

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING #98-35**

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 business tax to the sale of automobiles.

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 in the business of selling cars, trucks, and vans to the public. In so doing, the taxpayer has customarily passed the applicable

Tennessee business tax on to its customers by adding it as a separate item on the invoice. Both business tax as well as sales and use tax are calculated after adding to the purchase price the amount of business tax passed on to the customer.

ISSUE

Whether the taxpayer is permitted to pass the applicable business tax on to its customers as described in the facts.

RULING

The taxpayer may pass the business tax on to its customers as part of the sales price. The taxpayer is permitted to separately state on its invoice the amount of business tax which is being passed on to the customer. However, separately stating the amount of business tax which is passed on does not remove it from the sales price. Thus, any business tax passed on to the customer must be included in the tax base for both business tax as well as sales and use tax purposes.

ANALYSIS

The Business Tax Act, TENN. CODE ANN. §67-4-701 *et seq.*, is a component of Tennessee's privilege and excise taxes. It allows counties and incorporated municipalities to tax the privilege of making sales in Tennessee by engaging in any of the business activities enumerated in the Act. TENN. CODE ANN. §67-4-704(a); *Westinghouse Electric Corp. v. King*, 678 S.W.2d 19, 23 (Tenn. 1984).

Unlike the Retailers' Sales Tax Act, TENN. CODE ANN. §67-6-101 *et seq.*,¹ the Business Tax Act does not contain a specific provision directing the seller to collect business tax from the customer. Instead, business tax is generally considered an expense to be borne by the seller. *See, ADVO System, Inc. v. City of Phoenix*, 942 P.2d 1187, 1195 (Ariz. Ct. App. 1997)(when a privilege tax on doing business is passed along to the purchaser, it is "just another business expense -- not a tax"). Of course, business tax like any business expense will ordinarily be passed on to the customer in the price of goods sold. Furthermore, the Department has long recognized that there is no provision restricting the seller from stating the business tax as a separate item on the invoice.

Accordingly, the Department promulgated the following administrative rule shortly after the business tax was enacted:

¹ TENN. CODE ANN. §67-6-502 provides that sales and use tax "shall be collected by the retailer from the consumer insofar as it can be done." Thus, although the seller is liable to the state, as between the seller and the consumer the seller is directed to collect the tax from the consumer to the extent possible. *Sam Carey Lumber Company v. Sixty-One Cabinet Shop, Inc.*, 773 S.W.2d 252, 254 (Tenn. Ct. App. 1989) *perm. app. denied*. In fact, the seller has a cause of action against the consumer for payment of the tax. *Id.*

The Business Tax is a privilege tax imposed upon persons engaged in various businesses and activities in the state. If a dealer invoices the business tax as a separate item and passes it on to his customer, then the tax shall be added to the gross receipts and be used in determining the tax base for both Business Tax and Sales and Use Tax purposes.

TENN. COMP. R. & REGS. 1320-4-5-.03 ("Rule 3"). In 1997, the General Assembly codified this rule. 1997 TENN. PUB. ACTS 561.²

Thus, the Department's position can be stated as follows. The business tax is a tax imposed on the seller. The seller can pass on this expense by including it in the price of the item sold. The seller is permitted to separately state on its invoice the amount of business tax which is being passed on to the customer. However, separately stating the amount of business tax which is passed on does not remove it from the sales price as defined in TENN. CODE ANN. §§67-4-702(13) and 67-6-102(25).³ Thus, any business tax passed on to the customer must be included in the tax base for both business tax as well as sales and use tax purposes.

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APPROVED:

Ruth E. Johnson
Commissioner

DATE: 7-28-98

² TENN. CODE ANN. §67-1-112.

³ With certain specific exceptions, "sales price" means the total amount for which tangible personal property or taxable services are sold, without any deduction on account of any expenses whatsoever.