

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING #98-28**

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

Applicability of sales and use taxes to multi-level marketing company.

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] is a multi-level marketing company selling tangible personal property to persons ("Distributors") at a specific price ("member price") in Tennessee. Most Distributors purchase the Taxpayer's products for their own use or consumption. However, Distributors can sell the Taxpayer's products to other consumers. The Taxpayer recommends, but does not require, that if Distributors are going to resell the Taxpayer's products, sales be made at the Taxpayer's "suggested retail price," which is a higher price than the member price.

Some Distributors may have obtained a sales/use tax license from their state taxing authority and may provide exemption certificates to the Taxpayer when purchasing for resale. However, most Distributors have a very low volume of resales and have not obtained a sales/use tax license from their respective state taxing authorities.

The Taxpayer would like to collect and remit its Distributors' sales and use tax liabilities to the Department. The Taxpayer would like to collect the sales or use tax from the Distributors at the suggested retail price for sales that the Distributors have indicated are for resale and have not provided the Taxpayer with a resale certificate. Sales to the Distributors for their own use would be taxed at the member price to the Distributors. The Taxpayer will note on each invoice those products sold for resale and those sold for the Distributors' use and consumption, based on the representations of the Distributors. The Distributors' representations will be obtained verbally over the telephone or by electronic transmission or by other means at the time the order is made. Each invoice will contain language to the general effect that

Delivery and acceptance of this order warrants that the representations previously given by the purchasing distributor as to the use of the products ordered are factual and true. Any disputes and/or discrepancies as to the use of the products ordered should be resolved in favor of the Taxpayer.

The Taxpayer would base sales and use tax rates on the Distributors' "shipped to" location.

The Taxpayer only wants to be responsible for Distributors' sales or use of the Taxpayer's products. Accordingly, the Taxpayer will only collect and remit sales or use tax for Distributors' sales of the Taxpayer's products, unless a Distributor provides the Taxpayer with a properly executed resale certificate.

ISSUES

1. Whether the Taxpayer is permitted to collect and remit sales and use tax on behalf of Distributors based on the suggested retail price of tangible personal property shipped to Tennessee when the Distributors assert that the purchases are for resale.
2. Whether the Taxpayer is permitted to collect and remit sales and use tax on behalf of Distributors based on the member price of tangible personal property shipped to Tennessee when the Distributors assert that the purchases are for their own use or consumption.
3. Whether the Taxpayer's method of obtaining the Distributor's intent to resell or use the products is sufficient due diligence to charge the amount of tax that appears to be due.

RULINGS

1. The Taxpayer, having obtained the Distributors' agreements, is not prevented from collecting sales and use tax upon the sale of the products to unregistered Distributors for resale based on the suggested retail price to the consumer. The Taxpayer has a liability to collect and remit tax on the amount of the member price to the Distributors. If any excess tax is collected based on the suggested retail price to approximate the Distributors' tax liability, the Taxpayer must remit all tax collected to the Department. The Taxpayer should not collect tax when it receives a resale certificate from a registered Distributor and it is clear that the items purchased will be resold. This Ruling does not address the registration or tax collection responsibilities of the Distributors. The Distributors have the ultimate responsibility for seeing that the sales tax is remitted to the Department on their sales.
2. The Taxpayer must collect and remit sales and use tax upon the sale of the products to the Distributors for their own use based on the member price.
3. The Taxpayer's proposed method to determine the intended use of the products constitutes due diligence to determine the use of the products and the Taxpayer would not be held liable for misrepresentations by the Distributors.

ANALYSIS

A "sale at retail" is defined as the "taxable sale of tangible personal property or specifically taxable services to a consumer or to any person for any purpose other than for resale." Tenn. Code Ann. § 67-6-102(23)(A).

1. The Distributors will purchase items from the Taxpayer for resale to customers. Although these items are sold to the Distributors at the member price, they will ultimately be sold to customers at a suggested retail price. In the typical scenario, the local dealers would be registered and would collect sales

tax from their customers based on the sales price. Tenn. Code Ann. § 67-6-501(a); 67-6-502. This Ruling, however, does not address the registration or tax collection responsibilities of the Distributors. The Distributors have the ultimate responsibility for seeing that the sales tax is remitted to the Department on their sales.

In the Taxpayer's business, most Distributors are not registered dealers. The Taxpayer, however, would like to collect and remit the tax based on the suggested retail price when it sells the items to the Distributors, effectively collecting the same tax due from the Distributors who would then be reimbursed by their customers. The Taxpayer is under no obligation to collect the tax at this stage of the transaction; the obligation is actually on the Distributors to register and collect the tax from customers when they resell the items at the suggested retail price. If the Taxpayer wants to register and undertake the collection of the tax due on the transaction between the Distributors and customers, however, there is no statute barring its doing so. The Taxpayer should not collect tax, however, from a registered Distributor that presents a resale certificate when it appears that the items are for resale.

If any excess tax is collected based on the suggested retail price to approximate the Distributors' tax liability, the Taxpayer must remit all tax collected to the Department. Tenn. Code Ann. § 67-6-514.

2. Since the Taxpayer would be a registered dealer selling tangible personal property to consumers in Tennessee for their own use and consumption and not for resale, the Taxpayer should collect and remit tax based on the sales price. Tenn. Code Ann. § 67-6-501(a). Under the facts presented, the Taxpayer should then collect and remit tax based on the member price of the goods sold.

3. A dealer is required to exercise ordinary care in accepting resale certificates from its customers. TENN. COMP. R. & REGS. 1320-5-1-.68(4). The Taxpayer will ask the Distributors at the time of taking an order how they plan to use the products and put a disclaimer statement on the invoices shipped with the products. This appears to constitute the exercise of ordinary care on behalf of the Taxpayer. If a Distributor misled the Taxpayer and resold items that it said were for its own use, the Distributor would be liable for the additional tax due if the Taxpayer used ordinary care to determine the use of the items. Obviously, if the Distributor orders far more products than the Taxpayer understands could reasonably be used by a single person or household each month, the Taxpayer should make the appropriate inquiries to determine the use of the products and perhaps request that Distributor to register and collect the tax for itself.

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Tax Counsel

APPROVED: _____
Ruth E. Johnson
Commissioner

DATE: 6-12-98