

OKLAHOMA TAX COMMISSION



TAX POLICY DIVISION
RICK MILLER, DIRECTOR

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August 2, 2016

Re: Our File No. LR-15-037

Dear :

This is in response to your request for a letter ruling regarding the taxability of mobile point of sale devices used by _____ within its restaurants in Oklahoma. Set forth are the facts and questions presented and the responses thereto.

FACTS

("the Company") is one of the largest full service casual dining companies with restaurant locations in most states including Oklahoma. The Company has initiated a pilot program incorporating the use of a mobile point of sale device (herein "Mobile Point of Sale Device" or "Device") at its restaurant locations. The Device accommodates tabletop menu, ordering, and payment in some of its Oklahoma locations. The Device is an Android tablet with a touch screen interface that is located at each table. It provides pictures/detailed descriptions of the menu items and allows customers to place drink, appetizer, and entree orders, and pay their check directly through the Device. The customer has the option to pay their guest check by credit card, debit card, or gift card on the Device. Alternatively, it can be paid through their server/wait staff if preferred.

The Mobile Point of Sale Device also allows restaurants *the option* to enhance the customer experience by allowing access to premium content located on the Device. This content could include news, sports, access to social media, selecting songs to be played on the restaurant's playlist as well as access to interactive games. The Company will charge separate fees for access to games on the Device, access to current news and social media, and for song selections. The game application software resides within each Device. During the pilot phase, the Company will charge only for game fees, and the use of the Device to access news content

will be free. The premium content fee will be included as a line item on the customer's food and beverage bill. The vendor ("Vendor") of the Mobile Point of Sale Device has indicated to the Company that at the average restaurant over 80% of the restaurant customers use the Device for ordering and/or payment at the end of the meal, while only 12-20% of the customers access any premium content located on the Device.

The owner of the Devices charges the Company a monthly service fee for the use of the Devices. Per the agreement between the Vendor and the Company, the Company will be responsible for the collection of the revenue generated by accessing the premium content and collection/remittance of any applicable state or local taxes imposed on the transactions. Additionally, the Vendor may also charge monthly commissions to the Company as a percentage of the game fee and song fee income. The Company will be required to pay to the Vendor a portion (or potentially all) of the revenue generated by these premium content fees.

In a possible alternative scenario, the Vendor will not charge the Company a monthly service fee for use of the devices, but will instead receive from the Company all of the premium content fees up to a maximum amount, at which time the fees in excess of such amount will be shared with the Company.

The Mobile Point of Sale Device was developed specifically for the restaurant industry. The primary purpose of the Device is to facilitate (1) order placement, (2) order add-ons, (3) checkout/payment, and (4) customer satisfaction surveys. The benefits of the Device to the restaurant industry include increased food and beverage sales, a quicker table turnover, and increased guest loyalty and satisfaction. To achieve these desired results, the Company will provide one Mobile Point of Sale Device at each individual table within each restaurant. The average restaurant will typically contain 50 tables, and on average 50 Mobile Point of Sale Devices would then be used at each establishment.

It is the Company's intent that access to premium content (including news, videos, spots, educational items, and interactive games) is ancillary to the true purpose of the Device as part of the Company's established point of sale order and payment system. A picture of the Device and its intended use (e.g., ordering food through a mobile menu) is included below.

STATEMENTS RELATING TO REQUEST

Taxpayer is neither currently under audit by the Department nor has it been notified by the Department concerning a pending audit. The taxpayer has not submitted a refund claim containing transactions involving any issue included in this ruling request. Furthermore, the same issue is not currently the subject of litigation with the Department and the Attorney General's office has not been, or will not be, requested to issue an opinion on the same issue.

ISSUES

- 1) Based on the multifunctional nature of the Mobile Point of Sale Device, and given the primary purpose of order placement and payment, does the Department consider the Device to constitute a "coin operated amusement device" subject to an annual license fee of \$150 under Okla. Stat. Ann. tit. 68 §1503?

RESPONSE

The described Mobile Point of Sale Device does not constitute a coin operated amusement device and would not be subject to the annual license fee of \$75.

- 2) Based on the multifunctional nature of the Mobile Point of Sale Device, and given the primary purpose of order placement and payment, does the Department consider income from the Device to constitute "gross revenues generated from all coin-operated amusement machines" exempt from sales tax? If not, would it be subject to sales tax as a lease of tangible personal property under Okla. Stat. Ann. tit. 68, § 1352(22)?

RESPONSE

No, income generated from the device would not be considered gross revenues generated from coin operated amusement machines. Further, the gross receipts would not be subject to sales tax as a lease between the restaurant and its customers.

- 3) Based on the information provided, would the fees charged for access to the premium content be subject to sales tax? If so, are such fees properly categorized as a license to use tangible personal property? Further, would purchases of the device qualify for the exemption under Okla. Admin. Code 710:65-19-52(b)?

RESPONSE

In Oklahoma, sales tax is levied on the gross receipts from the sale of tangible personal property, certain services and other transactions as specified in Section 1354 of Title 68 of the Oklahoma Statutes. The described sales of access to premium content do not fall within the enumerated transactions subject to sales tax.

- 4) If the premium content fees are determined to be taxable in accordance with Okla. Stat. Ann. tit. 68, §1352(22), does the Department consider the Company's use of each Device to include both a license to use the Device and taxable business use, in which case both revenue streams would be subject to tax?

RESPONSE

See the response to Question 3.

- 5) Are the monthly service charges and commissions paid to the Vendor, who retains title to the devices, subject to tax as the rental of tangible personal property? If so, and the Vendor is not registered to collect and remit this tax, can the Company self-accrue use tax on the amount deemed as rental payments to the Vendor?

RESPONSE

Yes, the described amounts would be subject to sales tax as a rental of tangible personal

property. 68 O.S. § 1354. The Company renting these devices cannot accrue use tax. Since vendor is renting tangible personal property in Oklahoma, it must hold an Oklahoma Sales Tax Permit (68 O.S. §§ 1363 and 1364) and report the gross receipts associated with the rentals and pay the applicable sales tax calculated and collected thereon. (68 O.S. § 1365). To register for a sales tax permit, a completed Business Registration Packet (Packet A) available online at www.tax.ok.gov should be submitted, to the Taxpayer Assistance Division, Oklahoma Tax Commission P.O. Box 26920, Oklahoma City, OK 73126-0926.

6) Based on the information provided, would Mobile Point of Sale Device or any of the services described herein be considered a telecommunication service subject to sales tax?

RESPONSE

Neither the Mobile Point of Sale Device nor any of the services described herein are considered telecommunication services. 68 O.S. § 1354(A)(4)(a).

This response applies only to the circumstances discussed in your request received August 20, 2015. Pursuant to Oklahoma Administrative Code 710:1-3-73(e), this Letter Ruling may be generally relied upon only by the entity to whom it is issued, assuming that all pertinent facts have been accurately and completely stated, and there has been no change in applicable law.

Sincerely,

OKLAHOMA TAX COMMISSION



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Tax Policy Analyst