

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING # 13-04**

Letter rulings are binding on the Department only with respect to the individual taxpayer being addressed in the ruling. This ruling is based on the particular facts and circumstances presented, and is an interpretation of the law at a specific point in time. The law may have changed since this ruling was issued, possibly rendering it obsolete. The presentation of this ruling in a redacted form is provided solely for informational purposes, and is not intended as a statement of Departmental policy. Taxpayers should consult with a tax professional before relying on any aspect of this ruling.

SUBJECT

The application of the Tennessee sales and use tax exemption under TENN. CODE ANN. § 67-6-356 (2011) for telecommunications services used by call centers.

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") [REDACTED], [IS] located at [STREET ADDRESS], [CITY], Tennessee (hereinafter referred to as the "[PRIMARY LOCATION]").

The Taxpayer has a number of business lines, including: [DESCRIPTIONS]. These business lines are conducted through various partnerships, limited liability companies, and corporations. Each business line is operated by a separate legal entity that employs the personnel required to

conduct the line of business, and each entity is registered for sales and use tax purposes. The primary base of operations is the [PRIMARY LOCATION], [REDACTED].

The Taxpayer and its affiliates employ approximately [NUMBER] employees located at the [PRIMARY LOCATION] and approximately [NUMBER] in [OTHER LOCATION]. Certain Taxpayer associates located at the [PRIMARY LOCATION] utilize telecommunication services primarily in the activities of providing customer service, soliciting sales, and collecting accounts receivable. Associates performing these services at the [PRIMARY LOCATION] are employed by [NUMBER – MORE THAN ONE] different Taxpayer entities, including: [REDACTED].

[REDACTED].

RULING

Will the Taxpayer's operations at the [PRIMARY LOCATION] be considered one business, such that the employees of the Taxpayer and its various Taxpayer affiliates will be treated as employees of a single business for purposes of the Tennessee sales and use tax exemption under TENN. CODE ANN. § 67-6-356(a) (2011)?

Ruling: No. The Taxpayer and each affiliated entity are treated as separate entities for purposes of the exemption under TENN. CODE ANN. § 67-6-356(a) (2011). As a result, the Taxpayer may not treat its employees and the employees of its various affiliates as employees of a single business for purposes of the exemption.

ANALYSIS

Under the Retailers' Sales Tax Act,¹ the retail sale in Tennessee of tangible personal property and specifically enumerated services is subject to the sales and use tax, unless an exemption applies. One of the services subject to the sales and use tax is the furnishing of intrastate, interstate or international telecommunication services, pursuant to TENN. CODE ANN. § 67-6-205(c)(3) (Supp. 2012).

TENN. CODE ANN. § 67-6-356(a) (2011), however, provides an exemption from the Tennessee sales and use tax for "any sales of interstate telecommunication and international telecommunication services to a *business* for use in the operation of one (1) or more call centers."² The term "call center" is defined as "a single location that utilizes telecommunication services in one (1) or more of the following activities: customer services, soliciting sales, reactivating dormant accounts, conducting surveys or research, fund raising, collection of receivables, receiving reservations, receiving orders, or taking orders."³ To qualify for the

¹ Tennessee Retailers' Sales Tax Act, ch. 3, §§ 1-18, 1947 Tenn. Pub. Acts 22, 22-54 (codified as amended at TENN. CODE ANN. §§ 67-6-101 to -907 (2011 & Supp. 2012)).

² (Emphasis added).

³ TENN. CODE ANN. § 67-6-356(a) (emphasis added).

exemption, a call center must have at least 250 employee jobs engaged primarily in call center activities.⁴

Thus, in order to qualify for the TENN. CODE ANN. § 67-6-356(a) call center exemption, the interstate and international telecommunications services must be sold: 1) to a business; 2) for use at a single location; 3) which qualifies as a call center by having at least 250 employees engaging in enumerated call center activities; and 4) the 250 employees are primarily engaged in such call center activities.

BUSINESS

The Taxpayer and its affiliates are treated as separate businesses for purposes of the exemption under TENN. CODE ANN. § 67-6-356(a).

TENN. CODE ANN. § 67-6-356(a) exempts telecommunication services sold to “a business for use in the operation of one (1) or more call centers.”⁵ “[U]nless the context otherwise requires,” TENN. CODE ANN. § 67-6-102(9)(A) (Supp. 2012) defines a “business” as “any activity engaged in by any person, or caused to be engaged in by such person, with the object of gain, benefit, or advantage, either direct or indirect.” A “person” is defined in pertinent part as “any . . . co-partnership, joint venture, association, corporation, . . . or other group or combination acting as a unit, in the plural as well as the singular number.”⁶

Thus, it is necessary to determine whether the Taxpayer and its affiliates constitute a single business, or multiple separate businesses, for purposes of TENN. CODE ANN. § 67-6-356(a). But before that issue can be resolved, it is necessary to decide if the Taxpayer and its affiliates may properly be considered a “person” under TENN. CODE ANN. § 67-6-102(61).

The Taxpayer here operates through a number of related, yet different types of, business entities. For example, the Taxpayer and its affiliates operate through various partnerships, limited liability companies, and corporations. Due to the different types of business entities employed by the Taxpayer and its affiliates, the only portion of the “person” definition potentially applicable to the Taxpayer and its affiliates is if they are a “group or combination acting as a unit.”⁷

Tennessee’s courts have not had occasion to expound the proper interpretation of this statutory phrase, but some of Tennessee’s sister states have interpreted this phrase.⁸ For example, a

⁴ *Id.*

⁵ (Emphasis added).

⁶ TENN. CODE ANN. § 67-6-102(61).

⁷ *See id.* The “group or combination acting as a unit” language has been a component of the definition of “person” since the Retailer’s Sales Tax Act was first codified in 1947. *See* Retailer’s Sales Tax Act, ch. 3, § 2(a), 1947 Tenn. Pub. Acts 22, 23.

⁸ A number of Tennessee’s sister states have similar definitions of “person.” *Compare* TENN. CODE ANN. § 67-6-102(61), *with* ARIZ. REV. STAT. ANN. § 42-5001 (West, Westlaw through the Second Regular Session of the Fiftieth Legislature) (“‘Person’ or ‘company’ includes an individual, firm, partnership, joint venture, association, corporation, estate or trust, this state, any county, city, town, district, other than a school district, or other political subdivision and *any other group or combination acting as a unit*, and the plural as well as the singular number.

number of states have rejected claims that companies related solely by arm's length contracts establish a unit.⁹ The bases for these findings are the lack of existence of an agency relationship, no singularity of purpose, and respect of the corporate form.¹⁰ As the Supreme Judicial Court of Maine has observed, "[t]he reference in the law to 'other' groups or combinations is a catch-all phrase, applying to any other possible organizational entities that may be identified; it is not a device to allow separate corporations to be treated as a single entity under the tax code when such single entity treatment suits their purpose."¹¹

Many of these same principles apply in Tennessee. For example, Tennessee's courts regularly treat separate legal entities separately for tax purposes.¹² In addition, there is a "presumption of corporate separateness" for agency purposes, unless the parent corporation exerts "the kind of 'complete control' which renders the subsidiary nothing more than an instrumentality, agency, conduit, or adjunct of the parent corporation."¹³

Despite sharing a common [PRIMARY LOCATION], the Taxpayer and its affiliates remain separate legal entities. For example, [ENTITY NAME] operates in the corporate form, and is specifically enumerated in the TENN. CODE ANN. § 67-6-102(61) definition of "person." [NUMBER] of the affiliates are limited partnerships, which would also be considered separate persons due to the inclusion of "co-partnership" in the definition of person.¹⁴ Since separate entities are treated separately for tax purposes, each Taxpayer entity is properly considered

(Emphasis added)), and ME. REV. STAT. ANN. § 111(3) (West, Westlaw through the 2011 Second Regular Session of the 125th Legislature) ("'Person' means an individual, firm, partnership, association, society, club, corporation, financial institution, estate, trust, business trust, receiver, assignee or *any other group or combination acting as a unit*, the State or Federal Government or any political subdivision or agency of either government. (Emphasis added)).

⁹ See, e.g., *Home Depot USA, Inc. v. Ariz. Dept. of Revenue*, 287 P.3d 97, 103-04 (Ariz. Ct. App. 2012) (retailer and financing companies not a unit); *Linnehan Leasing v. State Tax Assessor*, 2006 ME 33, ¶ 22, 898 A.2d 408, 414 (auto dealer and financing company not a unit); *Home Depot USA, Inc. v. State, Dept. of Revenue*, 215 P.3d 222, 230 (Wash. Ct. App. 2009) (retailer and financing companies not a unit).

¹⁰ See *Home Depot USA, Inc. v. Ariz. Dept. of Revenue*, 287 P.3d at 103; *Nordstrom Credit, Inc. v. Dept. of Revenue*, 845 P.2d 1331, 1335 (Wash. 1993) (en banc) (quoting *Wash. Sav-Mor Oil Co. v. State Tax Comm'n*, 364 P.2d 440 (Wash. 1961)) ("The corporation will be regarded as a legal entity, as a general rule, and the courts will ignore the fiction of corporate entity only with caution, and when the circumstances justify it, and when it is used as a subterfuge to defeat public convenience, justify wrong, or perpetrate a fraud.").

¹¹ *Linnehan Leasing*, 2006 ME 33, at ¶ 22, 898 A.2d at 414.

¹² See, e.g., *Broadmoor-Kingsport Apartments, Inc. v. State*, 686 S.W.2d 70, 73 (Tenn. 1985) ("It would be untenable to permit a party to take advantage of the corporate form to hold title to property and to conduct business with respect to that property and then permit the party to disavow the corporate ownership when it becomes disadvantageous [for franchise tax purposes]."); *Cook Export Corp. v. King*, 617 S.W.2d 879, 881 (Tenn. 1981) ("[M]any subsidiary corporations do not have separate employees or payrolls, but this does not mean that they lack corporate existence or do not do business within the meaning of the [Tennessee franchise and excise taxes].").

¹³ *Gordon v. Greenview Hosp., Inc.*, 300 S.W.3d 635, 653-54 (Tenn. 2009) (footnote omitted).

¹⁴ See TENN. CODE ANN. § 67-6-102(61).

separate “persons,” and consequently, separate “businesses,” for purposes of the TENN. CODE ANN. § 67-6-356(a) exemption.¹⁵

250 EMPLOYEE REQUIREMENT

It is not necessary to discuss the second and fourth requirements discussed above because each entity is treated as a separate business for purposes of the TENN. CODE ANN. § 67-6-356(a) exemption, and each entity has less than 250 employees primarily engaged in call center activities. The entity with the most employees engaged in call center activities still only has [NUMBER – LESS THAN 250] employees. None of the Taxpayer’s entities therefore qualify for the TENN. CODE ANN. § 67-6-356(a) call center telecommunications exemption from the Tennessee sales tax because they all fail to meet the third requirement.

R. John Grubb II
Tax Counsel

APPROVED: Richard H. Roberts
Commissioner of Revenue

DATE: January 30, 2013

¹⁵ Although the Taxpayer has been granted a variance letter to file a combined Tennessee franchise and excise tax return, that variance is only applicable for franchise and excise purposes. The Taxpayer and its affiliated entities remain separate entities for sales tax purposes.