

Delivery Services

When a sale of tangible personal property is made in taxable manner the delivery charges may or may not be part of the tax base. In Section 1 of the Sales Tax Act, "Sales price" was defined to include "delivery charges" incurred or to be incurred before the completion of the transfer of ownership of tangible personal property from the seller to the purchaser. (MCL 205.51(1)(d)(iv)) "Delivery charges" were defined to mean charges by the seller for preparation and delivery to a location designated by the purchaser of tangible personal property or services. Delivery charges include, but are not limited to, transportation, shipping, postage, handling, crating, and packing.

Background

The Michigan Sales Tax Act {MCLA 205.52 (i)} provides that "there shall be collected from all persons engaged in the business of making sales at retail . . . an annual tax for the privilege of engaging in that business equal to 6% of the gross proceeds thereof..."

"Gross proceeds" is defined in {MCLA 205.51 (i)(h)} as "the amount received in money, credits, subsidies, property, or other money's worth in consideration of a sale at retail within this state, without a deduction for the cost of the property sold, the cost of material used, the cost of labor or service purchased... or other expenses."

"For the purpose of computing the tax, no deduction is allowable on account of freight, express mail, cartage or other transportation or delivery charges incurred or to be incurred on tangible personal property prior to completion or transfer of ownership of such property from the seller to the purchaser for use or consumption. It is immaterial whether such transportation charges are billed separately or whether they are paid by the seller or purchaser." (R205.124)

In Natural Aggregates Corporation v. Michigan Department of Treasury, 133 Mich App 441; 350 NW2d 272 (1984); 1v den 419 Mich 949 (1984), the Michigan Court of Appeals held that certain delivery charges were not taxable because the retailer was engaged simultaneously in a non-table business (viz., delivery). The court characterized the delivery as a transaction separate from the sale, both conceptually and temporally. The court noted that the purchase price of the tangible personal property (viz., sand and gravel) was the same for all customers regardless of the delivery method.

Customers who used the retailer's delivery service negotiated and contracted separately for the service and paid a separate price. The trucking charges were not a cost used to calculate the gross price of the product. The delivery charge was not an incidental cost of the purchase price, running between five and six times the amount of the purchase price. Construing MCL 205.52; MSA 7.522, the Court held that the retailer's delivery service was "some other kind of business" not taxable under the Act.

In Margaret H. James, Ltd. v. Michigan Department of Treasury, Court of Appeals unpublished Opinion No. 132896 (June 26, 1992), the Court of Appeals cited Natural Aggregates, supra. and further explained the statute's definition of "some other kind of business." The court concluded that a delivery service is a separate business when delivery charges are at the market rate and the records from this business show a net profit. These facts indicated that the delivery service was operating as a separate commercial endeavor.

In Viviano Flower Shop, Inc. v. Michigan Department of Treasury, Michigan Tax Tribunal, Docket No. 252577, August 1, 2002 charges for delivery were held to be exempt from tax because delivery was not required and the delivery charge was separately invoiced. The court ruled in favor of the taxpayer even though the delivery service did not satisfy the Department's requirement that it show "a profit".

Department of Treasury's Position

In Revenue Administrative Bulletin 2002-11, (RAB 02-11) guidance is provided in regard to delivery charges. The discussion is limited to charges for delivery directly by the seller or delivery by a contract carrier. Delivery by common carrier or postal service is not discussed.

When determining the taxability of delivery charges, the Department considers all of the facts and circumstances surrounding the retailer's business activities.

A retailer will be deemed simultaneously engaged in a separate delivery service business that is not taxable if all of the following conditions are met:

1. The customer has the option to either pick up or have the merchandise delivered (thus, the delivery service is not always necessary to complete the transfer of tangible personal property or the performance of the transaction);
2. The delivery service charge is separately negotiated and contracted for on a competitive basis and is not a cost in calculating the merchandise price, as the customer pays a separate price (thus, the delivery service charge is not incidental to the purchase price – demonstrating a separate service transaction);
3. The taxpayer's books and records separately identify the transactions used to determine the tax on the sale at retail; and,
4. Delivery service records show a net profit (thus, the delivery service has evidence of a separate competitive, commercial endeavor).

All four conditions must be met for the seller to be considered simultaneously engaged in a nontaxable delivery service.

Delivery charges on merchandise delivered by a seller who is not engaged in a separate delivery service business as defined above are taxable if the charges are incurred prior to the transfer of ownership. Delivery charges are not taxable if incurred after the transfer of ownership.

Examples

1. A retailer sells furniture and delivers it to the customer in trucks leased or owned by the seller, or occasionally contracts with a private delivery service. The delivery, which is optional to the customer, is priced and invoiced separately. The retailers records separately identify the sales transactions from the delivery service transactions, itemize delivery-related expenses, and show a net profit from the delivery business. The delivery charge is not taxable.
2. A retailer sells furniture and delivers it to the customer in trucks leased or owned by the seller, or occasionally contracts with a private delivery service. The delivery, which is optional to the customer, is included in the invoiced price of the furniture. Should the customer opt to pick up the furniture, the price would be reduced by the amount of the delivery charge. The retailer's records separately identify the sales revenue from the delivery service revenue, itemize delivery-related expenses, and show a net profit from the delivery business. The delivery charge is not taxable.
3. A retailer sells furniture and delivers it to the customer in trucks leased or owned by the seller, or occasionally contracts with a private delivery service. The delivery, which is optional to the customer, is included in the invoiced price of the furniture. However, should the customer opt to pick up the furniture, the invoice would not be reduced by the cost for the available delivery service (i.e., the available delivery service is a cost in calculating the price of the furniture and is not negotiable). The delivery charge portion of the invoice price is taxable as part of gross proceeds.
4. A retailer contracts with a private delivery service to deliver its stone; this delivery service is not optional to the customer. The delivery charge is taxable as part of gross proceeds.
5. A customer contracts with a private delivery service to pick up and deliver the stone purchased from a retailer. Because this is a service cost incurred after the transfer of ownership, the delivery charge for this service is not taxable.

Direct Mail

Direct mail receives special consideration because of its unique nature and because of the size of the direct mail industry. "Direct mail" means printed material delivered or distributed by United States mail or other delivery service to a mass audience or to addressees on a mailing list provided by the purchaser or at the direction of the purchaser when the cost of the items are not billed directly to the recipients, including tangible personal property supplied directly or indirectly by the purchaser to the direct

mail seller for inclusion in the package containing the printed material, but not including multiple items of printed material delivered to a single address. (MCL 205.51a(g))

Both the Sales Tax Act and the Use Tax Act provide special rules to govern the direct mail industry. A purchaser of direct mail other than a holder of a direct pay permit shall provide to the seller at the time of purchase either a direct mail form as prescribed by the department or information indicating the taxing jurisdictions to which the direct mail is delivered to recipients. (MCL 205.71(1))

Upon receipt of the direct mail form, the seller is relieved of all obligation to collect, pay, or remit the applicable tax and the purchaser is then obligated to pay the applicable tax on a direct pay basis. (MCL 205.71(2))

A direct mail form remains in effect for all subsequent sales of direct mail by the seller to the purchaser until revoked in writing. (MCL 205.71(3))

Upon receipt of information from the purchaser indicating the taxing jurisdictions to which the direct mail is delivered to recipients, the seller shall collect the tax according to that delivery information. In the absence of bad faith, the seller is relieved of any further obligation to collect the tax if the seller collected the tax using the delivery information provided by the purchaser. (MCL 205.71(4))

If the purchaser does not have a direct pay permit and does not provide the seller with a direct mail form or delivery information as required in subsection (1), the seller shall collect the tax in the same manner as provided in section 19. Nothing in this subsection limits a purchaser's obligation for the tax under this act. (MCL 205.71(5))

A purchaser who provides the seller with documentation of a direct pay permit is not required to provide a direct mail form or delivery information. (MCL 205.71(6))

Our firm provides the information in this whitepaper for general guidance only, and does not constitute the provision of legal advice, tax advice, accounting services, investment advice, or professional consulting of any kind. The information provided herein should not be used as a substitute for consultation with professional tax, accounting, legal, or other competent advisers. Before making any decision or taking any action, you should consult a professional adviser who has been provided with all pertinent facts relevant to your particular situation. Tax articles in this e-newsletter are not intended to be used, and cannot be used by any taxpayer, for the purpose of avoiding accuracy-related penalties that may be imposed on the taxpayer. The information is provided "as is," with no assurance or guarantee of completeness, accuracy, or timeliness of the information, and without warranty of any kind, express or implied, including but not limited to warranties of performance, merchantability, and fitness for a particular purpose.