

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING # 03-03**

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 the sales and use tax and the tobacco tax to tobacco that is pulled from inventory in Tennessee and then sold or given to retailers outside of Tennessee.

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 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 revocation of the ruling must inure to the taxpayer's detriment.

FACTS

[THE TAXPAYER] is a tobacco manufacturer and wholesaler. It manufactures tobacco from a raw state into a consumable product. It does not manufacture cigarettes, it only manufactures other tobacco products. Its products are sold and shipped into the majority of states in the United States.

Often, a salesperson for the taxpayer will take an almost out-of-date product on a customer's shelf and wrap it with a new product in an attempt to sell the almost out-of-date product and to avoid disposal costs of the almost out-of-date product for which the taxpayer's customer has already paid. The new product is at no charge to the taxpayer's customer.

QUESTIONS

1. What is the definition of the term "sample" from a sales and use tax perspective?
2. Is the definition of "sample" the same from a tobacco tax perspective as from a sales and use tax perspective?
3. Does the new product described above meet the definition of "sample" for sales and use tax purposes?
4. Does the new product described above meet the definition of "sample" for tobacco tax purposes?
5. Is Tennessee tobacco tax due on samples pulled from Tennessee inventory but not distributed in Tennessee when tobacco tax is being paid in another state.
6. Is Tennessee use tax due on samples pulled from Tennessee inventory but not distributed in Tennessee when use tax is being paid in another state?

RULINGS

- 1-4. The word "sample" is not defined in the sales and use tax law and is not defined in the tobacco tax law. The definition of "sample" has no effect on the analysis of the taxpayer's questions 5 and 6.
5. The tobacco tax does not apply to the sale of tobacco products to retailers that are not located in Tennessee.
6. Pulling tobacco from inventory in Tennessee for distribution to another state by itself is not a taxable use in Tennessee.

ANALYSIS

1 – 4. The word "sample" is not defined in the sales and use tax law and is not defined in the tobacco tax law. Tenn. Code Ann. §§ 67-4-1001 and 67-6-102.

There is a reference to the word "sample" in the tobacco tax rules and regulations. Tenn. Comp. R. & Regs. 1320-4-3-.07(1) says the following:

Manufacturers of cigarettes and other tobacco products will be allowed to package and distribute their own products as samples or gifts and remit the tax due thereon direct to the Department of Revenue. Each sample or gift package so distributed shall have printed thereon the inscription “State Tax Paid” and/or other inscriptions such as “Complimentary”, “Sample”, “Gift”, or “Not For Sale”. . . .

Although the word “sample” is not defined, the context establishes that a “sample” is free of charge. The facts provided by the taxpayer do not coincide precisely with the meaning of “sample” in the context of this rule. This rule does not contemplate combining the sample with another product for which a price is charged on the combined product.

In the context of the sales and use tax, the taxpayer could accept a resale certificate from the retailer for the new product that is added to the old product, because the combined product is for resale to the retailer’s customer. See *Nashville Clubhouse Inn v. Johnson*, 27 S.W.3d 542, 547 (Tenn. App. 2000).

The meaning of “sample” has no effect on the analysis of the taxpayer’s questions 5 and 6.

5. The word “sample” is not included in the definitions for the tobacco tax. Tenn. Code Ann. § 67-4-1001. The tobacco tax applies to the sale of tobacco products. Tenn. Code Ann. § 67-4-1002. “‘Tobacco products’ means cigars, cigarettes, manufactured tobacco and snuff, but not tobacco produced and processed by the grower for the grower’s own use and not for sale.” Tenn. Code Ann. § 67-4-1001(17). Other tobacco products include, but are not limited to, “cheroots, stogies, manufactured tobacco and snuff of all descriptions whether made of tobacco or any substitute therefore” Tenn. Code Ann. § 67-4-1005. The new product described by the taxpayer is a tobacco product.

“Every dealer or distributor of tobacco products herein defined shall pay to the department for exclusive state purposes, taxes in addition to all other taxes or fees, for the privilege of selling cigarettes and tobacco products in this state.” Tenn. Code Ann. § 67-4-1002. The tax on non-cigarette tobacco products is measured as a percentage of the wholesale cost price. Tenn. Code Ann. § 67-4-1005. “‘Wholesale cost price’ means the manufacturers’ and/or processors’ actual sales price of any tobacco product, delivered to Tennessee dealers, exclusive of any discounts, rebates, allowances, or the privilege tax herein imposed[.]” Tenn. Code Ann. § 67-4-1001(19). If the taxpayer sells tobacco products to retailers that are not located in Tennessee, the tobacco tax does not apply.

6. The word “sample” is not included in the definitions for the sales and use tax. Tenn. Code Ann. § 67-6-102. The sales and use tax applies to the sale or the use of tangible personal property in this State. Tenn. Code Ann. §§ 67-6-202 and 67-6-203. “‘Tangible personal property’ means and includes personal property, which may be seen, weighed, measured, felt, or touched, or is in any other manner perceptible to the senses.” Tenn. Code Ann. § 67-6-102(30). The new product described by the taxpayer is tangible personal property.

Tennessee taxes the use of tangible personal property in this State. Tenn. Code Ann. § 67-6-203. “‘Use’ means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof, except that it does not include the sale at retail of that property in the regular course of business[.]” Tenn. Code Ann. § 67-6-102(32)(A). However, “[i]t is not the intention of this chapter to levy a tax upon articles of tangible personal property imported into this state or produced or manufactured in this state for export.” Tenn. Code Ann. § 67-6-313(a). The Tennessee Supreme Court has held that by itself the withdrawal of tangible personal property from inventory in Tennessee for export to another state for use in the other state is not subject to the Tennessee use tax. *Young Sales Corporation v. Benson*, 450 S.W.2d 574, 577 (Tenn. 1970), and *Beecham Laboratories v. Woods*, 569 S.W.2d 456, 458 (Tenn. 1978).

Steve Butler
Tax Counsel

APPROVED: Loren L. Chumley
Commissioner of Revenue

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