

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING #99-14**

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

Application of the sales and use tax to storage and shipment of printed materials from a shipping point/warehouse located in Tennessee.

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] has a manufacturing plant located in an adjoining state where it prepares, prints and binds magazines, catalogs and print inserts that are distributed nationally and internationally. The Taxpayer produces printed material specifically for its

customers who either resell the products or use them to advertise to their customers. Every product (magazine, catalog, and newspaper insert) is unique based upon customer specifications. The vast majority of the items produced at the Taxpayer's plant are newspaper inserts and advertising publications. The balance of its production are magazines which are sold for resale.

The specifications for each individual issue of a magazine, catalog or insert are contracted with every customer. Product specifications include items such as paper stock, trim size, page count, print order, delivery date, and other terms and conditions. One of the items included in the terms and conditions of each sale is transportation of the product.

The Taxpayer is evaluating the impact of contracting with an independent carrier to transport the product from the manufacturing plant located outside Tennessee to a shipping point/location in Tennessee. The Taxpayer will retain title to the property and incur all costs associated with the shipment of the products to Tennessee. The Taxpayer may store products in Tennessee, but the storage will be temporary. Products stored by the Taxpayer will always be sold for resale by the Taxpayer's customers. The Taxpayer's carrier will transfer any products not to be stored to the purchaser's carrier. A transportation broker, at the direction of the purchaser, will have arranged with the common or contract carrier to take the products from the Taxpayer's carrier and transport the products to the designated location. The broker will ordinarily be hired directly by the Taxpayer's customer. The designated location will be outside the state of Tennessee. The Taxpayer does not have a registered location in Tennessee.

ISSUES

1. Whether a taxable Tennessee sale occurs when magazines, catalogs and inserts are shipped into Tennessee by the Taxpayer, temporarily stored here, and then transferred to a carrier contracted by the customer for transport outside Tennessee.
2. Whether the Taxpayer will be subject to use tax on products temporarily stored in Tennessee for subsequent shipment out of state.

RULINGS

1. Sales for resale are exempt. There is a taxable sale when the products are transferred from the Taxpayer's carrier to the purchaser's carrier in Tennessee.
2. The Taxpayer will not be subject to use tax on products temporarily stored in Tennessee for subsequent shipment out of state.

ANALYSIS

1. Tenn. Code Ann. § 67-6-102(24)(A) provides that "'Sale' means any transfer of title or possession, or both . . . in any manner or by any means whatsoever of tangible personal property for a consideration[.]" A sale which occurs outside the state is not subject to

Tennessee sales tax, and will not be subject to Tennessee use tax unless the property is returned to Tennessee at a later time. *Eusco, Inc. v. Huddleston*, 835 S.W. 2d 576, 582 (Tenn. 1992); see also, Tenn. Code Ann. § 67-6-313. Thus, whether the products are subject to sales tax in Tennessee turns on where the sale occurs.

The elements of a sale are “(1) transfer of title or possession, or both of (2) tangible personal property, for a (3) consideration.” *Volunteer Val-Pak v. Celauro*, 767 S.W. 2d 635, 636 (Tenn. 1989); see also, Tenn. Code Ann. § 67-6-102(24)(A). The place in which title or possession of the products passes is the location of the sale.

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. *Eusco, Inc.*, 835 S.W. 2d at 579 (citing *Illinois Cent. Gulf R.R. v. State*, 805 S.W. 2d 746 (Tenn. 1991)). Tenn. Code Ann. § 47-2-401 provides that “[u]nless 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.”

Upon arrival of the products at the shipping point in Tennessee, the Taxpayer completes its performance and transfers both title and possession to the purchaser’s carrier as agent for the purchaser. There is presently no meaningful method to distinguish between common and contract carriers for a specific trip or load. Regardless of the type of carrier used, then, the carrier is the entity present to accept title and possession of the goods. Unless an exemption applies, then, the transaction constitutes a taxable sale.

Some of the products are temporarily stored in Tennessee prior to transfer to the purchaser’s carrier. The Taxpayer stated that the products stored are those intended for resale by the Taxpayer’s customers. Sales for resale are not retail sales subject to sales and use tax. Tenn. Code Ann. § 67-6-102(23)(A). Accordingly, the products stored by the Taxpayer for resale are exempt from sales tax when transferred to the purchaser provided that the products are indeed for resale and the purchaser presents a valid resale certificate to the Taxpayer.

The other products sold by the Taxpayer are for the purchaser’s own use. The transfer of these products occurs in Tennessee and the purchaser subsequently removes the products from Tennessee. With respect to interstate commerce, Tennessee sales and use tax is to be applied to the fullest extent permitted by the Commerce Clause of the United States Constitution. *LeTourneau Sales & Service, Inc. v. Olsen*, 691 S.W. 2d 531, 534 (Tenn. 1985); *Cole Brothers Circus, Inc. v. Huddleston*, No. 01-A-01-9301-CH-00004, 1993 Tenn. App. LEXIS 386 (Tenn. Ct. App. June 4, 1993). It is well-settled that a state tax on interstate commerce is not per se unconstitutional and the taxpayer bears the burden of proving his immunity from the tax under the commerce clause. *LeTourneau*, 691 S.W. 2d 531; *General Motors Corp. v. Washington*, 377 U.S. 426, 84 S.Ct. 1564, 12 L.Ed. 2d 430 (1964); *Norton Co. v. Department of Revenue of Illinois*, 340 U.S. 534, 71 S.Ct. 377, 95 L.Ed 517 (1951).

A tax will survive challenge under the Commerce Clause so long as it (1) is applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S.Ct. 1076, 1079, 51 L.Ed. 2d 326 (1977).

In the present case, the Taxpayer enters Tennessee to transfer the products to the purchaser's carrier, providing nexus in state. The tax on the transaction will only be collected once, where the sale occurs, thus the tax is fairly related to services provided by the state. See *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 115 S.Ct. 1331, 115 S.Ct. 1331 (1995). Transactions in interstate commerce will not be taxed unless the sale is consummated in state. The transfer of the products to the purchaser is a taxable sale regardless of whether or not the purchaser removes the items from Tennessee. Accordingly, there is no discrimination against interstate commerce.

Unless an exemption applies, all sales occurring in state are subject to sales tax. Tenn. Code Ann. § 67-6-313(a) provides that "it 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." The import-for-export exemption from sales tax does not apply, however, when tangible personal property is transferred from a vendor located in Tennessee to a purchaser also located in Tennessee even though the purchaser intends to and does export the merchandise. *Jack Daniel Distillery v. Jackson*, 740 S.W. 2d 413 (Tenn. 1987). This result relies upon the purchaser taking title and/or possession of the property in Tennessee.

The question therefore becomes whether the transfer of title and possession from the Taxpayer to the purchaser's carrier in Tennessee constitutes a taxable sale in line with *Jack Daniel Distillery v. Jackson*, 740 S.W. 2d 413 (Tenn. 1987). The Taxpayer will retain title to the property and incur all costs associated with the shipment of the product to Tennessee. Until the products are transferred to the purchaser's carrier, then, the Taxpayer has title and possession of the products. The purchaser's carrier acts as the representative of the purchaser for purposes of delivery and accepts title and possession of the products in Tennessee. Accordingly, a taxable sale occurs when the products are transferred from the Taxpayer to the purchaser's carrier. See *McLeod v. J.E. Dilworth Company*, 322 U.S. 327, 64 S.Ct. 1023, 88 L.Ed. 1304 (1944); *World Book, Inc. v. Dept. of Treasury*, 564 N.W. 2d 82, 84 (Mich. Ct. App. 1997); *Revenue Cabinet v. Gruner & Jahr U.S.A. Group, Inc., d/b/a Brown Printing Co.*, Franklin County, Kentucky, Circuit Court 97-CI-00294 (March 16, 1998).

In *J.E. Dilworth Company*, a Tennessee company sold goods and transferred title to the goods in Tennessee prior to the goods being shipped to the customer in Arkansas by common carrier. *J.E. Dilworth Company*, 322 U.S. at 328, 64 S.Ct. 1023, 1024-25. The Court found that these sales were consummated in Tennessee. *Id.* The Court went on to state that it would have to "destroy both business and legal notions to deny that under

these circumstances the sale - the transfer of ownership - was made in Tennessee.” *Id.*, 322 U.S. at 330, 64 S.Ct. at 1025.

In *World Book*, the seller transferred title to the buyer in Illinois, but the goods were placed on a common carrier for delivery to the buyer in another state. *World Book, Inc.*, 564 N.W. 2d at 83. The court held that the transfer of title to the buyer constituted an Illinois sale, notwithstanding the role of the common carrier. *World Book, Inc.*, 564 N.W. 2d at 84.

The court in *Gruner & Jahr* addressed the Taxpayer’s situation in Kentucky and held that

[c]learly in this instance the common carriers stood in the place of the out of state customers in receiving the goods at Brown Printing’s dock. The common carrier and the broker provided their services to the out-of-state customer in accordance with that customer’s instructions and arrangements. It cannot be said that the broker and the carrier were acting for their own benefit or at the request and direction of anyone but the out of state customer who hired them and who actually owned the goods upon their delivery at the Kentucky dock. The common carrier stood in the place of the customer as the customer’s representative for purposes of delivery . . . Brown Printing’s delivery of the goods at its dock to the common carrier hired by the out-of-state customer constitutes delivery to a representative of that customer as a matter of law.

(p. 8-9). Similarly, in Tennessee there is a transfer of title and possession of the Taxpayer’s products to the customer through its carrier. There are no provisions in the law to exempt such a transaction from taxation. Accordingly, the transfer of products from the Taxpayer to the customer’s carrier is subject to sales tax.

2. The Taxpayer is not subject to use tax on the products stored in state for resale. Tenn. Code Ann. § 67-6-102(23)(A).

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APPROVED: Ruth E. Johnson, Commissioner

DATE: 5-7-99