

**TENNESSEE DEPARTMENT OF REVENUE
REVENUE RULING # 12-31**

WARNING

Revenue rulings are not binding on the Department. This ruling is based on the particular facts and circumstances presented, and is an interpretation of the law at a specific point in time. The law may have changed since this ruling was issued, possibly rendering it obsolete. The presentation of this ruling in a redacted form is provided solely for informational purposes, and is not intended as a statement of Departmental policy. Taxpayers should consult with a tax professional before relying on any aspect of this ruling.

SUBJECT

The application of the Tennessee sales and use tax to printed advertising materials shipped to a distribution center located in Tennessee for temporary storage before dissemination to locations both in and outside of Tennessee.

SCOPE

Revenue Rulings are statements regarding the substantive application of law and statements of procedure that affect the rights and duties of taxpayers and other members of the public. Revenue Rulings are advisory in nature and are not binding on the Department.

FACTS

The Taxpayer purchases printed advertising materials from Company A, the printer, located in State X (not Tennessee). The printed materials are shipped by Company A via common carrier to Taxpayer's distribution center located in Tennessee. The printed materials become the property of the Taxpayer as soon as they are printed by Company A. The Taxpayer does not take possession of the printed materials in State X and does not request that Company A store and later distribute the printed materials. The Taxpayer believes that State X would not impose a sales or use tax on the printed materials, based on a State X regulation exempting sales where the seller is obligated to deliver the goods to a carrier for transportation outside of State X. Company A is not registered to collect and remit Tennessee sales tax.

The printed materials are stored in the Taxpayer's distribution center in Tennessee until shipment to the Taxpayer's field service representatives who are located throughout the United States, including Tennessee. The Taxpayer does not alter the printed materials in any way while they are at the distribution center. The field service representatives then place the printed materials in the retail stores of the Taxpayer's customers, who are national retail chains that carry the Taxpayer's products. The printed materials remain the property of the Taxpayer in the customer's stores, and are eventually distributed in those stores to the stores' retail customers.

The printed advertising materials include signs, brochures, pamphlets, catalogues, etc., that describe the Taxpayer's products that are available for sale in the retail stores of the Taxpayer's customers.

RULINGS

1. Are advertising materials printed in State X (which is not Tennessee) that are shipped to the Taxpayer's distribution center located in Tennessee, and subsequently shipped throughout the United States, exempt from the Tennessee use tax under the "import for export" exemption?

Ruling: Advertising materials printed outside of Tennessee that are shipped to the Taxpayer's distribution center located in Tennessee, and subsequently shipped outside Tennessee, are exempt from Tennessee use tax pursuant to TENN. CODE ANN. §§ 67-6-102(90), -203(a) (2011). When such materials are shipped from the Taxpayer's distribution center in Tennessee to locations within Tennessee, however, the use tax is imposed.

2. Assuming that all or a portion of the printed advertising materials are determined to be subject to the Tennessee use tax, what is the correct tax base for the Taxpayer's use tax liability for those materials?

Ruling: The Taxpayer's use tax liability with respect to printed advertising materials remaining in Tennessee is determined based upon the "entire cost" of designing and printing the advertising materials.

3. If State X taxing authorities assert a sales or use tax due on the printed advertising materials, can the State X tax be credited against any Tennessee use tax due?

Ruling: If State X taxing authorities assert a sales or use tax due on the printed advertising materials, and the Taxpayer actually pays such tax, the State X tax may be credited against any Tennessee use tax due.

ANALYSIS

The Taxpayer has requested guidance regarding the application of the "exemption" found in TENN. CODE ANN. § 67-6-313(a) (2011) to its importation of advertising materials for subsequent shipping to retail locations, both within and outside of Tennessee. Discerning the proper treatment of TENN. CODE ANN. § 67-6-313(a), historically intertwined with TENN. CODE ANN. § 67-6-211 (2011)¹ and yet often misinterpreted, is not, however, necessary to determine the application of the Tennessee sales and use tax to the Taxpayer's transactions. By its plain terms, the controlling use tax statute provides the necessary means of analysis.

1. *Distribution and Storage in Tennessee*

The Taxpayer's advertising materials, printed in State X (outside Tennessee) and shipped to the Taxpayer's distribution center located in Tennessee, and subsequently shipped throughout the

¹ See generally Retailers' Sales Tax Act, ch. 3, § 4, 1947 Tenn. Pub. Acts 22, 29-30 (codified as amended at TENN. CODE ANN. §§ 67-6-211, 313(a) (2011)).

United States, are generally not subject to the Tennessee sales and use tax. Those advertising materials that are distributed within Tennessee, however, are subject to Tennessee use tax under TENN. CODE ANN. § 67-6-203(b)(1).

Retail sales in Tennessee of tangible personal property and certain enumerated items and services are subject to the sales and use tax under the Retailers' Sales Tax Act,² unless an exemption from taxation applies.

A complement to the sales tax, TENN. CODE ANN. § 67-6-203(a) (2011) imposes a tax at the same rate as the sales tax on “the purchase price of each item or article of tangible personal property³ when the tangible personal property is not sold, but is used, consumed, distributed, or stored for use or consumption in this state; provided, that there shall be no duplication of the tax.”⁴

Although TENN. CODE ANN. § 67-6-203(a) appears applicable because the Taxpayer is storing items in Tennessee,⁵ TENN. CODE ANN. § 67-6-203(b)(1) imposes a more specific tax on “distributors”⁶ based “on the value of catalogues, advertising fliers, or other advertising publications distributed to residents of Tennessee; provided that this tax shall not be duplicative of a sales or use tax otherwise collected on such publications.” The inclusion of the terms “distributor” and “distributing” is significant because a number of courts have looked to those terms' appearance, or absence, in their respective use tax statutes as a guidepost.⁷

The Tennessee Code Annotated does not define “distributor” for purposes of the TENN. CODE ANN. § 67-6-203(b)(1) use tax, except to state that the “commercial printer or mailer of any such catalogues, advertising fliers, or other advertising publications” is not a distributor. The statute also provides that a relationship with a Tennessee commercial printer or mailer, without more, does not establish nexus.⁸ In common parlance, however, to “distribute” means to “hand or share something out to a number of people,” or to “supply goods to retailers.”⁹

The Taxpayer's activities include storing a portion of its advertising materials for distribution within this state to retailers that sell the Taxpayer's products. The provision of advertising

² Tennessee Retailers' Sales Tax Act, ch. 3, §§ 1-18, 1947 Tenn. Pub. Acts 22, 22-54 (codified as amended at TENN. CODE ANN. §§ 67-6-101 to -907 (2011)).

³ Tangible personal property, as defined in the Retailers' Sales Tax Act, means “personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses.” TENN. CODE ANN. § 67-6-102(91)(A). There is no question that the Taxpayer's advertising materials constitute tangible personal property.

⁴ TENN. CODE ANN. § 67-6-203(a) (footnote added).

⁵ See also TENN. CODE ANN. § 67-6-102(90) (defining “storage”).

⁶ “‘Distributor’ does not include the commercial printer or mailer of any such catalogues, advertising fliers, or other advertising publications.” TENN. CODE ANN. § 67-6-203(b)(1).

⁷ See 2 JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION ¶ 16.04[3][a][ii], at 16-33 (3d ed. 2000 & Supp. 2012).

⁸ *Id.*

⁹ COMPACT OXFORD ENGLISH DICTIONARY OF CURRENT ENGLISH 288 (3d rev. ed. 2008).

materials to a number of retailers is properly considered distribution for purposes of TENN. CODE ANN. § 67-6-203(b)(1). Consequently, the Taxpayer must pay use tax on the value of the advertising materials distributed within the state of Tennessee.

The portion of the Taxpayer's advertising materials shipped outside of Tennessee, however, is not subject to the Tennessee sales and use tax. Under TENN. CODE ANN. § 67-6-203(a), the advertising materials are neither distributed in nor stored for use in this state. Rather, they are only being temporarily stored in Tennessee "pending shipping or mailing . . . to nonresidents of Tennessee," which is nontaxable.¹⁰ Nor does TENN. CODE ANN. § 67-6-203(b)(1) impose a tax on the advertising materials shipped outside of Tennessee because those materials are not being distributed within the state.

Consequently, the Taxpayer must pay use tax only on that portion of its advertising materials that will be distributed in Tennessee. The Taxpayer's advertising materials brought into this state for temporary storage before being shipped out of state are not subject to the Tennessee sales and use tax.

2. *Use Tax Base*

As discussed above, the Taxpayer is liable for Tennessee use tax with respect to the printed advertising materials purchased from an out-of-state vendor when the Taxpayer distributes such materials in Tennessee. The determination of the Taxpayer's use tax liability is based on the value of the materials that ultimately remain in Tennessee.

TENN. CODE ANN. § 67-6-203(b)(1) levies the use tax on the "*value* of catalogues, advertising fliers, or other advertising publications distributed to residents of Tennessee."¹¹ The Tennessee Court of Appeals has held that the term "value" as used in TENN. CODE ANN. § 67-6-203(b)(1) has the same meaning as "cost price" under an older version of subsection (a), which does not allow "any deductions therefrom on account of the cost of materials used, labor, or service costs, transportation charges, or any expenses whatsoever."¹² The court applied the cost price reasoning to a transaction involving the printing of brochures to hold that the proper use tax base was the entire amount paid to design and print the brochures, not just the cost of printing the brochures.¹³

TENN. CODE ANN. § 67-6-203(a) (2011) no longer uses the "cost price" to establish the use tax base, but now uses the "purchase price" as the benchmark. "Purchase price" is defined to be the same as the "sales price,"¹⁴ which is the "total amount of consideration" without deduction for, among other things, "[t]he cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the

¹⁰ TENN. CODE ANN. § 67-6-102(90).

¹¹ TENN. CODE ANN. § 67-6-203(b)(1) (emphasis added).

¹² *Rivergate Toyota, Inc. v. Huddleston*, No. 01A01-9602-CH-00053, 1998 WL 83720, at *2-3 (Tenn. Ct. App. Feb. 27, 1998); *see also* TENN. CODE ANN. § 67-6-203(a) (1994).

¹³ *Rivergate Toyota, Inc.*, 1998 WL 83720, at *3-4.

¹⁴ *See* TENN. CODE ANN. § 67-6-102(74).

seller.”¹⁵ In other words, despite the change in statutory language, the court’s rationale in *Rivergate Toyota, Inc.* still holds true under the new “purchase price” terminology.

Applying that rationale to the Taxpayer’s transactions at issue, the proper use tax base includes the “entire cost of the transaction” to the Taxpayer.¹⁶ This would include the costs paid to design and develop the advertising materials,¹⁷ the costs paid to print the advertising materials, transportation costs, and any other expenses paid by the Taxpayer to produce the advertising materials, regardless of where the expenses were incurred.

3. *Credit against Tennessee Use Tax Due*

If State X taxing authorities assert a sales or use tax due on the printed advertising materials, and the Taxpayer actually pays such tax, the State X tax may be credited against Tennessee use tax due.

As discussed above, TENN. CODE ANN. § 67-6-203(b)(1) levies a use tax to be paid by the distributor “on the value of catalogues, advertising fliers, or other advertising publications distributed to residents of Tennessee; *provided, that this tax shall not be duplicative of a sales or use tax otherwise collected on such publications.*”¹⁸

In addition, TENN. COMP. R. & REGS. 1320-5-1-.91 (2008) specifically provides that “[p]ersons actually paying a legally imposed Sales or Use Tax to another State on tangible personal property or taxable services imported into this State may claim such payment as a credit against any Use Tax liability accruing in this State.”

Accordingly, if State X taxing authorities impose a sales tax on the printed advertising materials, and the Taxpayer actually pays such tax, the State X sales tax can be credited against the Tennessee use tax due.

¹⁵ TENN. CODE ANN. § 67-6-102(81)(A)(ii).

¹⁶ See *Rivergate Toyota, Inc.*, 1998 WL 83720, at *4; see also TENN. CODE ANN. § 67-6-312(c) (2011).

¹⁷ Advertising services are not an enumerated taxable service under TENN. CODE ANN. § 67-6-205(c) (2011). Nevertheless, the use of advertising materials in Tennessee is taxable under TENN. CODE ANN. § 67-6-312(c) (2011), which unlike the second clause of TENN. CODE ANN. § 67-6-312(b), does not contain a prohibition against including advertising services in the sales price of the advertising materials. Consequently, all of the costs the Taxpayer paid to have its advertising materials developed are included in the use tax base, including advertising services. Cf. TENN. CODE ANN. § 67-6-102(81)(A)(ii) (seller’s service cost).

¹⁸ TENN. CODE ANN. § 67-6-203(b)(1) (emphasis added); see also TENN. CODE ANN. § 67-6-203(a) (providing that “there shall be no duplication of the tax”); TENN. CODE ANN. § 67-6-507(a) (2011) (Sales and use tax “does not apply with respect to the use, consumption, distribution or storage of tangible personal property . . . for use or consumption in this state, upon which a like tax equal to or greater than the amount imposed by [the Retailers’ Sales Tax Act] has been paid in another state.”); cf. *BellSouth Adver. & Publ’g Co. v. Johnson*, 100 S.W.3d 202, 208 (Tenn. 2003) (holding that the taxpayer was due a credit for the sales tax paid in another state for photocompositions that were subsequently used and taxed as a component of phone directories in Tennessee under TENN. CODE ANN. § 67-6-203 (1998)).

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