

TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING # 15-02

Letter rulings are binding on the Department only with respect to the individual taxpayer being addressed in the ruling. This ruling is based on the particular facts and circumstances presented, and is an interpretation of the law at a specific point in time. The law may have changed since this ruling was issued, possibly rendering it obsolete. The presentation of this ruling in a redacted form is provided solely for informational purposes, and is not intended as a statement of Departmental policy. Taxpayers should consult with a tax professional before relying on any aspect of this ruling.

SUBJECT

The application of the Tennessee sales and use tax to a company that promotes, sells, and delivers [TANGIBLE PERSONAL PROPERTY] to Tennessee customers on behalf of disclosed, third-party vendors.

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 ruling herein is binding upon the Department, and is 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], doing business as [D/B/A NAME] (the “Taxpayer”), is [REDACTED] company engaged in promoting, selling, and delivering [TANGIBLE PERSONAL PROPERTY] from third-party vendors to individual and business customers in Tennessee. [REDACTED], some of its contracted vendors are located outside of Tennessee. The Taxpayer enters into contracts with nearby [VENDORS OF TANGIBLE PERSONAL PROPERTY] to provide these functions and generates revenue through a flat delivery fee paid by customers on each order and a negotiated commission [REDACTED].

Through its website, the Taxpayer solicits and generates orders for the vendors’ [TANGIBLE PERSONAL PROPERTY] from Tennessee customers. The Taxpayer’s website presents the customers with the logo and slogan of each vendor, which the customers then click through to view and select [ITEMS OF TANGIBLE PERSONAL PROPERTY] available for purchase from the vendor. Customers pay the regular [LISTED SALES] price for each item of [TANGIBLE PERSONAL PROPERTY] ordered plus a flat delivery fee. Per its contracts with vendors, the Taxpayer collects sales tax on the total [LISTED SALES] price of the items purchased and the delivery fee. Additionally, the customers have the option of adding a tip to the order, which goes directly to the driver. The Taxpayer never imposes a mandatory tip.

Once a customer places an order and pays for it electronically through the Taxpayer’s online portal, the order is transmitted for fulfillment to the Taxpayer’s dispatch office in Tennessee. The customer funds are processed immediately through the Taxpayer’s bank and merchant accounts. Upon receiving the order at the dispatch office, the Taxpayer calls the appropriate vendor to place the [TANGIBLE PERSONAL PROPERTY] order.

The Taxpayer’s delivery drivers pick up the [TANGIBLE PERSONAL PROPERTY] from the vendor and deliver it to the customer’s address. The drivers typically do not use the dispatch office as a home base. Instead, they operate remotely and use text and cell phone to relay their location to the dispatch office. At the end of each week, the Taxpayer reconciles its orders by vendor and remits a payment to each vendor for that vendor’s portion of total [TANGIBLE PERSONAL PROPERTY] sales and all sales tax collected with respect to those sales. The Taxpayer retains its negotiated commission and all delivery fees.

RULING

Is the Taxpayer liable for the collection and remittance of Tennessee sales and use tax with respect to the [TANGIBLE PERSONAL PROPERTY] it promotes, sells, and delivers on behalf of its contracted vendors?

Ruling: No. The Taxpayer is acting on behalf of a disclosed seller, and as such, is not liable for the collection and remittance of Tennessee sales and use tax pursuant to TENN. COMP. R. & REGS. 1320-5-1-.01 (1974).

ANALYSIS

Under the Retailers' Sales Tax Act,¹ the retail sale in Tennessee of tangible personal property and specifically enumerated services is subject to the sales tax, unless an exemption applies. For purposes of the Tennessee sales and use tax, "retail sale" is defined as "any sale, lease, or rental for any purpose other than for resale, sublease, or subrent."² The term "sale" is defined in pertinent part to mean "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."³

The sales tax is collected from dealers.⁴ "Dealer" is defined under TENN. CODE ANN. § 67-6-102(23)(C) to include any person who "[s]ells at retail, or who offers for sale at retail, or who has in such person's possession for sale at retail," tangible personal property in this state. Every such person "making sales, whether within or outside the state, of tangible personal property, for distribution, storage, use, or other consumption in this state" is liable for the collection and remittance of sales and use tax.⁵

Notwithstanding the foregoing, a dealer may not be liable for the sales tax when it is acting on behalf of a disclosed third party. TENN. COMP. R. & REGS. 1320-5-1-.01 (1974) [hereinafter Rule 1] instructs that sales by a factor, auctioneer, or agent "entrusted with possession of . . . property for the purpose of sale" and "acting for a known or disclosed principal" are taxable to the principal, not the seller.

At most, the Taxpayer is taking and transferring possession of the vendors' [TANGIBLE PERSONAL PROPERTY] for the purpose of selling to Tennessee customers on behalf of the vendors. The Taxpayer promotes sales of the vendors' [TANGIBLE PERSONAL PROPERTY] on its website utilizing the vendors' own names, logos, slogans, and [TANGIBLE PERSONAL PROPERTY] descriptions. The Taxpayer takes possession of the [TANGIBLE PERSONAL PROPERTY] for the limited purpose of [REDACTED] delivery to a customer. While transporting the [TANGIBLE PERSONAL PROPERTY], the Taxpayer is prohibited from altering the [TANGIBLE PERSONAL PROPERTY] in any way and is required to make all reasonable efforts to maintain the [TANGIBLE PERSONAL PROPERTY] in the same condition in which the Taxpayer received it. Finally, the Taxpayer remits to the vendors all sales proceeds

¹ Tennessee Retailers' Sales Tax Act, ch. 3, §§ 1-18, 1947 Tenn. Pub. Acts 22, 22-54 (codified as amended at TENN. CODE ANN. §§ 67-6-101 to -907 (2013)).

² TENN. CODE ANN. § 67-6-102(76) (Supp. 2014).

³ TENN. CODE ANN. § 67-6-102(78)(A). "Tangible personal property" includes "property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses." TENN. CODE ANN. § 67-6-102(89)(A). [REDACTED].

⁴ TENN. CODE ANN. § 67-6-501(b) (2013).

⁵ TENN. CODE ANN. § 67-6-501(a).

and the taxes it collects with respect to those sales, retaining only the delivery fee and its pre-determined commission.⁶

Thus, to the extent the Taxpayer makes sales of [TANGIBLE PERSONAL PROPERTY] to customers in Tennessee, it does so acting on behalf of the vendor with whom it contracts. Because the third-party vendors are always disclosed on the Taxpayer's website, Rule 1 applies, with the result being that the Taxpayer is not liable for collecting Tennessee sales tax on such sales.

Accordingly, the Taxpayer is not liable for the Tennessee sales and use tax on its sales of [TANGIBLE PERSONAL PROPERTY] made on behalf of third-party vendors to customers in Tennessee.⁷

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APPROVED: Richard H. Roberts
Commissioner of Revenue

DATE: June 10, 2015

⁶ The delivery fee is subject to sales tax because it is included in the sales price of the [TANGIBLE PERSONAL PROPERTY]. See TENN. CODE ANN. § 67-6-102(79)(A). However, any discretionary tip going directly to the delivery drivers is not part of the sales price and, therefore, is not subject to tax. See TENN. COMP. R. & REGS. 1320-5-1-.76 (1992).

⁷ Note that any out-of-state [TANGIBLE PERSONAL PROPERTY] vendor engaging the Taxpayer for making sales of [TANGIBLE PERSONAL PROPERTY] to Tennessee customers will have sufficient nexus with Tennessee for purposes of the Tennessee sales and use tax. Thus, any such out-of-state dealer must register for the Tennessee sales and use tax and collect and remit all taxes due on sales to Tennessee customers. See TENN. CODE ANN. § 67-6-501(a).