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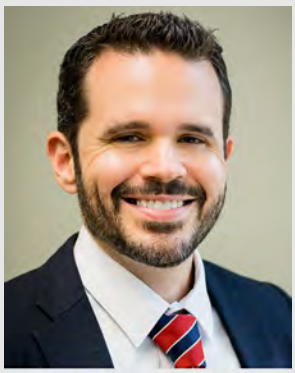

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In this edition of Florida Tax Today, Hogan writes about the tax issues that arise for 501(c)(6) organizations under Florida law.

My adopted hometown of Tallahassee, the capital of Florida, is chock-full of nonprofit corporations qualified under section 501(c)(6) of the Internal Revenue Code. These 501(c)(6) organizations are busy year-round, working to advance their members' interests in the Legislature and before the state agencies headquartered in the capital.

As readers know, IRC 501(c)(6) exempts from federal income tax "business leagues, chambers of commerce, real-estate boards, boards of trade . . . not organized for profit and no part of the earnings of which inures to the benefit of any private shareholder or individual."[1]

A common misconception is that 501(c)(6) organizations are treated in the same way that charitable nonprofits under IRC 501(c)(3) are treated in the Florida tax code. That is not the case.

Though 501(c)(6) organizations are "not for profit" and exempt from federal income tax, they are afforded no special treatment under Florida's sales and use tax laws. Because they are by and large treated the same as normal for-profit companies for Florida sales and use tax purposes, several issues arise.

1. No Sales and Use Tax Exemption

Charitable organizations qualified under IRC 501(c)(3) are exempt from Florida sales and use tax and do not have to pay tax on otherwise taxable purchases or lease payments.[2] This exemption is not shared by 501(c)(6) organizations, which like for-profit companies must pay tax on their purchases and taxable lease payments.

2. Merchandise Sales

In the same vein, 501(c)(6) organizations must charge tax on all merchandise sales in Florida, whether made at in-person events or online. This is because all retail sales of tangible personal property are subject to tax unless the sale is exempt.[3]

Special care must be taken by these organizations to apply the proper discretionary surtax rates on their Florida sales. The state-level sales tax is 6 percent, while the discretionary surtax varies by county and can reach up to 2 percent. The county-level rates are found in Form DR-15DSS, as published by the Department of Revenue.[4]

[1] IRC section 501(c)(6). This quotation omits the portion that refers to "professional football leagues," which is quite narrow in its application.

[2] Fla. Stat. section 212.08(7)(p).

[3] Fla. Stat. section 212.05.

[4] The form is available from the DOR, "Discretionary Sales Surtax Information for Calendar Year 2017." The 2 percent "top rate" of discretionary surtax is relatively new, as Liberty County raised its rate that high as of January 2017. Most Florida counties apply a discretionary surtax rate of 1 or 1.5 percent.

3. Educational Programs

Educational programs put on by 501(c)(6) organizations may qualify as nontaxable events, depending on the circumstances.

The normal rule is that sales tax is due on admissions as defined by Florida Statutes section 212.02(1).[5] A taxable admission is defined as "the net sum of money after deduction of any federal taxes for admitting a person or vehicle *to any place of amusement, sport, or recreation* or for the privilege of entering or staying in any place of amusement, sport, or recreation."[6]

The DOR has concluded that charges to people who attend a "business after hours" event akin to "a seminar, or a meeting for an educational purpose" are not taxable admissions.[7] The department reasoned that the charge to attend an educational seminar was not a charge for admission to a "place of amusement, sport, or recreation" under the statute.[8]

If the organization puts on an educational seminar that does not appear to be for the purpose of amusement, sport, or recreation, it may fall outside of the statutory definition of taxable admissions.[9]

A separate question arises when educational event attendees are given written materials to keep. A logical way to view this would be that if the organization gives these materials away for no additional charge to attendees, then the "free giveaway" is not a taxable transaction. Rather, the organization would be the consumer of the materials that it gives to participants. Unless otherwise exempt, the organization would be obligated to pay tax on the cost of the materials that it gives away to attendees.[10]

4. Sales of Recorded Educational Programs

The 501(c)(6) organizations we work with will often sell written materials and recordings of educational events on their websites. These materials may be delivered on a CD, another tangible medium, or as electronic downloads. How the materials are delivered is key to determining if they are subject to tax.

Florida sales tax applies to sales of tangible personal property,[11] which is defined as "personal property which may be seen, weighed, measured, or touched or is in any manner perceptible to the senses."[12]

Electronically delivered products are not tangible property subject to tax under chapter 212. This means that when someone purchases an educational program and receives it exclusively through an electronic delivery system, no sales tax is due.[13] But when the electronic files are delivered on a tangible medium — such as a CD or flash drive — the DOR considers this a sale of tangible personal property subject to tax.[14]

Therefore, a 501(c)(6) organization should collect tax on its sales of educational programs and written materials when they are delivered via CD or other tangible medium. These programs are not subject to tax when they are delivered electronically.

5. Sales of Membership Dues

The 501(c)(6) organizations in Tallahassee are largely supported by membership dues. These dues do not normally grant the members access to a physical facility and are typically not paid in exchange for tangible personal property. Because of this, membership dues are not normally subject to tax under chapter 212, Florida Statutes.[15]

[5] Fla. Stat. section 212.04(1)(a) (tax on admissions); and Fla. Admin. Code R. 12A-1.005(1)(a) (referencing section 212.02(1) for the definition of taxable "admissions").

[6] Fla. Stat. section 212.02(1) (emphasis added).

[7] TAA 95A-003 (Jan. 19, 1995).

[8] *Id.*

[9] If the question is "close," the organization would be well served by applying for a binding ruling from the DOR on the taxable status of the event.

[10] *See* TAA 95A-003 (Jan. 19, 1995) (county chamber of commerce was the "consumer" of food and drinks served for free to members and visitors at events; any tax due for the purchase of the materials consumed must be paid by the chamber).

[11] Fla. Stat. section 212.05.

[12] Fla. Stat. section 212.02(19).

[13] *See Department of Revenue v. Quotron Systems Inc.*, 615 So. 2d 774, 776-77 (Fla. Dist. Ct. App. 1993) (images delivered to customers on a computer screen are not tangible personal property subject to tax under chapter 212).

[14] *See* TAA 11A-002 (Jan. 13, 2011) (video files delivered electronically are not subject to tax; when the same video files are delivered via CD, flash drive, or hard drive, the sale is taxable); and TAA 11A-021 (July 23, 2011) (software delivered electronically is not subject to tax; software delivered through a tangible medium is taxable).

[15] The caveats here are important. Different facts might lead to different results.

The fact that these organizations may offer members access to electronic information through their membership websites will not normally change the nontaxable nature of the membership dues. The DOR has provided by rule that information services that constitute a charge for "furnishing information by way of electronic images which appear on the subscriber's video display screen" are not taxable.[16]

If the organization gives away magazines to its members, there is no tax due if no charge is made for the magazines separate and apart from the payment of membership dues. To qualify for this exemption, the organization's dues statements should not separately itemize a charge for the magazine, and the magazine itself should not state that a portion of the membership dues are attributable to the magazine.[17]

Finally, discounts on educational programs given to members do not constitute taxable sales of tangible personal property to members even if the discount is based on the payment of membership dues.[18]

Conclusion

501(c)(6) organization should be aware that the state of Florida does not treat them in the same way as charities qualified under IRC 501(c)(3). Such organizations should think through the issues outlined in this article as they serve their members in the Sunshine State. ■

[16] Fla. Admin. Code R. 12A-1.062(5).

[17] Fla. Admin. Code R. 12A-1.008(6)(d). The organization itself would be responsible for any tax due on the costs of producing the magazine and sending it to the members.

[18] *See* Fla. Stat. sections 212.05 and 212.02(16), (19) (tax applies to tangible personal property, not a discounted price; sales price is the total amount paid for tangible personal property).