

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING #00-21**

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

Application of the sales and use tax to various aspects of the taxpayer's business.

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] performs the following business activities for profit:

1. The sale of pallets of sod (purchased from a sod farm) to real property owners. [TAXPAYER] purchases the sod from a sod farm and resells it to

the customer. Typically, [TAXPAYER] delivers the sod to the real property owner and charges for the delivery and the sod. [TAXPAYER] does not charge a mark-up on the price of the sod, but it passes the cost to the customer for the amount paid to the sod farm for the pallets of sod. There is no installation.

2. The sale of pallets of sod (purchased from a sod farm) to builders. [TAXPAYER] purchases the sod from a sod farm and resells it to builders for a profit. Builders typically pick up the pallets of sod themselves. There is no installation.
3. The sale and installation of sod (purchased from a sod farm) for real property owners. Typically, [TAXPAYER] delivers the sod to the real property owner and charges for delivery, installation and the sod. [TAXPAYER] does not charge a mark-up on the price of the sod, but it passes the cost to the customer for the amount paid to the sod farm for the sod.
4. The sale and installation of shrubbery (purchased from a grower) for real property owners. Typically, [TAXPAYER] delivers the shrubbery to the real property owner and charges for delivery, installation and the shrubbery. [TAXPAYER] does not charge a mark-up on the price of the shrubbery, but it passes the cost to the customer for the amount paid to the grower for the shrubbery.
5. The cleaning of lots for a fee.
6. The removal of materials to a dump for a fee.
7. The spreading and moving of materials with a bobcat vehicle for a fee.
8. The setting of water meters for a fee.
9. The rolling of sod for a fee.
10. The pressure washing of driveways for a fee.

[TAXPAYER] does not grow sod or shrubbery as part of the business.

QUESTION

How does Tennessee sales and use tax apply to the fees charged by [TAXPAYER] to its customers, for each of the listed activities in the statement of facts?

RULING

Activities 1 and 2 are sales that are subject to the sales tax for the total sales price charged for the sod, including any charge for delivery. [TAXPAYER]'s original purchases of such sod ordinarily will be exempt from tax pursuant to Tenn. Code Ann. § 67-6-301(a). When Tenn. Code Ann. § 67-6-301(a) does not apply, [TAXPAYER]'s original purchases of sod may be made on a resale certificate.

Activities 3 and 4 are not subject to the sales tax, and ordinarily they are not subject to the contractors' use tax for the use of tangible personal property in the performance of a contract. The use of sod or shrubbery that is exempt from the sales tax based upon Tenn.

Code Ann. § 67-6-301(a) is not subject to the use tax. However, when Tenn. Code Ann. § 67-6-301(a) does not apply, [TAXPAYER] is liable for the contractors' use tax established by Tenn. Code Ann. § 67-6-209(b) based upon [TAXPAYER]'s purchase price of the sod or shrubbery, if no sales or use tax has been paid already upon such sod or shrubbery.

Activities 5 through 10 are non-taxable services. The fees for such services are not taxed. The contractors' use tax would apply to the purchase price of any tangible personal property used in the performance of the services, if no sales or use tax has been paid already upon such tangible personal property.

ANALYSIS

Activities 1 & 2

Tennessee taxes the retail sale of tangible personal property in this State. Tenn. Code Ann. § 67-6-202. The sales price for a retail sale is defined as “the total amount for which a taxable service or tangible personal property is sold, including any services that are a part of the sale of tangible personal property[.]” Tenn. Code Ann. § 67-6-102(26). Regarding sales of items that typically involve delivery, the Department of Revenue applies the following rule:

Freight, delivery, or other like transportation charges are subject to the Sales and Use Tax if title to the property being transported passes to the vendee at the destination point. Where title to the property being transported passes to the vendee at the point of origin, the freight or other transportation charges are not subject to the Sales or use Tax. It is immaterial whether the vendor or vendee actually pays for any charges made for transportation, whether the charges are actually paid by one or the other, or whether a credit or allowance is made or given for such charges. In cases, where a vendor makes a separate charge for delivering tangible personal property in his own vehicle, or makes arrangements for delivering tangible personal property, other than by a common carrier, the delivery charges shall be considered a part of the selling price subject to the Sales or Use Tax. Tenn. Comp. R. & Regs. 1320-5-1-.71 (“Rule 71”).

The general rule regarding the passing of title pursuant to a sale is the following: “Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods” Tenn. Code Ann. § 47-2-401. Therefore, any delivery charges will be included in the sales price under the facts given.

[TAXPAYER]'s sales of sod to real property owners are retail sales subject to the sales tax. “Sales of materials and supplies to owners of real property to be used by them, their agents, or independent contractors in erecting, altering, improving, or repairing buildings, or other improvements, are subject to the Sales or Use Tax.” Tenn. Comp. R. & Regs.

1320-5-1-.07(3). Pursuant to Tenn. Code Ann. §§ 67-6-102(26) and 47-2-401 and Rule 71, the sales tax is applied to the full sales price, including any charges for delivery.

[TAXPAYER]'s sales of sod to builders are retail sales subject to the sales tax.

Contractors engaged in constructing or improving real property, whether on a lump sum or a cost-plus basis, are purchasers and consumers of the materials used by them, and are required to pay the Sales or Use Tax on such materials or equipment purchased or imported into this State for use in connection with their contracts. Tenn. Comp. R. & Regs. 1320-5-1-.07(1).

Again, the sales tax is applied to the full sales price, including any charges for delivery.

[TAXPAYER]'s original purchases of sod ordinarily would be exempt from tax pursuant to Tenn. Code Ann. § 67-6-301(a), which reads as follows:

The gross proceeds derived from the sale in this state of livestock, nursery stock, poultry and other farm or nursery products, in any calendar year, directly from a farmer or nurseryman, are exempt from the tax levied by this chapter if fifty percent (50%) or more of such products are grown or produced in the calendar year by such farmer or nurseryman. If less than fifty percent (50%) of such products in any calendar year are grown or produced by such farmer or nurseryman, then only the gross proceeds of the sale in this state of the products actually grown or produced by such farmer or nurseryman shall be exempt from the tax levied by this chapter. When sales of livestock, nursery stock, poultry, or other farm or nursery products are made to consumers, other than as provided herein, they are not exempt from the tax imposed by this chapter.

This statute means that [TAXPAYER]'s original purchases of sod are free of tax, if the sod was produced by the person selling the sod. If the person selling the sod did not produce the sod himself or herself, this particular exemption only applies if the person selling the sod produced 50% or more of his or her own products (measured by gross proceeds) that calendar year.

Even if Tenn. Code Ann. § 67-6-301(a) does not apply, [TAXPAYER]'s original purchases of sod may be made free of tax on a resale certificate. Because [TAXPAYER] sells the sod to customers, the sales by the sod farms to [TAXPAYER] are sales for resale. Tenn. Comp. R. & Regs. 1320-5-1-.62(1). Sales for resale may be purchased free of sales tax, if [TAXPAYER] presents the sod farms or other vendors with a resale certificate. Tenn. Comp. R. & Regs. 1320-5-1-.68.

Activities 3 & 4

When [TAXPAYER] installs the sod or shrubbery for its customers, the sales tax does not apply. The reason is that [TAXPAYER] (rather than the customer) is considered the

user and consumer of the sod or shrubbery in the performance of a contract. Tenn. Comp. R. & Regs. 1320-5-1-.07(1).

Tennessee taxes the use of tangible personal property that is used in the performance of a contract based upon the following statute:

Where a contractor or subcontractor hereinafter defined as a dealer uses tangible personal property in the performance of the contract, or to fulfill contract or subcontract obligations, whether the title to such property be in the contractor, subcontractor, contractee, subcontractee, or any other person, or whether the title holder of such property would be subject to pay the sales or use tax, ... such contractor or subcontractor shall pay a tax at the rate prescribed by § 67-6-203 measured by the purchase price of such property, unless such property has been previously subjected to a sales or use tax, and the tax due thereon has been paid. Tenn. Code Ann. § 67-6-209(b).

However, Tennessee also has the following exemption from the use tax on tangible personal property used in the performance of a contract: “The tax imposed by this section shall have no application where the contractor or subcontractor, and the purpose for which such tangible personal property is used, would be exempt from the sales or use tax under any other provisions of this chapter.” Tenn. Code Ann. § 67-6-209(c).

Therefore, when Tenn. Code Ann. § 67-6-301(a) (discussed above) applies to [TAXPAYER]’s original purchase of sod or shrubbery, the use tax regarding the use of tangible personal property in the performance of a contract would not apply. Based upon the facts given, the use tax ordinarily would not apply.

On the other hand, if Tenn. Code Ann. § 67-6-301(a) does not apply to a particular purchase of sod or shrubbery by [TAXPAYER], the use tax for the use of tangible personal property in the performance of a contract would apply. In such cases, when [TAXPAYER] installs the sod or shrubbery onto the real property for the customer, [TAXPAYER] is not actually selling the items. Instead, [TAXPAYER] is using the sod or shrubbery in the performance of a contract. Tenn. Comp. R. & Regs. 1320-5-1-.07(1). Therefore, [TAXPAYER] would owe the use tax for the sod or shrubbery based upon the price at which [TAXPAYER] purchased the items. Tenn. Code Ann. § 67-6-209(b). Because [TAXPAYER] does not resell the sod or shrubbery, such items are not exempt from sales tax as sales for resale when they are purchased by [TAXPAYER] from the sod farms, growers, or other vendors.

To simplify the process of purchasing tangible personal property by entities, such as [TAXPAYER], that both sell tangible personal property and use tangible personal property in the performance of contracts, the following rule is applied:

- (1) Contractors and sub-contractors engaged in the business of erecting, building or otherwise improving, altering and repairing real property for others, and also engaged in the business of selling building materials and supplies to other

contractors, consumers, and users, and who may not be able to segregate that portion of the materials and supplies that they will use or consume in the fulfillment of their contracts from that portion of the materials and supplies that they will sell at retail, may give a resale certificate to the seller of the materials and supplies.

- (2) Contractor-dealers making sales of tangible personal property shall report all sales made, and all withdrawals from inventory for use as a contractor each month, and pay any applicable Sales or Use Tax due. Any withdrawal from inventory for use as a contractor shall be reported and the tax due thereon shall be paid with the return for the location of the inventory, regardless of the place of use, either in or out of the state.
- (3) Suppliers making sales of materials and supplies to contractor-dealers and delivering such materials and supplies to a job site for use, or tagging or marking particular materials and supplies for a particular job being performed by the contractor-dealer, shall collect the applicable Sales or Use Tax on those sales. Tenn. Comp. R. & Regs. 1320-5-1-.08.

It should be noted, however, that the above rule might not be much help to [TAXPAYER], because most of [TAXPAYER]'s original purchases of sod or shrubbery would be exempt from sales tax based upon Tenn. Code Ann. § 67-6-301(a). As noted above, the use of such sod or shrubbery in the performance of a contract also would be exempt from the use tax established by Tenn. Code Ann. § 67-6-209(b) in those situations in which Tenn. Code Ann. § 67-6-301(a) applies. In such situations the provisions of Tenn. Comp. R. & Regs 1320-5-1-.08 (2) and (3) regarding collection and payment of the sales and use tax would not apply.

It should also be noted that proper documentation is necessary to justify the exemption from the use tax. According to Important Notice, "Nursery Products Purchased By Landscape Contractors" (October, 1999):

Landscape contractors should maintain records of all purchases of items used in the performance of their contracts, including the purchases of nursery products from farmers or nurserymen. For purchases of nursery products made outside of Tennessee, the landscape contractor must obtain a written statement from the out-of-state dealer that the products were grown or produced by him, and therefore qualify as exempt.

Activities 5 – 10

The cleaning of lots for a fee, the removal of materials to a dump for a fee, the spreading and moving of materials with a bobcat vehicle for a fee, the setting of water meters for a fee, the rolling of sod for a fee, and the pressure washing of driveways for a fee, are all services. Tennessee taxes only those services that are designated as taxable services. None of these services are defined as taxable services by Tenn. Code Ann. § 67-6-102(24)(F) or by any other statute. Therefore, the fees for these services are not taxed. However, if [TAXPAYER] uses any items of tangible personal property in the

performance of its contracts to provide these services, and a sales or use tax has not already been paid upon such tangible personal property, the use tax established by Tenn. Code Ann. § 67-6-209(b) would apply, based upon the price paid by [TAXPAYER] for such items of tangible personal property. It should be noted that the cleaning of tangible personal property for a fee is a taxable service, pursuant to Tenn. Code Ann. § 67-6-102(24)(F)(v), but the facts do not indicate that [TAXPAYER] performs such services.

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APPROVED: Ruth E. Johnson
Commissioner of Revenue

DATE: 7/13/00