 aspect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that this document is not to be cited as precedent and that a change in statute, a regulation, or case law could void this ruling.

Company should forward its payment of tax and interest to my attention no later than sixty (60) days from the date of this letter [REDACTED]. Please advise if you have additional questions.

Sincerely,

[REDACTED]
Sales and Use Tax Director

cc: [REDACTED], General Counsel