
Opinion of the Tax Commissioner

Date Issued: October 8, 1991

Opinion No: 90-0012

Tax: Sales/Use

XXXX
XXXX
XXXX

Subject: Public Utility Service

This request for an opinion of the Tax Commissioner was received on December 18, 1990. Specifically, it concerns the application of sales and use tax to XXXX's express delivery service.

FACTUAL BACKGROUND

XXXX (hereinafter XXXX or Taxpayer) has submitted evidence outlining the following factual circumstances:

1. XXXX, formerly XXXX, is a wholly-owned subsidiary of XXXX.
2. XXXX provides next morning, door-to-door express delivery of packages weighing less than one hundred pounds throughout the United States as well as to and from some foreign countries. XXXX also acts as a domestic and international freight forwarder for shipments of any size.
3. In providing its services, XXXX uses the fleet of airplanes owned by XXXX to deliver all freight to XXXX which is, in its turn, a wholly-owned subsidiary of XXXX.
4. XXXX's personnel sort the packages and freight at the XXXX central sorting facility and reload the items for shipment to the appropriate destinations.
5. None of the corporate entities are regulated by the Public Utilities Commission of Ohio; nevertheless, XXXX and XXXX are subject to regulation and certification by other federal and state departments.

REQUEST FOR OPINION

Taxpayer requests an opinion of the Tax Commissioner finding that it is engaged in the rendition of a public utility service for purposes of Chapter 5739 of the Ohio Revised Code.

Ohio Revised Code section 5739.01(E) (2) exempts from the definition of a retail sale the purchase of items by a consumer whose purpose is to use or consume the items directly in the rendition of a public utility service. Generally, a two-part test formulated by the Supreme Court

of Ohio is used to determine whether an entity is a public utility, i.e., "...whether the taxpayer is a regulated public utility service...and...whether it was rendering a public utility service when the purchases were made..." See Pittsburgh & Conneaut Dock Co. v. Limbach (1985), 18 Ohio St. 3d 320; Midwest Haulers, Inc. v. Glander (1948), 150 Ohio St. 402; Manfredi Motor Transit Co. v. Limbach (1988), 35 Ohio St. 3d 73, 76. This general test notwithstanding, the Ohio Supreme Court has recognized that a consumer does not have to be statutorily defined as a public utility nor does it have to be regulated. Trans World Airlines v. Porterfield (1970), 22 Ohio St. 2d 177. It does, however, need to provide a service of public consequence or need which it offers to an indefinite public which has a legal right to the service. Ohio Power Co. v. Attica (1969), 19 Ohio App. 2d 89; Midwest Haulers, supra; Southern Power Co. v. Public Utilities Commission of Ohio (1924), 110 Ohio St. 246.

Based on the documentation and facts as presented, it is the opinion of the Tax Commissioner that Taxpayer is engaged in providing a public utility service.

This opinion applies to this taxpayer only. The opinion, and any reliance placed upon it, may not be transferred or assigned.

In addition, the tax consequences stated in this opinion may be subject to change for any of the reasons stated in R.C. 5703.53(C). It is the duty of the taxpayer to be aware of such changes. R.C. 5703.53(E).

Roger W. Tracy
Tax Commissioner