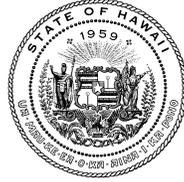


LINDA LINGLE
GOVERNOR

JAMES R. AIONA, JR.
LT. GOVERNOR



STATE OF HAWAII
DEPARTMENT OF TAXATION
P.O. BOX 259
HONOLULU, HAWAII 96809

STANLEY SHIRAKI
DIRECTOR OF TAXATION

RONALD B. RANDALL
ACTING DEPUTY DIRECTOR

October 19, 2010

LETTER RULING NO. 2010-26

[redacted text]

Re: Application of the general excise tax on the sale of audio tours by a nonprofit organization

Dear [redacted text]:

The following legend shall apply to this letter:

Nonprofit A = [redacted text]

Company B = [redacted text]

This responds to your letter of March 23, 2010 as supplemented by your letter of April 15, 2010 and transmission of Form A-7 (collectively referred to as "your letter") requesting a ruling from the State of Hawaii Department of Taxation (the "Department") on whether any portion of the proceeds received by Nonprofit A from the sale of audio tours is subject to the general excise tax ("GET").

SHORT ANSWER

The income received by Nonprofit A from its sales of audio tours to site visitors is exempt from GET under Hawaii Revised Statutes ("HRS") §237-23(b)(3). The exemption does not apply to any GET that is passed on by a seller of goods and/or services to Nonprofit A as a purchaser of goods and/or services.

FACTS REPRESENTED BY NONPROFIT A

Nonprofit A is a nonprofit organization recognized as tax exempt under Internal Revenue Code ("IRC") §501(c)(3) and exempt from GET on its income from its exempt activities as provided for under HRS §237-23(b). Nonprofit A's exempt purpose includes the promotion of scientific, educational, historical, and interpretive activities, the promotion of research and interpretive programs, assistance in the gathering and preservation of scientific information, objects, and documents, the assistance in the development and maintenance of

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[redacted text]

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libraries and museums, the assistance in the acquisition of non-federal lands, and the publishing and distribution of information. Specifically, Nonprofit A's exempt purpose includes support of the interpretive and related visitor service activities at sites across the Pacific region which includes selling interpretive and educational materials to visitors through its audio tours, bookstores, mail order, and membership programs.

Description of the Audio Tours

Nonprofit A provides audio tours, for a fee, to site visitors. The audio tours serve to educate visitors about the site they are visiting. Nonprofit A has contracted with Company B to produce the audio tours and manufacture the audio players because Nonprofit A is unable to do so on its own. Under the contract terms, Nonprofit A pays 50% of its monthly net audio tour revenue (gross audio tour revenue after deductions for sales tax, if any) to compensate Company B for producing the audio tours and manufacturing the audio players. The income generated from the sale of the audio tours is used to support research, interpretation, and conservation programs pursuant to Nonprofit A's exempt purpose.

LAW & ANALYSIS

Hawaii does not have a sale tax; instead Hawaii levies a business privilege tax against every person engaging in business within the State called the GET. Under HRS §237-13, the tax is measured by the application of rates against values of the products, gross proceeds of sale, or gross income received from doing business in the State. As distinguished from a sales tax, the legal incidence of the GET is upon the seller and not on the purchaser. The seller may visibly pass on the GET to the purchaser, but it is not a statutory requirement, rather it is a matter of contract between the seller and purchaser. The seller's GET liability is computed on its gross receipts, which includes the amount of any GET passed on to the purchaser. See Tax Facts 1996-1 and Tax Announcement No. 2006-15.

Generally, GET law provides that certain organizations created for the purposes enumerated in HRS §§237-23(a)(3) through (6) must apply with the Department in order to obtain a GET exemption on the organization's income from activities as provided for under HRS §237-23(b). Based on Nonprofit A's characterization as a corporation, association, trust, or society organized and operated exclusively for charitable, scientific, or educational purposes as described under HRS §237-23(a)(4) and its tax exempt status under IRC §501(c)(3), the Department granted Nonprofit A a GET exemption on its income from its charitable, scientific, and educational activities as described under HRS §237-23(b)(3).

The GET exemption does not apply to activities where the primary purpose is to produce income even if the income is to be used for or in furtherance of the organization's exempt activities. For example, the income from a silent auction held by the organization where the proceeds are used to fund activities pursuant to the organization's exempt purpose would still be subject to GET because the primary purpose of the silent auction is to produce income. See questions 8 and 9 in Tax Facts 1998-3. Based on the information in your letter,

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[redacted text]

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the audio tours fulfill Nonprofit A's general exempt purpose of promoting scientific, educational, historical, and interpretive activities, and its specific purpose of supporting interpretive and related visitor service activities at sites across the Pacific region. This activity also falls within the parameters of HRS §237-23(b)(3) as an educational activity; therefore, the income that Nonprofit A receives from the sale of audio tours to site visitors is exempt from GET. The fact that the audio tours generate income which Nonprofit A uses to fund other activities pursuant to its exempt purpose does not change the activity's primary function as an educational activity.

Your letter references HRS §237-18(b) which discusses the application of the GET to gate receipts or other admissions that are divided between a person furnishing or producing a play, concert, lecture, athletic event, or similar spectacle and the promoter offering the spectacle to the public. This statute is not relevant to the situation presented because the income in question is not a gate receipt or admission and the transaction does not involve a play, concert, lecture, athletic event, or similar spectacle.

Therefore, if the exemption under HRS §237-23(b)(3) did not apply to Nonprofit A, then Nonprofit A would be taxable on all of its gross receipts from the sale of the audio tours even though under the contract 50% of the monthly net audio tour revenue is used to pay Company B. Company B is subject the GET on all of its gross receipts from Nonprofit A (i.e., 50% of Nonprofit A's monthly net audio tour sales) regardless of Nonprofit A's exemption under HRS §237-23(b)(3).

CONCLUSION

Nonprofit A is an organization described under HRS §237-23(a)(4) and the income that Nonprofit A receives from the sale of audio tours to site visitors is exempt from GET under HRS §237-23(b)(3) because the activity's primary function is educational in nature. The fact that Nonprofit A uses the income from the audio tours to fund other activities pursuant to Nonprofit A's exempt purpose does not negate the main purpose of the audio tours. The GET exemption provided to Nonprofit A does not include any GET that is visibly passed on by a seller of goods or services to Nonprofit A as a purchaser of goods or services. The pass on of the GET is not required by statute, rather it is a contractual matter between the seller and purchaser.

This ruling only applies to Nonprofit A and is based upon our understanding of the facts that Nonprofit A has represented. It may not be used or cited as precedent by any other taxpayer. If it is later determined that our understanding of these facts is not correct, the facts are incomplete, or the facts later change in any material respect, this ruling will be void. This ruling may also be subject to change without notice due to future amendments to laws, rules, or official Department positions.

Nonprofit A has reviewed and agreed that the redacted version of this ruling attached as Exhibit A will be available for public inspection and copying.

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[redacted text]

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If you have any further questions regarding this matter, please direct your correspondence to my attention or call me at (808) 587-1577.

Sincerely,

/s/ Adriane Aarona

ADRIANE AARONA
Income Tax Specialist

APPROVED BY:

/s/ Johnnel Nakamura

JOHNNEL NAKAMURA
Administrative Rules Officer