

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING #00-52**

WARNING

Letter rulings are binding on the Department only with respect to the individual taxpayer being addressed in the ruling. This presentation of the ruling in a redacted form is informational only. Rulings are made in response to particular facts presented and are not intended necessarily as statements of Department policy

SUBJECT

Application of the sales tax to alleged sales for resale in different circumstances under which a resale certificate is issued.

SCOPE

This letter ruling is an interpretation and application of the tax law as it relates to a specific set of existing facts furnished to the Department by the taxpayer. The rulings herein are binding upon the Department and are applicable only to the individual taxpayer being addressed.

This letter ruling may be revoked or modified by the Commissioner at any time.

Such revocation or modification shall be effective retroactively unless the following conditions are met, in which case the revocation shall be prospective only:

- (A) The taxpayer must not have misstated or omitted material facts involved in the transaction;
- (B) Facts that develop later must not be materially different from the facts upon which the ruling was based;
- (C) The applicable law must not have been changed or amended;
- (D) The ruling must have been issued originally with respect to a prospective or proposed transaction; and
- (E) The taxpayer directly involved must have acted in good faith in relying upon the ruling, and a retroactive revocation of the ruling must inure to the taxpayer's detriment.

FACTS

[TAXPAYER'S] contract with its customer specifies that the taxpayer will invoice the customer upon delivery of [TANGIBLE PERSONAL PROPERTY] to the customer-designated site in Tennessee, and that the customer will pay the taxpayer according to the terms of the invoice.

After contract acceptance but before delivery and invoicing, the customer notifies the taxpayer of its intent to enter into a lease agreement whereby the customer will sell the ordered [TANGIBLE PERSONAL PROPERTY] to a leasing company and lease back the [TANGIBLE PERSONAL PROPERTY]. The lease is an operating lease, rather than a financing lease. The [TANGIBLE PERSONAL PROPERTY] will remain in the customer's possession for use in its own [BUSINESS]. Thus, the taxpayer's customer is the end user, and the [TANGIBLE PERSONAL PROPERTY] will not be placed into inventory for resale to other customers that would become end users.

The taxpayer desires to deliver the [TANGIBLE PERSONAL PROPERTY] and invoice the customer in accordance with its contract. Before doing so, the taxpayer obtains a certificate of resale signed by the customer. The certificate contains a statement to the effect that it is rendered pursuant to customer's intent to sell the [TANGIBLE PERSONAL PROPERTY] delivered under the contract to a leasing company for the purpose of leasing it back under an operating lease.

The taxpayer then completes delivery and invoicing of the [TANGIBLE PERSONAL PROPERTY] to the customer in Tennessee. At the point of invoicing, the customer has not yet entered into or finalized a sale or lease back agreement with a leasing company regarding the invoiced [TANGIBLE PERSONAL PROPERTY].

The taxpayer holds a sales and use tax registration for Tennessee and files returns monthly on an accrual basis.

The leasing company to which the [TANGIBLE PERSONAL PROPERTY] is subsequently sold by the customer is registered for sales and use tax in Tennessee and will offer the customer a resale exemption certificate for its purchase of the [TANGIBLE PERSONAL PROPERTY] from the customer. The leasing company will then invoice the customer for sales tax on the monthly lease invoices.

With respect to the above scenario, several distinct situations may occur:

Situation 1: The customer has a sales and use tax registration for Tennessee and is able to provide this registration number on the resale exemption certificate.

Situation 2: The customer does not have a sales and use tax registration for Tennessee and therefore is not able to provide a registration number on the resale exemption certificate. The customer, as noted above, states that it will be making an exempt sale for resale to the leasing company in Tennessee, based on receiving a properly completed Tennessee resale exemption certificate from the leasing company with the leasing company's Tennessee sales and use tax registration number.

QUESTIONS

1. Under Situation 1, does the taxpayer's acceptance of the customer's resale exemption certificate relieve the taxpayer from the obligation to collect and remit sales or use tax

on the delivery of the [TANGIBLE PERSONAL PROPERTY] that the customer intends to sell to a leasing company and lease back under an operating lease?

2. Under Situation 2, is the taxpayer relieved from the obligation to collect and remit sales or use tax on the delivery of the [TANGIBLE PERSONAL PROPERTY] that the customer intends to sell to a leasing company and lease back under an operating lease, if the taxpayer accepts the customer's resale exemption certificate for Tennessee which does not show a sales and use tax registration for Tennessee?

RULINGS

1. Yes. Under the facts given, the taxpayer's acceptance of the customer's resale exemption certificate relieves the taxpayer from the obligation to collect and remit sales tax on the sale.
2. No. Generally, if the customer is not registered for sales and use tax in Tennessee, the customer's Tennessee resale exemption certificate is not valid. However, if the customer is a dealer located outside of Tennessee and purchases tangible personal property in Tennessee for resale, the customer may furnish the taxpayer a valid certificate of resale from another state showing that the customer is a dealer located outside of Tennessee and would be entitled to purchase the tangible personal property on a resale certificate if the customer were a dealer in Tennessee.

ANALYSIS

1. Tennessee taxes retail sales of tangible personal property in Tennessee. Tenn. Code Ann. § 67-6-202.

'Retail sales' or 'sale at retail' means a taxable sale of tangible personal property or specifically taxable services to a consumer or to any person for any purpose other than for resale. 'Retail sales' or 'sales at retail' means and includes all such transactions as the commissioner, upon investigation, finds to be in lieu of sales. Any sales for resale must, however, be in strict compliance with rules and regulations promulgated by the commissioner. Any dealer making a sale for resale which is not in strict compliance with rules and regulations shall be personally liable for and pay the tax[.]

Sales for resale are defined as sales "whereby a supplier of materials, supplies, equipment, and services makes such tangible personal property or services available to legitimate dealers actually selling such property or services as such" Tenn. Comp. R. & Regs. 1320-5-1-.62(1). Sales for resale require a resale certificate in order to be sold free of sales tax. Tenn. Comp. R. & Regs. 1320-5-1-.68. However, the acceptance of a resale certificate is not the only requirement that is imposed upon an entity that makes a sale for resale. Tennessee also requires the following obligation:

If a wholesaler or dealer sells tangible personal property or taxable services free of the Sales or Use Tax on a certificate or resale when he knows, or should know in the use of ordinary care, that the property or service which he is selling is not for resale by the purchaser, but is for the purchaser's own use or consumption in his business or otherwise, the registration certificate of the wholesaler may be revoked by proper action by the Commissioner, and he shall be liable for the tax. . . . Tenn. Comp. R. & Regs. 1320-5-1-.68(4).

The taxpayer is required to use "ordinary care" to determine the legitimacy of the use of the resale certificate. Under the facts given, the customer presents a valid resale certificate along with a written statement explaining how and why the [TANGIBLE PERSONAL PROPERTY] is being purchased for resale even though the customer is not regularly engaged in the sale of this type of [TANGIBLE PERSONAL PROPERTY]. These facts constitute "ordinary care" sufficient for the taxpayer to honor the resale certificate.

2. The sale for resale exemption is for "legitimate dealers actually selling such property or services as such . . ." Tenn. Comp. R. & Regs. 1320-5-1-.62(1). Such dealers are required to register for sales and use tax in Tennessee. Tenn. Comp. R. & Regs. 1320-5-1-.63. The resale certificate contemplates use by a registered dealer. See Tenn. Comp. R. & Regs. 1320-5-1-.68. Therefore, generally the taxpayer is not relieved from the obligation to collect and remit sales tax on the sale, if the taxpayer accepts the customer's resale exemption certificate for Tennessee which does not show a sales and use tax registration for Tennessee. However, an exception to this general rule is found in Tenn. Comp. R. & Regs. 1320-5-1-.29(2), which says the following:

Bona fide dealers outside the State of Tennessee, who make purchases of tangible personal property or taxable services in this State which would otherwise be subject to the provisions of the Sales and Use Tax Law, may make purchases of items or services which they normally sell free of the Sales Tax, provided such a dealer will furnish his vendor in this State with a valid certificate of resale showing that he is a dealer located out of this State and would be entitled to purchase such property upon a resale certificate if he were a dealer in this State.

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APPROVED: Ruth E. Johnson
Commissioner of Revenue

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