

TENNESSEE DEPARTMENT OF REVENUE  
LETTER RULING # 18-05

**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 Tennessee sales and use tax to a not-for-profit entity's lease or rental of [TRANSPORTATION VEHICLES] for recreational use.

**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] (the "Taxpayer") is a [STATE] nonprofit corporation that is exempt from federal income taxation under Internal Revenue Code § 501(a) as an organization described in § 501(c)(3). The

Taxpayer's primary purpose is operating a [TRANSPORTATION VEHICLE] share program in [TENNESSEE CITY]. [REDACTED].

The [TRANSPORTATION VEHICLE] share program consists of [TRANSPORTATION VEHICLES] located in [STRUCTURES] throughout the city that are available to the public on-demand. [CUSTOMERS] can access the [TRANSPORTATION VEHICLE] by paying a single-use walk-up fee (the "Single Use Fee"), or by purchasing a weekly, monthly or yearly membership (collectively, a "Membership") by paying the appropriate fee (collectively, the "Membership Fees").

The Single Use Fee allows a customer to use a [TRANSPORTATION VEHICLE] for sixty minutes. The weekly membership allows a customer unlimited sixty-minute [USAGE] for one week. The monthly membership allows a [CUSTOMER] unlimited sixty-minute [USAGE] for one month, includes a free membership card, and automatically renews upon expiration. The yearly membership allows a [CUSTOMER] unlimited sixty-minute [USAGE] for one year, includes a free membership card, and automatically renews upon expiration.

The Taxpayer may also charge customers one or more of the following fees when applicable: Usage Fees, Out of Hub Fees, Out of Service Area Fees, or Stolen [TRANSPORTATION VEHICLE] Fees. The Taxpayer charges a Usage Fee of \$5.00 for each additional sixty-minute period, or portion thereof, that a customer keeps a [TRANSPORTATION VEHICLE] for longer than the initial sixty-minute period. The maximum daily Usage Fee is \$100.00. The Taxpayer charges a \$10.00 Out of Hub Fee when a customer does not properly dock a [TRANSPORTATION VEHICLE] after use. The Taxpayer charges a \$25.00 Out of Service Area Fee to customers who take a [TRANSPORTATION VEHICLE] out of the designated service area. And the Taxpayer charges a Stolen [TRANSPORTATION VEHICLE] Fee of \$2,000.00 when a customer does not return a [TRANSPORTATION VEHICLE] within 24 hours.

## RULINGS

1. Are the Taxpayer's Membership Fees exempt from the Tennessee sales and use tax pursuant to TENN. CODE ANN. § 67-6-330(a)(3) (Supp. 2017)?

Ruling: No. The Membership Fees are not exempt from the Tennessee sales and use tax pursuant to TENN. CODE ANN. § 67-6-330(a)(3). Rather, the Membership Fees are subject to the Tennessee sales and use tax because they are charges for the retail sale or rental of tangible personal property.

2. Are the Taxpayer's Single Use Fees subject to Tennessee sales and use tax?

Ruling: Yes. The Single Use Fees are subject to the Tennessee sales and use tax as charges for the lease or rental of tangible personal property.

3. Are the Taxpayer's Usage Fees, Out of Hub Fees, Out of Service Area Fees, and Stolen [TRANSPORTATION VEHICLE] Fees subject to Tennessee sales and use tax?

Ruling: Yes. The Usage Fees, Out of Hub Fees, Out of Service Area Fees, and Stolen [TRANSPORTATION VEHICLE] Fees are subject to the Tennessee sales and use tax as charges for the lease or rental of tangible personal property.

## ANALYSIS

Under the Retailers' Sales Tax Act,<sup>1</sup> the retail sale in Tennessee of tangible personal property and specifically enumerated services is subject to the sales and use tax, unless an exemption applies. "Retail sale" is defined as "any sale, lease, or rental for any purpose other than for resale, sublease, or subrent."<sup>2</sup>

TENN. CODE ANN. § 67-6-102(78)(A) (Supp. 2017) defines "sale," 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<sup>3</sup> for a consideration." "Lease or rental" is the "transfer of possession or control of tangible personal property for a fixed or indeterminate period of time for consideration."<sup>4</sup>

TENN. CODE ANN. § 67-6-204(a) (2013) imposes tax on the "sales price of all leases and rentals of tangible personal property." The "sales price" upon which tax is due is the "total amount of consideration paid, including cash, credit, property, and services, for which personal property or services are sold, leased, or rented, valued in money, whether received in money or otherwise."<sup>5</sup>

Not all transactions readily lend themselves to classification for sales tax purposes. In order to resolve the tension in these difficult transactions, Tennessee courts have developed a line of inquiry that focuses on what is the "true object"<sup>6</sup> of the transaction.<sup>7</sup> In applying this test, the courts look at the totality of the facts and circumstances<sup>8</sup> to determine what objective is really being accomplished by the transaction.<sup>9</sup>

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<sup>1</sup> 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 & Supp. 2017)).

<sup>2</sup> TENN. CODE ANN. § 67-6-102(76) (Supp. 2017).

<sup>3</sup> "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).

<sup>4</sup> TENN. CODE ANN. § 67-6-102(49).

<sup>5</sup> TENN. CODE ANN. § 67-6-102(79)(A). *See also* TENN. COMP. R. & REGS. 1320-05-01-.32(1) (1987).

<sup>6</sup> This inquiry is sometimes stated as the "primary purpose" test. *See generally Qualcomm, Inc. v. Chumley*, No. M2006-01398-COA-R3-CV, 2007 WL 2827513, at \*4-5 (Tenn. Ct. App. Sept. 26, 2007) (giving a synopsis of the "true object" or "primary purpose" test in Tennessee).

<sup>7</sup> This analysis is not entirely unique to Tennessee, but the application of the test does vary in other states. *See generally* 2 JEROME HELLERSTEIN ET AL., STATE TAXATION: SALES AND USE, PERSONAL INCOME, AND DEATH AND GIFT TAXES AND INTERGOVERNMENTAL IMMUNITIES ¶ 12.08[1], at 12-108 (3d ed. 1998 & Supp. 2014) (discussing the "true object" test).

<sup>8</sup> *See, e.g., AOL, Inc. v. Roberts*, No. M2012-01937-COA-R3-CV, 2013 WL 4067977, at \*6 (Tenn. Ct. App. Aug. 12, 2013) (basing the holding on the "totality of the circumstances").

<sup>9</sup> Note that it could be possible that there is not a single true object of the transaction, but rather multiple objects of the transaction. In that case, each object of the transaction should be analyzed separately for tax purposes. *Cf. Penske Truck Leasing Co. v. Huddleston*, 795 S.W.2d 669, 670-71 (Tenn. 1990) (holding that a long-term truck lease agreement and a fuel agreement were truly separate agreements and should be treated as separate transactions for sales tax purposes, despite being embodied in a single contract document).

When a transaction involves taxable and nontaxable components and the transaction's true object or a "crucial,"<sup>10</sup> "essential,"<sup>11</sup> "necessary,"<sup>12</sup> "consequential,"<sup>13</sup> or "integral"<sup>14</sup> element of the transaction is subject to tax, the entire transaction is subject to sales tax.<sup>15</sup> Only if the true object of the transaction is not independently subject to sales tax and the items that would be subject to sales tax are "merely incidental" to the true object of the transaction will the transaction not be subject to sales tax.<sup>16</sup>

For the reasons explained below, the true object of the transactions at issue is the lease or rental of a [TRANSPORTATION VEHICLE] to a retail customer. Accordingly, all of the Taxpayer's fees are subject to the Tennessee sales and use tax.

### **MEMBERSHIP FEES**

The Membership Fees are subject to the Tennessee sales and use tax because the true object of these transactions is the lease or rental of tangible personal property, which is taxable under TENN. CODE ANN. § 67-6-204(a).

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<sup>10</sup> See, e.g., *Thomas Nelson, Inc. v. Olsen*, 723 S.W.2d 621, 624 (Tenn. 1987) (holding that a transaction involving the sale of non-taxable intangible advertising concepts was nevertheless subject to sales tax on the entire amount of the transaction because advertising models, which were tangible personal property, were an "essential," "crucial," and "necessary" element of the transaction).

<sup>11</sup> *Id.*; see also *AT&T Corp. v. Johnson*, No. M2000-01407-COA-R3-CV, 2002 WL 31247083, at \*8 (Tenn. Ct. App. Oct. 8, 2002) (holding that a transaction involving the sale of engineering services along with separately itemized tangible telecommunications systems was subject to sales tax on the entire amount of the contract because "equipment, engineering, and installation combine in this instance to produce BellSouth's desired result: a functioning item of tangible personal property assembled on the customer's premises," and further describing the engineering services as "essential" and "integral" to the sale of tangible personal property).

<sup>12</sup> See *supra* note 11.

<sup>13</sup> See *Rivergate Toyota, Inc. v. Huddleston*, No. 01A01-9602-CH-00053, 1998 WL 83720, at \*4 (Tenn. Ct. App. Feb. 27, 1998) (holding that a transaction involving the commission and distribution of advertising brochures was subject to sales tax on the "entire cost of the transaction" because, although the transaction involved a number of services, the brochures themselves "were not inconsequential elements of the transaction but, in fact, were the sole purpose of the contract").

<sup>14</sup> See *AT&T Corp. v. Johnson*, 2002 WL 31247083, at \*8.

<sup>15</sup> See Tenn. Dept. of Rev. Ltr. Rul. 14-10 (Oct. 14, 2014) (discussing Tennessee law regarding the "true object" test).

<sup>16</sup> See generally *id.*

[TRANSPORTATION VEHICLES] are clearly tangible personal property because they are “property that can be seen, weighed, measured, felt, or touched.”<sup>17</sup> The Taxpayer is transferring possession of tangible personal property to its customers for a consideration, without transferring title to the property. Thus, the Taxpayer is leasing or renting tangible personal property to its customers, and such transfer is subject to the Tennessee sales and use tax.

One could argue that the Membership Fees are not lease or rental payments because a customer could pay a fee to join the Taxpayer’s program, and never actually use a [TRANSPORTATION VEHICLE]. While this may be true, it is also true that the Taxpayer does not charge additional fees for simply checking out a [TRANSPORTATION VEHICLE]. Additionally, the Membership itself confers no benefits other than the right to use a [TRANSPORTATION VEHICLE]. Thus, the Taxpayer’s customers do not purchase a Membership for any reason other than to use a [TRANSPORTATION VEHICLE].

The Taxpayer has inquired whether its Membership Fees are exempt from sales and use tax under TENN. CODE ANN. § 67-6-330(a)(3). TENN. CODE ANN. § 67-6-212 (2013), informally referred to as the “amusement tax,” imposes “a tax at a rate equal to the rate of tax levied on the sale of tangible personal property at retail by Tenn. Code Ann. § 67-6-202 (the sales tax) on the sales price”<sup>18</sup> of certain recreational and entertainment activities. One of the items listed as taxable under TENN. CODE ANN. § 67-6-212 is “[d]ues or fees to membership sports and recreation clubs.”<sup>19</sup>

TENN. CODE ANN. § 67-6-330(a) exempts from the amusement tax certain transactions that are otherwise taxable as “amusements” under TENN. CODE ANN. § 67-6-212. TENN. CODE ANN. § 67-6-330(a)(3) provides an exemption for “[m]embership application fees, dues or contributions except that portion attributable to admission prices, paid to institutions and organizations that have received a determination of exemption from the internal revenue service, pursuant to 26 U.S.C. § 501(c)(3), (8) and (19) that are currently operating under such exemption.” As noted above, the Taxpayer is a 501(c)(3) organization.

The Taxpayer’s Membership Fees fail to qualify under this exemption because under the application of the true object analysis, the Membership Fees are charges for the lease or rental of tangible personal property and are not membership dues within the meaning of TENN. CODE ANN. § 67-6-330(a)(3). Accordingly, the Membership Fees are properly subject to sales and use tax under TENN. CODE ANN. § 67-6-204(a) as charges for the lease or rental of tangible personal property.

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<sup>17</sup> TENN. CODE ANN. § 67-6-102(89)(A).

<sup>18</sup> TENN. CODE ANN. § 67-6-212(a) (2013). *See also* TENN. COMP. R. & REGS. 1320-05-01-.115.

<sup>19</sup> TENN. CODE ANN. § 67-6-212(a)(1) (2013).

## **SINGLE USE FEES**

The Single Use Fees are subject to the Tennessee sales and use tax because they are charges for the retail sale or rental of tangible personal property. The Single Use Fees are not exempt from the Tennessee sales and use tax pursuant to TENN. CODE ANN. § 67-6-330(a)(5)(ii).

The Single Use Fees are subject to the Tennessee sales and use tax as the rental of tangible personal property for a consideration. As stated above, the Taxpayer is transferring possession of tangible personal property to its customers for a consideration, without transferring title to the property. Thus, the Taxpayer is renting tangible personal property to its customers, and such transfer is subject to the Tennessee sales and use tax.

The Taxpayer has inquired whether its Single Use Fees are exempt from sales tax under TENN. CODE ANN. § 67-6-330(a)(5)(ii), which exempts from the sales tax on amusements the sales price of admissions to amusement or recreational activities conducted, produced or provided by organizations that are exempt from federal income tax under Internal Revenue Code Section 501(c)(3).<sup>20</sup>

Although the Taxpayer is an organization that is exempt from federal income tax under Internal Revenue Code Section 501(c)(3), the Single Use Fee is not a fee paid for admission to an amusement or recreational activity conducted, produced or provided by the Taxpayer. The Single Use Fee is a payment for the rental of a [TRANSPORTATION VEHICLE] for an allotted amount of time. Therefore the Single Use Fees are subject to sales and use tax under TENN. CODE ANN. § 67-6-204(a) as charges for the rental of tangible personal property.

## **USAGE FEES, OUT OF HUB FEES, OUT OF SERVICE AREA FEES, AND STOLEN [TRANSPORTATION VEHICLE] FEES**

Regardless of their characterization, the Taxpayer's Usage Fees, Out of Hub Fees, Out of Service Area Fees, and Stolen [TRANSPORTATION VEHICLE] Fees (collectively the "Additional Fees") are all additional charges for the rental of tangible personal property and as such are subject to the Tennessee sales and use tax.

As discussed above, sales tax is due on "the sales price of all leases and rentals of tangible personal property."<sup>21</sup> The "sales price" upon which tax is due is the "total amount of consideration paid, including cash, credit, property, and services, for which personal property or services are sold, leased, or rented, valued in money, whether received in money or otherwise."<sup>22</sup> Accordingly, the Additional Fees will be included in the sales price if they constitute part of the total consideration for the rental of a [TRANSPORTATION VEHICLE].

As noted above, the "sales price" of a lease or rental is "the total amount of consideration" for which personal property is leased or rented.<sup>23</sup> The Tennessee Court of Appeals has stated that, for

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<sup>20</sup> TENN. CODE ANN. § 67-6-330(a)(5)(A)(ii).

<sup>21</sup> TENN. CODE ANN. § 67-6-204(a).

<sup>22</sup> TENN. CODE ANN. § 67-6-102(79)(A). *See also* TENN. COMP. R. & REGS. 1320-05-01-.32(1) (1987).

<sup>23</sup> *Id.*

purposes of the Tennessee sales and use tax, the term “consideration” means “either a benefit to the promisor or a detriment to or obligation on the promisee.”<sup>24</sup> The Additional Fees clearly constitute an obligation on the part of the customer who is required to pay one or more of them in the event he or she fails to timely return a [TRANSPORTATION VEHICLE], fails to properly dock a [TRANSPORTATION VEHICLE], takes a [TRANSPORTATION VEHICLE] out of the designated service area, or fails to return a [TRANSPORTATION VEHICLE] within 24 hours. Moreover, the customer takes on this obligation specifically in return for the right to rent a [TRANSPORTATION VEHICLE]. Accordingly, the Additional Fees constitute part of the total consideration paid for the rental of a [TRANSPORTATION VEHICLE]. The Additional Fees are therefore properly included in the total sales price charged for renting a [TRANSPORTATION VEHICLE] for purposes of TENN. CODE ANN. § 67-6-204(a), and as such are subject to the Tennessee sales and use tax.

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APPROVED: David Gerregano  
Commissioner of Revenue

DATE: 9/21/18

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<sup>24</sup> *Nashville Clubhouse, Inc. v. Johnson*, 27 S.W.3d 542, 545 (Tenn. Ct. App. 2000) (citing *Trailer Conditioners, Inc. v. Huddleston*, 897 S.W.2d 728, 731 (Tenn. Ct. App. 1995)).