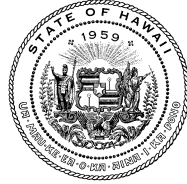


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RANDOLF L. M. BALDEMOR
DEPUTY DIRECTOR

August 6, 2012

LETTER RULING 2012-12

[Redacted Text]
[Redacted Text]
[Redacted Text]

Re: General Excise Tax Exemption for Services Exported out of State

Dear [Redacted Text]:

This letter is in response to your Request for Ruling dated April 8, 2012 in which, you, [Redacted Text] (“Taxpayer”) requested a ruling from the State of Hawaii Department of Taxation (the “Department”) on whether income earned as an editor of a publication for an organization based in the State of [Redacted Text] is subject to General Excise Tax (“GET”) and whether income earned from the sale of freelance articles is subject to GET.

FACTS REPRESENTED BY THE TAXPAYER

Taxpayer is an independent contractor who edits the [Redacted Text] (the “Journal”), a quarterly publication of the [Redacted Text] (the “Academy”). The Academy is a non-profit organization chartered and based in the State of [Redacted Text]. Taxpayer receives \$[Redacted Text] per issue or \$[Redacted Text] per year in exchange for editing the Journal.

Taxpayer also does freelance writing for publications located in the continental U.S. The two primary magazines that Taxpayer contributes articles to are [Redacted Text] (“Magazine One”) and [Redacted Text] (“Magazine Two”) which are chartered in [Redacted Text] and [Redacted Text] respectively. The magazines are circulated in all 50 states, Canada and in other countries.

Taxpayer has an oral agreement with Magazine One to write ten monthly feature articles per year about [Redacted Text]. The articles are written after receiving the editor’s approval of the [Redacted Text] to be covered.

Articles for Magazine Two are written after the editor is queried by Taxpayer and receives approval on the subject matter. Taxpayer retains the rights to the articles submitted, however, Magazine Two pays Taxpayer for the right of first publication.

LAW AND ANALYSIS

I. Journal Editing

Under section 237-7, Hawaii Revised Statutes (“HRS”), a “[s]ervice business or calling” includes all activities engaged in for other persons for a consideration which involve the rendering of a service, including professional and transportation services, as distinguished from the sale of tangible property or the production and sale of tangible property. “Service business or calling” does not include the services rendered by an employee to the employee’s employer.

Taxpayer’s business of editing the Journal as an independent contractor is a “service business” as defined in section 237-7, HRS. Taxpayer has contracted to receive \$[Redacted Text] per issue or \$[Redacted Text] per year in consideration for editing the Journal for the Academy. The income derived from editing the Journal as an independent contractor is subject to GET unless an exception applies.

The exemption at issue is the exemption for contracting or services exported out of State under section 237-29.53, HRS. Section 237-29.53, HRS, states:

(a) There shall be exempted from, and excluded from the measure of, taxes imposed by this chapter, all of the value or gross income derived from contracting (as defined under section 237-6) or services performed by a person engaged in a service business or calling in the State for use outside the State where:

- (1) The contracting or services are for resale, consumption, or use outside the State; and
- (2) The value or gross income derived from the contracting or services performed would otherwise be subject to the tax imposed under this chapter on contracting or services at the highest rate.

For the purposes of this subsection, the seller or person rendering the contracting or services exported and resold, consumed, or used outside the State shall take from the customer, a certificate or an equivalent, in a form the department prescribes, certifying that the contracting or service purchased is to be otherwise resold, consumed, or used outside the State. Any customer who furnishes this certificate or an equivalent shall be obligated to pay the seller or person rendering the contracting or services, upon demand, if the contracting or service purchased is not resold or otherwise consumed or used outside the State, the amount of the additional tax which by reason thereof is imposed upon the seller or person rendering the contracting or service.

First, in order for this GET exemption to apply, the service must be for use outside of the state of Hawaii. The "used or consumed" test sources gross receipts to the place "in which the services are intended to be used or consumed." Section 18-237-8.6-03, HAR. The sourcing focuses on the place where the customer uses or receives a benefit from the services. *see* Tax Information Release 2009-2. Since the Academy is the purchaser/consumer of the editing service, we must determine where the Academy uses or benefits from the editing performed by Taxpayer. The Academy is an organization based in the state of [Redacted Text] and receives the benefit of Taxpayer’s editing service when it receives the edited materials in the state of

~~[Redacted Text]~~. Thus, the service is used or consumed out of Hawaii.

Second, gross income derived from the editing service must be taxable at the highest rate. Under section 237-13(6)(A), HRS, for service businesses, GET is assessed and collected at a rate of four per cent of the gross income of the business and in the case of a wholesaler at rate of one-half of one per cent. Taxpayer is not providing services as a wholesaler and would be subject to GET at a rate of four per cent of the gross income without the exported service exemption notwithstanding the Honolulu County surcharge of one-half of one per cent.

Finally, in order for the GET exemption to apply, Taxpayer must obtain from the Academy a certificate or form certifying that the editing service that the Academy purchased is to be used outside of the state of Hawaii. This certificate or form will have the effect of obligating the Academy to pay Taxpayer any additional tax assessed against Taxpayer if the editing service is used in the state of Hawaii. The Department's Form G-61 should be used for this purpose. Presuming that Taxpayer obtains this certificate from the Academy, the income derived from editing the Journal is exempt from GET.

Taxpayer is still required to report the editing income on Form G-45/G-49 and then exempt it by attaching form G-45/G-49 Schedule GE. Please see Form G-45/G-49 Instructions for more information.

II. Income From Magazine Articles

As discussed above, exported services are exempt from GET under section 237-29.53, HRS, however, an exemption for the export of intangible personal property does not exist. Thus, whether the income derived from the transactions with Magazine One and Magazine Two are subject to GET depends on whether Taxpayer is performing a service or exporting intangible personal property rights. Such a determination is highly fact-intensive, would depend on the nature of Taxpayer's contracts in each transaction, and could turn on any number of factors.

Pursuant to Tax Information Release 2009-01 and due to the highly fact intensive nature of the issue presented, the Department is not able to issue a letter ruling determining whether the income derived from the transactions with Magazine One and Magazine Two, respectively, is subject to GET.

In summary, if Taxpayer is engaged in a "service business" as defined in section 237-7, HRS, and the exemption for exported services under section 237-29.53, HRS, applies the income derived from the transaction will be exempt from GET. Conversely, if Taxpayer has written an article and subsequently licensed the intangible property rights to such article to an out-of-state publication the income derived from the transaction is subject to GET as there is no applicable exemption.

The ruling contained in this letter is based upon information and representations submitted by the Taxpayer and accompanied by penalty of perjury statements executed by appropriate parties. While this office has not verified any of the material submitted in support of the request for ruling, it is subject to verification on examination.

Letter Ruling 2012-12

[Redacted Text]

August 6, 2012

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Except for the specific ruling above, we express or imply no opinion concerning the tax consequences of the facts of this case under any other provision.

The Taxpayer has reviewed the redacted version of this ruling and agreed that it will be available for public inspection and copying.

If you have any further questions regarding this matter, please call me at **[Redacted Text]**.

Sincerely,

TED S. SHIRAISHI
Administrative Rules Specialist