

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING # 02-13**

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 and use tax to a taxpayer that provides an Internet service to facilitate the sale and purchase of tangible personal property.

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 on 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

[THE TAXPAYER] is a Delaware company with its principal business location in [CITY], Tennessee. The taxpayer operates an electronic [COMMODITY (AGRICULTURAL PRODUCT)] exchange that is accessed via the Internet. Some of the content on the website such as weather, delayed [COMMODITY] futures quotes, industry calendar, news, industry links and the live trading monitor summary, can be viewed by anyone going to the taxpayer's website. However, users must pay a

subscription fee in order to access the electronic exchange. In paying this subscription fee, subscribers receive trading privileges on the exchange and emergency dial-in service to the website. The emergency access is available to subscribers at no additional charge and is for use only if the subscriber's Internet service provider is temporarily unable to provide Internet access. The emergency dial-in feature provides access to the taxpayer's website only, not to the Internet. The taxpayer is not an Internet service provider.

Subscribers to the taxpayer's website can buy and sell [COMMODITY] via the Internet. The exchange allows buyers and sellers to go through a bidding process and, once an agreement to buy and sell is reached, the taxpayer then guarantees performance to each of the parties. After agreeing to sell the [COMMODITY] on the exchange, the seller transfers an electronic warehouse receipt (a title document) to the taxpayer. Upon receipt of this title document, the taxpayer transfers funds to the seller. On the same day that the title document is received, the taxpayer invoices the buyer who has agreed to purchase the [COMMODITY]. When the taxpayer receives the buyer's payment, the taxpayer transfers the electronic warehouse receipt to the buyer. The taxpayer is paid commissions ranging from \$1.00 to \$1.50 per [UNIT] traded for its services. Depending on the circumstances, the commission can be paid by the buyer or split equally between the buyer and the seller.

While the taxpayer does take title to the [COMMODITY] via the electronic warehouse receipt, the physical [COMMODITY] itself is never moved from the warehouse at which it is stored at the direction of the taxpayer. The taxpayer is trading electronic warehouse receipts. The [COMMODITY] may be traded several more times prior to being moved, or the party purchasing the [COMMODITY] may move it immediately. Currently, a seller can be either a [COMMODITY] merchant, or a "special service provider." A special service provider is an agent who is representing producers and is in charge of marketing [COMMODITY] via the taxpayer's website. In the future, there is a possibility that the end user will be a [TYPE OF BUSINESS]. However, in either case, the taxpayer will always be selling to a reseller, not a consumer.

As mentioned above, the taxpayer currently provides only delayed [COMMODITY] futures quotes on its website, which anyone with Internet capabilities can access, regardless of whether they are a subscriber to the site. However, the taxpayer currently is considering purchasing quotes and reselling those live quotes to subscribers for a fee over and above the normal subscription fee.

All servers and equipment necessary to operate the website are located in [CITY], Tennessee. However, the majority of the website's subscribers are located in states other than Tennessee.

QUESTIONS

1. Is the monthly subscription fee subject to Tennessee sales tax?

2. Is the resale of live quotes to subscribers through the form of an increased subscription fee subject to Tennessee sales tax?

3. Are the commissions earned subject to Tennessee sales tax?
4. Is the [COMMODITY] being sold on the website of the taxpayer exempt from sales tax under Tenn. Code Ann. § 67-6-329?
5. Should the taxpayer collect resale certificates from its purchasers?
6. If the answer to any of the above questions is yes, does it make a difference if the subscriber or purchaser is not located in Tennessee?

RULINGS

1. No. The monthly subscription fee is not subject to the sales and use tax.
2. No. The resale of live quotes to subscribers through the form of an increased subscription fee is not subject to the sales and use tax.
3. No. The commissions that the taxpayer earns are part of the sales price of the [COMMODITY] sold to the buyers. The taxpayer's sales of [COMMODITY] are exempt from the sales and use tax pursuant to Tenn. Code Ann. § 67-6-301(c).
4. No. The [COMMODITY] being sold on the website of the taxpayer is not exempt from the sales and use tax under Tenn. Code Ann. § 67-6-329. However, the taxpayer's sales of [COMMODITY] are exempt from the sales and use tax pursuant to Tenn. Code Ann. § 67-6-301(c).
5. No. The taxpayer does not need to collect resale certificates from its purchasers.
6. Not applicable.

ANALYSIS

1 & 2. Tennessee taxes the retail sale or use of tangible personal property in this State. Tenn. Code Ann. §§ 67-6-202 and 67-6-203. “‘Tangible personal property’ means and includes personal property, which may be seen, weighed, measured, felt, or touched, or is in any other manner perceptible to the senses.” Tenn. Code Ann. § 67-6-102(29). “‘Sale’ means any transfer of title or possession, or both, ... of tangible personal property for a consideration[.]” Tenn. Code Ann. § 67-6-102(25)(A).

Tennessee also taxes the sale of specifically taxable services in this State. Tenn. Code Ann. § 67-6-205. The sales and use tax is not levied generally on the sale of all services. The tax applies only to those services that are “taxable under this chapter.” Tenn. Code Ann. § 67-6-205.

The monthly subscription fee is not subject to the sales and use tax, because the fee is not for the sale or use of tangible personal property and is not for the sale of a taxable service. The resale of live quotes is not subject to the sales and use tax, because the fee is

not for the sale or use of tangible personal property and is not for the sale of a taxable service.

3 – 6. The Tennessee sales and use tax includes the following exemption:

Each and every agricultural commodity sold by any person, other than a producer, to any other person, who purchases not for direct consumption but for the purpose of acquiring raw products for use or for sale in the process of preparing, finishing, or manufacturing such agricultural commodity for the ultimate retail consumer trade shall be and is exempt from any and all provisions of this chapter, including payment of the tax applicable to the sale, storage, use, transfer, or any other utilization or handling thereof, except when such agricultural commodity is actually sold as a marketable or finished product to the ultimate consumer, and in no case shall more than one (1) tax be exacted. Tenn. Code Ann. § 67-6-301(c)(1).

“Agricultural commodity” is defined to include “farm products.” Tenn. Code Ann. § 67-6-301(c)(2). [COMMODITY] is a farm product. Based on the facts provided by the taxpayer, the taxpayer’s customers’ purchases are not for direct consumption but are for the purpose of acquiring raw products for use or for sale in the process of preparing, finishing, or manufacturing the [COMMODITY] for the ultimate retail consumer trade. Furthermore, the statute provides that in no case shall more than one tax be exacted. Generally, the one tax that would be exacted on the sale of the [COMMODITY] would be the sale of the [COMMODITY] clothing or other [COMMODITY] products to the ultimate consumers. The taxpayer’s sales of [COMMODITY] are exempt from the sales and use tax.

The taxpayer’s commissions are part of the sales price of the [COMMODITY]. Tenn. Code Ann. § 67-6-102(26). Because the sales are exempt from the sales and use tax, the entire sales price of each sale is exempt from the sales and use tax.

Tenn. Code Ann. § 67-6-329(a)(3) exempts from the sales and use tax the following: “Seeds, seedlings, plants grown from seed and liners (cuttings) which will produce food or fiber (including tobacco) for human or animal consumption[.]” The taxpayer does not buy or sell the [COMMODITY] in the form of seeds, seedlings or plants. Therefore, this exemption does not apply. However, the exemption established in Tenn. Code Ann. § 67-6-301(c) does apply, as discussed above.

Because the taxpayer’s sales are exempt from the sales and use tax pursuant to Tenn. Code Ann. § 67-6-301(c), the taxpayer would not need to collect resale certificates from its purchasers.

None of the fees or transactions discussed above is subject to the sales and use tax. Therefore, the question regarding subscribers or purchasers located outside of Tennessee is not applicable.

Steve Butler
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APPROVED: Ruth E. Johnson
Commissioner

DATE: 6/7/02