

**TENNESSEE DEPARTMENT OF REVENUE
REVENUE RULING # 12-11**

WARNING

Revenue rulings are not binding on the Department. This presentation of the ruling in a redacted form is information only. Rulings are made in response to particular facts presented and are not intended necessarily as statements of Departmental policy.

SUBJECT

The application of the Tennessee sales and use tax to charges for electronic access to [WRITTEN MATERIALS].

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 is [REDACTED]. The Taxpayer's [REDACTED] services are offered both online and [REDACTED]. The Taxpayer is incorporated and headquartered outside Tennessee. [REDACTED].

The [WRITTEN MATERIALS] Fee is a [REDACTED] fee charged [REDACTED] that allows [CUSTOMERS] to access a variety of information and [WRITTEN MATERIALS] through the Taxpayer's website. The Taxpayer does not separately itemize charges for the benefits received by [CUSTOMERS]. [REDACTED].

Resources available through the Taxpayer's website include, but are not limited to, the following:¹

- [REDACTED].
- [REDACTED].
- Library content, which enables [CUSTOMERS] to access and research multiple databases that contain reference sources and periodicals.²
- Application Service Provider computer simulation programs, [REDACTED].

¹ [REDACTED].

² The library content includes access to [REDACTED], along with access to [REDACTED], dictionaries, encyclopedias, and similar materials.

The computer simulation programs reside on the Taxpayer's servers, which are located outside Tennessee, and are not transferred to [CUSTOMERS].

[CUSTOMERS] are not required to download any software or install any computer-related hardware in order to access the information and resources available on the Taxpayer's website.³ In general, [CUSTOMERS] may view, download, and/or print the electronic [WRITTEN MATERIALS].

RULINGS

1. Is the [WRITTEN MATERIALS] Fee subject to the Tennessee sales and use tax with respect to tax periods prior to January 1, 2009?

Ruling: No. The [WRITTEN MATERIALS] Fee is not subject to the Tennessee sales and use tax with respect to tax periods prior to January 1, 2009.

2. Is the [WRITTEN MATERIALS] Fee subject to the Tennessee sales and use tax with respect to tax periods beginning on or after January 1, 2009?

Ruling: Yes. For tax periods beginning on or after January 1, 2009, the [WRITTEN MATERIALS] Fee is subject to the Tennessee sales and use tax when charged to a [CUSTOMER] located in Tennessee.

ANALYSIS

Under the Retailers' Sales Tax Act, TENN. CODE ANN. §§ 67-6-101 to -907 (2011),⁴ the retail sale in Tennessee of tangible personal property and specifically enumerated items and services is subject to the sales and use tax, unless exempted by statute.

TENN. CODE ANN. § 67-6-102(80)(A) (2011) defines the term "sale" in pertinent part to mean "any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever of tangible personal property for a consideration."

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). Tangible personal property also includes

³ In some limited instances, the Taxpayer may provide [CUSTOMERS] with software that must be downloaded and installed on the [CUSTOMERS'] computers. [CUSTOMERS] have the right to use such software during [DEFINED TIME PERIOD] only. The Taxpayer acknowledges that the [WRITTEN MATERIALS] Fee is subject to the Tennessee sales and use tax in such instances; this revenue ruling therefore does not address that factual scenario.

⁴ Due to a change in the law that will be discussed below, the Taxpayer has requested that the application of the Tennessee sales and use tax to its [WRITTEN MATERIALS] Fee be addressed both for tax periods prior to the January 1, 2009, effective date of the new law, and for tax periods beginning on or after January 1, 2009. Amendments to the Retailers' Sales Tax Act that affect the analysis for tax periods beginning on or after January 1, 2009, will be discussed in Question #2. Otherwise, the relevant law is essentially the same, except that some sections have been renumbered. *Compare, e.g.,* TENN. CODE ANN. § 67-6-102(85) (Supp. 2008), *with* TENN. CODE ANN. § 67-6-102(92) (2011).

“prewritten computer software.”⁵ TENN. CODE ANN. § 67-6-102(84)(A). Conversely, the sale or use of intangible intellectual property is generally not subject to Tennessee sales and use tax.⁶

In addition to the transfer of tangible personal property, the term “sale” also includes “the furnishing of any of the things or services taxable” under the Retailers’ Sales Tax Act. *See* TENN. CODE ANN. § 67-6-102(80)(C). One of the “things” the Retailers’ Sales Tax Act specifically imposes sales and use taxation on is “[t]he retail sale, lease, licensing or use of computer software in this state, including prewritten and custom computer software⁷ . . . regardless of whether the software is delivered electronically, delivered by use of tangible storage media, loaded or programmed into a computer, created on the premises of the consumer or otherwise.” TENN. CODE ANN. § 67-6-231 (2011) (footnote added). Computer software is defined as “a set of coded instructions designed to cause a computer . . . to perform a task.” TENN. CODE ANN. § 67-6-102(20).

Services are also taxable under the Retailers’ Sales Tax Act. TENN. CODE ANN. § 67-6-201(a)(3) (2011); *see also* TENN. CODE ANN. § 67-6-102(80)(C). But the sales tax does not apply to all services; rather, it only applies to retail sales of those services specifically enumerated by the statute. *See Covington Pike Toyota, Inc. v. Cardwell*, 829 S.W.2d 132, 135 (Tenn. 1992); *Ryder Truck Rental, Inc. v. Huddleston*, No. 91-3382-III, 1994 WL 420911, at *3 (Tenn. Ct. App. Aug. 12, 1994). One of the services subject to the sales and use tax is the furnishing of “intrastate, interstate or international telecommunication services” for consideration, pursuant to TENN. CODE ANN. § 67-6-205(c)(3) (2011).⁸ The term “telecommunications service” is defined under TENN. CODE ANN. § 67-6-102(92)(A) as the “electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points.” TENN. CODE ANN. § 67-6-102(92)(B)(i) excludes from the definition of “telecommunications service,” however, data processing and information services “that allow data to be generated, acquired, stored, processed, or retrieved and delivered by electronic transmission to a purchaser, where such purchaser’s primary purpose for the underlying transaction is the processed data or information.”

⁵ TENN. CODE ANN. § 67-6-102(70) defines the term “prewritten computer software” in pertinent part as “computer software, including prewritten upgrades, that is not designed and developed by the author or other creator to the specifications of a specific purchaser.” TENN. CODE ANN. § 67-6-102(70) further provides that “[p]re-written computer software” or a prewritten portion of the computer software that is modified or enhanced to any degree, where the modification or enhancement is designed and developed to the specifications of a specific purchaser, remains prewritten computer software.” Note, however, that where there is a “reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for the modification or enhancement, the modification or enhancement shall not constitute prewritten computer software.” TENN. CODE ANN. § 67-6-102(70).

⁶ If intangible intellectual property is stored on tangible storage media that is sold or used in Tennessee, however, then it does become subject to the sales and use tax, *see Crescent Amusement Co. v. Carson*, 213 S.W.2d 27, 29 (Tenn. 1948) (holding that rental films are tangible personal property), unless the tangible method of data transfer is “merely incidental” to the underlying transaction. *Commerce Union Bank v. Tidwell*, 538 S.W.2d 405, 407 (Tenn. 1976).

⁷ As explained above, “prewritten computer software” is also subject to sales and use taxation as tangible personal property. *See* TENN. CODE ANN. § 67-6-102(91)(A).

⁸ The Taxpayer’s services cannot be characterized as any other type of service that is taxable under the Retailers’ Sales Tax Act; this revenue ruling therefore does not discuss any specifically enumerated services other than telecommunications services.

However, a nontaxable service or item may be subject to taxation when charges for the nontaxable service or item are included in the sales price of a taxable good or service. Specifically, TENN. CODE ANN. § 67-6-102(81)(A) provides that the sales price of a good or service equals the “total amount of consideration . . . for which personal property or services are sold,” with no deduction for the seller’s costs or charges by the seller for services necessary to complete the sale. Thus, if taxable goods or services and nontaxable goods or services are sold together for a single charge, the entire charge is generally subject to taxation. *See Tomkats Catering, Inc. v. Johnson*, No. M2000-03107-COA-R3-CV, 2001 WL 1090516, at *2 (Tenn. Ct. App. Sept. 19, 2001).

1. PERIODS PRIOR TO JANUARY 1, 2009

The [WRITTEN MATERIALS] Fee is not subject to Tennessee sales and use tax with respect to tax periods prior to January 1, 2009.

The [WRITTEN MATERIALS] Fee is subject to the Tennessee sales and use tax under the relevant provisions of the Retailers’ Sales Tax Act in effect prior to January 1, 2009, if the charge was made with respect to: 1) the retail sale of tangible personal property and/or computer software;⁹ 2) the furnishing of a taxable service; and/or 3) the furnishing of an otherwise nontaxable good or service that is bundled with a taxable good or service.

First, no retail sale of tangible personal property occurs in Tennessee when the Taxpayer charges [CUSTOMERS] in Tennessee the [WRITTEN MATERIALS] Fee, which allows [CUSTOMERS] to access electronic [WRITTEN MATERIALS] through the Taxpayer’s website.

The facts indicate that [CUSTOMERS] do not receive any tangible items in exchange for the [WRITTEN MATERIALS] Fee. Additionally, the furnishing of access to the computer simulation programs is not taxable as a sale of computer software in Tennessee because the Taxpayer offers the programs as an application service provider. Importantly, the computer simulation programs remain on the Taxpayer’s servers located outside the state of Tennessee at all times, and are never transferred to, downloaded to, or installed on the [CUSTOMERS’] computers. The Taxpayer always retains full control over the computer simulation programs and does not transfer title or possession of the programs to the [CUSTOMERS] at any time. *See* TENN. CODE ANN. § 67-6-102(80)(A). Rather, access to and the use of the computer simulation programs takes place entirely over the Internet. Because title, possession, and control of the computer simulation programs always reside with the Taxpayer, no sale occurs for Tennessee sales and use tax purposes.

Second, the provision of electronic [WRITTEN MATERIALS] in exchange for the [WRITTEN MATERIALS] Fee does not constitute a taxable service for Tennessee sales and use tax purposes.

⁹ Because part of the definition of “prewritten computer software” includes “computer software,” computer software is discussed in conjunction with tangible personal property even though there are separate bases for sales and use taxation.

The process of accessing the [REDACTED], reading materials, [REDACTED], library content and databases involves the electronic transmission of data between points, and could be characterized as a taxable telecommunications service under TENN. CODE ANN. § 67-6-102(92)(A). Nevertheless, the provision of electronic [WRITTEN MATERIALS] is excluded from the definition of “telecommunications service” because the data is stored and electronically retrieved by [CUSTOMERS] whose “primary purpose for the underlying transaction is the processed data or information.” *See* TENN. CODE ANN. § 67-6-102(92)(B)(i). Therefore, providing access to electronic [WRITTEN MATERIALS] in exchange for a [WRITTEN MATERIALS] Fee is not a taxable service for purposes of the Tennessee sales and use tax.

Finally, because providing electronic access to [WRITTEN MATERIALS] in exchange for a [WRITTEN MATERIALS] Fee does not implicate the Tennessee sales and use tax for the sale of tangible personal property, for the sale of computer software, or for the sale of a taxable service, there is no way that the Taxpayer can furnish an otherwise nontaxable good or service that is bundled with a taxable good or service.

Consequently, the Taxpayer’s [WRITTEN MATERIALS] Fee is not subject to the Tennessee sales and use tax for periods prior to January 1, 2009.

2. PERIODS BEGINNING ON OR AFTER JANUARY 1, 2009

The [WRITTEN MATERIALS] Fee is subject to Tennessee sales and use tax for periods beginning on or after January 1, 2009, when charged to a [CUSTOMER] located in Tennessee.

[REDACTED].

In 2008, the Tennessee General Assembly amended the Retailers’ Sales Tax Act to include TENN. CODE ANN. § 67-6-233(a) (2011), effective January 1, 2009.¹⁰ This provision imposes the sales and use tax on the “retail sale, lease, licensing or use of specified digital products transferred to or accessed by subscribers or consumers” in Tennessee.¹¹ The term “specified digital products” is defined under TENN. CODE ANN. § 67-6-102(88) as “electronically transferred¹² digital audio-visual works, digital audio works and digital books.” (footnote added).

Taxable retail sales, leases, licensing, or use of specified digital products include: “[s]pecified digital products sold with rights of permanent use and specified digital products sold with rights of less than permanent use”; “[s]pecified digital products sold with rights of use conditioned upon continued payment by the subscriber or purchaser”; and “[s]ubscriptions to, access to or the purchase of a digital code for receiving or accessing specified digital products.” TENN. CODE ANN. § 67-6-233(b)(1)-(3). The General Assembly included an exemption, however, for the “sale at retail, use, consumption, distribution and storage for use or consumption” of any

¹⁰ *See* Act of May 15, 2008, ch. 1106, §§ 19-20, 2008 Tenn. Pub. Acts 832, 837-38 (codified at TENN. CODE ANN. §§ 67-6-233, -329(d) (2011)).

¹¹ The tax applies to retail sales in Tennessee, “indicated by the residential street address or the primary business street address of the subscriber or consumer.” TENN. CODE ANN. § 67-6-233(g).

¹² “Electronically transferred” means “obtained by the purchaser by means other than tangible storage media.” TENN. CODE ANN. § 67-6-102(88).

specified digital product “if the sale, lease, licensing and use of the equivalent in a tangible form is exempt from taxation” under the Retailers’ Sales Tax Act. TENN. CODE ANN. § 67-6-329(d)(1) (2011).¹³

[REDACTED].

Therefore, unless an exemption applies, the [WRITTEN MATERIALS] Fee will be subject to the Tennessee sales and use tax for periods beginning on or after January 1, 2009, if the charge is made with respect to: 1) the retail sale of tangible personal property and/or computer software; 2) the furnishing of a taxable service; 3) the retail sale, lease, licensing, or use of a specified digital product; and/or 4) the furnishing of an otherwise nontaxable good or service that is bundled with a taxable good or service.

For the reasons discussed above in the response to Question #1, the [WRITTEN MATERIALS] Fee is not subject to taxation as a sale of tangible personal property, computer software, or an enumerated service.

In the Taxpayer’s case, however, [CUSTOMERS] pay the [WRITTEN MATERIALS] Fee in exchange for access to, among other things, specified digital products. The term “specified digital products” includes “digital books,” which are defined in TENN. CODE ANN. § 67-6-102(31) as “works that are generally recognized in the ordinary and usual sense as ‘books’ that are transferred electronically, including works of fiction and nonfiction and short stories.”¹⁴ Here, [CUSTOMERS] receive access to [REDACTED], dictionaries, and encyclopedias, which come within the definition of “digital books.”

As discussed above, the sales and use tax is imposed on the “retail sale, lease, licensing or use of specified digital products transferred to or accessed by subscribers or consumers” in Tennessee. TENN. CODE ANN. § 67-6-233(a). Because the [CUSTOMER] may view, download, or print digital books in exchange for the [WRITTEN MATERIALS] Fee, a taxable sale of specified digital products occurs. Even though [CUSTOMERS] may not be able to retain the possession or use of the digital books after the [EXPIRATION OF THE TIME PERIOD COVERED BY THE FEE], the temporally limited use of the digital books does not prevent their taxation because the statute specifically includes “specified digital products sold with rights of less than permanent use.” TENN. CODE ANN. § 67-6-233(b)(1).

An exemption is applicable to some of the specified digital products covered by the [WRITTEN MATERIALS] Fee, but the [CUSTOMERS] still receive additional specified digital products that are not exempt. [REDACTED].¹⁵

[REDACTED].¹⁶ [REDACTED].

¹³ This provision also became effective on January 1, 2009. *See* Act of May 15, 2008, ch. 1106, § 69, 2008 Tenn. Pub. Acts at 853-54.

¹⁴ The definition of “digital books” excludes “newspapers, magazines, periodicals, chat room discussions [and] weblogs.” TENN. CODE ANN. § 67-6-102(31).

¹⁵ [REDACTED].

The inclusion of taxable specified digital products as a component of the [WRITTEN MATERIALS] Fee renders the entire fee subject to Tennessee sales and use tax, when charged to a [CUSTOMER] in Tennessee. Even though some of the [WRITTEN MATERIALS] received by [CUSTOMERS] are not taxable, the facts indicate that the nontaxable items are bundled with taxable digital books for a single charge. TENN. CODE ANN. § 67-6-102(81)(A) provides that the sales price of a good or service equals the “total amount of consideration . . . for which personal property or services are sold.” Thus, if taxable items are bundled with nontaxable items and sold for a single charge, the entire charge is subject to taxation. *See, e.g., Tomkats Catering, Inc. v. Johnson*, 2001 WL 1090516, at *2.

Consequently, for the periods after January 1, 2009, the [WRITTEN MATERIALS] Fee is subject to Tennessee sales and use tax when charged to a [CUSTOMER] located in Tennessee.

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APPROVED: Richard H. Roberts
Commissioner of Revenue

DATE: July 24, 2012

¹⁶ The specific examples listed here, dictionaries and encyclopedias, are only representative of the broad array of materials available to [CUSTOMERS] in exchange for the [WRITTEN MATERIALS] Fee. These examples are non-exhaustive of the potentially taxable “specified digital products” provided to [CUSTOMERS].