

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING # 10-27**

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 Tennessee sales and use tax to Guaranteed Auto Protection waivers.

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] is an administrator of Guaranteed Auto Protection ("GAP") waivers, which provide vehicle purchasers with protection against an accident or theft in circumstances where such an event results in a total loss of the value of the vehicle. Typically, GAP waivers are sold

by auto dealers as an optional and additional sale at the time a customer obtains financing for a vehicle. A contract for the sale of a GAP waiver is usually included as an addendum to a retail installment sales contract.

In general, a GAP waiver provides that, if a total loss accident or theft occurs, the dealer or other issuer of financing will eliminate any debt the purchaser owes at the time of the loss that is in excess of the value of the vehicle as reflected in the payment for the loss provided by the purchaser's auto insurance provider. A GAP waiver, therefore, protects a vehicle purchaser from the possibility that he or she will suffer a total loss of his or her vehicle at a time when the amount owed on the financing of the vehicle exceeds the value of the vehicle.

The Taxpayer is a GAP waiver administrator that provides purchasers with the kind of protection from a total loss accident or theft of their vehicles as described above. The GAP waivers administered by the Taxpayer are sold by car dealerships across Tennessee. The sale of a GAP waiver administered by the Taxpayer is not included in the sale of the vehicle itself. Rather, in each instance in which GAP waiver coverage is purchased, it is purchased on a purely optional basis and is purchased separate and apart from the purchase of the vehicle itself.

The Taxpayer provided a sample GAP Waiver Agreement and Retail Installment Contract reflecting the typical documents dealerships use when selling the GAP waiver coverage administered by the Taxpayer. The GAP Waiver Agreement specifically states that "the purchase of GAP coverage is not required nor is it a condition of the extension of credit, and can be purchased from another source."

QUESTION

Are charges for Guaranteed Auto Protection waiver coverage subject to the Tennessee sales and use tax?

RULING

No. Charges for Guaranteed Auto Protection waiver coverage are not subject to the Tennessee sales and use tax.

ANALYSIS

The Retailers' Sales Tax Act, TENN. CODE ANN. § 67-6-101 *et seq.*, levies a tax on the sales price of each item or article of tangible personal property¹ sold at retail in Tennessee. TENN. CODE ANN. § 67-6-202(a) (Supp. 2010). "Retail sale" or "sale at retail" is defined as "any sale,"²

¹ "Tangible personal property" is defined as "personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses. TENN. CODE ANN. § 67-6-102(92)(A).

² A "sale" is defined in pertinent part as "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," and includes "the furnishing of any of the things or services taxable" under the Tennessee sales and use tax laws. TENN. CODE ANN. § 67-6-102(81)(A)&(D).

lease, or rental for any purpose other than for resale, sublease, or subrent.” TENN. CODE ANN. § 67-6-102(79) (Supp. 2010). In addition, TENN. CODE ANN. § 67-6-102(82)(A) defines the term “sales price” in pertinent part as the “total amount of consideration, including cash, credit, property, and services, for which personal property or services are sold, leased, or rented, valued in money.”

The Retailers’ Sales Tax Act also imposes the sales tax on certain services. The sales tax does not apply to all services; rather, it only applies to retail sales of those services specifically enumerated by the statute. *Ryder Truck Rental, Inc. v. Huddleston*, No. 91-3382-III, 1994 WL 420911 (Tenn. Ct. App. Aug. 12, 1994).

However, even if a service is not specifically enumerated by the statute, 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. Specifically, TENN. CODE ANN. § 67-6-102(82)(A) provides that the sales price of a good or service equals the “total amount consideration ... for which personal property or services are sold.” Additionally, TENN. CODE ANN. § 67-6-102(82)(A)(iii) provides that the sales price of the good or service sold includes “[c]harges by the seller for any services necessary to complete the sale.” Thus, when a non-enumerated service is sold along with a taxable good or service for a single lump sum price, any charges attributable to the non-enumerated service are included in the sales price of the taxable good or service. Even if charges for a non-enumerated service are separately invoiced, such charges will nevertheless be included in the sales price of the good or service if the non-enumerated service is necessary to complete the sale of the good or service.

Accordingly, the charges for GAP waiver coverage will be subject to the Tennessee sales and use tax if: (1) the GAP waiver coverage is a specifically enumerated service, or (2) such charges are properly included in the sales price of the vehicle with which the coverage is sold, pursuant to TENN. CODE ANN. § 67-6-102(82).

The Retailers’ Sales Tax Act does not specifically enumerate GAP waiver coverage as a taxable service. Therefore, charges for GAP waiver coverage are not subject to sales and use tax as a specifically taxable service.

In addition, charges for GAP waiver coverage are not properly included in the sales price of the vehicles with which they are sold, and are thus not subject to Tennessee sales and use tax. First, charges for the GAP waiver coverage are stated separately from the sales price of the vehicle. In fact, if the customer chooses to purchase the GAP waiver coverage, the coverage is stated in a separate agreement from the retail installment sales contract. In addition, the purchase of the GAP waiver coverage is purely optional. In the GAP Waiver Agreement, the customer purchasing the coverage specifically acknowledges that “the purchase of GAP coverage is not required nor is it a condition of the extension of credit, and can be purchased from another source.” Based on these facts, it is clear that the Taxpayer’s sale of the GAP waiver coverage is separate from the sale of the vehicle, and as a result charges for the GAP waiver coverage are not part of the sales price of the vehicle. Accordingly, charges for the GAP waiver coverage are not subject to the Tennessee sales and use tax.

Note that sales of GAP waiver coverage are not taxable as warranties pursuant to TENN. CODE ANN. § 67-6-230(b) (Supp. 2010). Under TENN. CODE ANN. § 67-6-230(b), sales of warranty or service contracts “covering the repair or maintenance of tangible personal property” are subject to the sales and use tax. However, GAP waiver coverage does not provide for any repair or maintenance of vehicles. Rather, the coverage provides for the elimination of excess debt owed on a vehicle if a total loss accident or theft occurs. GAP waiver coverage is therefore not taxable as a warranty under TENN. CODE ANN. § 67-6-230(b).

Abigail Sparks
Tax Counsel

APPROVED: Charles A. Trost
Commissioner of Revenue

DATE: 11/12/10