

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING #99-25**

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 computer consulting and programming services.

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] is a Tennessee corporation. The taxpayer is located in Tennessee and is engaged in the business of providing computer consulting, systems analysis, and programming services.

Currently, the taxpayer has only one employee providing its services to one customer, [CORPORATION]. [CORPORATION] is a local telephone company operating in [STATE OTHER THAN TENNESSEE], [STATE OTHER THAN TENNESSEE], and several other states, but not in Tennessee.

The taxpayer provides advice to [CORPORATION] on computer data management. The taxpayer also performs analysis, design and programming work for [CORPORATION]. The taxpayer estimates that its employee spends five percent of his time actually programming. His remaining time is divided evenly between consultation (advice, design, analysis, etc.) which is related to the programming and consultation which is unrelated to any programming provided by the taxpayer.

The taxpayer's employee does all of this work out of his home in Tennessee. Consultation is provided mainly over the phone but might also include trips to one of [CORPORATION'S] locations. Programming is done from the employee's home using a computer and modem to access [CORPORATION'S] computers located in [STATES OTHER THAN TENNESSEE]. None of the [CORPORATION'S] computers are located in Tennessee. The employee uses his computer only to access [CORPORATION'S] computers. He does not write programs for or store programs on his computer in Tennessee. Instead, every time he enters a line of programming, that information is immediately sent to and saved on the [CORPORATION] computer in another state. None of the programming is saved on the employee's computer in Tennessee. The taxpayer and [CORPORATION] have no agreement regarding when title to the software passes to [CORPORATION]. The employee accesses the [CORPORATION] computer by dialing a toll free telephone number provided by [CORPORATION].

ISSUE

Whether the computer programming or any of the computer consulting services performed by the taxpayer for [CORPORATION], as described in the facts, are subject to Tennessee sales or use tax.

RULING

No. Under the specific facts presented, the programming and the consulting services provided to [CORPORATION] are not subject to Tennessee sales or use tax.

ANALYSIS

The Tennessee Retailers' Sales Tax Act levies tax on the sale of tangible personal property at retail in this state as well as on certain services performed in this state which are specifically taxable under the Act. T.C.A. §§ 67-6-202 and 67-6-205. Also subject to tax are "any services that are a part of the sale of tangible personal property...." T.C.A. '67-6-102(26). On the other hand, a sale of tangible personal property which occurs outside the state is not subject to Tennessee sales tax, and will not be subject to Tennessee use tax unless the property is returned to Tennessee at a later time. *Eusco, Inc. v. Huddleston*, 835 S.W.2d 576, 582 (Tenn. 1992).

Under the facts presented, the taxpayer provides computer programming and computer consulting services to [CORPORATION] which is located outside Tennessee. The taxpayer estimates that its employee spends five percent of his time actually programming. His remaining time is divided evenly between consultation (advice, design, analysis, etc.) which is related to the programming and consultation which is unrelated to any programming provided by the taxpayer.

For Tennessee sales and use tax purposes, the transfer of computer software is specifically defined as a sale of tangible personal property. T.C.A. § 67-6-102(25)(B); *Creasy Systems Consultants, Inc. v. Olsen*, 716 S.W.2d 35 (Tenn. 1986). Accordingly, programming performed by the taxpayer for [CORPORATION] would be subject to tax if the sale occurred in Tennessee.

The consulting services provided by the taxpayer to [CORPORATION] are not specifically listed in the Retailers' Sales Tax Act as taxable services. See T.C.A. §67-6-102(24)(F). Nonetheless, they can become subject to tax if performed as part of a taxable sale of tangible personal property, including the sale of computer software or custom programming. T.C.A. § 67-6-102(26); See, *Thomas Nelson, Inc. v. Olsen*, 723 S.W.2d 621 (Tenn. 1987); *Creasy Systems Consultants*, 716 S.W.2d at 35. However, it is not necessary to determine for the purposes of this ruling what portion of the consulting services are performed as part of the sale of software because, as discussed below, the software is not subject to tax in Tennessee.

A sale consists of the transfer of title or possession, or both, of tangible personal property for a consideration. T.C.A. § 67-6-102(25)(A); *Volunteer Val-Pak v. Celauro*, 767 S.W.2d 635, 636 (Tenn. 1989). Thus, the place in which title to or possession of the software first passes to [CORPORATION] is the location of the sale. The facts provide that there is no agreement between the taxpayer and [CORPORATION] regarding the passage of title. Absent such an agreement, title passes to [CORPORATION] at the time and place at which the taxpayer completes his performance with reference to the physical delivery of the property. T.C.A. § 47-2-401; *Eusco, Inc.*, 835 S.W.2d at 579.

The programming at issue is performed from the employee's home in Tennessee using a computer and modem to access [CORPORATION'S] computers located in [STATES OTHER THAN TENNESSEE]. None of the [CORPORATION] computers are located in Tennessee. The employee uses his computer only for the purpose of accessing [CORPORATION'S] computers. He does not write programs for or store programs on his computer in Tennessee. Instead, every time he enters a line of programming, that information is immediately sent to and saved on the [CORPORATION] computer in another state. None of the programming is saved on the employee's computer in Tennessee.

Under these facts, it is clear that the taxpayer passes both title to and possession of the software to [CORPORATION] outside Tennessee. The taxpayer does not complete his performance with respect to delivery of the software until it is written and saved on [CORPORATION'S] out-of-state computers.

Accordingly, the taxpayer's programming and consulting services are not subject to sales and use tax in Tennessee.

David A. Gerregano
Tax Counsel

APPROVED: Ruth E. Johnson
Commissioner

DATE: 8/17/99