

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING # 01-13**

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 sales and use tax to [SHIPPING DEVICES] used in shipping [TYPE OF PRODUCTS].

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 manufacturer of [TYPE OF PRODUCTS] with a facility in Tennessee. The taxpayer sells [PRODUCTS] that it ships from the Tennessee facility to its customers. The [PRODUCT] is shipped [VIA] [SHIPPING DEVICES], to customers located both inside and outside of Tennessee. The taxpayer and its customer have an understanding that, once the customer has removed the [PRODUCT] from the [SHIPPING DEVICES], the [SHIPPING DEVICES] are to be returned to the taxpayer, which then re-uses the [SHIPPING DEVICES]. While some customers are charged a deposit to insure the return of the [SHIPPING DEVICES], other customers are not.

QUESTION

Does the taxpayer owe sales or use tax on its purchase of the [SHIPPING DEVICES] [VIA] which its [TYPE OF PRODUCTS] are shipped?

RULING

The taxpayer does not owe sales or use tax on its purchase of the [SHIPPING DEVICES].

ANALYSIS

Tenn. Code Ann. § 67-6-102(24)(E) states, in pertinent part:

"Sale at retail," "use," "storage," and "consumption" do not include the sale, use, storage or consumption of:

* * *

(ii) Materials, containers, labels, sacks, bags or bottles used for packaging tangible personal property when such property is either sold therein directly to the consumer or when such use is incidental to the sale of such property for resale ...

Tenn. Code Ann. § 67-6-102(24) operates to negate in part other provisions of the Retailers' Sales Tax Act that would otherwise impose sales or use taxes. Therefore, the rules of statutory construction that apply to exemptions apply to the construction and application of Tenn. Code Ann. § 67-6-102(24). *See, Hutton v. Johnson*, 956 S.W.2d 484 (Tenn. 1997). Tax exemption statutes are to be construed against the taxpayer and exemptions will not be implied. *Hyatt v. Taylor*, 788 S.W.2d 554 (Tenn. 1990). Every presumption is against exemption, and any well founded doubt defeats a claimed exemption. *United Cannery, Inc. v. King*, 696 S.W.2d 525 (Tenn. 1985). The burden is

upon the taxpayer to establish a claimed exemption. *Woods v. General Oils, Inc.*, 558 S.W.2d 433 (Tenn. 1977).

TENN. COMP. R. & REGS. 1320-5-1-.11 (hereinafter “Rule 11” or “the Rule”), entitled “Containers, Wrapping and Packing Materials and Related Products” interprets Tenn. Code Ann. § 67-6-102(24). The first paragraph of the regulation states:

Items actually accompanying the product sold or shipped, without which the delivery of the product is impracticable on account of the character of the contents, and for which there is no separate charge, are not subject to Sales or Use Tax. These items include such things as containers, packing materials, labels or name plate affixed to products manufactured, and printed matter containing only directions for use.

The Rule must be read in conjunction with the statute. While the Commissioner of Revenue is authorized to prescribe reasonable rules and regulations not inconsistent with the taxing statutes under Tenn. Code Ann. § 67-1-102, such rules and regulations may not enlarge the scope of either a taxing statute or an exemption. See, *Covington Pike Toyota, Inc. v. Cardwell*, 829 S.W.2d 132, 135 (Tenn. 1992); *Volunteer Val-Pak v. Celauro*, 767 S.W.2d 635, 637 (Tenn. 1989); *Coca-Cola Bottling Co. v. Woods*, 620 S.W.2d 473, 475-76 (Tenn. 1981).

In *Coca-Cola Bottling Co. of West Tennessee v. Celauro*, 1993 WL 330303 (Tenn. 1993), the Tennessee Supreme Court considered the exclusion from sales tax for containers found in the statute. In that case, Coca-Cola used pressurized tanks to deliver either a "pre-mix" or "post-mix" soft drink syrup. Pre-mix tanks contained a solution of syrup, water, and carbon dioxide that could be dispensed directly into a drinking container for the consumer. Post-mix tanks contained only soft drink syrup so that the customer was required to combine the syrup with water and carbon dioxide before the product was served. Coca-Cola's customers consisted primarily of restaurants that sold soft drinks directly to consumers. The pressurized tanks were delivered to the restaurants, or other customers, and connected to a dispensing unit. Empty tanks were either returned by the customer or retrieved by Coca-Cola and were cleaned and used again. No separate charge was made to the customer for the tank.

In construing the statute, the Court determined that the product tanks used by Coca-Cola were incidental to the sale of the soft drink products for resale. The evidence showed that there was no practical alternative for the product to be sold "to customers for resale without use of the product tank." The Court did not discuss Rule 11 in this case, but the Court's ruling is consistent with the Rule's requirement that delivery of the product would be impracticable without the container.

In *Evans v. Memphis Dairy Exchange*, 194 Tenn. 317, 250 S.W.2d 547 (1952), the Court considered a predecessor to the current statute. At that time, the exemption provided:

The terms 'sale at retail,' 'use,' 'storage,' and 'consumption' shall not include the sale, use, storage or consumption of industrial materials for * * * nor * * * materials, containers, labels, sacks or bags used for packaging tangible personal property for shipment or sale.

In that case, Memphis Dairy Exchange sold bottles to distributors who used the bottles in packaging milk for delivery to consumers. Consumers paid the distributors a deposit of three cents per bottle in order to assure the return of the bottle to the distributor. The Court held that the sale of the milk bottles to the distributors was not a taxable sale at retail under the above statute.

In the *Coca-Cola* and *Memphis Dairy Exchange* cases cited above, the packaging at issue consisted of the packaging which immediately held the actual property to be sold, that is, tanks to contain soft drinks or bottles to contain milk. Further, the product remained in the packaging at issue until after the product was delivered to the vendor's immediate customer. The container at issue in this ruling, the [SHIPPING DEVICE], holds the [PRODUCT] until the [SHIPPING DEVICE] comes into the possession of the taxpayer's customer. Whether the customer is an end user, or whether the customer is purchasing the [PRODUCT] for resale, the [SHIPPING DEVICE] clearly falls within the exemption outlined above. There is a strong analogy between the [SHIPPING DEVICES] and the tanks in *Coca-Cola v. Celauro, supra*. Therefore, the container is exempt under the provisions of Tenn. Code Ann. § 67-6-102(24)(E)(ii) and Rule 11. The taxpayer does not owe sales or use tax on its purchase of the [SHIPPING DEVICES].

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Tax Counsel

APPROVED: Ruth E. Johnson
Commissioner

DATE: 7/17/01