

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING #97- 44**

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 sales and use tax to the sale of school pictures to students and parents.

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], carries on a school photography business in Tennessee. In the taxpayer's own words, its business "consists of photographing students in school and offering picture packages for sale to the students/parents." The taxpayer first reaches an agreement with the school, allowing it to come in and photograph the students. On picture day, a photograph is taken of each student. Additionally, the school can choose to have group pictures taken.

After photographing students at school, the taxpayer offers the pictures to the students and their parents in various packages ranging in price from \$[DOLLAR AMOUNT] to \$[DOLLAR AMOUNT]. In some cases, money is collected on picture day or a proof is provided from which students and parents place orders. However, most of the taxpayer's business is conducted on a "family approval" basis whereby the taxpayer provides the entire package of pictures to the students, and they or their parents pay for the pictures they wish to keep, returning the remainder to the taxpayer. The pictures are delivered by the taxpayer to the school, and the school delivers the pictures to the students. Usually, the school collects the money and unsold pictures from the students and delivers them back to the taxpayer. In most cases, checks are written out to the school, but occasionally they are written to the taxpayer.

The taxpayer pays a commission to the school which may be as much as 50% of the gross proceeds. The commission varies from school to school based on market factors. If the money is collected by the school, it retains a percentage of the gross proceeds as its commission. If the taxpayer collects the money, the commission is paid in the form of a check from the taxpayer to the school. All promotional material and order forms distributed to students and parents display the taxpayer's name and logo and indicate that the taxpayer is offering pictures for sale. Students and parents are informed that "[a] portion of the purchase price may be retained by your school or organization to help in fundraising." The order form asks that checks be made payable to the school and states that all packages include tax, where applicable. If parents or students have questions, they are asked to call the taxpayer's customer service department.

QUESTIONS

1. Must sales tax be collected on the portion of gross receipts which is retained by the school?
2. Under what circumstances would the proceeds retained by the school be exempt from tax?
3. Are the answers to questions 1 and 2 different if checks from students or parents are inadvertently written out to the taxpayer rather than to the school?

4. Are the answers to questions 1 and 2 different if the taxpayer collects all of the proceeds from the students and parents and the school commission is paid in the form of a check from the taxpayer to the school?

ANSWERS

1. Yes, under the current factual situation, sales tax must be collected and remitted on 100% of the purchase price paid by the parents and students for the school pictures.

2. Proceeds retained by the school will be exempt from tax only if the school or a school support group purchases the pictures from the taxpayer and then resells them to the students and parents.

3. The tax consequences are determined by whether the taxpayer is selling pictures to the school or to the students and parents. To whom the checks are written is one indication of who is purchasing the pictures from the taxpayer, but it is not determinative. Under the current factual situation, to whom the checks are written will not change the tax consequences.

4. The tax consequences are determined by whether the taxpayer is selling pictures to the school or to the students and parents. Whether the school collects the money and retains a portion or the taxpayer collects the money and pays the taxpayer a percentage is one indication of who is purchasing the pictures from the taxpayer, but it is not determinative. Under the current factual situation, this issue will not change the tax consequences.

ANALYSIS

1. & 2. In most cases, sales made to a school are exempt from sales and use tax. TENN. CODE ANN. §67-6-322(a)(4). However, when a school or school support group purchases tangible personal property for the purpose of resale, the sale to the school is subject to tax and the subsequent resale is tax exempt. TENN. CODE ANN. §67-6-102(23)(H); see *also*, Opinion of the Attorney General 88-109. The sales and use tax code provides as follows:

Notwithstanding the exemptions provided by §§ 67-6-322 and 67-6-329 for sales to schools, “retail sale” and “sale at retail” subject to tax include any sale of tangible personal property or taxable services to a public or private school, grades kindergarten through twelve (K-12), or school support group, where such property or services are intended for resale by the school or school support group. Resales of such tangible personal property or taxable

services by such school or school support group shall not be subject to tax. If for any reason a vendor does not collect and remit tax to the department on the sale of these items to the school or school support group, then the school or school support group shall be liable for use tax based on the purchase price of the items. This subdivision (23)(H) does not apply to sales of school books and school lunches.

TENN. CODE ANN. §67-6-102(23)(H). If the pictures are first sold by the taxpayer to the school and then resold by the school to the parents and students, the tax base will include only the gross proceeds actually retained by the taxpayer. On the other hand, if the pictures are sold by the taxpayer to the parents and students, and a commission is paid to the school, the tax base will include 100% of the purchase price paid by the parents. In either case, the taxpayer is required to collect and remit the tax.

The amount of the tax base turns, then, on whether the taxpayer is selling pictures to the school for resale or to the parents and students. "The elements necessary to constitute a sale are (1) transfer of title or possession, or both of (2) tangible personal property, for a (3) consideration." *Volunteer Val-Pak v. Celauro*, 767 S.W.2d 635, 636 (Tenn. 1989); see also, TENN. CODE ANN. §67-6-102(24)(A). Clearly, a sale occurs under the facts presented here. However, it must be determined whether the party receiving the goods and passing them on to another is himself a buyer or is simply acting as an agent between the true buyer and seller. See, *Haskins v. Yates*, 1988 Lexis 492 (Tenn. Ct. App. August 5, 1988). A sale which is carried out through an agent acting for a known or disclosed principal is taxable to the principal. TENN. COMP. R. & REGS. 1320-5-1-.01.

The Court of Appeals has found that the following factors indicate a sale, rather than agency:

(1) The transferee (the school) gets legal title and possession of the goods.

(2) The transferee becomes responsible for an agreed price, either at once or when the goods are sold.

(3) The transferee can fix the price at which he sells without accounting to the transferor for the difference between what he obtains and the price he pays.

(4) The goods are incomplete and unfinished and the transferee is to make additions to them.

(5) The risk of loss is upon the transferee.

(6) The transferee deals or has a right to deal with the goods of persons other than the transferor.

(7) The transferee deals in his own name and does not disclose that the goods are those of another.

Haskins, 1988 Lexis 492.

Applying these factors to the current factual situation, it is apparent that the taxpayer is selling pictures to the parents and students, with the school serving as the taxpayer's agent:

(1) Although the school takes possession of the pictures for the purpose of delivering them to the students, the facts do not support a finding that title passes to the school. The taxpayer takes back any pictures not purchased by the students and parents, indicating they were not purchased by the school.

(2) The school is responsible for an agreed price only to the extent that it must send to the taxpayer all of the proceeds it collects, less its commission.

(3) The school has no discretion regarding what price is charged for the pictures.

(4) The school does not add anything to the product.

(5) There is no written agreement between the parties as to who bears the risk of loss. However, nothing in the facts as presented indicates that the school is required to pay to the taxpayer any money other than that which is collected from the students and parents.

(6) The facts do not indicate that the school is prohibited from having other photographers also take pictures at the school.

(7) Each poster, promotional flier, and order form displays the taxpayer's name and logo and indicates that the taxpayer, not the school, is offering the pictures.

These factors support a finding that the sale is made from the taxpayer to the students and parents, not to the school. Particularly important in reaching this conclusion, however, is the fact that the photographer comes into the school and has a direct relationship with the students from the beginning, as well as the fact that the taxpayer holds itself out in the promotional material and order forms as the entity selling the pictures.

Courts in other jurisdictions have reached similar conclusions. In North Carolina a case arose with facts very similar to those presented here. *In re: Assessment of Additional Sales and Use Tax Against Strawbridge Studios, Inc.* 380 S.E.2d 142 (N.C. App. 1989). The photographer in that case came into the school and

photographed all the students. *Id.* at 143. A proof was then provided from which a package could be ordered, with the price being set by the photographer. *Id.* The order form indicated that the school would retain a commission, but did not indicate that the school was selling the pictures. *Id.* A representative of the school delivered the picture packages to the students and collected all the money, which was deposited in the school's bank account. *Id.* The school then retained an agreed upon percentage of the proceeds as a commission and paid over the remainder to the photographer. *Id.* Under these facts, the North Carolina Court determined that the photographer was making sales directly to the students and parents. *Id.* at 146. Similarly, in a case in which the photographer responded to orders for school pictures from students or parents and in which the board of education's treasurer collected the money, with a commission going to the school, the Ohio Supreme Court held that sales were made from the photographer directly to the students and parents. *Ritchie Photographic v. Limbach*, 644 N.E.2d 312, 312-14 (Ohio 1994).

It should be noted that this situation is different from one in which a school or school support group purchases goods for resale which are fungible and are not identifiable with any particular company or person. For example, if a school purchases candy or other goods for resale as a fund raiser, there is no relationship between the ultimate consumer and the company which provided the product to the school, and the consumer generally is not made aware of the company which provided the product.

In this case the taxpayer has stated that its business consists of offering picture packages for sale to students and parents. Additionally, the facts establish that the taxpayer is a known principal, utilizing the school as its agent in selling pictures to the parents and students. Therefore, sales tax must be collected on the entire amount of the gross proceeds, including the portion which is retained by the school.

3. & 4. As noted in the analysis above, the tax base depends on whether the transaction is a sale to the school for resale or a sale directly to the parents and students. Whether payment is made to the school or the taxpayer is one indication but is not determinative. In this case, the school is collecting money as an agent for the taxpayer, and it does not matter to whom the check is written. Similarly, whether the school collects the proceeds and keeps a portion or the taxpayer collects the proceeds and pays a portion to the school is an indication but is not determinative of the nature of the transaction. Again, due to the other facts and circumstances, in this case it would not make a difference.

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APPROVED: Ruth E. Johnson

Commissioner

DATE: 10-17-97