

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING # 13-07**

Letter rulings are binding on the Department only with respect to the individual taxpayer being addressed in the ruling. 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 TENN. CODE ANN. § 67-6-205(c)(1) (Supp. 2012) to hotel rooms continuously occupied for ninety days or more.

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

[HOTEL ENTITIES] (collectively, the "Taxpayer") share the same majority shareholder and general manager. The Taxpayer entered into a contract with [CUSTOMER] (the "Customer") for the provision of hotel rooms to the Customer's employees. Pursuant to this contract, the Taxpayer provides rooms at a discounted rate at any of the Taxpayer's locations. The Taxpayer invoices the Customer on a weekly basis for the number of rooms furnished.

At two of the Taxpayer's locations, the occupancy by the Customer's employees remains fairly consistent with respect to the number of hotel rooms utilized each night. At the third location, the utilization of hotel rooms by Customer's employees fluctuates based on demand and availability.

RULINGS

1. Does the occupancy of the Taxpayer's hotel rooms in a single hotel by differing Customer employees establish continuous occupancy for purposes of the exemption under TENN. CODE ANN. § 67-6-205(c)(1) (Supp. 2012)?

Ruling: Yes, provided that the hotel rooms are in the same hotel. Taxpayers may not aggregate rooms across separate hotel locations.

2. Do the Customer's employees need to occupy the same hotel rooms every night to establish continuous occupancy for purposes of TENN. CODE ANN. § 67-6-205(c)(1) (Supp. 2012)?

Ruling: No, the Customer's employees do not need to occupy the same hotel rooms every night to establish continuous occupancy. The Taxpayer must only establish that the Customer occupied a certain number of hotel rooms, in that hotel, for ninety continuous days.

3. How is continuous occupancy determined for purposes of TENN. CODE ANN. § 67-6-205(c)(1) (Supp. 2012) when the number of hotel rooms rented by the Customer fluctuates from night to night?

Ruling: Since the Customer occupies a different number of hotel rooms each night, the Taxpayer must track the Customer's occupancy rate on a nightly basis at that hotel. The night that the Customer occupies the fewest number of hotel rooms at that particular hotel in any given ninety-day period represents the continuous occupancy rate for that period. Note that there may be multiple ninety-day periods being tracked simultaneously.

4. Once continuous occupancy has been established at a hotel for purposes of TENN. CODE ANN. § 67-6-205(c)(1) (Supp. 2012), may the Taxpayer apply for a refund of Tennessee sales tax collected and remitted under TENN. CODE ANN. § 67-6-205(c)(1)?

Ruling: Yes. The Taxpayer may apply for a refund of Tennessee sales tax collected and remitted with respect to the rental of hotel rooms that are continuously occupied for ninety days or more. The Taxpayer must first credit the Customer for any sales tax collected and remitted on rooms to which the sales tax ultimately does not apply. The Taxpayer may then apply for a refund or claim a credit for that amount on a subsequent Tennessee sales and use tax return.

5. Are there any exceptions to the requirement that the Taxpayer collect and remit Tennessee sales tax under TENN. CODE ANN. § 67-6-205(c)(1) (Supp. 2012) during the first ninety days of occupancy?

Ruling: No. Until the ninety-day continuous occupancy requirement is met, the Taxpayer must collect and remit Tennessee sales tax with respect to the rental of its hotel rooms.

ANALYSIS

Under the Retailers' Sales Tax Act,¹ the retail sale in Tennessee of tangible personal property and specifically enumerated services and items is subject to the sales and use tax.

The rental of hotel rooms is one transaction specifically enumerated as subject to the Tennessee sales tax. TENN. CODE ANN. § 67-6-205(c)(1) (Supp. 2012) imposes the sales tax on the "sale, rental or charges for any rooms, lodgings, or accommodations furnished to persons by any hotel, inn, tourist court, tourist camp, tourist cabin, motel, or any place in which rooms, lodgings or accommodations are furnished to persons for a consideration." The sales tax does not apply, however, "to rooms, lodgings, or accommodations supplied to the same person for a period of ninety (90) continuous days or more."²

Thus the Taxpayer's Customer will be exempt from sales tax on the rental of hotel rooms if such rental is 1) of rooms, lodgings, or accommodations; 2) the Customer and/or its employees qualify as being the "same person"; and 3) there is a period of ninety days continuous occupancy or more. The Taxpayer's hotel rooms clearly qualify as rooms, lodgings, or accommodations, so only the second and third requirement merit further discussion, in addition to the process for returning already collected sales taxes to the Taxpayer and its Customer.

1. CUSTOMER'S EMPLOYEES & DEFINITION OF "PERSON"

The same Customer employees need not occupy the hotel rooms for the entire ninety days in order to qualify for the sales tax exemption because it is the Customer, not the employees, renting the hotel rooms.

As stated above, the sales tax does not apply "to rooms, lodgings, or accommodations supplied to the same *person* for a period of ninety (90) continuous days or more."³ TENN. CODE ANN. § 67-6-102(61) (Supp. 2012) defines "[p]erson" in pertinent part as "any individual, firm, co-partnership, joint venture, association, [or] corporation."

The Customer is a corporation, and consequently comes within the TENN. CODE ANN. § 67-6-102(61) definition of "person." The Customer, not its employees, is renting the rooms so the Customer is the relevant person for purposes of TENN. CODE ANN. § 67-6-205(c)(1), rendering it irrelevant whether different employees of the Customer utilize the rooms during the ninety days.

2. CONTINUOUS OCCUPANCY & VARYING ROOMS AT THE SAME HOTEL

The Customer's employees do not have to occupy the same hotel rooms every night to establish continuous occupancy, but the hotel rooms must be located in the same hotel.

¹ 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 & Supp. 2012)).

² TENN. CODE ANN. § 67-6-205(c)(1) (Supp. 2012).

³ *Id.* (emphasis added).

As stated above, the sales tax does not apply to “rooms, lodgings, or accommodations supplied to the same person for a period of ninety (90) continuous days or more.”⁴ Although the statute is silent as to whether it requires the same rooms to be rented, at least one Tennessee court has held that the ninety-day continuous occupancy is not broken where a business entity contracts for a block of rooms but the hotel retains the right to assign which rooms the entity’s employees stay in.⁵

Furthermore, it would be overly burdensome to require taxpayers to account not only for the number of rooms occupied by their business customers, but also the specific rooms the customers’ employees occupied. It would also create an administrative burden for the Department to track the specific rooms rented by such employees when the taxpayer files for a credit on a subsequent return or requests a refund pursuant to TENN. CODE ANN. § 67-1-1802 (2011).

Thus, as a matter of both law and policy, continuous occupancy is not defeated if the Customer’s employees are assigned different rooms in the same hotel during the ninety-day period.⁶

3. DETERMINATION OF CONTINUOUS OCCUPANCY IN A SINGLE HOTEL

Continuous occupancy is determined by the minimum number of hotel rooms rented by the Customer in any given hotel location for a ninety-day period.

As a consequence of the sales tax applying until the ninetieth day of continuous occupancy, the Taxpayer must collect and remit sales tax on all rented hotel rooms for the first eighty-nine days of occupancy. The Taxpayer must track the number of rooms rented by the Customer in each hotel location separately and on an ongoing basis.⁷ Fluctuations in the number of rented rooms, such as cancellations or the rental of additional rooms, affect the ninety-day continuous occupancy rate. As seen immediately below, it is imperative to thoroughly track the number of

⁴ *Id.*

⁵ See Order at 1-2, *Nashville Hotel Co. v. Woods*, No. B-17248 (Davidson Cnty. Cir. Ct. June 1, 1977) (holding that the taxpayer business entity was due a refund of sales taxes paid in protest for room rentals exceeding ninety days, despite the hotel’s ability to assign which rooms the entity’s employees would stay in); compare TENN. CODE ANN. § 67-3002(c)(4)(1) (1976) (relied upon by the *Nashville Hotel Company* court and containing a similar ninety-day continuous occupancy requirement), with TENN. CODE ANN. § 67-6-205(c)(1) (Supp. 2012) (current ninety-day continuous occupancy requirement).

⁶ Accounting for each hotel location separately is consistent with how Taxpayers are required to file their Tennessee sales and use tax returns.

⁷ The Taxpayer must retain such records pursuant to TENN. CODE ANN. § 67-6-523(b), which provides that every dealer

shall secure, maintain, and keep for a period of three (3) years from December 31 of the year in which the associated return required by this chapter was filed a complete record of tangible personal property received, used, sold at retail, distributed or stored, leased, or rented within this state by the dealer, together with invoices, bills of lading, and other pertinent records and papers as may be required by the commissioner for the reasonable administration of [the sales and use tax laws].

rooms rented given the potential for overlapping ninety-day periods or a break in the chain of continuity due to cancellations.

Take the following as an example: A customer rents at least twenty hotel rooms for ninety continuous days (Days 1-90). The customer rented the fewest number of hotel rooms (twenty rooms) on Day 10 of the ninety-day period. On Day 90, the hotel can refund the customer for sales tax collected and remitted on the twenty rooms and may either claim a credit or file a claim for refund. Furthermore, after the ninety-day period, the hotel no longer needs to collect and remit sales tax on the twenty rooms, assuming the customer maintains continuous occupancy.

Continuing with the hypothetical, after Day 10 (wherein the customer rented only twenty rooms), the customer continuously occupied at least thirty rooms for ninety continuous days (Days 11-101). Thus on Day 101, the hotel can refund the customer for sales tax collected and remitted on the additional ten continuously occupied rooms on Day 101. The hotel may then claim a credit or file a claim for refund on those ten additional continuously occupied rooms for the second, overlapping ninety-day period. In addition, although sales tax is collected and remitted during the initial ninety-day period for a block of rooms, once a block of rooms has reached the ninety day requirement, the hotel need not collect sales tax on those same rooms, unless and until there is a cancellation that reduces the number of rented rooms below the number of rooms in the block.⁸

4. REFUND OR CREDIT OF SALES TAX PAID

The Taxpayer may claim a credit on a future sales tax return or apply for a refund for Tennessee sales tax collected and remitted with respect to the rental of hotel rooms that are continuously occupied for ninety days or more. The Taxpayer must first credit the Customer for any sales tax collected and remitted on rooms to which the sales tax ultimately does not apply. The Taxpayer may then apply for a refund or claim a credit for that amount on a subsequent Tennessee sales and use tax return.

As stated above, TENN. CODE ANN. § 67-6-205(c)(1) specifically exempts from sales tax any hotel rooms continuously occupied by the same person for ninety continuous days. TENN. COMP. R. & REGS. 1320-5-1-.70(2) (2008) further clarifies this exemption:

After a transient has occupied a room or other accommodation for ninety (90) continuous days or more the dealer furnishing the room or other accommodations may refund any Sales Tax which he has actually collected from the person, and claim credit for that tax on a subsequent return filed with the Department.

Thus the Taxpayer has two options regarding sales tax collected and remitted on rooms to which the sales tax ultimately does not apply after refunding or crediting the Customer with the tax previously collected.⁹ First, the Taxpayer may claim a credit for the amount collected and remitted on a subsequent tax return; or second, the Taxpayer may file a claim for refund pursuant

⁸ See *infra*, Appendix 1.

⁹ See TENN. CODE ANN. § 67-1-1802(a)(1)(A) (2011).

to TENN. CODE ANN. § 67-1-1802 (2011) for the amount collected from the Customer. Such claim must be filed “within three (3) years from December 31 of the year in which the payment was made.”¹⁰

5. EXCEPTIONS TO THE SALES TAX COLLECTION REQUIREMENT

Until the ninety-day continuous occupancy requirement is met, the Taxpayer must collect and remit Tennessee sales tax with respect to the rental of its hotel rooms. There are no exceptions to the sales tax collection requirement imposed by TENN. CODE ANN. § 67-6-205(c)(1) for the first eighty-nine days of continuous occupancy of a hotel room.

TENN. CODE ANN. § 67-6-205(c)(1) provides the only exception to the imposition of the sales tax for renting hotel rooms, but as explained above, it only applies after ninety days of continuous occupancy. There is no statute or regulation that authorizes a suspension of the sales tax collection obligation before the ninety days is reached. The failure to collect and remit sales tax during the initial eighty nine day period will subject the Taxpayer to civil and possibly criminal penalties.

R. John Grubb II
Senior Tax Counsel

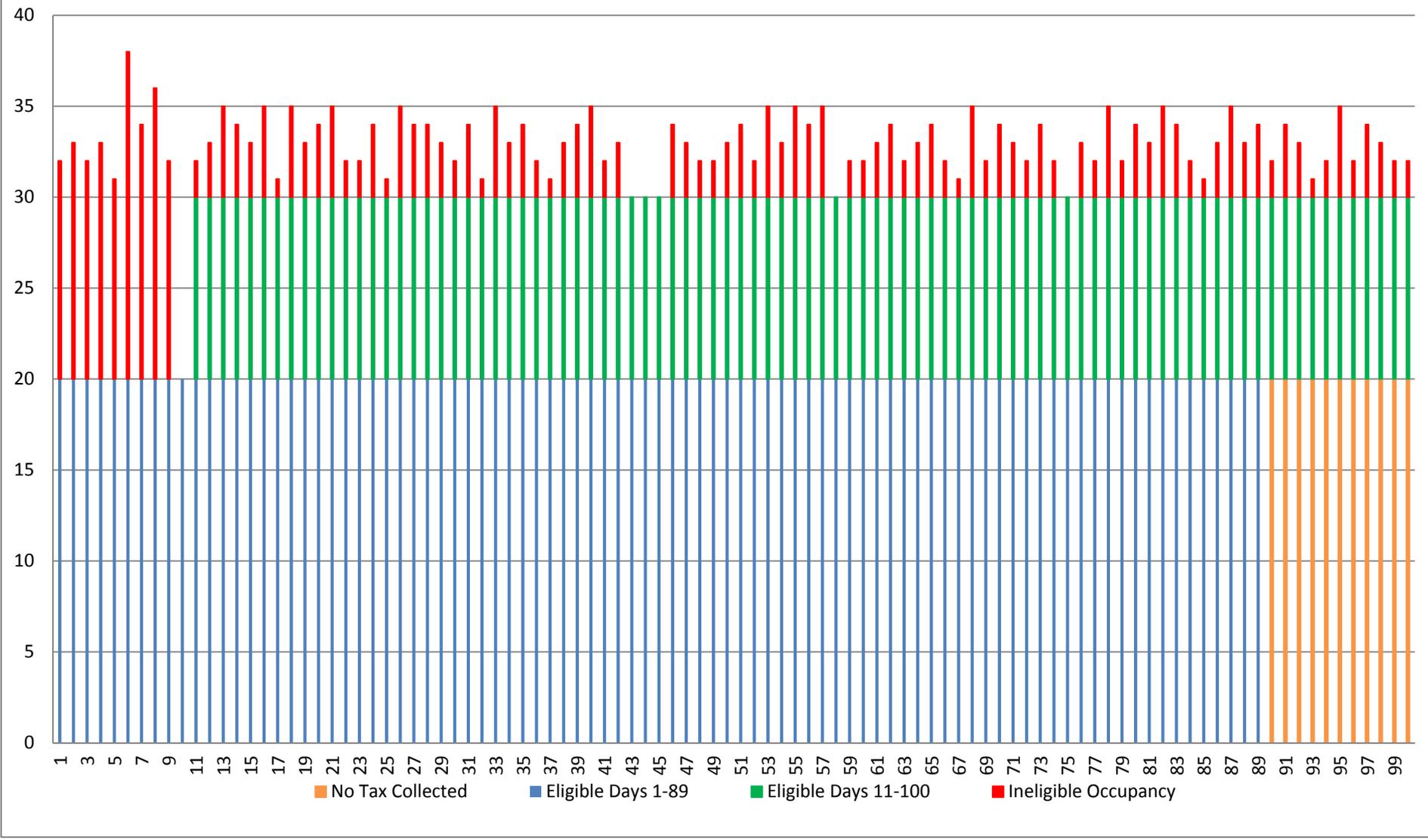
APPROVED: Richard H. Roberts
Commissioner of Revenue

DATE: June 26, 2013

¹⁰ *Id.*

Appendix 1:

Hotel 1



Vertical Axis: Quantity of rooms rented
 Horizontal Axis: Count of continuous rental days