

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING # 08-23**

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

Whether certain telephone answering services are subject to the Tennessee sales tax as telecommunications services or ancillary 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 his detriment.

FACTS

[THE TAXPAYER] creates customized interactive and automated answering system contact management software applications for physician practices and hospitals. The software enables the customer to receive, sort, deliver, retrieve, and otherwise manage after-hours telephone calls and resulting messages from patients, physicians and others. The software applications that control the answering services are hosted on computer servers located at the Taxpayer's data center in [CITY], Tennessee. As discussed in more detail below, calls to each customer are

routed to and from the data center via the Publicly Switched Telephone Network (the “PSTN”) or the Internet. After business hours, a customer forwards all incoming calls to a dedicated toll-free number provided by the Taxpayer, which is the gateway into the data center.

Once an incoming call is routed to the data center, the interactive and automated answering system provides the caller with a choice of several options, which are determined based on preprogrammed criteria selected by the taxpayer’s customers and the responses given by the caller to a series of voice prompts. The outcome of each call depends on the various inputs and the automated answering system’s responses, but can be categorized into five groups:

- (1) The caller is instructed (i) to hang up and call back during normal business hours, (ii) to call emergency assistance, or (iii) to proceed immediately to the nearest hospital emergency room.
- (2) The caller is connected to an appropriate party, which is usually the physician on call. In this case, the data center automatically initiates an outbound call through the PSTN to a telephone number specified by the customer, and then connects the caller’s inbound call with the data center-initiated outbound call.
- (3) The caller is prompted to leave a voice message for the customer. The message is deposited into the appropriate inbox to be retrieved by the customer through the PSTN or via the Internet. The customer is notified of the new message in a manner previously selected by the customer. Typical notification methods include a message sent to the customer’s pager or mobile telephone, or a telephone call to the customer, each of which are automatically initiated by the data center via the PSTN.
- (4) The caller is asked to enter a call-back telephone number. The call-back number is then passed on to the physician’s pager or mobile telephone via the PSTN as described above.
- (5) The caller is transferred to a live operator who transcribes the message and then sends the transcribed message to the customer’s pager or mobile telephone via the PSTN as described above.

The Taxpayer does not sell or otherwise provide the customers or the callers with telephone lines, pagers, mobile telephones, or any other means by which to receive and transfer calls or to retrieve and access messages. Rather, the Taxpayer, the customers, and the callers each purchase the telecommunications services necessary to accomplish their respective roles in the answering services provided by the Taxpayer.

The callers purchase telecommunications services from their respective telephone companies in order to initiate the telephone call that ultimately is routed to the data center for further processing. The customers purchase telecommunications services from their respective telephone companies in order to forward inbound calls to the data center, receive messages or calls forwarded by the data center to mobile telephone calls and pagers, and to retrieve messages stored in the data center. Finally, the Taxpayer purchases telecommunications services from its

telephone company in order to redirect calls, receive messages, or forward messages, as the case may be, to the customers.

QUESTIONS

1. Are the Taxpayer's answering services considered "telecommunications services" pursuant to Tenn. Code Ann. § 67-6-102, and thus a taxable service subject to the Tennessee sales tax pursuant to Tenn. Code Ann. § 67-6-205?
2. Are the answering services provided by the Taxpayer services subject to the Tennessee sales tax pursuant to any other subsection of Tenn. Code Ann. § 67-6-205?

RULINGS

1. No. The Taxpayer's answering services are not "telecommunications services" for purposes of Tenn. Code Ann. § 67-6-102, and are not subject to the Tennessee sales tax pursuant to Tenn. Code Ann. § 67-6-205.
2. No. The answering services are not subject to the Tennessee sales tax pursuant to any other subsection of Tenn. Code Ann. § 67-6-205. Specifically, the answering services are not subject to the sales tax as ancillary services pursuant to Tenn. Code Ann. § 67-6-205.

ANALYSIS

1. Telecommunications Services

The Taxpayer's answering services are not "telecommunications services" for purposes of Tenn. Code Ann. § 67-6-102(81) (2007) and are therefore not subject to the Tennessee sales tax as such.

Under the Retailers' Sales Tax Act, Tenn. Code Ann. § 67-6-101 *et seq.*, the retail sale of tangible personal property in Tennessee and certain services is generally subject to the Tennessee sales and use tax. Tenn. Code Ann. § 67-6-205(c)(3) (2007) imposes the sales tax on "the furnishing, for a consideration, of intrastate, interstate or international telecommunication services." The term "telecommunications service" is defined under Tenn. Code Ann. § 67-6-102(81)(A) (2007) as the "electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points."

Importantly, the term "telecommunications services" does not include telephone answering services. Although an answering service may involve the transmission of information (*e.g.*, the person answering the telephone may transmit a message to the service recipient via telecommunications), the primary purpose of the answering service transaction is the answering of the telephone, rather than the transmission of the resulting message.

In determining whether a transaction that involves telecommunications comes within the definition of a taxable "telecommunications services" under Tenn. Code Ann. § 67-6-102(81), the Tennessee courts have applied the "true object" test to the transaction in question. For example, in *Prodigy Services Corp., Inc. v. Johnson*, 125 S.W.3d 413 (Tenn.Ct.App. 2003), the

Tennessee Court of Appeals ruled that the sale of Internet access services was not taxable as a telecommunications service, because providing telecommunications services was not the “true object” of the sale, even if some of the services sold fit within the definition of the term. The “true object” of a telecommunication service was also discussed by the Tennessee Court of Appeals in *Equifax Check Services, Inc. v. Johnson*, No. M1999-00782-COA-R3-CV, 2000 Tenn.Ct.App. LEXIS 412 (Tenn.Ct.App. June 27, 2000). In that case, Equifax provided a service whereby a merchant could dial into Equifax’s computers to determine whether a customer had sufficient funds to cover a check tendered to the merchant. The purpose of the service was to enable merchants to minimize the number of bad checks they accepted. In holding that the service was not taxable as a telecommunications service, the court explained that the “true object” of the transaction was not the provision of a telecommunications service, but rather access to the account information provided by Equifax.

In contrast, the Tennessee Court of Appeals held in *BellSouth Telecommunications, Inc. v. Johnson*, No. M2005-00865-COA-R3-CV (Tenn.Ct.App. October 27, 2006), that certain services involving voice mail were taxable as telecommunications services. BellSouth offered voice mail services that included alerting customers to the receipt of messages on their home phones, notifying customers of new messages on the customers’ pagers, allowing customers to exchange information through messaging with other customers, and allowing customers to classify messages as urgent. The court found based on these facts that the “true object” of the voice mail services was to transmit, albeit in a delayed manner, voice, data, audio, video or other information to a point or between points, and that the service was therefore a “telecommunications service” as defined under Tenn. Code Ann. § 67-6-102(81). As the court explained, a caller uses a telephone to call the person with whom he wants to speak. If there is no answer, the caller may leave a recording, stored on BellSouth’s computers, for the recipient to receive at a convenient time. Additionally, the court stated that the fact that the oral message is held in abeyance does not change the nature of the service provided; that is, the customer can communicate with a specific person through telephonic means. As such, the taxpayer was providing a taxable telecommunications service.

Under the facts provided, the Taxpayer provides its customers access to an interactive and automated telephone answer system. The answering system uses its software in conjunction with preprogrammed criteria from a customer in order to interpret a caller’s voice response and provide the caller with a list of options tailored to the caller’s needs. In the Taxpayer’s case, the services provided are answering services that do not come within the definition of “telecommunications services” under Tenn. Code Ann. § 67-6-102(81). Although some of the options provided to callers by the answering system’s response do transmit voice, data, audio, video, or any other information or signals to a point or between points, the primary purpose of the automated answering services provided by the Taxpayer is to answer customers’ phones after normal business hours and determine what options best suit the caller. Thus, the “true object” of the answering service is to answer the phones of customers during non-business hours and to determine a caller’s options, as opposed to providing telecommunication service. Therefore, the Taxpayer’s answering services are not “telecommunications” for purposes of Tenn. Code Ann. § 67-6-102(81), and are not subject to Tennessee sales tax as such.

2. Other subsections of Tenn. Code Ann. § 67-6-205 (2007)

The Taxpayer's answering services are not subject to the Tennessee sales tax pursuant to any other subsection of Tenn. Code Ann. § 67-6-205 (2007). Specifically, the answering services are not subject to the sales tax as ancillary services pursuant to Tenn. Code Ann. § 67-6-205.

The furnishing of "ancillary services" for a consideration is subject to the Tennessee sales tax pursuant to Tenn. Code Ann. § 67-6-205(c)(9) (2007). Tenn. Code Ann. § 67-6-102(4) (2007) defines the term "ancillary services" as "services that are associated with, or incidental to, the provision of telecommunication services, including, but not limited to, detailed telecommunications billing service, directory assistance service, vertical service, and voice mail service."¹ Tenn. Code Ann. § 67-6-102(4)(E) (2007) defines the term "voice mail service" as an ancillary service that "enables the customer to store, send or receive recorded messages." "Vertical services" include any ancillary services that "are offered in connection with one or more telecommunications services, that offers advanced calling features that allow customers to identify callers and to manage multiple calls and call connections, including conference bridging services."

The Taxpayer's answering services do not constitute a voice mail service or a vertical service. First, the taxpayer does not offer any of the advanced calling features that allow customers to identify callers and to manage multiple calls and call connections, including conference bridging services. Next, the Taxpayer's answering services do not come within the definition of "voice mail service" because the Taxpayer's primary purpose is to answer its customers' calls and determine a caller's options based on the caller's voice responses during non-work hours. See *Prodigy Services Corp., Inc. v. Johnson*, 125 S.W.3d 413 (Tenn.Ct.App. 2003); *Equifax Check Services, Inc. v. Johnson*, No. M1999-00782-COA-R3-CV, 2000 Tenn.Ct.App. LEXIS 412 (Tenn.Ct.App. June 27, 2000); *BellSouth Telecommunications, Inc. v. Johnson*, No. M2005-00865-COA-R3-CV (Tenn.Ct.App. May 26, 2006). Although one of the options the Taxpayer provides allows its customers' callers to store, send or receive recorded messages, the "true object" of the Taxpayer's interactive and automated answering service is to answer the phones and directs calls of customers during non-business hours.

Accordingly, the Taxpayer's answering services are not subject to the Tennessee sales tax as ancillary services pursuant to Tenn. Code Ann. § 67-6-205(c)(9).²

Conclusion

The Taxpayer's answering services are not "telecommunications services" for purposes of Tenn. Code Ann. § 67-6-102(81) (2007), and are not subject to the Tennessee sales tax pursuant to Tenn. Code Ann. § 67-6-205 (2007). The answering services are not subject to the Tennessee sales tax pursuant to any other subsection of Tenn. Code Ann. § 67-6-205 (2007). Specifically,

¹ Ancillary services are specifically excluded from the definition of "telecommunication services" pursuant to Tenn. Code Ann. § 67-6-102.

² Note that the Taxpayer's answering services are not subject to taxation pursuant to any other provision of the Retailers' Sales Tax Act.

the answering services are not subject to the sales tax as “ancillary services” pursuant to Tenn. Code Ann. § 67-6-205(c)(9) (2007).

Tony Greer
Tax Counsel

APPROVED: Reagan Farr
Commissioner of Revenue

DATE: 3-12-08