

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING #99-38**

SUBJECT

Application of the sales and use tax to the sale of school pictures by a photography business to students or parents, if the school attempts to claim such sales as one of no more than two tax-exempt fund-raising events.

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 conducts a school photography business in the State of Tennessee. This business consists of photographing students in school and offering picture packages for sale to the students or parents.

In most cases, the pictures are sent home from the school with the students so that the students or parents may review the pictures to decide if they want to purchase all, part, or none of the picture packages. In a minority of cases, the students or parents pay for the picture packages in advance, subject to complete

satisfaction with the product. If not completely satisfied, the students or parents may request either new pictures or a refund of their money.

The school collects the money for purchases of the picture packages. The school receives a commission on the sales, typically in the amount of 50%. Sometimes, the school deposits the money, and the taxpayer bills the school for the amount in excess of the school's commission. Alternatively, the taxpayer collects the money from the school and remits the commission to the school.

QUESTIONS

1. Are sales of picture packages by the taxpayer to students or parents exempt from Tennessee sales and use tax, if the school designates such sales as one of no more than two fund-raising events?
2. When are sales of school pictures used to raise funds by a school potentially taxable?
3. If such sales are not exempt, under what circumstances would school photography be exempt from Tennessee sales and use taxes as a fundraiser?
4. Is each school group within a school entitled to have two annual tax-exempt fundraisers in addition to the two held by the school?
5. If the school (or other organization) provides documentation to the taxpayer that school photography is one of two tax-exempt fund raisers but then holds a third fund raiser, who is liable for the tax on the school photography sales?

ANSWERS

1. No. The taxpayer's sales of picture packages to students or parents cannot qualify as one of a school's two tax-free fund-raising events, because the exemption can only apply to sales made by the school. Sales made by the taxpayer cannot qualify as one of the two fundraisers.
2. Under the facts given, the sales of school pictures to raise funds for a school are taxable.
3. The sales of school photography would be exempt from sales and use tax only under very limited circumstances. The school would have to purchase the pictures from the taxpayer for resale to the students or parents and not be acting merely as an agent for the taxpayer's sales to students or parents. Also, the school would have to state in writing (preferably in the form of a sworn affidavit) that the sales will be one of no more than two fund-raising events for the entire

calendar year. Any tax-exempt fundraiser must be limited to 30 consecutive days or less.

4. If a school group, within the meaning of “school group” in Rule 1320-5-1-.09(4), is acting as an agent for the school, the school group cannot conduct any tax-exempt fundraisers beyond the school’s two annual tax-exempt fundraisers. A school group may not be used as a way to allow a school to have additional tax-free fundraisers.

5. Assuming that the picture sales otherwise qualify for the exemption for semiannual or less-frequent fund raisers of a school, if the school holds a third fund raiser during the year, the school must pay use tax on the cost price of all picture packages sold during the year.

ANALYSIS

1. & 2. This letter ruling request involves many of the same issues as Letter Ruling No. 97-44, and it involves the same taxpayer. The taxpayer has raised basically the same questions addressed in that letter ruling, except that the current letter ruling request involves specific questions regarding the exemption from sales tax for “casual and isolated sales” by schools that engage in no more than two fund raisers during a calendar year. The taxpayer wants to know if that exemption can alter the result of Letter Ruling No. 97-44.

Letter Ruling No. 97-44 says that the sales tax applies to the entire purchase price paid by students or parents for school pictures. It also says that the school’s commission would be exempt from tax only if the school purchases the pictures from the taxpayer and then resells them to the students or parents. Because the school acts as agent for the taxpayer and does not actually purchase the pictures for resale, the sale occurs between the taxpayer and the students or parents. Therefore, none of the exemptions from taxation regarding schools would apply. The sales tax must be collected and remitted on the entire sales price.

The specific exemption that the taxpayer is asking about is found in Tenn. Code Ann. Section 67-6-102(2), which reads in part as follows:

“Business” does not include any sales or use tax of tangible personal property of any type sold directly to consumers by any person, including, but not limited to, the Girl Scouts or county fairs; provided, that the tangible personal property is not regularly sold by such person or is regularly sold by such person only during a temporary sales period which occurs on a semiannual, or less frequent, basis.

The Tennessee Department of Revenue Sales and Use Tax Rules address this exemption in Rule 1320-5-1-.09(4), which reads as follows:

Irregular sales of tangible personal property or regular sales of tangible personal property made only during a temporary sales period occurring on a semiannual or less frequent basis are casual and isolated sales not subject to tax. If a person other than a public or private school, grades K-12, or school group has or conducts more than two (2) sales periods during a calendar year, such person shall be liable for sales tax on all sales during that calendar year. Public and private schools, grades K-12, and school support groups having or conducting more than two (2) sales periods during a calendar year, having purchased tangible personal property or taxable services without the payment of tax, shall be liable for the use tax based on the purchase price of the items or services purchased during that calendar year. A sales period shall be presumed to be temporary if it is of 30 consecutive days duration or less. Persons making purchases of tangible personal property or taxable services for resale during temporary semiannual or annual sales periods shall provide their vendor with a written statement indicating that the items or services will be sold during a semiannual or annual sales period.

The result is clear and unambiguous based upon both the statute and the rule. The exemption does not apply to the sale of school pictures by the taxpayer to the students or parents, because the taxpayer is in the business of selling school pictures. The number of fund raisers held by a particular school is irrelevant, because the school is not selling the pictures. As Letter Ruling No. 97-44 makes clear, the school is merely acting as the agent of the taxpayer. The sales occur between the taxpayer and the students or parents and are therefore taxable in their entirety.

3. It would be difficult, although not impossible, for the sale of picture packages to students or parents to become exempt from the sales and use tax. The taxpayer would have to change the way that it does business. It would have to actually sell the picture packages to the schools for resale to the students or parents. Also, each school would have to provide the taxpayer "with a written statement indicating that the items or services will be sold during a semiannual or annual sales period." Rule 1320-5-1-.09(4).

It must be emphasized that changing the nature of the transaction as a sale to the school for resale to the students or parents is not merely a matter of calling it a sale for resale. To be a true sale for resale, the facts of the transaction between the taxpayer and the school would have to qualify as a sale under the factors explained in Letter Ruling No. 97-44 and in Haskins v. Yates, 1988 WL 80967 (Tenn. App.):

The Court of Appeals has found that the following factors indicate a sale rather than agency:

- (1) The transferee (the school) gets legal title and possession of the goods.
- (2) The transferee becomes responsible for an agreed price, either at once or when the goods are sold.
- (3) The transferee can fix the price at which he sells without accounting to the transferor for the difference between what he obtains and the price he pays.
- (4) The goods are incomplete and unfinished and the transferee is to make additions to them.
- (5) The risk of loss is upon the transferee.
- (6) The transferee deals or has the right to deal with the goods of persons other than the transferor.
- (7) The transferee deals in his own name and does not disclose that the goods are those of another. (Letter Ruling 97-44).

It should be apparent from these criteria that in order for the transaction at issue to qualify as a sale for resale, the facts of the transaction would have to change dramatically from the facts given. However, if the taxpayer actually did sell picture packages to schools for resale, the transaction would be analogous to the sale of school yearbooks to schools for resale, which was discussed in Opinion of the Attorney General, No. 88-109. In such cases, the taxpayer would have to collect and remit sales tax on the purchase price paid by the school.

In order to escape the sales tax entirely, the school would have to provide to the taxpayer a written statement (preferably a sworn affidavit) saying that the picture packages will be sold during one of no more than two fund-raising events during the calendar year. Each such sales event may not last more than 30 consecutive days. A common misconception is that a school can engage in two tax-exempt fund raisers and then have additional taxable fund raisers. This is not true. A third school fund raiser during a calendar year renders all fund raisers taxable for that year. Rule 1320-5-1-.09(4).

4. Whether a school group, within the meaning of "school group" in Rule 1320-5-1-.09(4), can conduct two tax-exempt fund raisers separate from and in addition to the school's fund raisers depends upon the particular circumstances. If a school group is acting as an agent for the school, the group cannot have any tax-exempt fund raisers during a calendar year separate from or in addition to the school's fund raisers. If a school group is acting as an agent for the school, the school is actually raising the funds. Gehl Corporation v. Johnson, 991 S.W.2d 246, 248 (Tenn. App. 1998). The primary test of agency in this context is control

of the group by the school. A benefit to the school is also required. Id. A possible factor showing an agency relationship in this context is if a school group is created for the purpose of raising funds for the school. Another potential factor showing an agency relationship in this context is if the purpose of a school group's fund raiser is to raise funds for the school rather than for the group. A school group cannot provide a method for a school to circumvent the limitation of two annual tax-exempt fund raisers.

5. If the taxpayer obtains from a school a written statement (preferably a sworn affidavit) saying that the sales of picture packages will be sold by the school as one of no more than two fund raisers during a calendar year, and the school subsequently holds a third fund raiser, the school is liable for the use tax on the purchase price that it paid for the picture packages. Rule 1320-5-1-.09(4) and Tenn. Code Ann. Section 67-6-102(24)(H). Of course, this entire scenario depends upon the taxpayer actually selling picture packages to schools for resale to students or parents, as discussed in the criteria found in Haskins v. Yates, 1988 WL 80967 (Tenn. App.). Otherwise, the taxpayer cannot utilize the exemption for "casual and isolated sales."

Steve Butler
Tax Counsel

APPROVED: Ruth E. Johnson

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