

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING #01-15**

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 tax to the printing, sorting, and mailing of coupons and newsletters in Tennessee for an out-of-state customer.

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

[THE TAXPAYER] is located in [CITY, TENNESSEE], Tennessee. Printing, sorting and mailing services are a part of the Taxpayer's business conducted from its sole office in [CITY, TENNESSEE]. The Taxpayer has requested this ruling regarding its sales and use tax obligation for these services that are provided to one [STATE – NOT TENNESSEE] customer. The Taxpayer prints, sorts and mails advertising coupons and newsletters for this customer. The coupons/newletters are mailed directly to residents across the United

States and are not resold by the [STATE – NOT TENNESSEE] customer. The facts presented do not indicate any explicit agreement as to the passage of title or delivery of the items printed.

The Taxpayer supplies a listing to its [STATE – NOT TENNESSEE] customer that shows where the coupons/newsletters are distributed. The [STATE – NOT TENNESSEE] customer determines the [STATE – NOT TENNESSEE] Use Tax it pays on the coupons/newsletters distributed to [STATE – NOT TENNESSEE] residents using this listing. The charges for printing, sorting and mailing (excluding postage) are allocated to [STATE – NOT TENNESSEE] by the [STATE – NOT TENNESSEE] customer based upon the percentage of the mailings made to [STATE – NOT TENNESSEE] residents. For example, if twenty-five per cent (25%) of the mailings go to [STATE – NOT TENNESSEE] residents, twenty-five per cent (25%) of the invoice (excluding postage) from the taxpayer will be reported on the [STATE – NOT TENNESSEE] customer's [STATE – NOT TENNESSEE] Use Tax Return.

QUESTIONS

Should the taxpayer collect and remit Tennessee sales tax on its charges for printing, sorting and mailing of coupons/newsletters from its Tennessee location for its [STATE – NOT TENNESSEE] customer? If so, does the tax only apply to the portion of the coupons/newsletters mailed to Tennessee residents?

RULING

Absent an agreement otherwise, passage of title and delivery take place in Tennessee. Therefore, the Taxpayer should collect the Tennessee sales tax on its sales to the [STATE – NOT TENNESSEE] customer. The tax applies to the total charge made to the [STATE – NOT TENNESSEE] customer for printing, mailing and sorting the coupons/newsletters (excluding postage).

ANALYSIS

Application of the Tax

T.C.A. Section 67-6-202 imposes the sales tax upon the business of selling tangible personal property in Tennessee. The newsletters and coupons printed by the taxpayer constitute tangible personal property. If there is a transfer of title and/or possession in Tennessee, a “sale” of this tangible personal property takes place in Tennessee. T. C.A. Section 67-6-102(25(A)). Absent a specific exemption, such sales are subject to the sales tax based upon the “sales price”. The “sales price” is

...the total amount for which a taxable service or tangible personal property is sold, including any services that are a part of the sale of tangible personal property...without any deduction therefrom on account of the cost of the property sold, the cost of the materials used, labor or service costs, losses, or any other expense whatsoever;....

T.C.A. Section 67-6-102(26). The Taxpayer prints the tangible personal property it sells, but sorting and mailing charges are also included in the tax base as part of the sales price if the sale is a Tennessee sale.

To determine whether the sales of the coupons/newsletters are taxable Tennessee sales, it is necessary to determine if title to the printed items passes in Tennessee. The applicable provisions of Tennessee's Uniform Commercial Code control whether title to the tangible personal property transfers in Tennessee for purposes of application of the sales tax. *Eusco, Inc. v. Huddleston*, 835 S.W.2d 576, 579 (Tenn. 1992).

Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, ...

(a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but

(b) if the contract requires delivery at destination, title passes on tender there.

Tenn. Code Ann. Section 47-2-401(2). In the instant case, the Taxpayer prints and mails the coupons/newsletters in Tennessee to locations throughout the country, including Tennessee and [STATE – NOT TENNESSEE]. The facts presented do not indicate that there is any agreement as to the passage of title or the place of delivery. The above referenced statute indicates that absent an explicit agreement as to passage of title, title passes when the seller completes his performance with reference to physical delivery of the goods. T.C.A. Section 47-2-308 states:

Unless otherwise agreed:

(a) *the place for delivery of goods is the seller's place of business or if he has none, his residence; but*

(b) *in a contract for sale of identified goods which to the knowledge of the parties at the time of contracting are in some other place, that place is the place for their delivery; and*

(c) *documents of title may be delivered through customary banking channels.*

(Emphasis mine). These two statutes taken together indicate the place of delivery and passage of title in this case is the Taxpayer's place of business in Tennessee.

The Tennessee Supreme Court considered very similar circumstances involving the attempted imposition of the Tennessee sales tax on advertisements mailed from Florida in the case of *Volunteer Val-Pak v. Celauro*, 767 S.W.2d 635 (Tenn. 1989). Volunteer Val-Pak was located in Tennessee and conducted a direct mail advertising business. It solicited business from different merchants for advertisements and/or coupons to be mailed as a package to Tennessee residents. Val-Pak engaged an affiliated Florida corporation to fulfill its contract with the Tennessee merchants. The Florida corporation arranged for the

printing of the advertisements and coupons, mostly in Florida. The printed items were collated, inserted, addressed, stamped and mailed entirely from St. Petersburg, Florida.

The Department contended Tennessee sales tax was due on the sale of these printed items. However, the Supreme Court held that the Volunteer Val-Pak's sales were Florida sales because title passed in Florida. The Court said:

Absent an explicit agreement between buyer and seller, title passes "at the time and place at which the seller completes his performance with reference to the physical delivery of the goods..." T.C.A. Section 47-2- 401. *Beyond question, the seller's (taxpayer's) performance was completed when the Florida corporation placed the collective mailing in the post office in St. Petersburg, Florida.*

(Emphasis mine) *Id.* p.637. The Court found there was no explicit agreement for passage of title, and relied upon the U.C.C. to determine that title passed upon mailing in Florida. The rationale of this decision when applied to the facts supports the conclusion that the title to the coupons/newsletters printed by the Taxpayer in Tennessee passes upon mailing from Tennessee. Taxpayer's sales to the [STATE – NOT TENNESSEE] customer are Tennessee taxable sales.

As previously indicated, the sales tax base is the "sales price". This includes any charges for services that are part of the sale. In this case, "sales price" includes all charges for printing, mailing and sorting that take place prior to the passage of title or mailing. These charges are all part of the "sales price" of the coupons/newsletters that is subject to the sales tax. However, sales tax does not apply to charges for transportation services provided after a sale has already been completed. Accordingly, separate charges for postage or other shipping of tangible personal property after title passes in Tennessee are not taxed. The rules of the Department of Revenue give guidance in this area and state in relevant part:

Where title to the property being transported passes to the vendee at the point of origin, the freight or other transportation charges are not subject to the Sales or Use Tax.

Tenn. Admin Comp. 1320-5-1-.71.

Catalogues, magazines, handbills, and other items of tangible personal property which are sold, imported, or caused to be imported into the State for advertising purposes, and which are not for resale purposes, are subject to the Sales or Use Tax. *Any charges for postage are not subject to the Sales or Use Tax, provided the charge for postage is stated separately on the invoice.*

Tenn. Admin. Comp. 1320-5-1-.99(3)

(Emphasis mine). Since the sales to the [STATE – NOT TENNESSEE] customer will be consummated by passage of title at the point of origin in Tennessee prior to the shipment of the tangible personal property, the separately stated postage charges are not included in

the tax base. See *Rivergate Toyota, Inc. v. Huddleston*, 1998 WL 83720 (Tenn. Ct. App.)Tenn. App.

The Specific Exemption

Of course a sale is not taxed even if it is a Tennessee sale if there exists a specific exemption from the sales tax in the Tennessee law. The Taxpayer has cited an exemption for cooperative direct mail advertising that is contained in T.C.A. Section 67-6-344 as follows:

(a) The tax imposed by this chapter does not apply to the sale or use of direct mail advertising materials which are distributed in Tennessee from outside the state by a person engaged solely and exclusively in the business of providing cooperative direct mail advertising.

(b) For the purpose of this section:

(1) "Cooperative direct mail advertising" means the business of providing advertising in the form of discount coupons or advertising leaflets for more than one (1) business which are delivered by mail in a single package to potential customers of businesses subscribing to the cooperative direct mail advertising; and

(2) "Direct mail advertising materials" means discount coupons and advertising leaflets, including accompanying envelopes and labels.

This exemption closely follows the facts in the case of *Volunteer Val-Pak v. Celauro*, 767 S.W.2d 635 (Tenn. 1989). In addition, the legislative history indicates the exemption was enacted as a legislative reaction to this case¹.

Exemptions are strictly construed against the taxpayer and in favor of the state. *Phillips & Buttorff Mfg. Co. v. Carson*, 188 Tenn.132, 217 S.W.2d. 1 (1949). In this ruling, the exemption clearly does not apply to exempt the sales. While some of the advertising materials are sent to Tennessee residents, these materials are not distributed from outside the state. Also, the Taxpayer is not engaged solely and exclusively in the business of providing direct mail advertising. Furthermore, the materials are not sent to customers as part of a package containing materials from more than one business.

¹ **Compiler's Notes to Statute.** Acts 1989, ch. 496, S 2 provides that the enactment of this section by that act applies retroactively to all audit assessments of tax regarding cooperative direct mail advertising materials which are outstanding and unpaid on June 1, 1989 and also to all unpaid assessments of tax regarding cooperative direct mail advertising materials which are the subject of litigation on June 1, 1989.

Credit for Use Tax Paid in [STATE – NOT TENNESSEE]

The [STATE – NOT TENNESSEE] customer pays a use tax directly to the State of [STATE – NOT TENNESSEE] based upon the charges related to the tangible personal property shipped to residents of [STATE – NOT TENNESSEE]. The payment of taxes to other states is not the basis for an exemption. T.C.A. Section 67-6-507(a) allows credit to dealers for taxes paid in other states as follows:

- (a) The provisions of this chapter do 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 this chapter has been paid in another state, the proof of payment of such tax to be according to rules and regulations made by the commissioner. If the amount of tax paid in another state is not equal to or greater than the amount of tax imposed by this chapter, then the dealer shall pay to the commissioner an amount sufficient to make the tax paid in the other state and in this state equal to the amount imposed by this chapter.

This credit provision is basically designed to prevent multi-state taxation of the same transaction by allowing a credit against the Tennessee use tax for taxes the taxpayer pays to other states. Tenn. Admin. Comp. 1320-5-1-.91 states in relevant part:

Persons actually paying a legally imposed Sales and Use Tax to another State on tangible personal property ...imported into this State may claim such payment as a credit against any Use Tax liability accruing in this State.

It is applied in conjunction with the provisions of the use tax that prohibit duplication of the tax. T.C.A. Sections 67-6-203(a), 67-6-210(a). However, in this case, it is the Tennessee sales tax, not the use tax, that is applicable to the Taxpayer. The Tennessee sales tax attaches before the liability for the [STATE – NOT TENNESSEE] use tax, and the credit is not intended to apply in this case. Also, the [STATE – NOT TENNESSEE] tax is not actually paid by the Taxpayer. There exists no risk of multi-state taxation to the Taxpayer that could possibly violate the Commerce Clause of the United States Constitution. Accordingly, the credit is not available to the Taxpayer.

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APPROVED: Ruth E. Johnson
Commissioner of Revenue

DATE: 7/27/01