

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING # 04-37**

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 sales and use tax to products sold by structural metal fabricators.

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 revocation of the ruling must inure to the taxpayer's detriment.

FACTS

[THE TAXPAYER] is a Tennessee corporation which fabricates iron and steel. [THE TAXPAYER] does not install any of its products itself; rather, it typically sells the products to construction contractors working on large utility, government and industrial projects. Almost all of the jobs are outside of Tennessee and the completed materials are shipped via common carrier to the job site for installation by construction contractors. The product remains tangible personal property until installation by the construction contractors at which time it becomes real property.

QUESTION

Under which circumstances does [THE TAXPAYER] have to collect and remit Tennessee sales and use tax on the sale of its products?

RULINGS

1. If [TAXPAYER] fabricates steel or iron for sale to another dealer, who will not install the metal but will resell it, then [TAXPAYER] may accept a resale certificate from the dealer and no sales and use tax is due from [TAXPAYER] .
2. If the product is picked up in Tennessee by a contractor for its own use, whether in Tennessee or in another state, [TAXPAYER] must collect and remit sales and use tax.¹
3. If the product is delivered to a contractor in Tennessee for the contractor's own use, whether in Tennessee or in another state, [TAXPAYER] must collect and remit sales and use tax.²
4. If the product is delivered via common carrier to a customer outside of Tennessee, the sale is not subject to sales and use tax unless: the sales contract expressly states that title passes in Tennessee, the carrier is the buyer of the goods, or the buyer has hired the carrier to pick up the goods in Tennessee.³

ANALYSIS

Applicable Statutes and Tenn. Comp. R. & Regs.

Tenn. Code Ann. §67-6-202(a) levies the Tennessee sales tax as follows:

For the exercise of the privilege of engaging in the business of selling tangible personal property at retail in this state, a tax is levied on the sales price of each item

¹ Under Streamlined Sales and Use Tax statutes, effective July 1, 2005, when the product is received by the purchaser at the business location of the seller, the sale is sourced to that business location. Tenn. Code Ann. § 67-6-902(a)(1). If the purchaser picks up the product at the Taxpayer's Tennessee business location, the sale will be subject to Tennessee sales and use tax under the Streamlined Sales and Use Tax statutes. Receipt by the purchaser does not include delivery to a carrier, unless the purchaser is the carrier, regardless of who hires the carrier.

² Under Streamlined Sales and Use Tax statutes, effective July 1, 2005, this sale will be sourced to the location where the product is received by the purchaser or the purchaser's donee, designated as such by the purchaser, including the location indicated by the seller's instructions for delivery to the purchaser or donee. Tenn. Code Ann. § 67-6-902(a)(2). If the Taxpayer, by use of a carrier, delivers the product to a point in Tennessee, the sale will be subject to Tennessee sales and use tax under the Streamlined Sales and Use Tax statutes and will be taxed at the rate applicable to the location to which the product is delivered.

³ Under Streamlined Sales and Use Tax statutes, effective July 1, 2005, this sale will be sourced to the location where the product is received by the purchaser or the purchaser's donee, designated as such by the purchaser, including the location indicated by the seller's instructions for delivery to the purchaser or donee. Tenn. Code Ann. § 67-6-902(a)(2). However, if the carrier is the purchaser, the sale will be sourced to Tennessee where the purchaser/carrier takes receipt or possession of the goods under the Streamlined Sales and Use Tax statutes. Receipt by the purchaser does not include delivery to a carrier, unless the purchaser is the carrier, regardless of who hires the carrier.

or article of tangible personal property when sold at retail in this state; the tax to be computed on gross sales for the purpose of remitting the amount of tax due the state and is to include each and every retail sale.

A “sale” is defined by Tenn. Code Ann. §67-6-102(a)(27)(A) to mean:

“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, and includes the fabrication of tangible personal property for consumers who furnish, either directly or indirectly, the materials used in fabrication work . . . [.]

Tenn. Code Ann. §67-6-339 provides an exemption from sales and use tax for products sold to or used by structural metal fabricators:

[sales and use tax] does not apply to materials sold to or used by a structural metal fabricator; provided, that such materials are used by the fabricator to fabricate structural metal products for application or use by the fabricator in the performance of a contract outside the state.

Tenn. Comp. R. & Regs. 1320-5-1-.29 (“Rule 29”) provides:

(1) If a nonresident of Tennessee purchases articles of tangible personal property or taxable services from a dealer in Tennessee, and the sale is delivered to the vendee in Tennessee, the sale is not one of interstate commerce, and is subject to the Sales Tax. It is immaterial that the property will be later transported outside the State.

Tenn. Comp. R. & Regs. 1320-5-1-.68 (“Rule 68”) provides:

(1) Dealers shall require certificates of resale for all tangible personal property sold or services rendered in this State, for the purpose of resale, and such certificates must be available at the establishment of the dealer for ready inspection and comparison with the deductions claimed on monthly Sales and Use Tax returns. A dealer duly registered under the provisions of the Sales Tax Act and continually engaged in the business of selling tangible personal property or taxable services at retail may present evidence to his wholesaler or supplier as to his registration as a retailer, and shall not be required to execute additional certificates of resale for individual purchases as long as there is no change in the character of his operation, and the purchases are of tangible personal property or taxable services of a sort usually purchased by the purchaser for resale

Application of Statutes and Tenn. Comp. R. & Regs.

The only circumstance under which [THE TAXPAYER] may accept a resale certificate is if it sells its product to a dealer who will not use it, but will resell it to another party. Pursuant to Rule 68, if [TAXPAYER] sells its product to a dealer for the purpose of

resale, then it must obtain a resale certificate in order to be relieved from collecting and remitting sales and use tax.

If [THE TAXPAYER] is determined to be a structural metal fabricator for the purposes of Tenn. Code Ann. §67-6-339 and it uses the product itself for a job outside Tennessee, then the materials used to fabricate the product are exempt from sales and use tax. Tenn. Code Ann. §67-6-339 exempts from sales and use tax materials used by a structural metal fabricator provided that such materials are used by the fabricator to fabricate structural metal products for application or use by the fabricator in the performance of a contract outside the state. However, according to the facts provided, [THE TAXPAYER] does not use the metal products itself; therefore, this exemption would not apply.

If [THE TAXPAYER] sells its product to a customer for that customer's own use and the customer picks up the product at [TAXPAYER'S] place of business, [THE TAXPAYER] must collect sales and use tax on the transaction, whether or not the product is actually used in Tennessee.⁴ Since the transaction occurred in Tennessee, a taxable "sale" has occurred and according to Tenn. Code Ann. §67-6-202(a), sales and use tax is due.

If [THE TAXPAYER] delivers its product via common carrier to a customer in Tennessee, [TAXPAYER] must collect sales tax on the transaction, whether or not the product is actually used in Tennessee.⁵ See Rule 29. Since the transaction occurred in Tennessee, a taxable "sale" has occurred and according to Tenn. Code Ann. §67-6-202(a), [TAXPAYER] must collect and remit sales and use tax.

If [THE TAXPAYER] delivers its product via common carrier to a customer in another state, the sale is not subject to sales and use tax unless: the sales contract specifies that title passes to the customer in Tennessee, the carrier is the buyer of the goods, or the buyer has hired the carrier to pick up the goods in Tennessee.⁶ Absent one of these exceptions, delivery via common carrier to a customer in another state does not constitute a "sale" in Tennessee, thus no Tennessee sales tax need be collected by [TAXPAYER] from the customer. Although no exemption certificate is required for out of state deliveries via common carrier, [TAXPAYER] must maintain documentation that shows an out-of-state sale in order to avoid potential liability.

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Approved: Loren L. Chumley
Commissioner of Revenue

Date: 11/23/04

⁴ See footnote 1.

⁵ See footnote 2.

⁶ See footnote 3.