

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING # 00-29**

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

Taxability of mail-order sales where goods are shipped by Tennessee vendor to non-Tennessee vendee.

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] operates a mail order house located within the city limits of [CITY], Tennessee.

All products¹ offered for sale by the taxpayer are advertised at an Internet website, access to which is provided at no charge to the customer.

Customers order products by one of two methods: (1) using an electronic order form located at the website that is filled out with information about the products to be purchased and the customer's credit card number, and is then transmitted electronically to the taxpayer's office, or (2) using a hard copy order form located at the website that is printed out and completed in the same manner as described for the electronic form, and is then sent via U.S. Mail to the taxpayer's office. Customers using the hard copy order form have the option to submit a personal check or money order as payment rather than using a credit card.

Upon receipt of each order, the taxpayer packages the items purchased, and ships the items directly to the customer's home. This shipment is via the postal service, unless the customer requests the use of a courier service such as Federal Express or UPS.

For customers that reside within Tennessee, the taxpayer charges state and local sales tax on the retail price of the items purchased, including the freight charges. The sales tax collected from these customers is paid to the Tennessee Department of Revenue.

For customers that reside outside of the State of Tennessee, the taxpayer does not charge or collect any type of sales tax. Items shipped to these customers are for their personal use outside of Tennessee.

For each customer order processed by the taxpayer, a commercial invoice is created and a copy is maintained in the customer file. The commercial invoice includes the customer name and shipping address, items ordered and the prices, and sales tax collected (if applicable). The copy of each invoice maintained by the taxpayer is signed and dated by an accounts receivable department representative at the time of order processing. An example of such an invoice is included with the ruling request.

¹ The products sold do not include motor vehicles or aircraft.

QUESTIONS

1. Is the taxpayer liable for Tennessee state and local use tax collection and remittance for those products sold and shipped to a customer residing outside of Tennessee, when the goods sold are for the personal use of the non-Tennessee customer?
2. Are the “commercial invoices” maintained by the taxpayer sufficient proof that products were shipped to a customer residing outside of Tennessee?

RULINGS

1. Yes, when the goods are shipped as described in the ruling request.
2. The “commercial invoices” may constitute acceptable proof of shipment to a customer residing outside of Tennessee; however, in the event the Department should perform an audit on the taxpayer, other evidence may be considered in determining where products were shipped.²

ANALYSIS

1.

Tenn. Code Ann. § 67-6-102(25)(A) provides that “‘Sale’ means any transfer of title or possession, or both . . . in any manner or by any means whatsoever of tangible personal property for a consideration[.]” A sale 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); see also, Tenn. Code Ann. § 67-6-313. Thus, whether the products are subject to sales tax in Tennessee turns on where the sale occurs.

The elements of 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(25)(A). The place in which title or possession of the products passes is the location of the sale.

For Tennessee sales tax purposes, the place where title to tangible personal property is transferred to the buyer is determined under the applicable provisions of the Uniform Commercial Code. *Eusco, Inc.*, 835 S.W. 2d at 579 (citing *Illinois Cent. Gulf R.R. v. State*, 805 S.W. 2d 746 (Tenn. 1991)). Tenn. Code Ann. § 47-

² Under the ruling provided in response to the first question, whether the customer is located in or out of state is of little importance.

2-401 provides that “[u]nless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods.”

The information provided in the ruling request does not indicate that the parties explicitly agree on a point where title passes. However, the internet order form used by customers to order goods from the taxpayer contains the following statement: “No refunds except in cases where the [merchandise] has been electronically or physically damaged prior to shipment.” Here, the taxpayer deposits the goods in the mail for delivery to its customers. The statement on the order form is indicative that the taxpayer undertakes no responsibility for loss or damage to the goods once they are placed in the mails.³ At that point, the taxpayer apparently views its performance in the sale contract as complete. Therefore, title to the goods passes in Tennessee when the taxpayer deposits them in the mails. (In *Volunteer Val-Pak v. Celauro*, *supra*, the Tennessee Supreme Court addressed a fact pattern in which goods were deposited in the mail out-of-state for delivery into Tennessee. The Court used a similar analysis to conclude the transaction did not constitute a Tennessee sale but rather a sale in the state where the mailing took place.)

With respect to interstate commerce, Tennessee sales and use tax is to be applied to the fullest extent permitted by the Commerce Clause of the United States Constitution. *LeTourneau Sales & Service, Inc. v. Olsen*, 691 S.W. 2d 531, 534 (Tenn. 1985); *Cole Brothers Circus, Inc. v. Huddleston*, No. 01-A-01-9301-CH-00004, 1993 Tenn. App. LEXIS 386 (Tenn. Ct. App. June 4, 1993). It is well-settled that a state tax on interstate commerce is not per se unconstitutional and the taxpayer bears the burden of proving his immunity from the tax under the commerce clause. *LeTourneau*, 691 S.W. 2d 531; *General Motors Corp. v. Washington*, 377 U.S. 426, 84 S.Ct. 1564, 12 L.Ed. 2d 430 (1964); *Norton Co. v. Department of Revenue of Illinois*, 340 U.S. 534, 71 S.Ct. 377, 95 L.Ed 517 (1951).

A tax will survive challenge under the Commerce Clause so long as it (1) is applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S.Ct. 1076, 1079, 51 L.Ed. 2d 326 (1977).

In the present case, the tax is premised on the sale taking place in Tennessee. Tax on the transaction will only be collected once, where the sale occurs, thus the tax is fairly related to services provided by the state. See *Oklahoma Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 115 S.Ct. 1331, 115 S.Ct. 1331 (1995). Transactions in interstate commerce will not be taxed unless the sale is consummated in state. The transfer of the products to the purchaser is a taxable

³ The Tennessee Supreme Court used risk of loss as an indication of passage of title in *Hearthstone, Inc. v. Moyers*, 809 S.W.2d 888 (Tenn. 1991).

sale which takes place within Tennessee, regardless of whether or not the items are shipped to a Tennessee or non-Tennessee address. Accordingly, there is no discrimination against interstate commerce.

Unless an exemption applies, all sales occurring in state are subject to sales tax. Tenn. Code Ann. § 67-6-313(a) provides that “it 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.” This exemption from sales tax does not apply, however, when the transfer of tangible personal property is wholly within Tennessee, even if it is intended that the merchandise will be removed from the state. *Jack Daniel Distillery v. Jackson*, 740 S.W. 2d 413 (Tenn. 1987). This result relies upon the purchaser taking title to the property in Tennessee. The use of the mails for shipping the product to the customer does not alone suffice to make the transaction subject to the Tennessee sales tax.

Since under the facts presented, the sale in question takes place in Tennessee, and there is no applicable exemption statute, the sale is subject to sales tax, regardless of the customer’s location in or out of state.

2.

The second question is, in effect, a request that the Department rule in advance on what audit evidence would or would not be considered in the event the commissioner performs a tax audit. The Department cannot rule that, in the event of an audit, the proposed “commercial invoice” will always constitute adequate proof of the details of the sale. It appears that the “commercial invoice” bearing an out-of-state customer address would likely indicate a sale shipped out of state.⁴ However, the commissioner is empowered with broad powers to obtain evidence in ascertaining a taxpayer’s tax liability. See Tenn. Code Ann. § 67-1-1301 *et seq.*, Tenn. Code Ann. § 67-6-523. In light of these powers to obtain evidence, as well as the expectation that the commissioner’s auditors would apply generally accepted auditing methods, the commissioner’s auditors would not be limited to the examination of the “commercial invoices” in the performance of an audit.

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APPROVED: Ruth E. Johnson

DATE: 9/1/00

⁴ The commercial invoice would not constitute adequate proof in the event of sales of motor vehicles or aircraft. See TENN. COMP. R. & REGS. 1320-5-1-.03 (motor vehicles) and Tenn. Code Ann. § 42-1-113 (aircraft).

