

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

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 the sale of carpet that is designated for resale to a specific customer.

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;
- (G) 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] makes sales of materials and supplies to various dealers, including contractor-dealers. The material is sometimes tagged or side-marked on the taxpayer's

invoice for a particular job. The side mark does not always mark the material for a contracted job to be performed by the contractor-dealer. In many instances, dealers (not necessarily contractor-dealers) will ask the taxpayer to use the side mark as an identifier of the person to whom the carpet ultimately will be resold. In those particular instances, the carpet would be for resale. The taxpayer is registered in Tennessee for sales and use tax purposes. The taxpayer asks for a ruling on whether, under these facts, it can accept resale certificates from its customers in lieu of collecting sales and use tax.

ISSUE

Pursuant to Tenn. Comp. R. and Regs. 1320-5-1-.08, must the taxpayer collect sales tax when a dealer purchases tagged or side marked merchandise that is intended for resale?

RULING

The taxpayer can accept a resale certificate from dealers buying tagged or side marked merchandise if it is intended for resale and is not delivered to a job site. Sales and use tax must be collected on sales of materials tagged or marked for a particular job intended to be performed by the contractor-dealer.

ANALYSIS

Retail sales of tangible personal property in Tennessee are subject to sales and use tax under Tenn. Code Ann. § 67-6-101 et. seq. Retail sales include those made by an out-of-state dealer, such as the taxpayer in this case, if delivery is made to a buyer in Tennessee. Tenn. Code Ann. § 67-6-102(a)(25)(C). Furthermore, a retail sale is defined as a taxable sale of tangible personal property to a consumer or to any person for any purpose other than for resale. Tenn. Code Ann. § 67-6-102(a)(25)(A). Any sales for resale, however, must be in strict compliance with the rules and regulations promulgated by the Commissioner of Revenue. *Id.* Any dealer making a sale for resale that is not in strict compliance with these rules and regulations shall be personally liable for the tax. *See Upper East Tennessee Distributing v. Johnson*, 1997 WL 243503 (Tenn. Ct. App. May 13, 1997).

As some of the taxpayer's customers are in the business of reselling the carpet on some occasions and are also in the business of installing on other occasions, they come under the rules governing contractor-dealers found in Sales and Use Tax Rule 8:

- (1) Contractors and sub-contractors engaged in the business of erecting, building or otherwise improving, altering and repairing real property for others, and also engaged in the business of selling building materials and supplies to other contractors, consumers, and users, and who may not be able to segregate that portion of the materials and supplies that they will use or consume in the fulfillment of their contracts from that portion of the materials and supplies that they will sell at retail, may give a resale certificate to the seller of the materials and supplies.

(2) Contractor-dealers making sales of tangible personal property shall report all sales made, and all withdrawals from inventory for use as a contractor each month, and pay any applicable Sales or Use Tax due. Any withdrawal from inventory for use as a contractor shall be reported and the tax due thereon shall be paid with the return for the location of the inventory, regardless of the place of use, either in or out of the state.

(3) Suppliers making sales of materials and supplies to contractor dealers and delivering such materials and supplies to a job site for use, or tagging or marking particular materials and supplies for a particular job being performed by the contractor-dealer, shall collect the applicable Sales or Use Tax on those sales.

Tenn. Comp. R. & Regs. 1320-5-1-.08. Generally, a dealer may make tax-free sales to contractor-dealers on a resale certificate. Subsequently, the contractor-dealer must collect sales tax on the material which is sold at retail and pay use tax on the material which is used in the fulfillment of a contract.

However, Rule 8(3) contains an important exception. A supplier must collect sales tax from a contractor-dealer where the material is delivered to a job site for use or if the materials are tagged or marked for a particular job to be performed by the contractor-dealer. *See, Honest Abe Log Homes, Inc. v. Huddleston*, 1994 Lexis 635 (Tenn. Ct. App. 1994).

Applying the statutes and the case law to the facts provided, the taxpayer's sales of tangible personal property to dealers that are intended for resale may be sold tax exempt to those dealers who provide valid resale certificates. As these sales are not delivered to a job site and are not intended for a particular job to be performed by the contractor-dealer, these sales are outside the provisions of Rule 8(3). The taxpayer must acquire and retain a copy of the dealers' resale certificates to preclude future sales tax liability on these sales.

If the carpet is side-marked or tagged, there is a presumption that it is intended for a contractor-dealer's use on a particular job. If the contractor-dealer indicates they are purchasing carpet strictly for resale (the contractor-dealer or its subcontractor will not be installing the carpet), the taxpayer needs to obtain the resale certificate and additional supporting documentation from the contractor-dealer indicating the tagged carpet was purchased for resale only. For example, the taxpayer could obtain a statement from the contractor-dealer that it will resale rather than install the carpet along with the name of the customer to whom the carpet will be resold. The taxpayer should retain that documentation along with the resale certificate in its records.

Conversely, sales to contractor-dealers that are tagged or marked for a particular job intended to be performed by the contractor-dealer, or are delivered to a job site, cannot be

purchased tax-exempt with a resale certificate. The taxpayer must collect applicable sales or use tax on those sales.

NOTE: Public Chapter 357 of 2003 and Public Chapter 959 of 2004 enable Tennessee's participation in the Streamlined Sales Tax Agreement effective July 1, 2005. This may result in changes to the rules regarding the handling of exemption certificates, including resale certificates. The Department of Revenue will make every reasonable attempt to notify impacted parties of these changes. We encourage you to visit our website at www.state.tn.us/revenue for updates.

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APPROVED: Loren L. Chumley
Commissioner

DATE: 1/20/05