

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING # 12-05**

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 call tracking 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'S NAME] (the "Taxpayer") provides services to [REDACTED] ("Retailers"), whereby the company collects and analyzes certain information regarding prospective customers, measures advertising performance, and evaluates employee call handling skills (collectively referred to as "Call Tracking Services"). The Taxpayer has Retailers within the State of Tennessee that purchase its various Call Tracking Services.

Even though the Taxpayer is the party contractually providing the Call Tracking Services, it has engaged a third-party call measurement, monitoring, and tracking service provider (“Subcontractor”) as a subcontractor to provide the Call Tracking Services on its behalf. Subcontractor is headquartered in [LOCATION – NOT TENNESSEE] and has a call center located in [LOCATION – NOT TENNESSEE].

To facilitate the call tracking and measurement services, Subcontractor arranges for one or more custom “vanity” numbers (*i.e.*, toll-free 1-8YY telephone numbers that can be customized) to be used by the Retailers (that is, the customers of the Taxpayer). The quantity of toll-free numbers that are used by a Retailer is determined by the Retailer when the Retailer contracts with the Taxpayer for a particular Call Tracking Services package. Various packages include the use of one to ten toll-free numbers. If the Retailer wants any of the numbers to have custom digits, the Retailer has the right to request the desired number, contingent on that number being available. The toll-free numbers are used in advertisements on the Taxpayer’s website and on the Retailer’s website. Under certain premium plans, the toll-free numbers can also be used in advertising media of the Retailer’s choice, such as newspapers, radio and television ads, and so on.

All vanity numbers ring directly to Subcontractor’s call center in [LOCATION – NOT TENNESSEE]. The numbers do not ring directly to the Retailer’s location, nor does the Retailer have any other use of the toll-free numbers. Subcontractor is the “customer of record” for any numbers used. Subcontractor maintains exclusive rights to any such numbers beyond the term of the agreement with the Taxpayer and/or the Retailer.

The telecommunications providers bill Subcontractor for the use of the toll-free numbers. Per the agreement with Subcontractor, all applicable federal, state and local taxes are included in the telecommunications service provider’s invoice to Subcontractor and are paid by Subcontractor. No federal, state or local taxes are charged to the Taxpayer by Subcontractor.

When a potential customer of the Retailer dials the toll-free number, the call is connected to Subcontractor’s servers, which are located in [LOCATION – NOT TENNESSEE]. Subcontractor’s servers pick up the call and play a “welcome” message; the server then makes a second call dialed to the “point to number” at the Retailer. The second call is transparent to the customer. The “point to number” is the Retailer’s own separate pre-existing or dedicated local telephone number, to which the toll-free number is forwarded. The call rings at the Retailer’s location. The toll-free number is required for the Call Tracking Services. The Retailer is the “customer of record” for the local telephone number(s) used as part of the service. The local telecommunications service provider bills the Retailer for the local service in Tennessee, which includes all applicable federal, state and local taxes.

A salesperson at Retailer’s location answers the phone and a recording is played indicating who is on the line, where the customer obtained the toll-free number, and asking whether the salesperson wishes to be connected to the customer. If prompted, the salesperson is then connected to the customer. Subcontractor’s servers continue to participate in and record the call. Subcontractors also provide the information obtained from and about the customer to Retailer via the Internet. The salesperson at Retailer’s location has access to this information during the call.

Once the Retailer's salesperson is done talking to the customer, the customer has the option to take a survey. If the customer chooses to proceed, Subcontractor's servers take over conducting the survey. Once the customer hangs up, the call comes to an end.

The Retailer has access to a report via the Internet that contains the detailed information for each of these calls, including a link to a recording of the call. Under certain plans, the Retailer can also create reports to determine which advertisements were most effective based on the number of calls received using the toll-free number assigned to that advertisement. The Taxpayer also receives a report summarizing the Retailer's phone referral reports and usage data for each toll-free number.

The Taxpayer charges the Retailer a flat subscriber fee for the Call Tracking Services. The flat fee ranges from \$[AMOUNT] per month for the basic service, which includes the use and tracking of one toll-free number to \$[AMOUNT] per month for the premium service, which includes the use and tracking of [REDACTED] numbers. The charge for the use of the toll-free numbers is included in the flat fee; thus, there is neither a separate fee charged for the toll-free numbers nor any per minute charges related to the toll-free numbers.

RULING

Are the Call Tracking Services sold by the Taxpayer subject to the Tennessee sales and use tax?

Ruling: No. The Call Tracking Services sold by the Taxpayer 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 certain specifically enumerated services is subject to the sales and use tax.¹ However, the Taxpayer's Call Tracking Services are not among the services enumerated under the Retailers' Sales Tax Act.

First, the Taxpayer's Call Tracking Services do not constitute the furnishing of a taxable telecommunications service. TENN. CODE ANN. § 67-6-205(c)(3) (2011) imposes the sales tax on the furnishing of "intrastate, interstate or international telecommunication services." The term "telecommunications service" is defined under TENN. CODE ANN. § 67-6-102(92)(A) as the "electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points." However, TENN. CODE ANN. § 67-6-102(92)(B)(i) excludes from the definition of "telecommunications service" data processing and information services "that allow data to be generated, acquired, stored, processed, or retrieved and delivered by electronic transmission to a purchaser, where such purchaser's primary purpose for the underlying transaction is the processed data or information."

¹ TENN. CODE ANN. § 67-6-102(80)(D) (2011) defines the term "sale" in pertinent part to include "the furnishing of any of the things or services taxable" under the Retailers' Sales Tax Act. Because the facts indicate that the Taxpayer makes no sales of tangible personal property, computer software, or other taxable items, this letter ruling will discuss only the application of the Tennessee sales and use tax to services.

Here, the Taxpayer provides a service whereby it transmits or conveys voice, audio, and/or data between two points via electronic means, and thus appears to come within the definition of a “telecommunications service.”

However, the Taxpayer’s Call Tracking Services clearly fall within the exception to the definition found under TENN. CODE ANN. § 67-6-102(92)(B)(i). First, the Taxpayer’s services allow marketing data to be generated, acquired, stored, processed, retrieved and delivered by electronic transmission to the Retailer. Second, the Retailer’s primary purpose for purchasing the Taxpayer’s services is the processed data or information. While the Taxpayer relies on telecommunications for the provision of its services, the “true object” of the transaction is the acquisition of the underlying marketing data. The Tennessee Court of Appeals has held that the reliance on telecommunications does not render a taxpayer’s service taxable, when the true object of the transaction is the provision of a nontaxable service. *Equifax Check Services, Inc. v. Johnson*, M1999-00782COA-R3-CV, 2000 WL 827963 (Tenn. Ct. App. June 27, 2000) (holding that check guarantee services did not constitute taxable telecommunications services despite the use of telecommunications to provide the services).²

Accordingly, the Taxpayer’s Call Tracking Services do not constitute the furnishing of a taxable telecommunications service.

Second, the Taxpayer’s service cannot be characterized as any other type of service that is taxable under the Retailers’ Sales Tax Act. The Taxpayer’s Call Tracking Services are most properly characterized as marketing or consulting services. The Taxpayer describes its services as involving the collection and analysis of certain information regarding prospective customers, the measurement of advertising performance, and the evaluation of employee call handling skills. The Retailers’ Sales Tax Act does not impose the sales tax on the furnishing of marketing or consulting services.³

Accordingly, the Taxpayer’s Call Tracking Services are not subject to the Tennessee sales and use tax.

Kristin Husat
General Counsel

APPROVED: Richard H. Roberts
Commissioner of Revenue

DATE: May 30, 2012

² The *Equifax* decision was determined based on a prior version of the definition of “telecommunications service” under the Retailers’ Sales Tax Act. However, subsequent amendments to the definition do not render the “true object” test inapplicable to the Taxpayer’s case.

³ Note that the sale of final artwork suitable for use in advertising materials is subject to the Tennessee sales and use tax; however, the facts indicate that the Taxpayer does not create or transfer final artwork to its customers. *See* TENN. CODE ANN. § 67-6-312 (2011).