

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING # 01-20**

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 Tennessee sales tax to disposable meal accompaniments such as paper napkins, straws, plastic utensils, stirrers and other disposable paper items.

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

[TAXPAYER] is a large food and foodservice supply distributor.¹ Taxpayer has a variety of customers, including restaurants, hospitals and universities. This ruling request

¹ When this ruling was requested, the Taxpayer was identified as [COMPANY ONE]. Since that date, the Taxpayer was acquired by [COMPANY TWO]. In addition, Taxpayer went through a statutory merger in which it was consolidated into [COMPANY THREE]. Finally, the name of the Taxpayer was changed to [COMPANY ONE].

is specifically in reference to the Taxpayer's sales to its restaurant customers who have issued to the Taxpayer a valid Tennessee resale certificate.

The Taxpayer has been charging sales tax on the sales of paper napkins, straws, plastic utensils, stirrers and other disposable paper items that would accompany a taxable meal service such as paper place mats and paper soufflé cups. Several of the taxpayer's Tennessee customers have stated that the taxpayer should not be charging sales tax on these disposable "meal accompaniments."²

QUESTION

Are paper napkins, straws, plastic utensils, stirrers and other disposable paper and plastic items sold by Taxpayer to a restaurant who furnishes these items to the latter's retail customers as part of a taxable meal service subject to the Tennessee sales tax?

RULING

No. The sale by Taxpayer of disposable paper and plastic items to a restaurant which furnishes them to its retail customers as part of a food order would constitute a sale for resale. (The purchasing restaurant must purchase these items using a valid resale exemption certificate.)

ANALYSIS

Under T.C.A. Section 67-6-102(24)(A) the term "sale at retail" means "a taxable sale of tangible personal property or specifically taxable services to a consumer or to any person for any purpose other than for resale."

The Department of Revenue rule applicable to sales for resale provides the following definition:

"Sales for resale" means those whereby a supplier of materials, supplies, equipment and services makes such tangible personal property or services available to legitimate dealers *actually selling such property or services as such*, or which becomes an industrial material or supply in a manufacturing or processing operation.

Tenn. Comp. R. & Regs. 1320-5-1-.62(1) (emphasis added).

The Department has treated disposable paper and plastic items sold to restaurants that are furnished by the applicable restaurant as part of a food order to be exempt from tax as a sale for resale.

Therefore, restaurants may purchase tax-exempt from the Taxpayer, on a resale certificate, disposable paper and plastic items to be furnished to the restaurant's customers as part of a food order. These items would include paper napkins, straws, plastic utensils,

² Based on the Taxpayer's clarification of its opinion request, no ruling is either sought or issued concerning sales tax on condiments sold by the Taxpayer to its restaurant customers.

stirrers and other disposable paper and plastic items, such as place mats and paper soufflé cups.

However, only disposable items not actually re-used by the purchasing restaurant would qualify for the sale for resale exemption. Thus, a plastic cup that is actually re-used by the purchasing restaurant would not qualify even if it were disposable in the sense that it was designed to be disposed of after a single use. The plastic cup, in that event, would not have been sold for resale but rather sold for use by the restaurant.

Additionally, even if the item is disposable, but it is used a single time in the kitchen or toilet area of the restaurant rather than as a part of a food order, the sale for resale exemption would not apply. Thus, the Taxpayer's sale to restaurants of items such as aluminum foil and paper towels used in the kitchen, or toilet tissue and paper towels used in the restrooms, would be subject to the sales tax. In that event, the Taxpayer would be required to collect the sales tax at the time of sale.

Both the Taxpayer and its restaurant customers should be aware of the Department's rule applicable to Resale Certificates in this context since they may each suffer adverse tax consequences if they accept or present a resale certificate contrary to applicable law and the Department's rule. Tenn. Comp. R. & Regs. 1320-5-1-.68.

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APPROVED: Ruth E. Johnson
Commissioner

DATE: 10/15/01