

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING # 11-62**

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

The application of the Tennessee sales and use tax to construction dust and debris protection services.

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

[TAXPAYER] (the "Taxpayer") offers construction dust and debris protection to building owners and roofing contractors. The Taxpayer installs [BRAND NAME] plastic below the ceilings in commercial buildings to prevent dust and debris from falling into work areas during a re-roofing construction project. The re-roofing construction is performed by an unrelated company. The Taxpayer contains the construction debris so that the building owner may

continue its operations during construction. The [BRAND NAME] plastic is temporary and may remain in place anywhere from a few days up to several months. Upon completion of the project, the Taxpayer removes the plastic and the accumulated construction dust and debris on and above the [BRAND NAME] plastic.

The construction dust and debris protection process takes place as follows:

- 1) Installation. Ladders and lift equipment are used as the [BRAND NAME] plastic is nailed, screwed, and taped to the ceilings and walls. The [BRAND NAME] plastic is [PRODUCT DETAILS]. Drains and hoses may be installed in the plastic if rain water becomes an issue.
- 2) After installation and during the project. It is the building owner's responsibility to monitor the integrity of the [BRAND NAME] plastic and to notify the Taxpayer of any tears or leaks. The Taxpayer may be called back to make repairs to the [BRAND NAME] plastic.
- 3) Following completion of the project. When the re-roofing construction project is completed, the building owner contacts the Taxpayer to schedule the removal of the [BRAND NAME] plastic. The Taxpayer, using ladders and lift equipment, removes the [BRAND NAME] plastic utilizing a rolling technique that provides containment of all of the construction dust and debris resulting from the roofing construction. The [BRAND NAME] plastic and the debris are disposed of in dumpsters.
- 4) Optional service. The Taxpayer offers an optional service whereby the tops of ducts, pipes, and other horizontal surfaces that were located above the [BRAND NAME] plastic are brushed, dusted, or vacuumed. The optional service is performed at the same time as the removal of the [BRAND NAME] plastic following completion of the construction project.

RULING

Are the Taxpayer's construction dust and debris protection services subject to the Tennessee sales and use tax?

Ruling: No. The Taxpayer's construction dust and debris protection services are not subject to the Tennessee sales and use tax.

ANALYSIS

Under the Retailers' Sales Tax Act, TENN. CODE ANN. § 67-6-101 *et seq.*, the retail sale in Tennessee of tangible personal property and specifically enumerated services is subject to sales and use tax, unless specifically exempted from taxation.¹ The sales tax does not apply to all services; rather, it only applies to retail sales of those services specifically enumerated by the

¹ TENN. CODE ANN. § 67-6-102(78) (2011) 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." Additionally, TENN. CODE ANN. § 67-6-102(80)(C) defines the term "sale" to include "the furnishing of any of the things or services taxable" under the Retailers' Sales Tax Act.

statute. *Ryder Truck Rental, Inc. v. Huddleston*, 1994 WL 420911 (Tenn. Ct. App. Aug. 12, 1994). 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.²

Accordingly, the Taxpayer's sales will be subject to the Tennessee sales and use tax if they involve 1) the retail sale of tangible personal property; 2) the furnishing of a taxable service; and/or 3) the furnishing of an otherwise nontaxable service that is sold as part of the sale of a taxable good or service.

Here, the Taxpayer makes no sales of tangible personal property. The Taxpayer's services will therefore be subject to the Tennessee sales and use tax only if such services are specifically enumerated under the Retailers' Sales Tax Act.

The first provision under which the Taxpayer's services are potentially taxable is TENN. CODE ANN. § 67-6-205(c)(4) (2011), which imposes the sales tax on the "performing, for a consideration, of any repair services to any kind of tangible personal property or computer software." The term "repair" includes work done to preserve or restore property to or near its original condition made necessary by wear, dilapidation, and so on. TENN. COMP. R. & REGS. 1320-5-1-.54(2) (2000) ("Rule 54(2)"). Importantly, however, TENN. CODE ANN. § 67-6-205(c)(4) does not apply to the repair or maintenance of real property or items affixed thereto. Specifically, Rule 54(2) provides that "[r]epair services and repairs of tangible personal property shall not include any maintenance or other work on buildings, or electrical wiring, plumbing, or fixtures attached to and a part of any real property."

While the Taxpayer's services may possibly be characterized as work done to restore property to its original condition, such services nevertheless are performed on real property. The Taxpayer has indicated that it performs its services on commercial buildings. Because the Taxpayer's services do not constitute the repair of tangible personal property, such services are not taxable under TENN. CODE ANN. § 67-6-205(c)(4).

The second provision under which the Taxpayer's services are potentially taxable is TENN. CODE ANN. § 67-6-205(c)(5), which imposes the sales tax on the "laundering or dry cleaning of any kind of tangible personal property." The term "laundering" is applied broadly to include the washing, drying, or cleaning of any type of tangible personal property. *See* TENN. COMP. R. & REGS. 1320-5-1-.53(1) (1974) (stating that the "washing, drying, or cleaning of any kind of tangible personal property" is subject to the sales tax). Importantly, TENN. CODE ANN. § 67-6-205(c)(5) does not apply to the cleaning of real property. TENN. COMP. R. & REG. 1320-5-1-.53(2) specifically provides that the "cleaning of real property such as windows, walls, and wall to wall carpeting in buildings, is not subject to any Sales or Use Tax."

² Specifically, TENN. CODE ANN. § 67-6-102(81)(A) provides that the sales price of a good or service equals the "total amount of consideration ... for which personal property or services are sold," including any services necessary to complete the sale. 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.

Regardless of whether the Taxpayer's use of [BRAND NAME] plastic to capture and contain construction debris can be properly characterized as a cleaning service, such services are performed on real property. The Taxpayer has indicated that it performs such services on commercial buildings. Similarly, the Taxpayer's optional service whereby it brushes, dusts, or vacuums the tops of ducts, pipes, and other horizontal surfaces are performed on fixtures to real property. Because the Taxpayer's services do not constitute the cleaning of tangible personal property, such services are not taxable under TENN. CODE ANN. § 67-6-205(c)(5).

The third provision under which the Taxpayer's services are potentially taxable is TENN. CODE ANN. § 67-6-205(c)(6), which imposes the sales tax on the service of "the installing of tangible personal property that remains tangible personal property after installation . . . where a charge is made for the installation," regardless of whether the installation is incident to the sale of the tangible personal property or whether any tangible personal property is transferred in conjunction with the installation service.

Here, however, the Taxpayer's customers do not purchase [BRAND NAME] plastic installation services. Rather, the true object of the sales transaction is the procurement by the customer of construction dust and debris protection services; the temporary installation of [BRAND NAME] plastic is merely incidental to the true object of the transaction. As a result, the Taxpayer's services cannot be characterized as an installation service subject to taxation under TENN. CODE ANN. § 67-6-205(c)(6). *See Sky Transp., Inc. v. City of Knoxville*, 703 S.W.2d 126 (Tenn. 1985) (holding that lift tickets were not subject to the local amusement admissions tax because the lifts were for transportation purposes); *Equifax Check Services, Inc. v. Johnson*, 2000 WL 827963, 4 (Tenn. Ct. App. 2000) (holding that check guarantee services were not taxable telecommunication services).

Accordingly, the Taxpayer's construction dust and debris protection services are not subject to the Tennessee sales and use tax.

Note that the Taxpayer's purchases of items used to perform its services are subject to the sales and use tax. For example, TENN. COMP. R. & REG. 1320-5-1-.53(3) provides that "all items used to wash or clean real property, such as equipment, public utilities, and cleaning agents, are subject to the Sales or Use Tax."³ Because the Taxpayer is considered the end user and consumer of tangible personal property that it purchases and then uses in the provision of its services, sales of such tangible personal property to the Taxpayer are subject to the Tennessee sales and use tax. The Taxpayer's vendor must therefore collect sales and use tax on such sales.

If the Taxpayer's vendor fails to collect sales and use tax on the Taxpayer's purchases of tangible personal property used in the provision of its services, the Taxpayer must accrue and remit use tax with respect to such items. Contractors are generally liable for the "contractor's use tax" under TENN. CODE ANN. § 67-6-209(b) (2011) when the contractor uses tangible personal property in the performance of the contract. TENN. CODE ANN. § 67-6-209(b) provides that where

³ Similarly, the Taxpayer's purchases of items not used to wash or clean real property are subject to the sales and use tax, because such items are not resold but are instead used in the performance of a service. *See* TENN. CODE ANN. § 67-6-102(77) (defining "resale"); TENN. CODE ANN. § 67-6-209(b) (2011) (imposing the contractor's use tax on the use of property to perform a contract).

a contractor or subcontractor defined as a “dealer”⁴ uses tangible personal property in the performance of the contract, or to fulfill contract or subcontract obligations, such contractor or subcontractor shall pay a tax at the rate set forth under TENN. CODE ANN. § 67-6-203 “measured by the purchase price of such property.” Similarly, TENN. COMP. R. & REGS. 1320-5-1-.103(2) (2000) provides that contractors must pay sales and use tax on the purchase price of the materials used in their work.

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APPROVED: Richard H. Roberts
Commissioner of Revenue

DATE: 11/9/11

⁴ The definition of “dealer” includes one who “uses tangible personal property ... in the performance of such person’s contract or to fulfill such person’s contract obligations, unless such property has previously been subjected to a sales or use tax, and the tax due thereon has been paid.” TENN. CODE ANN. § 67-6-102(25)(K). The Taxpayer is therefore a “dealer” for purposes of the sales and use tax.