

## Sales/Use:

### Michigan: Retailer Does Not Owe Use Tax on Distributed Ad Materials Because It Lacked Control

*Case Nos. 352088 and 352667*, Mich. Ct. App. (7/8/21). The Michigan Court of Appeals (Court) affirmed that a nationwide retailer did not “use” its postcards, circulars, coupons, and newspaper inserts (*i.e.*, advertising materials) that were sent to Michigan residents for the Michigan use tax period at issue because it “deferred all aspects of delivery” to a third-party direct mail vendor and did not have sufficient retention of control over the materials after delivery to constitute a taxable “use” as defined under Michigan law. In doing so, the Court rejected, among other claims, the Michigan Department of Treasury’s contention that the retailer used the advertising materials after they had been delivered to Michigan residents, and that an incident of ownership incorporated the right to manage customer use of the advertising materials given that customers needed to present the materials at the retailer’s Michigan stores by a specific date chosen by the retailer. Rather, the Court concluded that:

**URL:** [https://courts.michigan.gov/Courts/COA/Opinions/Zip%20Files/20210708\\_unpublished.zip](https://courts.michigan.gov/Courts/COA/Opinions/Zip%20Files/20210708_unpublished.zip)

1. The retailer no longer exercised a right of power over the advertising materials incident to ownership once in the hands of customers; and
2. The customers became the owners of the advertising materials and could do with them whatever they wished.

According to the Court, “the mere fact that a customer might not be able to redeem a coupon or take advantage of a sale after a certain date” does not translate to the retailer’s “use” of the advertising materials under Michigan law. A dissenting in part and concurring in part opinion follows. Please contact us with any questions.

— John Hirz (Cleveland)  
Senior Manager  
Deloitte Tax LLP  
jhirz@deloitte.com

Drew Werner (Detroit)  
Manager  
Deloitte Tax LLP  
anwerner@deloitte.com

This document contains general information only and Deloitte is not, by means of this document, rendering accounting, business, financial, investment, legal, tax, or other professional advice or services. This document is not a substitute for such professional advice or services, nor should it be used as a basis for any decision or action that may affect your business. Before making any decision or taking any action that may affect your business, you should consult a qualified professional advisor. Deloitte shall not be responsible for any loss sustained by any person who relies on this document.

**About Deloitte**

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee (“DTTL”), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as “Deloitte Global”) does not provide services to clients. In the United States, Deloitte refers to one or more of the US member firms of DTTL, their related entities that operate using the “Deloitte” name in the United States and their respective affiliates. Certain services may not be available to attest clients under the rules and regulations of public accounting. Please see [www.deloitte.com/about](http://www.deloitte.com/about) to learn more about our global network of member firms.