

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING #98-06**

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

Sales taxability of free-of-charge magazines printed in Tennessee and mailed by the printer.

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 the publisher of the magazine [MAGAZINE X]. This magazine is distributed to qualified readers at no charge.

Currently, the magazine is printed in [STATE A - NOT TENNESSEE]. Consideration is being given to having the printing done by a printer located in Tennessee. Such printer would handle the pre-press, printing, packaging and distribution of the magazine.

The magazine is prepared by the [CITY 1], Tennessee editorial office of the taxpayer and electronically transmitted to the printer. The Tennessee office of the taxpayer is responsible for the production of the magazine. All personnel who perform the writing, editing, design and layout of the publication perform their work in the [CITY 1] office. Telephone interviews are conducted with government and corporate officials throughout the world. Copy written by freelancers is edited by the staff. The magazine pages are designed and layouts are prepared on computers. The final product is in the form of disks, that are sent to the printer. The taxpayer does not own the printing facility. The printer, currently in [STATE A], takes the electronic information on the disks and makes film and plates, and then manufactures copies of the magazine. The printer then places the magazines in the U.S. postal system for delivery to [NUMBER] subscribers and [NUMBER] recipients on taxpayer's complimentary list.

Magazines are sent free to qualified subscribers and the complimentary list. There are approximately [NUMBER] copies distributed to paid subscribers who do not qualify for free subscriptions. Taxpayer's most recent circulation audit shows that [NUMBER] copies are distributed free to qualified subscribers in Tennessee, the complimentary list has approximately [NUMBER] individuals in the state, and there are no paid subscriptions in the state. Single copies are not offered for sale on newsstands.

The magazine's revenue is derived through advertising, primarily from state, county, and local governments, as well as non-profit economic development organizations, chambers of commerce, and utility companies. Approximately [NUMBER]% of the advertising comes from private developers and real estate brokers.

The sales and marketing offices are in [CITY 2], [STATE B - NOT TENNESSEE]. Sales promotion material is created there and mailed to clients from [STATE B]. There is one sales representative based in [CITY 1], but she does not sell to customers within Tennessee.

[MAGAZINE X] is published every [MONTHS AND TIMES PER YEAR PUBLISHED - LESS THAN BIWEEKLY]. The magazine is not printed on newsprint or bond paper.

ISSUE

Is Tennessee sales or use tax due on the magazines distributed by mail?

RULING

Tennessee sales tax is due on the portion of the magazines addressed to Tennessee recipients. No Tennessee sales or use tax is due on the portion of the magazines addressed to non-Tennessee recipients.

ANALYSIS

1. ABSENT A SPECIFIC EXEMPTION, MAGAZINES DELIVERED BY THE PRINTER IN-STATE ARE SUBJECT TO THE SALES TAX

Generally, unless there is a specific exemption, sales tax is due on a retail sale made by a Tennessee vendor and delivered in Tennessee. The tax is levied by T.C.A. § 67-6-202(a), which provides:

For the exercise of the privilege of engaging in the business of selling tangible personal property at retail in this state, a tax is levied at the rate of six percent (6%) of the sales price of each item or article of tangible personal property when sold at retail in this state; the tax is to be computed on gross sales for the purpose of remitting the amount of tax due the state and is to include each and every retail sale.¹

In the instant ruling request, it is clear that taxpayer's purchase from the printer is not a sale for resale, but a retail sale, and therefore taxable unless a specific exemption applies.

TENN. COMP. R. & REGS. 1320-5-1-.99(3) states:

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.²

TENN. COMP. R. & REGS. 1320-5-1-.49 specifically addresses items given away by a dealer, stating in pertinent part:

¹ Localities also impose a sales tax under the provisions of T.C.A. § 67-6-701 et seq.

² The question of taxability of postage is not specifically raised in the ruling request. However, the taxpayer has stated that the postage is paid by the taxpayer, not by the printer.

(1) Items of tangible personal property ... which are purchases for use as premiums and gifts, are subject to the Sales or Use Tax.

In summary, since the magazines are being given away by the taxpayer, their sale to the taxpayer by a Tennessee printer, except in the circumstances addressed in the next section, is subject to the sales tax.

It appears from the facts presented in the instant ruling request that the magazines currently distributed to Tennessee recipients are subject to Tennessee use tax, levied under the provisions of T.C.A. §§ 67-6-203, 67-6-210, and/or 67-6-211. See *J.C. Penney Co. v. Olsen*, 796 S.W.2d 943 (Tenn. 1990), *D.H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24, 108 S.Ct. 1691, 100 L.Ed.2d 21 (1988).

2. MAGAZINES SHIPPED BY THE PRINTER TO RECIPIENTS LOCATED OUTSIDE THE STATE ARE NOT SUBJECT TO SALES OR USE TAX

However, that portion of the magazines mailed to out-of-state recipients is not subject to tax. It is well settled that an item of tangible personal property shipped out-of-state by a vendor cannot be subjected to the sales tax. Here, the magazines are shipped directly to the recipients by the vendor, and there is no event, such as transfer of possession to the taxpayer or its agent, that would trigger the Tennessee sales tax. Those magazines bound for out-of-state addresses are not transferred to the taxpayer in-state, as in *Jack Daniel Distillery v. Jackson*, 740 S.W.2d 413 (Tenn. 1987), *Scholl, Inc. v. Jackson*, 731 S.W.2d 893 (Tenn. 1987), or delivered to an agent of the taxpayer in-state, as in *Board of Publication of Methodist Church, Inc. v. Woods*, 609 S.W.2d 501 (Tenn. 1980).

The portion of the magazines sent out-of-state cannot be subjected to Tennessee sales or use tax.

3. NO EXEMPTION IS AVAILABLE THAT WOULD EXEMPT THOSE MAGAZINES SHIPPED BY THE PRINTER TO TENNESSEE RECIPIENTS

This ruling will now consider whether two exemptions specifically applicable to printed materials will exempt the portion of the magazines delivered in-state.

T.C.A. § 67-6-329(a)(21) provides an exemption for

[p]eriodicals printed entirely on newsprint or bond paper and regularly distributed twice monthly, or on a biweekly or more frequent basis, and advertising supplements or other printed matter distributed with such periodicals.

The magazine that is the subject of this ruling request is published [NUMBER - LESS THAN BIWEEKLY] times per year. It is not printed on newsprint or bond paper. Therefore, the exemption in T.C.A. § 67-6-329(a)(21) does not apply.

T.C.A. § 67-6-329(a)(16) exempts

[m]agazines and books which are distributed and sold to consumers by United States mail or common carrier, where the only activities of the seller or distributor in Tennessee are those activities having to do with the printing, storage, labeling and/or delivery to the United States mail or common carrier of such magazines or books, or the maintenance of raw materials with respect to such activities, notwithstanding that such seller or distributor maintains in Tennessee employees solely in connection with the production and quality control of such printing, storage, labeling and/or delivery, or in connection with news gathering and reporting;

The effect of this exemption is a total exemption for publications, if the in-state activities of the seller or distributor of the publication are limited to the activities listed in the statute. These activities are confined to activities carried on in conjunction with the in-state printing of the publication, and news reporting activities. In the instant ruling request, at least two activities other than those listed in the exemption statute are performed. The maintenance of an editorial office, where writing, editing, design and layout take place, goes further than mere news gathering or reporting.³ Further, the presence of a sales representative is not one of the activities enumerated in the exemption statute.⁴ Therefore, this exemption does not apply.

In summary, there are no applicable exemptions that would exempt the portion of the magazines addressed to in-state recipients.

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³ Under the taxpayer's present method of operation as described in the ruling request, the taxpayer's activities in its [CITY 1] office causes it to incur a use tax liability on its fabrication of layouts. TENN. COMP. R. & REGS. 1320-5-1-1.03 specifies that use tax is due upon the fair market value of tangible personal property fabricated for one's own use. The layouts are taxable, since they are tangible personal property, *i.e.*, a computer disk. (There is an exemption for film, negatives, typesetting, and materials necessary for typesetting, but the layouts on computer disk do not appear to be covered by the exemption. See T.C.A. § 67-6-102(23)(E)(iii).)

⁴ The presence of the sales representative and the activities of the editorial office give rise to nexus with Tennessee. Thus, if the taxpayer should ever make sales into Tennessee, it would be required to collect Tennessee sales or use tax.

DATE: 2-26-98