TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING #96-26

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

Whether a moving company may purchase boxes using a resale certificate? Whether the boxes are resold or used by the company in providing moving 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 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 this 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 is a Tennessee corporation whose primary business is the moving and storage of household goods for individuals. The Taxpayer purchases boxes from

[OUTSIDE TENNESSEE], without a resale exemption certificate. The Taxpayer pays the Tennessee sales tax on the purchase price. The boxes are then stored at a facility in Tennessee. The Taxpayer represents that its customers have the option of purchasing the boxes from the Taxpayer or providing their own boxes. When the household goods reach their final destination, the customer must pay for the services provided and boxes purchased. The Taxpayer contends the customer receives possession and title to the boxes at the point of destination. However, the shipment contracts submitted state in fine print down the margin of the page the following:

> Customer agrees that title to all packing material passes to customer before any use of such material is made upon delivery at origin.

Charges for the boxes are separately stated on the contracts. In addition to the moving charge, charges for packing the customers belongings are also separately stated. However, customers may pack their own belongings if they choose to do so. Customers are also allowed to purchase boxes from the Taxpayer even though they are not utilizing the Taxpayer's moving or storage service. Annual sales from these customers are between [DOLLAR AMOUNTS]. At present, the Taxpayer is not collecting and remitting sales tax on its retail sales to customers because it pays sales tax on its purchases of the boxes. The Taxpayer indicates it is seeking registration as a dealer for the purpose of collecting and remitting sales taxes on the sales of boxes.

QUESTIONS

1. Is the Taxpayer generally responsible for collecting and remitting Tennessee sales tax on its sales of boxes that are used to move customers?

2. Is the Taxpayer responsible for collecting and remitting Tennessee sales or use taxes on the sale of boxes to their customers that are used by the Taxpayer to move the customer's belongings across state lines?

RULINGS

1. Moving companies are primarily considered to be in the business of providing a nontaxable service. However, under the facts presented, the Taxpayer is responsible for collecting and remitting Tennessee sales tax on the separate charges it makes for the boxes.

2. The Taxpayer is responsible for sales or use taxes on the sales price of boxes sold to customers that are moved across state lines. Title and/or possession to these boxes passes when the customer receives the boxes for the purpose of depositing their belongings. Therefore, the Taxpayer must collect sales tax on boxes used to move a customer out of state. The Taxpayer is also required to collect the use taxes due from the customer on any boxes sold to the customer and used to move the customer into Tennessee.

ANALYSIS

1. Initially, the question presented appears to be controlled by an administrative rule of the Department.

> Warehousemen engaged in the business of moving, storing and shipping tangible personal property belonging to other persons render services which are not subject to the Sales Tax. Crating, boxing, packaging, and packing materials used by such warehousemen in the performance of these services are deemed to be purchased by them for use or consumption, and are subject to the Sales and Use Tax.

Tenn. Admin. Comp. 1320-5-1-.21(1).

The Taxpayer is a warehouseman "engaged in the storage of goods for hire". T.C.A. § 47-7-101(1)(h). The Taxpayer is also engaged in the business of moving household goods. Under the rule, it may seem sales or use tax is due only on the Taxpayer's purchase of the boxes. *See also* Tenn. Admin. Comp. 1320-5-1-.11(2). However, the rule must be interpreted in a manner to be consistent with the present statutes and case law. The Department's rule does not address the separate billing of customers for boxes, or warehousemen that sell boxes as a regular and distinctly separate part of their business. While there is no specific Tennessee statute or case law that addresses the sale of boxes by movers, several cases and statutes are instructive and indicate that under the facts presented a taxable sale of the boxes does take place.

T.C.A. § 67-6-102(24)(A) defines "sale" in pertinent part for sales tax purposes as follows:

> "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, ...

Taxpayers making sales of tangible personal property must register for sales tax purposes and may purchase tangible personal property for resale without payment of the tax on the purchase price.

Tennessee Administrative Regulation 1320-5-1-.62(1) defines exempt "sales for resale" as follows:

> "Sales for resale" means those whereby a supplier of materials, supplies, equipment and services makes such tangible personal property or services available to legitimate dealers actually selling such property or services as such, ...

Nashville Mobilphone Co., Inc. v. Woods, 655 S.W.2d 934, 935 (Tenn. 1983), is a Tennessee case that addressed the taxability of a transaction which involved the transfer of property in connection with a service. Nashville Mobilphone Company ("Mobilphone") provided a communication service to its subscribers and also leased telephones. Title to the telephones at all times remained with Mobilphone and customers paid separate monthly charges for rental and maintenance. A customer could furnish his own telephone, but could not rent a telephone without also subscribing to the communication service. *Id.* at 935. The issue was whether Mobilphone's purchases of the telephones which it leased to customers was exempt from sales and use tax as sales for resale. The Supreme Court stated:

> [W]hen the primary function and purpose of the taxpayer is to provide services, the ownership, use and maintenance of certain types of personal property and equipment are necessary in order to enable it to furnish the services, so that the taxpayer, not its customer, is the ultimate user or consumer within the meaning of sales and use tax statutes."

Id. at 937.

The Court determined there was no sale for resale because Mobilphone was the ultimate consumer of the telephones and used them as part of its own "radio common carrier system". The Court relied on *American Video Corp. v. Lewis*, 389 So. 2d 1059 (Fla. App. 1980) and specifically noted that itemized billing specifying a rental charge was not controlling. Mobilphone only rented telephones to its subscribers, and thus, the telephones were of no value to customers "except in connection with and as part of the service." *Id.*

Just recently the Supreme Court revisited *Mobilphone* and distinguished it in *Cape Fear Paging Co. v. Huddleston***,** No. 01A01-9502-CH00037, 1996 WL 479504 (Tenn., August 26, 1996.)

Cape Fear provided paging services to the public. In addition to Cape Fear's monthly fee for the paging services, it made pagers available to its customers. Customers were not required to obtain pagers from Cape Fear. A significant number of the customers, twenty percent (20%), supplied their own pager. The remaining customers either leased or purchased a pager from Cape Fear. Cape Fear had acquired the pagers free of tax and remitted tax based on the sales price or lease payments received. The Department assessed use tax against Cape Fear on those pagers which were leased to paging service customers, based on the holding in *Nashville Mobilphone Co. v. Woods*, 655 S.W.2d 934 (Tenn. 1983).

The determinative issue according to the Court in this case was:

> . . .whether Cape Fear purchased the pagers for the purpose of leasing them to its customers or in order to provide paging services to its

> customers. These alternative purposes are not mutually exclusive, but the important distinction is whether furnishing the pagers was a constituent aspect of providing paging service.

Id., p 5.

The Court distinguished Cape Fear's pagers from the equipment at issue in *Mobilphone*, and upon review of the totality of the facts determined that the pagers could be purchased on a resale certificate. The Court stated:

> Although no single fact or circumstance is determinative in this case, the totality of the facts and circumstances show that the pagers were purchased for the purpose of leasing them to the taxpayer's customers. Even though furnishing pagers to customers for an additional charge was beneficial to Cape Fear and was a part of its business, it was a service distinct from providing paging services. It was a service not provided to Cape Fear's customers who obtained their pagers from sources other than Cape Fear or to those customers who purchased their pagers from Cape Fear. Since paging services were also available from other providers and could be received on any Nokia pager, the leased pagers had value separate and apart from Cape Fear's paging services.

Id. p.6.

The boxes provided by the Taxpayer to its customers are similar in many respects to these pagers. The boxes are separately billed to the customers. The boxes are not required to be purchased from the Taxpayer. A customer may obtain the boxes from someone else if they choose to do so or use their own boxes. Also boxes may be purchased from the taxpayer without obtaining the Taxpayer's moving services. In this last regard, an even better case is made for the sale of the boxes than is made for the pagers. The pagers were only leased to customers of Cape Fear who actually took the paging services according to the testimony of the president of the company as noted by the Court of Appeals. *Cape Fear Paging Co. v. Huddleston*, 195 Tenn. App. Lexis 441 (Ct. App. 1995)

In *Cape Fear*, the Supreme Court reversed the Court of Appeals which relied upon *Mobilphone* and stated that *Mobilphone*:

> would require a finding that the pagers were "unused, unusable, and of no value in and of themselves to the customer" and further, the pagers are "completely without value to the customer except in connection with and as part of the service for which the customer subscribes."

Id. p. 9.

Another recent case from Connecticut in which the rental of a trash container was not separately billed from the charges for the trash disposal service is worthy of note at this point. This case discusses the "primary purpose test " which is akin to the rationale applied in the Tennessee cases previously discussed In *Sanitary Services Corp. v Meehan*, 665 A. 2d 895, 896 (Conn. 1995), the primary purpose test was applied to determine whether waste containers purchased by a trash removal company for use by its customers were purchased for resale under a statute which included rentals as sales for resale. The Connecticut Supreme Court stated:

> Whether a transaction qualifies as a 'sale for resale' depends upon 'a determination of the true object of the contracts between the parties.'
> . . .That determination depends, in turn, upon whether the taxpayer provided the property to its customers as an independent part of the contractual relationship or whether the property was in itself incidental to the primary purposes of the contracts. 'It is the primary purpose for which the personal property was purchased and put to use that controls the determination of the property's taxability.'

Id. at 896.

The Court evaluated the company's contracts and found that the true object was the provision of refuse service and not the rental of equipment. There was no separate fee for the waste containers and the company would not have been able to perform its contractual obligations without the use of them. In concluding that the true object of the contracts was the provision of refuse service the Court held that the purchase of waste containers was not a "sale for resale" and thus, subject to sales and use tax. *Id.*

The cases demonstrate that it is important to demonstrate that the sale of the tangible personal property may be separated from the service also being provided by the taxpayer. Whether there is a separate charge for the tangible personal property, whether the property is sold to the general public apart from the provision of service, and whether the tangible personal property has any value apart from the service, are all important factors in determining if the property is resold or just used in providing the service.

The law applied to the facts presented by the Taxpayer in this ruling indicates the purchase of the boxes is for resale. The Taxpayer charges an additional separately stated fee for these boxes. The boxes are available to the general public apart from the provision of the moving service. The boxes also would seem to have an inherent value for storage purposes aside from the moving services provided. Therefore, sales or use tax should be collected and remitted on the Taxpayer's retail sales of the boxes to its customers. Once properly registered the taxpayer may present a "resale certificate" to its suppliers in order to purchase boxes for resale without payment of the tax.

2. The Taxpayer has also raised a second question regarding its sale of boxes. Simply put, the taxpayer suggests that sales of boxes used to move individuals from the State of

Tennessee to another state are not subject to any Tennessee sales or use tax. This contention is centered around the argument that in such cases the sale does not take place in Tennessee. In order to require the Taxpayer to collect the sales tax, (*use tax* is discussed later) the sale must take place in Tennessee.

Sale is defined by statute to occur when there is a "transfer of title or possession" in this state. T.C.A. § 67-6-102(24)(A), quoted above. The Taxpayer agrees that the sales tax should be collected on boxes sold to be used in intrastate moves within Tennessee, but not on interstate moves. The Taxpayer has cited T.C.A. § 47-2-401(2) of the Uniform Commercial Code-Sales which addresses the passage of title to tangible personal property. Indeed this provision of the UCC has been determined to control the passage of title for sales tax purposes.

For Tennessee sales tax purposes, the place where title to tangible personal property is transferred to the buyer is determined under the applicable provisions of the Uniform Commercial Code. See *Illinois Cent. Gulf R.R. v. State*, 805 S.W.2d 746 (Tenn. 1991); *Volunteer Val-Pak v. Celauro*, 767 S.W.2d 635 (Tenn. 1989). The Uniform Commercial Code provides:

> unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading . . . if the contract requires delivery at a destination, title passes on tender there.

Tenn. Code Ann. § 47-2-401(2) (1979).
Eusco, Inc. v. Huddleston, 835 S.W.2d. 576 (Tenn. 1992)

Absent any specific agreement as to the passage of title, this provision of the UCC as applied to the instant ruling would support a conclusion that delivery of the boxes is made and title passes when the boxes are utilized as depositories for the customer's belongings. Obviously, this takes place before the customer is moved; i.e. at the point of origin of the move instead of the point of destination as the Taxpayer has suggested. While there is scant case authority on this subject, one Tennessee case approaches the issue of the deposit of tangible personal property in a container as it affects the passage of title.

In *Sadek v. Nashville Recycling Co., et al*. 751 S.W.2d. 428 (Tenn. Ct. App., 1988) a recycling company picked up its partially filled container of used chicken grease from a fast food restaurant (KFC). However, the recycling company not only took the grease in its container, but also added to the container grease from a container of another recycling

company that had also been filled by KFC. Criminal charges were brought and then dropped. This civil litigation followed. The court said:

> Where a buyer places his container on the premises of the seller for the purpose of receiving fungible goods, when the seller places such fungible goods in the container of the buyer, such goods have been "identified to the contract" and the buyer thereby receives title, or at least a "special interest" in the goods. *See* T.C.A. §§ 47-2-401, 47-2-501. *Rawls v. Patterson*, 60 Tenn. (1 Baxt.) 372 (1872); *Barker v. Reagan*, 51 Tenn. (4 Heisk) 590 (1871); *Bush v. Barfield*, 41 Tenn. 92 (1 Cold.) 92 (1860).

Id., p.429.

While this case approaches the issue from a slightly different perspective, it indicates that without a specific agreement for passage of title, there may be delivery and passage of title in Tennessee merely by identifying the goods and placing them in the purchaser's container. The converse should also be true. Absent a specific agreement as to passage of title, delivery and passage of title to the boxes purchased should take place by placing the purchaser's goods in the boxes.

Of course, the contracts for the sale of the boxes and the movement of goods which are used by the Taxpayer explicitly state that title to all packing materials passes at the point of origin.

> Customer agrees that title to all packing material passes to customer before any use of such material is made upon delivery at origin.

No charges for any packing material are indicated on the contract except charges for "containers". Boxes are the "containers" used in the movement of customers belongings. Therefore, title to the containers or boxes passes at the point of origin.

As an aside, it should be noted that if it the Department accepted the contention that title to the boxes passes at the point of destination, as contended by the Taxpayer, then freight, delivery or transportation charges associated with the delivery of the boxes would also be subject to tax.

> Freight, delivery, or other like transportation charges are subject to the Sales and Use Tax if title to the property being transported passes to the vendee at the destination point. Where title to the property being transported passes to the vendee at the point of origin, the freight or other transportation charges are not subject to the Sales or Use Tax . . .

Tenn. Admin. Comp. 1320-5-1-.71.

Since title passes at the point of origin, the sales tax would not apply to those boxes used to move individuals into Tennessee from other states. However, the customer would owe the use tax on boxes sold to them and used to move them to a destination in Tennessee. T.C.A. §§67-6- 210, 67-6-102(6)(B). The Taxpayer is liable for this use tax. The Taxpayer must collect and remit the use tax to the Department.

> Out of state dealers which have a sufficient jurisdictional contact or nexus with this State, and accept orders from residents of this State, shall register with the Department for Use Tax purposes, and report and pay the appropriate Use Tax to the Department.

Tenn. Admin. Comp. 1320-5-1-.63.

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