

**TENNESSEE DEPARTMENT OF REVENUE
REVENUE RULING # 11-22**

WARNING

Revenue rulings are not binding on the Department. This presentation of the ruling in a redacted form is information only. Rulings are made in response to particular facts presented and are not intended necessarily as statements of Departmental policy.

SUBJECT

The application of the Tennessee sales and use tax to an online customer tracking and referral business.

SCOPE

Revenue Rulings are statements regarding the substantive application of law and statements of procedure that affect the rights and duties of taxpayers and other members of the public. Revenue Rulings are advisory in nature and are not binding on the Department.

FACTS

The Taxpayer operates an Internet website where customers can choose a vendor and access detailed information about the vendor. The information is located directly on the Taxpayer's website or is accessed by clicking on a link located on the Taxpayer's website that directs the customer to the vendor's website. Additionally, customers can submit purchase requests to the vendor through the Taxpayer's Internet site via email. Alternatively, the customer may telephone the vendor directly by using a telephone number posted on the website. The Taxpayer receives compensation for providing vendors' websites, for tracking customers, and for referring customers to vendors.

The Taxpayer charges a monthly fee for providing a vendor with a vendor-specific website established and maintained on behalf of the Taxpayer by a third party; the Taxpayer refers to this service as a "web hosting and maintenance" service. Title to and possession of the website never passes to the vendor and no software is ever installed on the vendor's computer. The vendor can only gain access to the website remotely via the Internet and cannot manipulate the content of the website.

The Taxpayer also charges a fee for each time a vendor receives a sales lead as a result of a customer visiting the Taxpayer's website, which is referred to by the Taxpayer as a "new product referral." If a customer visiting the Taxpayer's main website locates a vendor in which the customer is interested, the customer may request to be contacted by the vendor. The customer submits this request to the Taxpayer on the Taxpayer's main website. The Taxpayer then uses the customer's phone number or zip code to match the customer with the vendor's business

location that is nearest the customer. The Taxpayer then sends the customer's information to that vendor, who in turns contacts the customer.

Additionally, the Taxpayer charges a monthly fee that allows vendors to advertise their inventories of previously used products on the Taxpayer's main website.

Finally, the Taxpayer also charges vendors a monthly fee for "tracking services." These services include providing and displaying a telephone number on the Taxpayer's main website or on the vendor-specific website that allows customers to contact the vendor directly about new products. For an additional charge, the vendor may also display the telephone number in advertisements, not located on the Taxpayer's main website or on the vendor-specific website, that are purchased by the vendor from third parties. The tracking services also include providing the vendor with a report containing information collected from the telephone calls made to the telephone number such as the date, time, call duration, caller name, and caller telephone number. The Taxpayer contracts with an out-of-state third party to maintain and monitor the telephone number.

The Taxpayer's website and the technology supporting these four revenue sources reside on computers located outside the state of Tennessee. These computers are not owned by the Taxpayer, but rather they are owned by the third party that contracts with the Taxpayer to maintain the websites.

Currently, the Taxpayer collects Tennessee sales tax and files sales tax returns in Tennessee for sales that result from the operation of its website.

QUESTIONS

1. Are the charges for new product referrals subject to the Tennessee sales and use tax?
2. Is the monthly fee for vendors to advertise their pre-owned product inventories on the Taxpayer's website subject to the Tennessee sales and use tax?
3. Is the monthly fee for displaying a phone number and tracking customers through information obtained from phone calls made to the phone number subject to the Tennessee sales and use tax?
4. Is the monthly fee for providing vendors with a website subject to the Tennessee sales and use tax?

RULINGS

1. No. The charges for new product referrals are not subject to the Tennessee sales and use tax.
2. No. The monthly fee for vendors to advertise their pre-owned product inventories on Taxpayer's website is not subject to the Tennessee sales and use tax.
3. No. The monthly fee for displaying a phone number and tracking customers through information obtained from phone calls made to the phone number is not subject to the Tennessee sales and use tax.

4. No. The monthly fee for providing vendors with a website is not subject to the Tennessee sales and use tax.

ANALYSIS

1-3. New product referrals, used product advertising, and tracking services

The charges and fees for new product referrals, space on the Taxpayer's website to advertise used products, and tracking services are not subject to the Tennessee sales and use tax.

Under the Retailers' Sales Tax Act, TENN. CODE ANN. § 67-6-101 *et seq.*, retail sales of tangible personal property and specifically enumerated services in Tennessee are subject to sales and use tax. TENN. CODE ANN. § 67-6-102(79) (Supp. 2010) defines a "retail sale" as a "sale, lease, or rental for any purpose other than for resale, sublease, or subrent." The term "sale" includes "the furnishing of any of the things or services taxable" under the Tennessee sales and use tax laws. TENN. CODE ANN. § 67-6-102(81)(D).

The fees charged by the Taxpayer for new product referrals, used product advertising, and tracking services are all related to services, rather than the sale of tangible personal property. The Retailers' Sales Tax Act imposes the sales tax on certain services. The sales tax does not apply to all services; rather, it only applies to retail sales of those services specifically enumerated by the statute. *Ryder Truck Rental, Inc. v. Huddleston*, No. 91-3382-III, 1994 WL 420911 (Tenn. Ct. App. Aug. 12, 1994).¹ In particular, TENN. CODE ANN. § 67-6-205(c)(3) (Supp. 2010) imposes the sales tax on retail sales of the service of "furnishing, for a consideration, of intrastate, interstate or international telecommunication services."²

"Telecommunications service" is defined 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." TENN. CODE ANN. § 67-6-102(93)(A). However, the definition of "telecommunication service" specifically excludes data processing and information services, advertising, and Internet access services. TENN. CODE ANN. § 67-6-102(93)(B)(i),(iv),(vi).

The Taxpayer's referral, tracking, and advertising services are not subject to the Tennessee sales and use tax as telecommunication services. The Taxpayer's referral services include providing a vendor with contact information for customers who have expressed interest in that vendor's products. The customer provides this information to the Taxpayer via the Taxpayer's website. The Taxpayer's use of the Internet and its website to gather customer information and transmit it to a vendor could arguably be classified as the use of telecommunications services. However,

¹ Note that even if a service is not specifically enumerated by the statute, the service may be subject to the sales tax where charges for the service are included in the sales price of a taxable good or service. Specifically, TENN. CODE ANN. § 67-6-102(82)(A) provides that the sales price of a good or service equals the "total amount of consideration . . . for which personal property or services are sold." Thus, when the sale of a non-enumerated service is part of the sale of a taxable good or service, the charges for the non-enumerated service are included in the sales price of the taxable good or service and as such are subject to taxation.

² The new product referrals, used product advertising, and tracking services do not come within the scope of any other service enumerated under TENN. CODE ANN. § 67-6-205(c) or elsewhere in the Retailers' Sales Tax Act.

the Tennessee Court of Appeals has held that when a telecommunications service is merely used to deliver another service that is the true object of the transaction, the service cannot be subjected to the sales and use tax as a telecommunications service. *Equifax Check Servs., Inc. v. Johnson*, No. M1999-00782-COA-R3-CV, 2000 WL 827963 (Tenn. Ct. App. June 27, 2000).

Here, telecommunications services are only an incidental means of providing the Taxpayer's referral service, which is the true object of the transaction. The Taxpayer's tracking services include the furnishing of a toll free telephone number and the collection of data from calls made to that number. While the calls made to a vendor by way of the telephone number are clearly telecommunication services, the actual telephone service is provided by a third party and not by the Taxpayer. Importantly, the purpose of the Taxpayer's services is to generate data from the calls made to the telephone number, such as date, time, and duration of call, and transmitting this data to the vendor. Because a vendor's primary purpose in obtaining these services is to acquire the data from the telephone calls, the Taxpayer's tracking services are excluded from the definition of telecommunication services under TENN. CODE ANN. § 67-6-102(93)(B)(i) as data processing and information services.

Additionally, the Taxpayer also charges a fee for vendors to advertise their pre-owned products. Advertising is also specifically excluded from the definition of "telecommunication services" pursuant to TENN. CODE ANN. § 67-6-102(93)(B)(iv).

Accordingly, the Taxpayer's referral, tracking, and advertising services do not come within the definition of "telecommunication services" and are not subject to the Tennessee sales and use tax as such.³ Moreover, the Taxpayer's services do not come within the scope of any other enumerated service under the Retailers' Sales Tax Act. Therefore, the fees charged for product referrals, tracking services, and web site advertisements are not subject to the Tennessee sales and use tax.

4. *Vendor websites*

The monthly fee for providing a vendor with a website is not subject to the Tennessee sales and use tax.

The retail sale⁴ of tangible personal property, including computer software, is subject to the Tennessee sales and use tax. TENN. CODE ANN. § 67-6-202(a) (Supp. 2010). "Tangible personal property" is defined as "personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses" and expressly includes prewritten computer software. TENN. CODE ANN. § 67-6-102(92)(A). The sale of all computer software is subject to the Tennessee sales tax under TENN. CODE ANN. § 67-6-231 (Supp. 2010). TENN. CODE ANN. § 67-6-102(71) defines "prewritten computer software" as "computer software . . .

³ Note that any telecommunications services that the Taxpayer purchases in order to provide its nontaxable service are subject to the sales and use tax upon purchase.

⁴ TENN. CODE ANN. § 67-6-102(81)(A) defines the term "sale" in pertinent part as "any *transfer of title or possession, or both, exchange, barter, lease or rental*, conditional or otherwise, in any manner or by any means whatsoever of tangible personal property for a consideration." (Emphasis added.) A "lease or rental" occurs when there is a "transfer of possession or control" of tangible personal property for a fixed or indeterminate term for a consideration. TENN. CODE ANN. § 67-6-102(52).

that is not designed and developed by the author or other creator to the specifications of a specific purchaser.” “Computer software” is “a set of coded instructions designed to cause a computer or automatic data processing equipment to perform a task.” TENN. CODE ANN. § 67-6-102(20). Under these definitions, a website is properly characterized as computer software, and the transfer of a website for a consideration therefore constitutes a taxable sale of tangible personal property.

In the Taxpayer’s case, the fee a vendor pays for the provision of a vendor website does not represent a sale of tangible personal property, including prewritten computer software, or of custom computer software, because the Taxpayer does not transfer title, possession, or control of the website to the vendor at any time. Significantly, the vendor websites remain on third party servers on behalf of the Taxpayer at all times; the websites are never transferred to, or installed on, the vendors’ computers. In fact, vendors do not download or otherwise install software of any type on their own computers; rather, access to and use of the websites take place entirely over the Internet. Additionally, the vendors are unable to connect to the third party servers and have no way to manipulate the content of the vendor websites. Because title and possession of the software are never transferred to the vendor, there is no taxable sale of tangible personal property.

Furthermore, the fee charged for the provision of a vendor website is a fee for services rather than for the transfer of tangible personal property. However, such services are not included among any of the enumerated taxable services under the Retailers’ Sales Tax Act.⁵ Therefore, the monthly fee for providing a vendor with a website is not subject to the Tennessee sales and use tax.

5. Procedure for claiming refunds of Tennessee sales tax paid

The Taxpayer may request a refund for sales taxes previously collected and remitted to the Tennessee Department of Revenue on its charges for new product referrals, advertising space, tracking services, and vendor websites. The Taxpayer must follow the procedure for claiming refunds set forth under TENN. CODE ANN. § 67-1-1802 (Supp. 2010).

With respect to a refund of sales taxes paid, TENN. CODE ANN. § 67-1-1802(a)(1) requires that the Taxpayer first refund or credit the sales tax to its customers (in this case, the vendors). TENN. CODE ANN. § 67-1-1802(a)(1) also requires that the Taxpayer submit its claim for refund within three years from December 31 of the year in which the tax payment was made. The claim must set forth each ground upon which a refund is claimed, the amount of such refund, the tax period, the tax type, and any other information reasonably sufficient to apprise the Commissioner of Revenue of the general basis for the refund claim.⁶ It is recommended that the Taxpayer include a copy of this letter ruling with any claims for refund of sales taxes paid with respect to the new product referrals, advertising space, tracking services, and vendor websites.

⁵ As discussed above, the sales tax does not apply to all services; rather, it only applies to retail sales of those services specifically enumerated by the statute. *Ryder Truck Rental, Inc. v. Huddleston*, No. 91-3382-III, 1994 WL 420911 (Tenn. Ct. App. Aug. 12, 1994).

⁶ A Tennessee sales and use tax refund claim form is available on the Department’s website at <http://state.tn.us/revenue/forms/sales/f1403301.pdf>.

If a claim is not determined within the six-month period following receipt of the claim by the Commissioner, the claim shall be deemed denied for the purpose of filing suit in chancery court. TENN. CODE ANN. § 67-1-1802(b)(2). The Taxpayer must file suit on a denied refund claim in the appropriate Tennessee chancery court within one year from the date that the refund claim was filed with the Department. TENN. CODE ANN. § 67-1-1802(b)(1).

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