

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING #96-23**

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

Sales and use tax liability of [THE TAXPAYER] on weight loss seminar fees and property distributed to seminar participants.

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

[THE TAXPAYER] produces and conducts weight management seminars which are conducted exclusively through [PARTICIPATING ORGANIZATIONS]. A flat fee

(currently \$[AMOUNT]) per participant is charged for these seminars. The program and materials cannot be purchased directly by individuals. The participants attend twelve weekly class sessions, usually held at the participating [PARTICIPATING ORGANIZATION]. [THE TAXPAYER] prepares video taped class sessions. The participating [PARTICIPATING ORGANIZATIONS] use the video tapes to conduct the classes. Each videotaped lecture lasts approximately forty-five minutes. A volunteer (usually a [PARTICIPATING ORGANIZATION] member) assumes responsibility for showing the video tape. After the classes are conducted, the [PARTICIPATING ORGANIZATION] returns the video tape to [THE TAXPAYER]. Generally, a large number of class participants return for class each week throughout the twelve-week course.

[THE TAXPAYER] employs several trained staff members to provide counseling by telephone to class participants. Class participants have access to counseling through an incoming WATS (1-800) number. [THE TAXPAYER] also employs outreach directors who work with the [PARTICIPATING ORGANIZATIONS] to ensure that the program is properly presented. The outreach directors are available to provide advice with respect to the presentation of the course. The counseling staff and outreach directors are located at [THE TAXPAYER]'s offices in [CITY], Tennessee.

[THE TAXPAYER] provides to the seminar participants a workbook for use in conjunction with the classes and audio tapes as encouragement to apply the principles covered in the class sessions. The workbook and audio tapes cannot be purchased separately from seminar participation, and are distributed only to participants in the classes. [THE TAXPAYER] prepares the text of the workbooks and contracts with a commercial printer for the printing and production of the workbooks. [THE TAXPAYER] produces master audio and video cassette tapes, in a commercial recording studio. [THE TAXPAYER] purchases blank audio and video cassette tapes, tape cases and tape portfolios, and reproduces the audio and video cassette tapes at its facility in [CITY], Tennessee.

ISSUES

1. Are the seminar fees collected by [THE TAXPAYER] subject to sales tax?
2. What is the proper sales or use tax treatment of the seminar materials (workbooks and audio tapes) provided to seminar participants?

RULINGS

1. The fees received by [THE TAXPAYER] for participation in its seminars are in payment for rendering a service which is not subject to sales or use tax.

2. [THE TAXPAYER] is required to pay sales or use tax on the purchase of materials for utilization in its seminar presentations.¹ The proper tax base is the purchase price of the materials.

ANALYSIS

The first question to consider in determining if [THE TAXPAYER]'s receipts are subject to sales tax is whether [THE TAXPAYER] is providing a taxable service. T.C.A. § 67-6-205 imposes sales taxes on "all services taxable under this part." The sales tax does not apply to all services; it applies only to those services specifically enumerated by the statute. *Ryder Truck Rental, Inc. v. Huddleston*, 1994 Tenn. App. LEXIS 444. T.C.A. § 67-6-102(23)(F) lists the services which are subject to sales tax. Conducting seminars is not one of the taxable services listed in T.C.A. § 67-6-102(23)(F).

The next consideration of taxability is whether [THE TAXPAYER]'s receipts are subject to sales tax as an amusement. It appears that the seminar provided by [THE TAXPAYER] is not a taxable amusement within the ambit of T.C.A. §§ 67-6-102(23)(G) and 67-6-212.

The final consideration is whether the fee paid to [THE TAXPAYER] is for the purchase of the tangible personal property provided, or if the transfer of such property is incidental to the service provided to the participant. [THE TAXPAYER] furnishes workbooks and audio tapes to participants in the seminars. Written materials and audio tapes are distributed to the participants, but the participants' primary objective in attending the seminar is to acquire knowledge from the video taped lectures, not to receive the written or audio tape materials. The workbooks and audio tapes would appear to be considerably less useful to the participants without attendance at the class sessions. The benefit of group support which can only be obtained through class attendance is important to the total weight loss program. Access to the available counseling is likewise a significant component of the entire program. In short, the seminars can be viable programs without the workbooks and audio tapes, but the workbooks and audio tapes do not constitute a viable program without the seminars. Here, the workbooks and audio tapes are incidental to the class participation.

In determining the sales tax treatment of tangible personal property which is provided to the customer as a part of a larger transaction which does not entirely consist of the sale of tangible personal property, the Tennessee courts have looked to whether the property is a "crucial element" of the total transaction, in which case the transaction is taxable as the sale of tangible personal property, or whether the property is incidental to the total transaction, in which case the transaction is not considered a sale of tangible personal property. In *Thomas Nelson, Inc. v. Olsen*, 723 S.W.2d 621 (Tenn. 1987), the Supreme

¹ These materials include, but are not limited to, materials for producing manuals and workbooks (paper, ink, covers, etc.), materials for producing audio tapes (blank tapes, cassette cases, tape portfolios), and materials for producing video tapes.

Court upheld a use tax assessment upon transactions involving services which, without the transfer of tangible personal property to the customer, would have clearly been exempt. The Court held that models transferred to the customer were a crucial element of the contract, without which the otherwise nontaxable portion of the contract could not have been performed, and not merely incidental by-products of the otherwise nontaxable service included in the contract. *Id.* at 624. In *Thomas Nelson*, the Court reviewed and explained two earlier cases. In *Crescent Amusement Co. v. Carson*, 187 Tenn. 112, 213 S.W.2d 27 (1948), the Court upheld the imposition of the sales tax on the rental of motion picture film to theaters. The Court rejected the argument that the rental payment was for a nontaxable license, because the film was the *only* means by which the purchaser could exercise the nontaxable license. *Thomas Nelson*, 723 S.W.2d at 623. *Commerce Union Bank v. Tidwell*, 538 S.W.2d 405 (Tenn. 1976), involved the sale of computer software. The software, which the court regarded as information or nontaxable intellectual intangible property, was transferred to the purchaser by means of punch cards, tapes, or discs. The software was often accompanied by manuals. The Court held that the tangible personal property transferred as a part of the transaction was incidental to the total purchase which was not a taxable sale of tangible personal property. *Id.* at 408.

Under these particular facts, it appears the fee paid is not for the tangible personal property received. The audio tapes and workbooks are not a crucial element of the total sale. Rather, the workbooks and audio cassettes are incidental to participation in the seminar. In this situation the charge is not for the materials but for participation in the seminar, and therefore is not subject to sales tax.²

In summation, [THE TAXPAYER] is not required to collect and remit sales tax with respect to the seminar fees.

Because [THE TAXPAYER] is not selling the audio tapes, video tapes and workbooks, [THE TAXPAYER]'s purchase of materials utilized by it in the production of workbooks, audio tapes, and video tapes are sales at retail, as defined in T.C.A. § 67-6-102(23)(A), and the vendor is required to collect sales tax on the sales price as defined in T.C.A. § 67-6-102(25). [THE TAXPAYER] should not issue a certificate of resale to its vendors for these items. Tenn. Comp. R. & Regs. 1320-5-1-.68(3). To the extent the vendor of such materials does not collect sales tax from [THE TAXPAYER], [THE TAXPAYER] is required to accrue and remit use tax on the cost of such materials as provided in T.C.A. §§ 67-6-203 and 67-6-210.

Owen Wheeler
Tax Counsel 3

² This analysis is based on there being no separate charge for the seminar materials.

APPROVED: Ruth E. Johnson

DATE: 7/11/96