

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING #95-35**

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 tax liability of [THE TAXPAYER] on transactions involving both theatrical sets and services performed by [THE TAXPAYER]'s employees.

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] designs and constructs sets for use in its client's commercial advertisements, stage shows, television shows, and music videos. [THE TAXPAYER] uses the creative talents of its personnel to design a set in accordance with specifications given by the client. [THE TAXPAYER] purchases the materials needed to construct the set, and at all times retains title to all parts of the set. The set is assembled at the place where the client is conducting the filming. The assembly is performed by [THE TAXPAYER]'s employees, and [THE TAXPAYER]'s employees remain on the location at all times. The presence of the employees is required so that changes or modifications to the set can be made as needed by the client during the filming. When the filming is completed, the sets are broken down and the components either stored for future use in other sets or disposed of as scrap.

ISSUE

Are these transactions a rental of tangible personal property or are they a nontaxable service as contemplated by T.C.A. § 67-6-204(b) and Tenn. Comp. R. & Regs. 1320-5-1-.32(5)?

RULING

These transactions are a taxable rental of tangible personal property. They are not a nontaxable service since the sets do not require an operator or crew to perform their function.

ANALYSIS

While there is a certain artistic or intellectual component in these transactions, the sets are clearly tangible personal property. *See Thomas Nelson, Inc. v. Olsen*, 723 S.W.2d 621 (Tenn. 1987), *Crescent Amusement Co. v. Carson*, 187 Tenn. 112, 213 S.W.2d 27 (1948). Since the sets are tangible personal property, their rental would be taxable under T.C.A. § 67-6-204, unless the transaction falls under the exception of T.C.A. § 67-6-204 (b).

T.C.A. § 67-6-204 (b) provides:

If the owner of the property maintains continuous supervision over the personal property being leased or rented, and furnishes an operator or crew to operate such property, the owner is rendering a service, and the same is not subject to sales or use tax. On the other hand, if the owner does not furnish the crew or operator, but merely rents the property, and the lessee operates it personally for a stated consideration or price, either by the day or week or month, in such case, the sales or use tax would apply as the lessee has the possession, use and control of the property.

Tenn. Comp. R. & Regs. 1320-5-1-.32(5) repeats this provision. Historically, this exemption has been applied to such transactions as rental of heavy equipment or transportation equipment with an operator. In *Hyatt v. Taylor*, 788 S.W.2d 554 (Tenn. 1990), the Court held that this exemption was limited to tangible personal property that requires the continuous presence of an operator or a crew in order for the property to perform the function it is designed to accomplish. *Id.* at 556. See also *Essary v. Huddleston*, Tenn. Ct. App. No. 02A01-9408-CH-00179 (June 29, 1995), where the taxpayer's failure to demonstrate that an operator or crew was required in order for the property to perform its function was fatal to a claim of exemption. Here, while [THE TAXPAYER]'s employees are continuously present, and may be called upon to perform modifications, repairs, etc., or to insure working parts perform correctly, the facts given do not indicate that the set requires "operation" by [THE TAXPAYER]'s employees. Therefore, the rental of these sets does not come within the exception of T.C.A. § 67-6-204(b) and Tenn. Comp. R. & Regs. 1320-5-1-.32(5). The rental is a taxable rental of tangible personal property.

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Ruth E. Johnson
Commissioner

Date 11-2-95