

**TENNESSEE DEPARTMENT OF REVENUE
REVENUE RULING # 02-04**

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

Whether the sales and use tax applies to various transactions of an out-of-state computer software developer under various proposed factual scenarios.

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, a [STATE – NOT TENNESSEE] Limited Partnership, is a software developer. The taxpayer develops software for the purpose of “licensing” the software to other entities in [STATE – NOT TENNESSEE], outside of [STATE – NOT TENNESSEE] and within the United States, and outside of the United States. The taxpayer’s offices are in [STATE – NOT TENNESSEE]. The taxpayer does not have any offices outside of [STATE – NOT TENNESSEE]. In addition, the taxpayer has no employees other than those located in and working in [STATE – NOT TENNESSEE], except in the circumstances discussed below.

The taxpayer’s software is designed to facilitate individual stock trading on various national stock exchanges (“Trading Software”). Typically, the Trading Software is licensed to broker-dealer which then allows the broker-dealer’s customer (“end user”) to use the Trading Software in one of two manners. The end user may use the Trading Software on a computer terminal located in the broker-dealer’s office. Alternatively, the end user may download the software from the broker-dealer’s website or under certain circumstances from the taxpayer’s website for use in the end user’s home or office.

The following is a list of the various fees charged by the taxpayer:

Back Office Fee: License fee charged (a flat fee per month) for the use of the taxpayer's reconciler program, which consolidates broker-dealer accounts at the end of each day and submits them to the appropriate clearing firm.

ECN Book Fee: License fee paid by the broker-dealer for access to and use of the Electronic Communications Network ("ECN").

Order Fee: Nominal fee charged for each order placed by an end user in the broker-dealer's office.

Internet Order Fee: Nominal fee charged for each order placed via the Internet by an end user.

Minimum Order Fee: The cumulative minimum Order Fees (a flat fee) required to be paid by the broker-dealer each month. The amount due is calculated by subtracting the actual Order Fees from the flat fee. If the broker-dealer has Order Fees equal to or more than the flat fee, no Minimum Order Fee is due.

Charts and Graphs Fee: License fee for the taxpayer's charts and graphs software ("Analytic Software") used at the broker-dealer's office. The fee is charged per terminal.

Remote Charts and Graphs Fee: License fee paid directly by end users on their credit cards for the use of the taxpayer's order-entry software and charts and graphs software. Software is downloaded from the website of the broker-dealer directly to the end user. No physical disk or CD is sent to the end user. The Remote Charts and Graphs Fee consists of a fixed monthly fee for use of the charts and graphs software and a fixed monthly exchange fee. The exchange fee is a direct pass through charge, which is collected by the taxpayer from the end user and remitted to the exchanges (i.e., NYSE, NASDAQ, etc.).

Technical Support Fee: Hourly fee for providing technical support services via telephone.

Contract Change Fee: Fee charged for modification of licensing agreements or contracts.

Late Count Fee: Fee charged for late payment of bill.

The Trading Software is licensed pursuant to a software site license entered into between the taxpayer and the broker-dealer ("Site License"). The Site License typically has a term of one year subject to termination by either party on sixty (60) days notice. The Site License provides that the taxpayer retains ownership of the code for the duration of the Site License and thereafter. Use of the software pursuant to a Site License by an end user must be in the broker-dealer's office (i.e., the site) and may not be by or through the Internet.

Under certain circumstances, a broker-dealer may enter into an amendment to the standard Site License with the taxpayer to permit the end user to use the Trading Software through the Internet. If the broker-dealer enters into an Internet Amendment with the taxpayer, each end user must enter into a Sub-license Agreement (“Sub-license”) with respect to the end user’s use of the Trading Software. The Sub-license is executed via point and click method on the Internet.

The Site License Agreement and Internet Amendment (including Sub-license Agreement as an Exhibit to the Internet Amendment) Forms have been provided as part of the taxpayer’s facts. It is intended by the parties to the contracts that all of the agreements be enforceable as between the parties to the contracts pursuant to the provisions of applicable [STATE – NOT TENNESSEE] law. Any dispute between the parties to the contracts must be determined in the State District Court of a specific county in [STATE – NOT TENNESSEE]. The sample Sub-license Agreement provided by the taxpayer establishes contractual relationships between and among the taxpayer, the broker-dealer and the end user, including a contractual relationship between the taxpayer and the end user.

The license fees relative to the Trading Software include the Back Office Fees, ECN Book Fees, Order Fees, Internet Order Fees and Minimum Order Fees and are payable by the broker-dealer directly to the taxpayer. The Back Office Fee and ECN Book Fee are fixed monthly fees. The Order Fees and Internet Order Fees entail a fixed fee multiplied by the number of times the end user uses the Trading Software to place an order relative to a stock trade. No Order Fee or Internet Order Fee is charged for a canceled order. If the monthly sum of the Order Fees do not equal or exceed a flat fee, a Minimum Order Fee is due for the difference (the flat fee less total Order Fees for the month).

The taxpayer may also provide Analytic Software (software which possesses the capability to supply charts, graphs and analytics) to the individual end user. The license fee relative to the Analytic Software is a fixed monthly charge for each work station provided in the broker-dealer’s office, payable by the broker-dealer directly to the taxpayer (Charts and Graphs Fee), and for each end user of the Analytic Software provided to the end user via download from the Internet, payable directly to the taxpayer by the end user on his or her credit card (Remote Charts and Graphs Fee).

Software programs developed by the taxpayer are advertised in trade publications (or will in the future be advertised in trade publications) with national circulation, through direct mail and through other multi-media campaigns. The taxpayer’s contact with customers occurs almost exclusively by telephone, mail and Internet from its offices in [STATE – NOT TENNESSEE]. Except in limited circumstances, all software is shipped to the customer’s location via a carrier,

downloaded from the Internet or personally delivered by an unrelated third party installer who is paid by the customer and is not an agent of the taxpayer.

The taxpayer provides technical support services from its [STATE – NOT TENNESSEE] office to all broker-dealer customers relative to the Trading Software and the Analytic Software. This service is not included in the license agreement as a warranty provision. The taxpayer's technical support employees have no authority to make sales presentations or to take new orders. The Technical Support Fees represent a fixed fee charged for each hour of service and are billed directly to the broker-dealer each month.

A broker-dealer is charged a Contract Change Fee for each modification of the licensing agreements or contracts. In addition, a Late Count Fee is charged on the late payment of a bill.

The taxpayer did not have customers in Tennessee at the time that it submitted the ruling request. However, based on the taxpayer's recent expansion, it anticipates licensing software and providing technical support services to broker-dealers or end users in Tennessee in the near future.

QUESTIONS

1. If the taxpayer has no employees in Tennessee, is sales or use tax due on license fees relative to the Trading Software (Back Office Fees, ECN Book Fees, Order Fees, Internet Order Fees and Minimum Order Fees) provided to the broker-dealer on disk or CD pursuant to the Site License if the broker-dealer is located in Tennessee?
2. If the taxpayer has no employees in Tennessee, is sales or use tax due on license fees relative to the Trading Software provided to the broker-dealer via the Internet (no disk or CD is provided) pursuant to the Site License if the broker-dealer is located in Tennessee?
3. If the taxpayer has no employees in Tennessee, is sales or use tax due on license fees charged to the broker-dealer with respect to Trading Software provided to the broker-dealer on disk or CD and downloaded from a broker-dealer's website for use by the end user pursuant to a Sub-license in the end user's home or office, if the Site License relates to the broker-dealer's office in Tennessee?
4. If the taxpayer has no employees in Tennessee, is sales or use tax due on license fees charged to the broker-dealer with respect to Trading Software downloaded from the taxpayer's website for use by the end user in the end user's home or office, if the Site License relates to the broker-dealer's office in Tennessee?

5. If a broker-dealer's office is in Tennessee, and the taxpayer has no employees in Tennessee, does the fact that the broker-dealer's customer (i.e., end user) may be located in a state other than the broker-dealer's office (i.e., the broker-dealer is providing Trading Software to end users by the Internet pursuant to an Internet Amendment and Sub-license) make a difference?
6. If the broker-dealer is located in Tennessee, and the taxpayer has no employees in Tennessee, is sales or use tax due on the monthly Remote Charts and Graphs Fee paid directly by the end user to the taxpayer for use of the Analytic Software downloaded from the broker-dealer's website, if the end user is located outside of Tennessee?
7. If the end user is located in Tennessee, and the taxpayer has no employees in Tennessee, is sales or use tax due on the monthly Remote Charts and Graphs Fee paid directly by the broker-dealer to the taxpayer on behalf of the end user for use of the Analytic Software downloaded from the broker-dealer's website, if the broker-dealer is located outside of Tennessee?
8. Will sales or use tax be due on separately stated Technical Support Fees charged pursuant to the Site License (but not part of a warranty or pre-paid service agreement) if the broker-dealer is located in Tennessee, but the work is performed via telephone or Internet by a taxpayer employee based in [STATE – NOT TENNESSEE]?
9. Will sales or use tax be due on separately stated Contract Change Fees charged pursuant to the Site License, if the broker-dealer is located in Tennessee?
10. Will sales or use tax be due on separately stated Late Count Fees charged to a broker-dealer located in Tennessee?
11. Regarding Questions 1 through 10 above, will any answer change if a taxpayer employee based in [STATE – NOT TENNESSEE], with no authority to propose or negotiate sales, occasionally travels to Tennessee to provide technical support services for a broker-dealer located in Tennessee pursuant to the Site License?
12. Regarding Questions 1 through 10 above, will any answer change if a taxpayer employee based in [STATE – NOT TENNESSEE], with no authority to propose or negotiate sales, frequently travels to Tennessee to provide technical support services for a broker-dealer located in Tennessee pursuant to the Site License?
13. Regarding Questions 1 through 10 above, will any answer change if a taxpayer employee occasionally travels to Tennessee to solicit customers (sales calls, proposals, etc.) or to take sales orders?

14. Regarding Questions 1 through 10 above, will any answer change if a taxpayer employee frequently travels to Tennessee to solicit customers (sales calls, proposals, etc.) or to take sales orders?
15. If sales tax liability exists, what are the registration and filing requirements?
16. If sales tax liability does not exist, does the taxpayer have any responsibility to collect the use tax on its transactions in Tennessee?
17. If the taxpayer has any responsibility to collect the use tax on its transactions in Tennessee, what are the registration and filing requirements?
18. If no responsibility for collecting use tax exists, can the taxpayer choose to collect the use tax on behalf of the broker-dealer or end user?

RULINGS

1. Yes. The presence of a broker-dealer in Tennessee establishes a substantial nexus between the taxpayer and Tennessee. The license fees are subject to the Tennessee sales and use tax as parts of the gross proceeds of the lease or rental of the computer software.
2. Yes. The presence of a broker-dealer in Tennessee establishes a substantial nexus between the taxpayer and Tennessee. The license fees are subject to the Tennessee sales and use tax as parts of the gross proceeds of the lease or rental of the computer software.
3. Yes. The presence of a broker-dealer in Tennessee establishes a substantial nexus between the taxpayer and Tennessee. The license fees are subject to the Tennessee sales and use tax as parts of the gross proceeds of the lease or rental of the computer software.
4. Yes. The presence of a broker-dealer in Tennessee establishes a substantial nexus between the taxpayer and Tennessee. The license fees are subject to the Tennessee sales and use tax as parts of the gross proceeds of the lease or rental of the computer software.
5. No. It does not make a significant difference. The presence of a broker-dealer in Tennessee establishes a substantial nexus between the taxpayer and Tennessee. The license fees are subject to the Tennessee sales and use tax as parts of the gross proceeds of the lease or rental of the computer software.
6. Yes. The presence of a broker dealer in Tennessee establishes a substantial nexus between the taxpayer and Tennessee. The Remote Charts and Graphs

Fee is subject to the Tennessee sales and use tax as a part of the gross proceeds of the lease or rental of the computer software.

7. Yes. The presence of the taxpayer's computer software in Tennessee establishes a substantial nexus between the taxpayer and Tennessee. The Remote Charts and Graphs Fee is subject to the Tennessee sales and use tax as a part of the gross proceeds of the lease or rental of the computer software.

8. The presence of a broker-dealer in Tennessee establishes a substantial nexus between the taxpayer and Tennessee. If the Technical Support Fees are optional service fees for advice over the telephone and such fees are separately itemized or billed, the fees would not be subject to the Tennessee sales and use tax. If the Technical Support Fees are for any repair work performed on computer software while the computer software is located in Tennessee, such fees would be subject to the Tennessee sales and use tax. If the repair work is performed while the computer software is located outside of Tennessee and the fees are separately itemized or billed, such fees would not be subject to the Tennessee sales and use tax.

9. Yes. The presence of a broker-dealer in Tennessee establishes a substantial nexus between the taxpayer and Tennessee. The Contract Change Fees would be part of the gross proceeds of the lease or rental of the computer software and would be subject to the Tennessee sales and use tax.

10. Yes. The presence of a broker-dealer in Tennessee establishes a substantial nexus between the taxpayer and Tennessee. The Late Count Fees would be part of the gross proceeds of the lease or rental of the computer software and would be subject to the Tennessee sales and use tax.

11. No. The rulings for questions 1 through 10 would not change. The additional facts would provide more evidence of a substantial nexus between the taxpayer and Tennessee.

12. No. The rulings for questions 1 through 10 would not change. The additional facts would provide more evidence of a substantial nexus between the taxpayer and Tennessee.

13. No. The rulings for questions 1 through 10 would not change. The additional facts would provide more evidence of a substantial nexus between the taxpayer and Tennessee.

14. No. The rulings for questions 1 through 10 would not change. The additional facts would provide more evidence of a substantial nexus between the taxpayer and Tennessee.

15. The taxpayer must file with the Commissioner an application for a certificate of registration for sales and use tax on a form prescribed by the Commissioner. Generally, returns and payments of tax are due monthly, on the twentieth day of the following calendar month.

16. If there is a substantial nexus between the taxpayer and Tennessee, the taxpayer would have responsibility for collecting use tax as well as sales tax on its transactions in Tennessee.

17. The taxpayer must file with the Commissioner an application for a certificate of registration for sales and use tax on a form prescribed by the Commissioner. Generally, returns and payments of tax are due monthly, on the twentieth day of the following calendar month.

18. Yes. The taxpayer can choose to collect the Tennessee sales or use tax, even if there is not a substantial nexus between the taxpayer and Tennessee.

ANALYSIS

1-6. Tennessee taxes the retail sale of tangible personal property in this State. Tenn. Code Ann. § 67-6-202. “Sale’ means 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[.]” Tenn. Code Ann. § 67-6-102(25)(A).

‘Sale’ also means such transfer of customized or packaged computer software, which is defined to mean information and directions loaded into a computer which dictate different functions to be performed by the computer, whether contained on tapes, discs, cards, or other device or material. For such purpose, computer software shall be considered tangible personal property; Tenn. Code Ann. § 67-6-102(25)(B).

It should be noted that the method of transfer is not relevant. Any “transfer” of computer software is defined as a “sale.” Tenn. Code Ann. § 67-6-102(25)(B). Transfer by disk or CD is a transfer within the meaning of the statute. Transfer by download from the Internet is a transfer within the meaning of the statute.

Tennessee taxes the use, consumption, distribution, or storage for use or consumption of tangible personal property in this State. Tenn. Code Ann. § 67-6-203. The use tax also applies to tangible personal property that is imported or that is caused to be imported from other states or foreign countries, and used, consumed, distributed, or stored to be used or consumed in this State by a dealer. Tenn. Code Ann. § 67-6-210. The use tax also applies to the use, consumption, distribution, or storage to be used or consumed in this State of tangible personal property “after it has come to rest in this state and has become a part of the mass of property in this state.” Tenn. Code Ann. § 67-6-211. The

Tennessee use tax applies to computer software. University Computing Company v. Olsen, 677 S.W.2d 445, 448 (Tenn. 1984).

Tennessee taxes the lease or rental of tangible personal property in this State measured by the gross proceeds derived from the lease or rental. Tenn. Code Ann. § 67-6-204(a)(1). “Lease or rental’ means leasing or renting of tangible personal property and the possession or use thereof by the lessee or renter for a consideration, without transfer of the title of such property[.]” Tenn. Code Ann. § 67-6-102(16). “Gross proceeds” includes “everything of value received by the lessor because of the leasing of the property.” Furniture Lease Company v. Tidwell, 495 S.W.2d 535, 536 (Tenn. 1973).

Based on the facts provided by the taxpayer, the Tennessee sales and use tax would apply to the transactions at issue. The taxpayer would be leasing or renting computer software in Tennessee under Tennessee law. Tenn. Code Ann. §§ 67-6-102(25)(A)&(B) and 67-6-102(16). If possession of the computer software passes in Tennessee (title does not pass under the facts provided), the Tennessee sales tax applies. Eusco, Inc. v. Huddleston, 835 S.W.2d 576, 579 (Tenn. 1992). If the computer software is used, consumed, distributed, or stored to be used or consumed in Tennessee, the Tennessee use tax applies. University Computing Company v. Olsen, 677 S.W.2d 445, 448 (Tenn. 1984). The Tennessee sales and use tax would apply to the gross proceeds of the lease or rental of the computer software. Tenn. Code Ann. § 67-6-204(a)(1).

The power of Tennessee or any other state to impose its sales and use tax (or the obligation to collect its sales and use tax) on an entity is limited by the United States Constitution. Quill Corporation v. North Dakota, 504 U.S. 298 (1992). Both the Due Process Clause and the Commerce Clause impose limits on the taxing power of states. Id. at 305.

The Due Process Clause of the United States Constitution requires that the taxpayer have “minimum contacts” with the taxing state in order for the taxing state to impose its tax. Id. at 307. If the taxpayer’s marketing efforts are “purposefully directed” toward the taxing state, the requisite minimum contacts exist. Id. at 308. The taxpayer in this ruling purposefully directs its marketing efforts toward Tennessee. Therefore, the taxpayer has sufficient minimum contacts with Tennessee to satisfy the requirements of the Due Process Clause. The Due Process Clause does not bar Tennessee from imposing its sales and use tax on the transactions at issue.

The Commerce Clause of the United States Constitution grants to Congress the power to “regulate Commerce with foreign Nations, and among the several States.” U. S. Constitution, Article I, § 8, cl. 3. Although the Commerce Clause does not explicitly limit the power of the states, the United States Supreme Court has held consistently that the Commerce Clause implicitly limits the power of states to interfere with interstate commerce. Quill Corporation v. North Dakota,

504 U.S. 298, 309 (1992). This implicit limitation on the power of states to interfere with interstate commerce is known as the “negative” or “dormant” Commerce Clause. Id.

The negative Commerce Clause imposes limitations on state taxation. Id. One of the limitations is that there must be a “substantial nexus” between the taxpayer and the taxing state in order for the taxing state to tax the taxpayer or to require the taxpayer to collect tax from its customers for the taxing state. Id. at 311. In the area of sales and use taxes, the nexus requirement is satisfied by the physical presence of the taxpayer in the taxing state. Id. at 317. The nexus requirement is satisfied even if the taxpayer’s physical presence in the taxing state is unrelated to the activity that the taxing state seeks to tax. National Geographic Society v. California Board of Equalization, 430 U.S. 551 (1977).

In Tyler Pipe Industries v. Washington State Department of Revenue, 483 U.S. 232, 249 (1987), the taxpayer had no office, owned no property, and had no employees in the taxing state. The taxpayer utilized an independent contractor located in the taxing state for the purpose of maintaining its market there. Id. The Court held that the status of the taxpayer’s representative as an independent contractor (rather than an employee or agent) was not sufficient to defeat the taxing state’s nexus argument. Id. at 250. The physical presence in the taxing state of the independent contractor was sufficient to establish a substantial nexus between the taxpayer and the taxing state. Id. at 251.

Likewise, in Scripto, Inc. v. Carson, 362 U.S. 207, 208-09 (1960), the taxpayer had no place of business, had no property, and had no employees in the taxing state. The taxpayer utilized “advertising specialty brokers,” who had written contracts to solicit orders for the taxpayer’s products in specific territories within the taxing state. Id. at 209. The Court held that the presence of the “advertising specialty brokers” in the taxing state was sufficient to establish a substantial nexus. “The formal shift in the contractual tagging of the salesman as ‘independent’ neither results in changing his local function of solicitation nor bears upon its effectiveness in securing a substantial flow of goods into [the taxing state].” Id. at 621-22.

Based on the facts provided by the taxpayer, the presence of a “broker-dealer” in Tennessee establishes a substantial nexus between the taxpayer and Tennessee. The broker-dealer is physically present in Tennessee and solicits sales for the taxpayer. The broker-dealer facilitates contractual relationships between the taxpayer and end users. Consistent with Tyler Pipe Industries v. Washington State Department of Revenue, 483 U.S. 232 (1987) and Scripto, Inc. v. Carson, 362 U.S. 207 (1960), the facts provided by the taxpayer establish a substantial nexus between the taxpayer and Tennessee.

The Tennessee sales or use tax would be due on the gross proceeds of the lease or rental of computer software to a broker-dealer in Tennessee or to an

end user in Tennessee. The various fees paid to the taxpayer would constitute the taxable gross proceeds of the lease or rental of the computer software to the broker-dealer in Tennessee, except in some situations described below the Technical Support Fee if it is optional and separately billed or itemized. (See number 8 below.) “Gross proceeds” includes “everything of value received by the lessor because of the leasing of the property.” Furniture Lease Company v. Tidwell, 495 S.W.2d 535, 536 (Tenn. 1973).

7. In this question the taxpayer would not have a broker-dealer located in Tennessee. The connection between the taxpayer and Tennessee would be the computer software in Tennessee to which the taxpayer holds title.

As explained above, the Due Process Clause of the United States Constitution requires that the taxpayer have “minimum contacts” with the taxing state in order for the taxing state to impose its tax. Quill Corporation v. North Dakota, 504 U.S. 298, 307 (1992). If the taxpayer’s marketing efforts are “purposefully directed” toward the taxing state, the requisite minimum contacts exist. Id. at 308. The taxpayer in this ruling purposefully directs its marketing efforts toward Tennessee. Therefore, the taxpayer has sufficient minimum contacts with Tennessee to satisfy the requirements of the Due Process Clause. The Due Process Clause does not bar Tennessee from imposing its sales and use tax on the transactions at issue.

Also as explained above, the negative Commerce Clause requires the “physical presence” of the taxpayer in the taxing state in order for the taxing state to impose its tax. Id. at 317. For the purpose of the sales and use tax, computer software is defined by Tennessee law as tangible personal property. Tenn. Code Ann. § 67-6-102(25)(B). The United States Tax Court has held that computer software can be tangible personal property under Federal law for the purpose of the Federal investment tax credit. Norwest Corporation and Subsidiaries v. Commissioner of Internal Revenue, 108 T.C. 358, 375 (1997). Even if the computer software is considered intangible, that alone would not necessarily negate the taxpayer’s substantial nexus with Tennessee. See Geoffrey, Inc. v. South Carolina Tax Commission, 437 S.E.2d 13 (S.C. 1993).

The presence in Tennessee of the computer software owned by the taxpayer establishes a substantial nexus between the taxpayer and Tennessee. The negative Commerce Clause does not bar Tennessee from imposing its sales and use tax on the transactions at issue. The Comptroller of Public Accounts for the State of Texas recently addressed a similar fact pattern and reached the same conclusion. See 1998 WL 734648 (Tex.Cptr.Pub.Acct.), Hearing No. 36,237.

It is possible that the volume of computer software in Tennessee could be sufficiently small that it would not be adequate to establish a substantial nexus between the taxpayer and Tennessee. See Quill Corporation v. North Dakota, 504 U.S. 298, 315 (1992), footnote 8. See also J. C. Penney National Bank v.

Johnson, 19 S.W.3d 831 (Tenn. App. 2000). This ruling assumes the presence in Tennessee of a volume of computer software that rises above the level of a “slightest presence.”

If a substantial nexus exists, the fee paid by the broker-dealer on behalf of the end user would be a part of the gross proceeds of the lease or rental of the computer software. As a part of the gross proceeds of the lease or rental of the computer software, the fee would be subject to the sales and use tax. Tenn. Code Ann. § 67-6-204.

8. The presence of a broker-dealer in Tennessee establishes a substantial nexus between the taxpayer and Tennessee. If the technical support fee is an optional service fee for advice over the telephone and the fee is separately itemized or billed, the service would not be subject to the Tennessee sales and use tax.

Tennessee levies the sales and use tax on the following:

The performing for a consideration of any repair services with respect to any kind of tangible personal property[.] Tenn. Code Ann. § 67-6-102(24)(F)(iv).

Computer software is defined as tangible personal property for the purpose of the sales and use tax. Tenn. Code Ann. § 67-6-102(25)(B). If the technical support fee is for any repair services performed with respect to computer software while the computer software is located in Tennessee, the sales and use tax would be due on such fee. If the computer software is not located in Tennessee when the repair services are performed and the fee is separately itemized or billed, the sales and use tax would not be due on such fee.

9. The presence of a broker-dealer in Tennessee establishes a substantial nexus between the taxpayer and Tennessee. The contract change fee would accompany a change in the lease or rental agreement and would be part of the gross proceeds of the new lease or rental. See Furniture Lease Company v. Tidwell, 495 S.W.2d 535 (Tenn. 1973). This fee would be subject to the sales and use tax as a part of the gross proceeds.

10. The presence of a broker-dealer in Tennessee establishes a substantial nexus between the taxpayer and Tennessee. The late count fee would be part of the gross proceeds of the lease or rental. See Furniture Lease Company v. Tidwell, 495 S.W.2d 535 (Tenn. 1973). This fee would be subject to the sales and use tax as a part of the gross proceeds.

11-14. The rulings regarding questions 1 through 10 above would not change. The additional facts would provide more evidence of a substantial nexus between the taxpayer and Tennessee.

In Pearle Health Services, Inc. v. Taylor, 799 S.W.2d 655, 657 (Tenn. 1990), the taxpayer sent agents into the taxing state every six to eight weeks to show new products to retail stores. Also, the taxpayer sent quality control inspectors into the taxing state every fifteen to eighteen months to perform quality control audits. The Court held that the periodic visits of these people established a substantial nexus between the taxpayer and the taxing state. Id. at 659.

Thus, occasional or frequent visits to Tennessee by the taxpayer's technical support employee or sales employee would be additional physical presence in Tennessee sufficient on their own, or in combination with other facts, to establish a substantial nexus between the taxpayer and Tennessee. It is possible that occasional visits to Tennessee could be so rare that they would constitute a "slightest presence" and would not establish a substantial nexus between the taxpayer and Tennessee.

15-17. The Tennessee sales and use tax applies if possession of the computer software is transferred in Tennessee (title does not pass according to the facts provided by the taxpayer), Eusco, Inc. v. Huddleston, 835 S.W.2d 576, 579 (Tenn. 1992), or if the computer software is used, consumed, distributed, or stored for use or consumption in Tennessee. University Computing Company v. Olsen, 677 S.W.2d 445, 448 (Tenn. 1984). The Tennessee sales and use tax would apply to the gross proceeds of the lease or rental of the computer software. Tenn. Code Ann. § 67-6-204(a)(1). If there is a substantial nexus between the taxpayer and Tennessee, the taxpayer would be responsible for collecting the use tax as well as the sales tax on its transactions in Tennessee. Tenn. Code Ann. § 67-6-501.

The taxpayer should file with the Commissioner an application for a "certificate of registration." Tenn. Code Ann. § 67-6-601.

Every application for a certificate of registration shall be made upon a form prescribed by the commissioner, and shall set forth the name under which the applicant transacts or intends to transact business, the location of the applicant's place or places of business, and such other information as the commissioner may require. The application shall be signed by the owner if a natural person; in the case of an association or partnership, by a member or partner; in the case of a corporation, by an executive officer or some person specifically authorized by the corporation to sign the application, to which shall be attached the written evidence of such person's authority. Tenn. Code Ann. § 67-6-202(a).

Generally, payment is due monthly.

(a) The taxes levied under this chapter shall be due and payable monthly, on the first day of each month, and for the purpose of ascertaining the

amount of tax payable under this chapter, it shall be the duty of all dealers on or before the twentieth day of each month to transmit to the commissioner, returns, showing the gross sales, or purchases, as the case may be, arising from all sales or purchases taxable under this chapter during the preceding calendar month.

(b) At the time of transmitting the return required hereunder to the commissioner, the dealer shall remit to the commissioner therewith the amount of tax due under the applicable provisions of this chapter, and failure to so remit such tax shall cause the tax to become delinquent. Tenn. Code Ann. § 67-6-504(a)&(b).

However, the Commissioner is authorized to require periodic payment and filing dates other than monthly in some instances. Tenn. Code Ann. § 67-6-505(a). If the average amount of tax remitted per month would be \$200 or less, the Commissioner generally requires quarterly payment and filing.

If the taxpayer does not have a location in Tennessee, the following provision would apply regarding collection and remission of the local option tax (which is in addition to the current state sales and use tax rate of six percent).

Notwithstanding any other provisions of this part, dealers with no location in this state may choose to pay, in lieu of the tax otherwise authorized by this part, local tax at the rate of two and twenty-five hundredths percent (2.25%) of the sales price on all sales made in this state. Tenn. Code Ann. § 67-6-702(f).

18. If there is not a substantial nexus between the taxpayer and Tennessee, the taxpayer can volunteer to collect and remit Tennessee sales and use tax. In such instance, the taxpayer could utilize the following statute:

(a) An out-of-state person making sales in Tennessee, who cannot be required to register for sales and use tax under applicable law but who nevertheless voluntarily registers to collect and remit use tax on items of tangible personal property sold to Tennessee customers, shall be allowed, for the purpose of compensating such person in accounting for and remitting the tax, a deduction against taxes due, reported and paid to the department as follows:

(1) Two percent (2%) of the first two thousand five hundred dollars (\$2,500) on each report; and

(2) One and fifteen one-hundredths percent (1.15%) of amounts over two thousand five hundred dollars (\$2,500) on each report.

(b) No deduction from tax shall be allowed if any such report or payment of tax is delinquent. Tenn. Code Ann. § 67-6-509.

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APPROVED: Ruth E. Johnson
Commissioner of Revenue

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