

**TENNESSEE DEPARTMENT OF REVENUE
REVENUE RULING # 13-03**

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 online advertising and database services.

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 a company formed under the laws of a state other than Tennessee; the Taxpayer does not own or lease any real or tangible personal property in Tennessee. All of the Taxpayer's office locations, equipment, and computer servers are located outside Tennessee. However, the Taxpayer has independent contractors and/or employees who live in Tennessee or who travel to the state for business purposes.

The Taxpayer is primarily engaged in the marketing and management of online classified advertising. The Taxpayer derives its revenues from offering to its customers a wide range of advertising services over the Internet.

Banner Advertising

The Taxpayer maintains one or more websites and derives receipts from selling banner advertising on such websites to end users and to resellers of such banner advertising. [REDACTED].

Advertising of Seller's Inventory

The Taxpayer maintains a database of items of inventory available for purchase from third party sellers, as well as a database of [PROPERTY] available for lease from third party lessors or their agents (the "Inventory"). Potential customers (*i.e.*, purchasers or tenants) can access the Taxpayer's website at no charge and can search the Taxpayer's database electronically to find Inventory items by certain search criteria.

The Taxpayer does not own, sell, or lease any Inventory. The Taxpayer's websites do not have any purchase or "shopping cart" functionality to purchase or lease Inventory. Instead, if a potential customer searches the Taxpayer's electronic database and is interested in purchasing or leasing an item of Inventory, the Taxpayer's websites then provide contact information and/or a mechanism to allow the customer to contact the seller or lessor. The website may also provide redirects and/or hyperlinks from the Taxpayer's websites to the seller's or lessor's website, which is not maintained on the Taxpayer's web server. The potential customer can then contact the seller or lessor to purchase or lease the Inventory directly.

The Taxpayer derives subscription revenues from sellers and lessors (and not from their customers) as follows: [REDACTED].

Separately Stated Service Charges

The Taxpayer may impose a separately stated charge for additional services. Such charges may include the following:

- a) Separately stated photography fee. On occasion, the Taxpayer will charge a photography fee for the Taxpayer to take a photograph of the Inventory item, which the Taxpayer then adds to the online advertisement about the item. The Taxpayer does not transfer any tangible personal property to the seller or lessor.
- b) Separately stated set up fee. On occasion, the Taxpayer will charge a "set up" fee for the seller or lessor to have the right to enter information about the Inventory into the Taxpayer's database.

Access to Online Database Applications

The Taxpayer charges third party business ("Customers") a [REDACTED] fee to access its online database applications and provide related services ("ASP Services"). At all times, the Taxpayer owns and operates the underlying database software, and the software resides on the Taxpayer's servers. The Customer is allowed to access the Taxpayer's online database applications via the Internet, and the Customer can then incorporate the searchable online database applications into its own website and populate the database with its own Inventory. Alternatively, the Customer can populate the database with Inventory owned by third party sellers or lessors, as the Taxpayer does. Potential customers can then access and search the Taxpayer's database applications via the Customer's website.

If the Customer wishes to populate the database with Inventory owned by sellers or lessors for an advertising charge, the online database applications have functionality that allows the seller or lessor to make payment of the advertising fee using a credit card. The credit card is processed by a third party credit card processing service company for a service fee, and the advertising fee, less the service fee, is credited to the Taxpayer's bank account. The Taxpayer then transfers the net advertising fee to the Customer.

Wholesale Receipts

In some cases, the Taxpayer will permit Customers to sell or resell the Taxpayer's advertising and subscription services as their own. In general, these services are the same as described above. As part of this arrangement, the Taxpayer provides a version of the Taxpayer's website that is co-branded with the Taxpayer and Customer marks (a "Co-Branded Site"); no software is transferred to the Customer at any time. This version of the website is integrated with the Customer's website and offers users the ability to search the Taxpayer's database for Inventory. Customers may also sell the banner advertising on the Co-Branded Site. The Taxpayer only charges the Customers wholesale fees in connection with the advertising and subscription services sold by the Customer. The Taxpayer does not charge the Customer for the Co-Branded Site, other banner advertising sold on the Co-Branded Site, or a royalty for the use of the Taxpayer's trade name.

RULINGS

1. Are receipts from sales of online banner advertising subject to the Tennessee sales and use tax?

Ruling: No. Receipts from sales of online banner advertising are not subject to the Tennessee sales and use tax.

2. Are receipts from sellers and/or lessors for the privilege of advertising their property on the Taxpayer's online database subject to the Tennessee sales and use tax?

Ruling: No. Receipts from sellers and/or lessors for the privilege of advertising their property on the Taxpayer's online database are not subject to the Tennessee sales and use tax.

3. Are the separately stated service charges for the photography fee and the "set up" fee subject to the Tennessee sales and use tax?

Ruling: No. Under the facts presented, the separately stated charges for the photography fee and the "set up" fee are not subject to the Tennessee sales and use tax, because no sale takes place in Tennessee.

4. Are receipts from providing access to the Taxpayer's online database applications and related services subject to the Tennessee sales and use tax?

Ruling: No. Receipts from providing access to the Taxpayer's online database applications and related services are not subject to the Tennessee sales and use tax.

5. Are wholesale receipts from resellers of the Taxpayer's online advertising services subject to the Tennessee sales and use tax?

Ruling: No. Wholesale receipts from resellers of the Taxpayer's online advertising services are not subject to the Tennessee sales and use tax.

ANALYSIS

Under the Retailers' Sales Tax Act, TENN. CODE ANN. §§ 67-6-101 to -907 (2011 & Supp. 2012), the retail sale in Tennessee of tangible personal property is subject to the sales and use tax.¹ TENN. CODE ANN. § 67-6-231(a) (2011) further provides that the "retail sale, lease, licensing or use of computer software" in Tennessee is subject to the sales and use tax, regardless of whether the software is delivered electronically, via tangible storage media, or otherwise.

Additionally, the term "sale" is defined to include "the furnishing of any of the things or services taxable" under the Retailers' Sales Tax Act.² In particular, the sale or use of final artwork and advertising materials are subject to the sales and use tax.³ The term "final artwork" is defined as "tangible personal property or its digital equivalent" that is suitable for use in producing advertising materials.⁴ Final artwork includes, but is not limited to, photographs, illustrations, drawings, paintings, calligraphy, models and similar works that are used to produce advertising materials.⁵ "Advertising materials" is defined as "tangible personal property or its digital equivalent produced to advertise a product, service, idea, concept, issue, place or thing, including, but not limited to, brochures, catalogs and point-of-purchase materials, but not including preliminary artwork" and not including certain original sound recordings or video recordings.⁶

In the case of services, the sales tax does not apply to all services. Rather, it only applies to retail sales of those services specifically enumerated by the statute.⁷ Even if a service is not specifically enumerated by the statute, however, the service may be subject to the sales tax where charges for the service are included in the sales price of a taxable good or service. Specifically, 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.⁸ Thus, when the sale of a non-enumerated service is part of the sale of a taxable good or service, the charges for the non-enumerated service are included in the sales price of the taxable good or service and as such are subject to taxation.

¹ TENN. CODE ANN. § 67-6-102(89)(A) (Supp. 2012) defines "tangible personal property" to include prewritten computer software. TENN. CODE ANN. § 67-6-102(76) provides that the term "retail sale" means "any sale, lease, or rental for any purpose other than for resale, sublease, or subrent." TENN. CODE ANN. § 67-6-102(80)(A) 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."

² TENN. CODE ANN. § 67-6-102(78)(D).

³ TENN. CODE ANN. § 67-6-312(b), (c) (2011).

⁴ TENN. CODE ANN. § 67-6-102(38).

⁵ *Id.*

⁶ TENN. CODE ANN. § 67-6-102(2).

⁷ *Ryder Truck Rental, Inc. v. Huddleston*, 1994 WL 420911 (Tenn. Ct. App. Aug. 12, 1994).

⁸ TENN. CODE ANN. § 67-6-102(80)(A).

Accordingly, the transactions described herein will be subject to the Tennessee sales and use tax if the particular transaction constitutes 1) the sale of tangible personal property or computer software in Tennessee; 2) the sale in Tennessee of final artwork or advertising materials, including digital equivalents; 3) the furnishing of a taxable service in Tennessee; and/or 4) the furnishing of an otherwise nontaxable service that is sold as part of the sale of a taxable good or service.

1. *Online Banner Advertising*

Receipts from sales of online banner advertising are not subject to the Tennessee sales and use tax.

The Taxpayer maintains one or more websites and derives receipts from selling banner advertising on such websites to end users and to resellers of such banner advertising. [REDACTED].

The sale of online banner advertising does not involve the sale of tangible personal property or computer software. Additionally, advertising services are not among the services specifically subject to taxation under the Retailers' Sales Tax Act.

It is possible that a taxpayer could furnish taxable final artwork or advertising materials, which include digital equivalents, when it sells banner advertising. In the Taxpayer's case, however, the facts indicate that any sales by the Taxpayer of final artwork or or advertising materials would take place outside Tennessee: the Taxpayer has stated that all of its office locations, equipment, and computer servers are located outside Tennessee. Because no furnishing of final artwork or advertising materials occurs in Tennessee, the transaction is not subject to the Tennessee sales and use tax. Note, however, that if the Taxpayer were to transfer final artwork or advertising materials in Tennessee for a consideration, such sales would be subject to the sales and use tax.

Finally, because the Taxpayer does not make sales of taxable goods or services in conjunction with the sale of online banner advertising, the sale of such advertising cannot be characterized as the furnishing of an otherwise nontaxable service that is sold as part of the sale of a taxable good or service.

As a result, receipts from sales of online banner advertising are not subject to the Tennessee sales and use tax.

2. *Advertising on Online Database*

Receipts from sellers and/or lessors for the privilege of advertising their property on the Taxpayer's online database are not subject to the Tennessee sales and use tax.

The Taxpayer maintains a database of items of inventory available for purchase from third party sellers, as well as a database of [PROPERTY] available for lease from third party lessors or their agents (the "Inventory"). Potential customers (*i.e.*, purchasers or tenants) can access the Taxpayer's website at no charge and search the Taxpayer's database electronically to find Inventory items by certain search criteria. The Taxpayer does not own, sell, or lease any Inventory. The Taxpayer's websites do not have any purchase or "shopping cart" functionality to

purchase or lease Inventory. Instead, if a potential customer searches the Taxpayer's electronic database and is interested in purchasing or leasing an item of Inventory, the Taxpayer's websites then provide contact information and/or a mechanism to allow the customer to contact the seller or lessor. The website may also provide redirects and/or hyperlinks from the Taxpayer's websites to the seller's or lessor's website, which is not maintained on the Taxpayer's web server. The potential customer can then contact the seller or lessor to purchase or lease the Inventory directly.

The Taxpayer's sale of this online database service does not involve the sale of tangible personal property, computer software, final artwork, or advertising materials. Additionally, the furnishing of an online database is not among the services specifically subject to taxation under the Retailers' Sales Tax Act. Finally, because the Taxpayer does not make sales of taxable goods or services in conjunction with the sale of online database services, the sale of such services cannot be characterized as the furnishing of an otherwise nontaxable service that is sold as part of the sale of a taxable good or service.

3. *Separately Stated Charges*

Under the facts presented, the separately stated charges for the photography fee and the "set up" fee are not subject to the Tennessee sales and use tax.

The Taxpayer may impose a separately stated charge for providing additional services related to a seller or lessor's purchase of advertising services. Such charges may include the following:

- a) Separately stated photography fee. On occasion, the Taxpayer will charge a photography fee for the Taxpayer to take a photograph of the Inventory item, which the Taxpayer then adds to the online advertisement about the item.
- b) Separately stated set up fee. On occasion, the Taxpayer will charge a "set up" fee for the seller or lessor to have the right to enter information about the Inventory into the Taxpayer's database.

The photography fee does include the furnishing of a photograph, which constitutes final artwork when used in the online advertisement for an item. Final artwork includes, but is not limited to, photographs and other illustrations and their digital equivalents. As explained above, the sale of final artwork is subject to taxation. However, the facts indicate that the Taxpayer's sales of final artwork, in the form of digital photographs, takes place outside Tennessee; all of the Taxpayer's office locations, equipment, and computer servers are located outside Tennessee.

Because no sale or use of final artwork occurs in Tennessee, the sale is not subject to the Tennessee sales and use tax. Note, however, that if the Taxpayer were to transfer final artwork in Tennessee for a consideration, such sales would be subject to the sales and use tax.⁹

⁹ Note as well that in instances where the Taxpayer does not separately charge for the photography services, but furnishes final artwork in the form of photographs under its contract with a seller, the transfer of final artwork in Tennessee would cause the entire charge under the contract to become taxable. TENN. CODE ANN. § 67-6-102(78)(A).

The “set up” fee does not involve the sale of tangible personal property, computer software, or final artwork in digital form. Additionally, the set up fee does not involve a service that is among those specifically subject to taxation under the Retailers’ Sales Tax Act. Finally, because the Taxpayer does not make sales of tangible personal property, computer software, final artwork in digital form, or taxable services in conjunction with this service, the sale of this service cannot be characterized as the furnishing of an otherwise nontaxable service that is sold as part of the sale of a taxable good or service.

4. *Access to Online Database Applications*

Receipts from providing access to the Taxpayer’s online database applications and related services are not subject to the Tennessee sales and use tax.

The Taxpayer charges Customers a quarterly fee to access its online database applications and provide related services (“ASP Services”). At all times, the Taxpayer owns and operates the underlying database software, and the software resides on the Taxpayer’s servers. The Customer is allowed to access the Taxpayer’s online database applications via the Internet, and the Customer can then incorporate the searchable online database applications into its own website and populate the database with its own Inventory. Alternatively, the Customer can populate the database with Inventory owned by third party sellers or lessors, as the Taxpayer does. Potential customers can then access and search the Taxpayer’s database applications via the Customer’s website. If the Customer wishes to populate the database with Inventory owned by sellers or lessors for an advertising charge, the online database applications have functionality that allows the seller or lessor to make payment of the advertising fee using a credit card. The credit card is processed by a third party credit card processing service company for a service fee, and the advertising fee, less the service fee, is credited to the Taxpayer’s bank account. The Taxpayer then transfers the net advertising fee to the Customer.

No taxable sale or use of tangible personal property or computer software occurs in Tennessee when the Customer accesses the online database applications via the Internet, because the Taxpayer does not transfer title, possession, or control of the applications to the Customer at any time. Furthermore, the applications are never delivered to, transferred to, or installed on, the customer’s computers.

Additionally, the provision of ASP Services does not constitute a taxable service for Tennessee sales and use tax purposes. As noted above, only specifically enumerated services are subject to the Tennessee sales and use tax. One of the services subject to the sales and use tax is the furnishing of “intrastate, interstate or international telecommunication services.”¹⁰ The term “telecommunications service” is defined 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.”¹¹ However, excluded from the definition of “telecommunications service” are data processing and information services “that allow data to be generated, acquired, stored, processed,

¹⁰ TENN. CODE ANN. § 67-6-205(c)(3) (Supp. 2012). The Taxpayer’s services cannot be characterized as any other type of service that is taxable under the Retailers’ Sales Tax Act; this letter ruling therefore does not discuss any specifically enumerated services other than telecommunications services.

¹¹ TENN. CODE ANN. § 67-6-102(90)(A).

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.”¹²

The ASP Services involve the electronic transmission, conveyance, or routing of data between points, and the ASP Services as such could be characterized as a telecommunications service. However, the ASP Services are excluded from the definition of “telecommunication services” because the Taxpayer offers a service that allows data to be generated, acquired, stored, processed, retrieved, or delivered electronically to the Customer. Additionally, the Customer's primary purpose for the underlying transaction is the management and processing of its Inventory data and information. Accordingly, the ASP Services fall under the category of data processing and information services, which are specifically excluded from the definition of “telecommunications service.” The provision of access to the online database applications therefore does not constitute a taxable telecommunications service.

Because the Taxpayer does not make sales of tangible personal property or computer software and does not provide a taxable service in conjunction with providing access to its online database applications, no part of the transaction can be described as the furnishing of an otherwise nontaxable service that is sold as part of the sale of a taxable good or service.

5. *Wholesale Receipts*

Wholesale receipts from resellers of the Taxpayer's online advertising services are not subject to the Tennessee sales and use tax.

In some cases, the Taxpayer will permit Customers to sell or resell the Taxpayer's advertising and subscription services as their own. In general, these services are the same as described above. As part of this arrangement, the Taxpayer provides a version of the Taxpayer's website that is co-branded with the Taxpayer and Customer marks (a “Co-Branded Site”); no software is transferred to the Customer at any time. This version of the website is integrated with the Customer's website and offers users the ability to search the Taxpayer's database for Inventory. Customers may also sell the banner advertising space on the Co-Branded Site. The Taxpayer only charges the Customers wholesale fees in connection with the advertising and subscription services sold by the Customer. The Taxpayer does not charge the Customer for the Co-Branded Site, other banner advertising space sold on the Co-Branded Site, or a royalty for the use of the Taxpayer's trade name.

As discussed above, the Retailers' Sales Tax Act subjects the retail sale of tangible personal property and specifically enumerated services to the sales and use tax. The term “retail sale” means “any sale, lease, or rental for any purpose other than for resale, sublease, or subrent.”¹³ Thus, sales for resale are not subject to the Tennessee sales and use tax.

Here, the Taxpayer makes no sales of tangible personal property, computer software, or taxable services. The Taxpayer does not transfer software to the Customer as part of the transaction. Therefore, it is irrelevant whether the Taxpayer's sales are retail or wholesale. In either event, the

¹² TENN. CODE ANN. § 67-6-102(90)(B)(i).

¹³ TENN. CODE ANN. § 67-6-102(76).

Taxpayer's receipts from resellers of its online advertising services are not subject to the Tennessee sales and use tax.

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APPROVED: Richard H. Roberts
Commissioner of Revenue

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