

**TENNESSEE DEPARTMENT OF REVENUE  
LETTER RULING # 95-09**

**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 necessarily intended as statements of Departmental policy.**

**SUBJECT**

Application of the sales and use tax to certain items sold to restaurants and hotels.

**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 a partnership engaged in representing paper manufacturers on a brokerage basis. All of the taxpayer's sales are to registered dealers authorized to make purchases for resale without payment of sales tax. The taxpayer generally markets paper or disposable plastic products sold to restaurants and hotels. The specific items at issue are guest checks sold by the taxpayer to restaurants and toilet tissue, facial tissue and soap sold to hotels for use in hotel accommodations.

## **QUESTIONS**

- 1) Whether sales tax is applicable to sales of guest checks to restaurants.
- 2) Whether sales tax is applicable to sales of toilet tissue, facial tissue and soap sold to hotels for use in hotel accommodations.
- 3) Assuming a registered dealer presents a resale certificate, whether the taxpayer is liable for sales tax on sales of items obviously not intended for resale.

## **RULINGS**

- 1) Sales tax is applicable to sales of guest checks to restaurants.
- 2) Sales tax is applicable to sales of toilet tissue, facial tissue and soap sold to hotels for use in hotel accommodations.
- 3) A dealer or wholesaler who sells tangible personal property free of the sales tax on a resale certificate when he knows, or should know in the use of ordinary care, that the property that he is selling is not for resale by the purchaser, but is for the purchaser's own use and consumption, is liable for the sales tax.

## **ANALYSIS**

- 1) T.C.A. Section 67-6-202 imposes the sales tax on all sales of tangible personal property at retail in this state. T.C.A. Section 67-6-102(23) (A) defines retail sale as "a taxable sale of tangible personal property or specifically taxable services to a consumer or to any person for any purpose other than for resale." T.C.A. Section 67-6-102(23) (E) (ii) provides that the term "sale at retail" shall not include the following:

Materials, containers, labels, sacks, bags or bottles used for packaging tangible personal property when such property is either sold therein directly to the consumer or when such use is incidental to the sale of such property for resale.

Guest checks provided by restaurants to their customers are used by the restaurants rather than resold. Although the guest check is provided to the customer at the time of purchase, the check is not a material used for packaging tangible personal property and does not fall within the cited exemption for "[m]aterials, containers, labels, sacks, bags or bottles used for packaging tangible personal property" for resale.

- 2) T.C.A. Section 67-6-102(23) (F) (i) defines retail sale to include "[t]he sale, rental or charges for any rooms, lodgings or accommodations furnished to transients by any hotel, inn, tourist court, tourist camp, tourist cabin, motel, or any place in

which rooms, lodgings or accommodations are furnished to transients for a consideration." Therefore, hotels provide a taxable service.

Dealers engaged in providing taxable services are considered the user and consumer of all tangible personal property purchased by them for use in the provision of their services. In *Nashville Mobilphone Co., Inc. v. Woods*, 655 S.W.2d 934, 937 (Tenn.1983), the Tennessee Supreme Court observed that "when the primary function and purpose of the taxpayer is to provide services, the ownership, use and maintenance of certain types of personal property and equipment are necessary in order to enable it to furnish the services, so that the taxpayer, not its customer, is the ultimate user or consumer within the meaning of sales and use tax statutes." Because the hotel uses tissue and soap to provide its service, a hotel or motel may not purchase toilet tissue, facial tissue and soap on a resale certificate.

- 3) T.C.A. Section 67-6-102 (23) (A) provides the following definition:

"Retail sales" or "sales at retail" means and includes all such transactions as the commissioner, upon investigation, finds to be in lieu of sales. Any sales for resale must, however, be in strict compliance with rules and regulations promulgated by the commissioner. Any dealer making a sale for resale which is not in strict compliance with rules and regulations shall be personally liable for and pay the tax;

Sales And Use Tax Rule 1320-5-1-.68 RESALE CERTIFICATE provides in relevant part as follows:

If a wholesaler or dealer sells tangible personal property or taxable services free of the Sales or Use Tax on a certificate of resale when he knows, or should know in the use of ordinary care, that the property or service which he is selling is not for resale by the purchaser, but is for the purchaser's own use or consumption in his business or otherwise, the registration certificate of the wholesaler may be revoked by proper action of the Commissioner, and he shall be liable for the tax.

Therefore, if the taxpayer sells tangible personal property free of the sales tax on a resale certificate when he knows, or should know in the use of ordinary care, that the property that he is selling is not for resale by the purchaser, but is for the purchaser's own use and consumption, then he shall be held liable for the sales tax.

Steven Thomas  
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APPROVED: Ruth Johnson, Commissioner

DATE: 3/13/95