

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING # 12-14**

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 services relating to the management of cooperative advertising funds.

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"), a [STATE OF INCORPORATION] corporation, has multiple clients (the "Clients") who have entered into cooperative advertising arrangements with [THIRD PARTY]. Pursuant to these arrangements, the Clients and [THIRD PARTY] share certain promotional expenditures. The Client provides cooperative advertising funds (the "Co-ops") that the [THIRD PARTY] may utilize in its advertising. The Co-ops are structured on a

reimbursement model, whereby the [THIRD PARTY] must submit a claim for reimbursement from the Co-op for promotional expenses that it has incurred.¹

The Taxpayer provides the following services (the “Co-op Services”) to the Clients with respect to the Co-ops:

Database Management. The Taxpayer maintains, manages, and updates a database containing Co-op data and balances. The Clients do not have access to the database and do not receive any transfer of, or license to use, the database or other software.

Information. The Taxpayer fields phone calls regarding Co-op funds usage, rules, and requests for additional claim forms. The Taxpayer does not provide the telecommunications services used for this service.

Administration. The Taxpayer receives and processes Co-op claims. This includes ascertaining the availability of funds to ensure coverage of the claim; ensuring that claims comply with the Co-op rules; contacting the Client for decisions on questionable claims; and issuing checks to [THIRD PARTY] for approved claims.

Reporting. The Taxpayer prepares the following reports, which are all delivered solely via electronic means: quarterly reports of [THIRD PARTY] claims; year end reports of Co-op funds usage; and specific reports, as requested.

The Taxpayer provides no tangible personal property to the Clients in conjunction with the Co-op Services.

The Co-op Services are provided on a stand-alone basis, independent of any other goods or services that may be sold by the Taxpayer. The Taxpayer bills the Client for the Co-op Services separately and apart from any other goods or services that it may provide the Client.

RULING

Are the Co-op Services subject to the Tennessee sales and use tax?

Ruling: No. The Co-op Services are not subject to the Tennessee sales and use tax.

ANALYSIS

Under the Retailers’ Sales Tax Act, TENN. CODE ANN. §§ 67-6-101 to -907 (2011), the retail sale in Tennessee of tangible personal property is subject to the sales and use tax. 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)

¹ Generally speaking, cooperative advertising is an arrangement between a manufacturer, wholesaler, or distributor and another business, typically a retailer, whereby one party helps to pay for some or all of the other party’s advertising. The cooperative advertising arrangement will include certain requirements, such as the specific placement of a manufacturer’s product in an advertisement. Cooperative advertising funds are generally structured on a reimbursement model, rather than as an up-front payment. The party running the advertising campaign must therefore submit a claim for reimbursement from the cooperative advertising fund.

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.”

TENN. CODE ANN. § 67-6-102(91)(A) defines “tangible personal property” to include prewritten computer software. Additionally, TENN. CODE ANN. § 67-6-231(a) (2011) specifically provides that the “retail sale, lease, licensing or use of computer software” in Tennessee is subject to the sales and use tax, “regardless of whether the software is delivered electronically, delivered by use of tangible storage media, loaded or programmed into a computer, created on the premises of the consumer or otherwise provided.”

TENN. CODE ANN. § 67-6-102(80)(D) defines the term “sale” to include “the furnishing of any of the things or services taxable” under the Retailers’ Sales Tax Act. 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*, 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. 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,” with no deduction for the seller’s costs or charges by the seller for 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.

Accordingly, the Co-op Services will be subject to the Tennessee sales and use tax if the transaction constitutes 1) the sale of tangible personal property or computer software in Tennessee; 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.

First, no sale or transfer of tangible personal property occurs in conjunction with the Taxpayer’s furnishing of the Co-op Services. Additionally, the Taxpayer does not sell, lease, license, or otherwise provide the use of computer software to its Clients in conjunction with these services.²

The Taxpayer does provide various reports to the Clients; however, the facts indicate that such reports are always delivered electronically. In the case of the electronic transmission of documents or data, no transfer of tangible personal property occurs between the Taxpayer and the Client.³ Additionally, no transfer of tangible personal property is considered to have taken

² While software may be used by the Taxpayer to maintain the Co-op database, the Client does not itself have access to or otherwise use the software. The Clients do not have access to the database and do not receive any transfer of, or license to use, the database or other software.

³ Note that the transfer of certain items via electronic means is subject to the sales and use tax. For example, the “retail sale, lease, licensing or use of specified digital products transferred to or accessed by subscribers or consumers” in Tennessee is subject to the sales and use tax. TENN. CODE ANN. § 67-6-233(a) (2011). “Specified digital products” is defined as “electronically transferred digital audio-visual works, digital audio works and digital books.” TENN. CODE ANN. § 67-6-102(88). Additionally, TENN. CODE ANN. § 67-6-231(a) (2011) provides that the retail sale, lease, licensing or use of computer software in Tennessee is subject to the sales and use tax, regardless of whether the software is delivered electronically or via a tangible storage medium.

place if the Client subsequently prints out or otherwise creates tangible copies of the electronically transferred documents for its own use.

Second, the Co-op Services do not constitute taxable services for Tennessee sales and use tax purposes. As noted above, only specifically enumerated services are subject to the Tennessee sales and use tax. The Co-op Services include database management, information, administrative, and reporting services; none of these functions are properly characterized as being among the services enumerated under the Retailers' Sales Tax Act.⁴

Third, no part of the transaction can be described as the furnishing of an otherwise nontaxable service that is sold as part of the sale of a taxable good or service. The Taxpayer does not make sales of tangible personal property in conjunction with the Co-op Services, and does not provide a taxable service. Additionally, the Co-op Services are provided on a stand-alone basis, independent of any other goods or services that may be sold by the Taxpayer. The Taxpayer bills the Client for the Co-op Services separately and apart from any other goods or services that it may provide the Client.

Accordingly, charges for the Co-op Services are not subject to the Tennessee sales and use tax.

Note that the Retailer's Sales Tax Act does not require that the Taxpayer maintain specific documentation with respect to its sales of nontaxable services. However, there is a general requirement that each dealer keep records of its sales and purchases. TENN. CODE ANN. § 67-6-523 (2011) requires all taxpayers to establish and maintain records that are adequate for auditors to use in determining the correct amount of the taxpayer's tax liability. The Taxpayer should therefore keep sufficient records of its sales and purchases, including copies of invoices and purchase orders. Records of business transactions must be retained for a minimum of three years from December 31 of the year in which the associated Tennessee sales and use tax return was filed.

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APPROVED: Richard H. Roberts
Commissioner of Revenue

DATE: 8-2-2012

⁴ Importantly, the Taxpayer does not provide the telecommunications services used in the communications portion of the Co-op Services. Thus, that function cannot be characterized as a taxable telecommunications service under to TENN. CODE ANN. § 67-6-205(c)(3) (2011).