

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING # 96-24**

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

The application of sales and use tax to [THE TAXPAYER], a Tennessee corporation, to publications which are printed by a Tennessee printer in the following scenarios:

- (1) The publications are shipped by common carrier or are mailed out-of-state by a Tennessee Printer to non-residents of Tennessee;
- (2) The publications are mailed out-of-state by a Tennessee Mailer to non-residents of Tennessee, where the Mailer contracts with the Tennessee Printer to perform mailing services, and no legal relationship exists between the Mailer and the Taxpayer; and
- (3) The publications are mailed out-of-state by a Tennessee Mailer to non-residents of Tennessee, where the Mailer contracts with the Taxpayer to perform mailing 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 but 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

1. **Generally.** The taxpayer is and will be producing revenue from several sources. Primarily, the taxpayer is and will be in the business of producing various publications related to the field of [FIELD]. The principal publications that will be produced by the taxpayer are [PUBLICATION 1], [SUPPLEMENT TO PUBLICATION 1], Monographs, and Newsletters (referred to collectively as the “Publications” and individually as “Publication”). Also, the taxpayer will frequently reprint various articles from the Publications at the request of various [BUSINESS TYPE] companies (“Reprints”). The facts with respect to each Publication are represented below.

2. **[PUBLICATION 1].** [PUBLICATION 1] is a [PROFESSION] magazine which contains various educational articles related to the field of [FIELD] and is approximately [NUMBER] pages in length. Articles that are published in the [PUBLICATION 1] are written by various [PROFESSIONALS] and other specialists, domestic and international. Generally, articles in the [PUBLICATION 1] relate to current [PROBLEMS] in our society, as well as current or proposed treatments with respect to such [PROBLEMS]. The [PUBLICATION 1] also contains roughly [NUMBER] pages of advertisements by various [BUSINESS TYPE] companies.

The [PUBLICATION 1] has been and will be published once a month on a regular basis and mailed to approximately [NUMBER] readers (it is estimated that [NUMBER] are and will be located throughout the United States and [NUMBER] will be international). It is anticipated that approximately [NUMBER] of the [NUMBER] readers will subscribe to the [PUBLICATION 1] and the remaining readers will receive the [PUBLICATION 1] at no cost.

3. **Supplement.** A Supplement to the [PUBLICATION 1], if any, will be part of the same copyright as the [PUBLICATION 1] and will contain educational articles related to the field of [FIELD] but will typically address specific topics. An advertiser’s name will be prominently displayed on the inside cover of the Supplement.

Supplements to the [PUBLICATION 1] will be published sporadically depending on funds available, interest, etc. If a Supplement to the [PUBLICATION 1] is published, generally it will be separately bound and mailed.

4. **Monographs and Newsletters.** Monographs and Newsletters are Publications that each contain articles that typically relate to specific [PROBLEMS] and existing or proposed treatments. Monographs are typically [NUMBER] pages in length and an advertiser’s name is prominently displayed on the inside cover of the Monographs. Newsletters are typically [NUMBER] pages in length and contain [NUMBER] pages of advertising.

Monographs and Newsletters will be produced sporadically depending on funds available, interest, etc. These Publications will be mailed to readers located throughout the United States. The readers' addresses will be derived from a mailing list supplied by a non-resident mail list company, which is typically selected by a non-resident [BUSINESS TYPE] company.

5. **Shipment of Publications.** With respect to each Publication, the Taxpayer will use the articles submitted by the various authors to produce a draft of a Publication for printing and delivering such draft to a Tennessee printer (the "Printer"). The Taxpayer will continue to oversee the printing of the Publications for quality control purposes and may from time to time receive proofs for inspection.

Upon approval of a final draft by the Taxpayer, the Printer will print the Publications in final form and deliver a small number of samples to the Taxpayer for archive purposes.

The remaining Publications may be handled in one of three ways: (1) the Printer will deliver the remaining copies directly to a Tennessee mailer (the "Mailer"); or (2) the Printer will retain possession of the Publications and perform the labeling and mailing functions; or (3) the Printer will ship part or all of the Publications by common carrier to non-residents of Tennessee.

With respect to Publications delivered to the Mailer, address labels will be delivered directly to the Mailer from a non-resident mail list company. The Mailer will then affix the address labels to the Publications and deliver them directly to the U.S. Postal Service for mailing.

With respect to Publications mailed by the Printer, address labels will be delivered directly to the Printer from a non-resident mail list company. The Printer will then affix the address labels to the Publications and deliver them directly to the U.S. Postal Service for mailing.

With respect to Publications shipped by common carrier, the Printer will directly deliver such Publications to the common carrier for delivery outside of Tennessee. Typically, part or all of the Monographs and Newsletters will be handled in this fashion.

The Printer will bill the Taxpayer for its work. The Mailer will either be paid by the Taxpayer or the Printer, depending on the agreement of the parties. The Taxpayer will pay the U.S. Postal charge for any items mailed. Charges for common carrier shipping will be born by the Taxpayer or a non-resident third party, depending on the agreement of the parties. Any common carrier shipment charges paid by the Printer will be billed by the Printer to the Taxpayer.

6. **Reprints.** From time to time, the Taxpayer will instruct the Printer to make a specified number of copies of specified articles from the Publications (and, infrequently, copies of an entire Publication). Generally, the Printer will ship the copies by common

carrier directly to one or more non-resident recipients, typically a non-resident [BUSINESS TYPE] company.

Charges for common carrier shipping will be born by the Taxpayer or the [BUSINESS TYPE] company, depending on the agreement of the parties. Any common carrier shipment charges paid by the Printer will be billed by the Printer to the Taxpayer.

7. **Publications produced for export.** The Publications, when shipped out-of-state to a non-resident, will not be imported or mailed back to Tennessee by such non-resident or other third party.

QUESTIONS

Whether the Taxpayer will be subject to sales and use tax on the Publications if:

- (1) The Publications are shipped by common carrier or are mailed out-of-state by a Tennessee Printer to non-residents of Tennessee;
- (2) The Publications are mailed out-of-state by a Tennessee Mailer to non-residents of Tennessee, where the Mailer contracts with the Tennessee Printer to perform mailing services and where no legal relationship exists between the Tennessee Mailer and the Taxpayer; and
- (3) The Publications are mailed out-of-state by a Tennessee Mailer to non-residents of Tennessee, where the Mailer contracts with the Taxpayer to perform mailing services.

RULINGS

1. The Taxpayer will not be subject to sales or use tax on Publications which are shipped by common carrier or mailed out-of-state by a Tennessee Printer to non-residents of Tennessee.
2. The Taxpayer will not be subject to sales or use tax on Publications mailed out-of-state by a Tennessee Mailer to non-residents of Tennessee, where the Mailer contracts with the Printer to perform mailing services, and where no legal relationship exists between the Tennessee Mailer and the Taxpayer.
3. The Taxpayer will be subject to sales or use tax on Publications mailed out-of-state by a Tennessee Mailer to non-residents of Tennessee, where the Mailer contracts with the Taxpayer to perform mailing services.

ANALYSIS

T.C.A. Section 67-6-102(24)(A) provides that “‘Sale’ means 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[.]” T.C.A. Section 67-6-102(28) defines “tangible personal property” as including “personal property, which may be seen, weighed, measured, felt, or touched, or is in any other manner perceptible to the senses.” It is clear that the Publications constitute “tangible personal property” within the definition of the Code.

In order for a transaction involving the sale of tangible personal property to be subject to sales tax in Tennessee, there must be a transfer of title or possession of the personalty. With respect to the scenario set forth in Ruling 1, the Taxpayer contracts with a Tennessee Printer to print the Publications. The Printer retains possession of the Publications, and will either perform the labeling and mailing functions, or will ship part or all of the Publications by common carrier to non-residents of Tennessee. Under this scenario, there has been no transfer of title or possession of tangible personal property to the Taxpayer. Therefore, the transactions set forth in this scenario are not subject to Tennessee sales tax.

In the scenario set forth in Ruling 2, the Printer contracts with a Tennessee Mailer to label and mail the Publications to non-residents of Tennessee. The Mailer receives address labels from a non-resident mailing list company, affixes the address labels to the Publications and delivers them directly to the U.S. Postal Service for mailing. As a factual matter, the Taxpayer represents that no legal relationship exists between the Mailer and the Taxpayer in this scenario. Thus, the Mailer would not be construed as an agent or representative of the Taxpayer. Under this scenario, there is no transfer of title or possession of tangible personal property to the Taxpayer or to the Taxpayer’s agent or representative. Hence, the transactions set forth in this scenario are not subject to Tennessee sales tax.

In the scenario set forth in Ruling 3, the Taxpayer contracts with the Mailer to mail the Publications to non-residents of Tennessee and directly pays the Mailer. After printing is complete, the Printer delivers the Publications to the Mailer. A transfer of title or possession has occurred at this point. The transfer is made to a party with whom the Taxpayer does have a legal relationship, as agent or obligor under the contract. The Taxpayer may exercise direction and control over the Publications through the Mailer. It is the Department’s position that a taxable event has occurred under this scenario.

This position is consistent with *Board Of Publication Of Methodist Church, Inc. v. Woods*, 655 S.W.2d 934 (Tenn. 1980). In that case, the taxpayer (“Methodist Publishing”) printed catalogs for an out-of-state buyer (“Camping World”). The catalogs were picked up or delivered to Mail Services Company in Tennessee. Mail Services Company was employed by Camping World for the purpose of affixing mailing labels derived from a mailing list provided by Camping World to the catalogs, and delivering the catalogs to the U.S. Postal Service for delivery. Methodist Publishing asserted that Tennessee sales tax did not apply to catalogs which were picked up or delivered to Mail Services that were subsequently mailed to non-residents of Tennessee.

Methodist Publishing claimed that the transaction was exempt under T.C.A. Section 67-3007 [now 67-6-313]¹ and the Commerce Clause of the United States Constitution.

The Court held that a taxable event had occurred in Tennessee for which no exemption existed:

No doubt exists that a sale, as defined in T.C.A. § 67-3002, took place when the catalogs were delivered by plaintiff to Mail Services. Mail Services was the authorized agent for the buyer, Camping World, and was under Camping World's direction and control as to how the catalogs were to be delivered or disposed of; the catalogs were not yet committed to interstate commerce at this time.

Since the transfer of possession or "sale" took place within Tennessee, clearly the transaction was intended to be taxed under T.C.A. § 67-3003 and was not exempt from taxation under the Commerce Clause or T.C.A. § 67-3007, even though the parties contemplated immediate exportation. *International Harvester Co. v. Department of Treasury of State of Indiana*, 322 U.S. 340 (1944); *McGoldrich v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940); *Central Transportation Company v. Atkins*, 202 Tenn. 512, 305 S.W.2d 940 (Tenn.1957); *Williams Rental, Inc. v. Tidwell*, 516 S.W.2d 614 (Tenn.1974); *Deere & Co. v. Allphin*, *supra*.

609 S.W.2d at 504.

In the scenario presented in Ruling 3, the Publications have been delivered by the Printer to a third party that has contracted with the Taxpayer to provide mailing services. The transfer of possession takes place in Tennessee. It is the Department's position that a taxable event will have occurred at the point of delivery, and that such event is not exempt pursuant to T.C.A. Section 67-6-313(a).

It is also the Department's position that this transaction would not qualify as exempt under T.C.A. Section 67-6-329(a)(16). This section provides a specific exemption from sales and use tax for:

(16) Magazines and books which are distributed and sold to consumers by United States mail or common carrier, where the only activities of the seller or distributor in Tennessee are those activities having to do with the printing, storage, labeling and/or delivery to the United States mail or common carrier of such magazines or books, or the maintenance of raw materials with respect to such activities, notwithstanding that such seller or distributor maintains in Tennessee employees solely in connection with the

¹ T.C.A. Section 67-6-313(a) states "[i]t is not the intention of this chapter to levy a tax upon articles of tangible personal property imported into this state or produced or manufactured in this state for export."

production and quality control of such printing, storage, labeling and/or delivery, or in connection with news gathering and reporting;

The Taxpayer, which is the “seller or distributor” of the Publications in the scenarios presented, is a Tennessee corporation engaging in activities within Tennessee that are more expansive than those provided for in the exemption.

The scenarios set forth in Rulings 1 and 2 also do not subject the Taxpayer to use tax in Tennessee. T.C.A. Section 67-6-102(30) defines use as follows:

(A) "Use" means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof, except that it does not include the sale at retail of that property in the regular course of business;

(B) "Use" means the coming to rest in Tennessee of catalogues, advertising fliers, or other advertising publications distributed to residents of Tennessee in interstate commerce; provided, that the labeling, temporary storage, and other handling in connection with mailing or shipping of same in interstate commerce to non-residents of Tennessee shall not constitute a taxable use in Tennessee;

It is the Department’s position that in the scenarios set forth in Rulings 1 and 2 the Taxpayer is not exercising a “taxable use” of the Publications under these Code sections.

In conclusion, as more fully set forth above, the Taxpayer will not be subject to sales and use tax on the Publications if the Publications are shipped by common carrier or are mailed out-of-state by a Tennessee Printer to non-residents of Tennessee. The Taxpayer will not be subject to sales and use tax if the Publications are mailed out-of-state by a Tennessee Mailer to non-residents of Tennessee, where the Mailer contracts with the Tennessee Printer to perform mailing services. The Taxpayer will be subject to sales and use tax if the Publications are mailed out-of-state by a Tennessee Mailer to non-residents of Tennessee, where the Mailer contracts with the Taxpayer to perform mailing services.

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