

**TENNESSEE DEPARTMENT OF REVENUE  
REVENUE RULING # 05-13**

**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 cigarette sales exemption for cigarettes nearing their expiration date.

**SCOPE**

Revenue Rulings are statements regarding the substantive application of law and statements of procedure that affect the rights and duties of taxpayers and other members of the public. Revenue rulings are advisory in nature and are not binding on the Department.

**FACTS**

[THE COMPANY] is a [RETAIL CHAIN] that operates stores in Tennessee. All of its stores are cigarette retailers. As of June 2003, the three largest cigarette manufacturers have stopped giving credit to retailers for returned out-of-date cigarettes. The Company and other retailers are now left with inventories of out-of-date cigarettes. According to conversations with the Company, the typical mark-up on cigarettes is [X%]. The Company has proposed a discount of fifty percent (50%) on cigarettes that are within one month of their expiration date.

**QUESTION**

Does Tenn. Code Ann. §47-25-309(2) permit the Company to apply a fifty percent (50%) discount to cigarettes that are within one month of their expiration date? This discount would result in a sales price below cost.

**RULING**

No. Tenn. Code. Ann. §47-25-309(2) permits sales of cigarettes below cost only when they are sold as imperfect or damaged. Cigarettes within one month of their expiration date are not imperfect or damaged.

## ANALYSIS

Tenn. Code Ann. §47-25-303 establishes:

- (a) It is a Class C misdemeanor for any retailer, with intent to injure competitors or destroy substantially or lessen competition, to advertise, offer to sell, or sell at retail, cigarettes at less than cost to the retailer.
- (b) Evidence of advertisement, offering to sell or sale of cigarettes by any retailer at less than cost to the retailer shall be prima facie evidence of both a violation of the unfair Retailer's Cigarette Sales Law, compiled in this part, and of intent to injure competitors or destroy substantially or lessen competition.

Tenn. Code Ann. §47-25-309(2) provides an exemption to §47-25-303 for cigarettes that are:

Advertised, offered for sale, or sold as imperfect or damaged and the advertising, offer to sell, or sale shall state the reason thereof and the quantity of such cigarettes advertised, offered for sale, or to be sold.

Tenn. Code Ann. §47-25-309(2) only applies to cigarettes that are imperfect or damaged. Cigarettes that have not been physically damaged are suitable for sale until they reach their expiration date. The expiration date is commonly understood to mean, "The date past which a product, such as food or medicine, must be sold or removed from availability because it is no longer expected to be fresh or effective." *The American Heritage Dictionary*, Fourth Edition. Cigarettes that have not reached their expiration date are considered fresh and suitable for sale.

The Company is not proposing to sell cigarettes that have been physically damaged or have reached their expiration date; rather, the Company is proposing to sell the cigarettes below cost before they have reached their expiration date. The Company is suggesting that cigarettes within one month of their expiration date are imperfect or damaged. The Company does not present any evidence for this conclusion. Furthermore, such a conclusion would be contrary to the intent of Tenn. Code Ann. §47-25-309. If a retailer is permitted to sell cigarettes below cost at a point when it individually determines that the cigarettes are imperfect or damaged, then the retailer could sell its cigarettes below cost at any time. Such an interpretation of the exemption in Tenn. Code Ann. §47-25-309 would circumvent and nullify Tenn. Code Ann. §47-25-303.

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Approved: Loren L. Chumley  
Commissioner of Revenue

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