

STATE OF MAINE
KENNEBEC, ss.

MAINE BOARD OF TAX APPEALS
DOCKET NO. BTA-2022-4

[CORPORATE TAXPAYER]

Petitioner

v.

DECISION

MAINE REVENUE SERVICES,

Respondent

[Corporate Taxpayer] (the “Company”) (the “Company”) appeals the assessment of Maine sales tax and interest issued by Maine Revenue Services (“MRS”) for the period between [year 1], and [year 4]. The Company argues that the assessment must be canceled because no sales tax was due upon its sales of certain digital media sold into Maine during the period at issue. After considering the parties’ arguments and the evidence presented, we uphold the assessment in full.

I. Background

At all relevant times, the Company was a [non-Maine] Corporation¹ making remote sales of digital audiobooks and “memberships”² throughout the nation, including Maine. The Company made the sales of digital audiobooks and “memberships” exclusively through its website, and the Company maintained no physical presence in Maine.

When a customer purchased a “membership” from the Company, the Company billed the customer a set amount on a monthly basis and, in exchange, the customer received one credit for a digital audiobook. The credits could then be exchanged for digital audiobooks at any time.

¹ The Company’s registration enabled it to consider social and environmental factors in its decision-making.

² These may be referred to as “subscriptions.”

After cancellation of a “membership,” the customer retained all previously acquired digital audiobooks and credits.

When a customer purchased or redeemed a credit for a digital audiobook from the Company, the customer received the ability to utilize a software application program to access and listen to the digital audiobook for an indefinite period. The customer also received the ability to reduce the digital audiobook to an MP3 audio file, to be downloaded and saved to the customer’s electronic devices for future listening.³ The software application program provided the customer an “enhanced experience” including features not available when utilizing the MP3 audio file. Notably, the Company did not make use of digital rights management technology to limit customers use of the digital audiobooks. On its website, the Company characterized the rights of its customers in the purchased digital audiobooks as ownership. However, the customers’ rights in the digital audiobooks were limited by intellectual property laws including copyright and trademark.

In [year 3], the Company registered as a remote seller of tangible personal property in Maine and began collecting and remitting sales tax on membership fees and individual audiobook sales. In [year 4], MRS requested the Company’s Maine sales figures for the period at issue, which the company provided. According to the information provided by the Company, the Company’s Maine sales surpassed the transaction threshold in [year 1]. According to MRS’s audit of the information, the Company failed to collect taxes on \$[amount] of Maine sales for the period. Notably, MRS utilized the Company’s sales of “memberships” rather than redemption of the “membership” credits in computing the assessment. Thereafter, MRS issued an Audit Assessment Notice for the period [year 1], through [year4], for \$[amount] in sales and use tax,

³ We note, that according to testimony provided by the Company, roughly 10% of customers chose to download the digital audiobooks in MP3 form.

\$[amount] in interest, and no penalties. On reconsideration, MRS gave the Company the opportunity to provide information regarding the redemption of “membership” credits.⁴

Thereafter, MRS upheld its assessment upon reconsideration. This appeal followed.

On Appeal, the Company argues that MRS erred in determining that its sales of digital audiobooks were sales of tangible personal property subject to the sales tax. The Company further argues that MRS incorrectly utilized its sales of “memberships” credits instead of the redemption of those credits in computing the assessment. It is the Company’s burden to show that it is entitled to relief. 36 M.R.S. § 151-D(10)(F). We consider the matter de novo as to facts and law. *Id.* § 151(2)(G).

II. Discussion

A. Digital Audiobooks.

Maine law imposes the sales tax “on the value of all tangible personal property, products transferred electronically and taxable services sold at retail in this State.” 36 M.R.S.A. § 1811(1).⁵ “Sale” is defined as follows:

“Sale” means any transfer, exchange or barter, in any manner or by any means whatsoever, for a consideration and includes leases and contracts payable by rental or license fees for the right of possession and use, but only when such leases and contracts are deemed by the State Tax Assessor to be in lieu of purchase.

Id. § 1752(13). “Tangible personal property” is defined as follows:

“Tangible personal property” means personal property that may be seen, weighed, measured, felt, touched or in any other manner perceived by the senses, but does not include rights and credits, insurance policies, bills of exchange, stocks and bonds and similar evidences of indebtedness or ownership. . . . “*Tangible personal property*” includes any product transferred electronically.

⁴ The Company provided testimony that it does not currently track redemptions of membership credits on a state-by-state basis.

⁵ For the period at issue, a remote seller of tangible personal property was required to collect and remit sales tax on their Maine sales if the seller’s gross sales from delivery of tangible personal property into Maine in the previous calendar or current calendar year exceeded \$100,000 or the seller sold tangible personal property into Maine in at least 200 separate transactions in the previous or current calendar year. See *Id.* § 1951-B(3) (repealed September 19, 2019); see also *id.* § 1754-B(1-B) (effective September 19, 2019).

Id. § 1752(17) (emphasis added). Further, a “product transferred electronically” is defined as follows:

“Product transferred electronically” means a digital product transferred to the purchaser electronically the sale of which in nondigital physical form would be subject to tax under [Part 3 of Title 36] as a sale of tangible personal property.”

Id. § 1752(9-E).

Although we are not required to follow MRS’s interpretations of tax law contained in its guidance documents, we frequently reference them when they provide an accurate explanation of tax law in an easy-to-understand form. *See Blue Yonder, LLC v. State Tax Assessor*, 2011 ME 49, ¶ 6, 17 A.3d 667; *Enerquin Air, Inc. v. State Tax Assessor*, 670 A.2d 926, 928-29 (Me. 1996). We find MRS’s Reference Guide to the Sales and Use Tax Law provides an accurate and easy-to-understand explanation of the law on this matter:

The sale of a digital product is subject to the general rate of tax if the nondigital physical form would be subject to sales tax. For instance, the sale of digital music, books, magazines, newspapers, and movies are taxable since the sale of a CD, paper-bound book, DVD, and printed magazines and newspapers are taxable.

The sale of a digital copy of a publication is taxable provided the publication is downloadable to the subscriber’s electronic device. If the subscriber is allowed only to access and view an online version of the publication and the digital copy may not be downloaded, the subscription is not taxable.

When the location where the digital publication is being downloaded is unknown, the subscriber’s billing address determines whether the sale occurs in Maine or not. If the billing address is in Maine, the subscription is treated as taxable. For more information on sourcing sales into the State of Maine, see Title 36, section 1819.

MRS, Sales, Fuel & Special Tax Division, A Reference Guide to the Sales and Use Tax Law, pg. 2 (Dec 2020) (hereinafter the “Reference Guide”).

The Company first argues that the conveyance of the digital audiobooks is not subject to sales tax because no non-digital physical form of the digital audiobooks exists. In support of this

argument, the Company looks to the “enhanced experience” it provided which was not downloadable but only available to its customers by streaming the “enhanced experience” through its software application program. We cannot agree.

The Company made its digital audiobooks available in an MP3 format, downloadable to its customers’ devices. In this format, the digital audiobooks conveyed by the Company were, in essence, an audiobook the sale of which would be taxable. It is immaterial that the customers also received access to the Company’s software application program and the “enhanced experience” available through it. No adjustment is warranted on this basis.

The Company next argues that it did not make sales of the digital audiobooks within the meaning of the statute but, instead, conveyed only nontaxable licenses to its customers. Again, we cannot agree. The law makes clear that, if a physical corollary exists, the conveyance of the digital form is a taxable sale. Even if, as the Company argues, its conveyance of the digital audiobooks is correctly cognized as a license, the conveyance would still be subject to the sales tax. As provided by section 1811(1), the term “sale” includes licenses when deemed by the State Tax Assessor to be “in lieu of purchase.” MRS has made clear that a license will be treated as one in lieu of purchase where it has a duration greater than 10 years. *See, e.g.,* MRS Instructional Bulletin No. 3, Photographers and Photofinishers § 2(D), *see also* MRS Instructional Bulletin No. 20, Lease and Rental Transactions § 1(C). Here, by the Company’s own admission, its customers retain the use of the digital audiobooks downloaded in MP3 format in perpetuity. No adjustment on this basis is warranted.

B. “Memberships.”

As discussed above, the Company sold “memberships” to its customers, and its customers received credits for digital audiobooks. Again, we find the Reference Guide provides

a useful explanation of the law in accessible terms. As explained by the Reference Guide to the Sales and Use Tax Law in its discussion of gift certificates, which are a type of credit:

No sales tax applies to the sale of a gift certificate because no tangible personal property or taxable service is being purchased at that time. When the certificate is later redeemed, sales tax is collected at that time (unless a specific exemption applies).

Reference Guide, pg. 2.

For the audit period, MRS utilized the sales of “memberships” in the computation of sales tax. The Company argues that no tax was due on the “membership” sales because the “memberships” constituted a credit. Instead, the computation of sales tax must be made based upon the redemption of the “membership” credits. While we agree in principle with the Company, the Company has not made available sufficient data on its customers’ redemption of “membership” credits. Maine law places the burden to keep such necessary data on the Company. 36 M.R.S.A. § 135. In the absence of such data, MRS may use some reasonable corollary as a substitute in making an assessment, and the burden is on the Company to prove the resulting assessment incorrect. *Id.* § 151-D(10)(F). The Company has not shown the assessment to be incorrect. No adjustment on this basis is warranted. We uphold the assessment in full.

III. Decision

Based upon the evidence presented and the applicable law, we uphold the assessment of Maine sales and use tax and interest for the period from [year 1], to [year 4]

The Board may, in limited circumstances, reconsider its decision on any appeal. If either party wishes to request reconsideration, that party must file a written request with the Board within 20 days of receiving this decision. Contact the Appeals Office at 207-287-2864 or see the

Board's rules, available at <http://www.maine.gov/boardoftaxappeals/lawsrules/>, for more information on when the Board may grant reconsideration. If no request for reconsideration is filed within 20 days of the date of this proposed decision, it will become the Board's final administrative action. If either party wishes to appeal the Board's decision in this matter to the Maine Superior Court, that party must do so within 60 days of receiving this decision. During the 60-day period in which an appeal may be filed with the Superior Court, the taxpayer may contact Maine Revenue Services at 207-624-9595 for a statement of the amount then due. After that 60-day period has expired, Maine Revenue Services will contact the taxpayer with an updated statement of the amount or amounts due at that time.

Issued: October 16, 2023.