

A motion by Tennessee and South Dakota to adopt a rule relating to the Definition of Sales Price

Rule 327.7 Sales Price Definition

A. The purpose of this section of the sales price definition rule is to clarify which taxes are included in or excluded from the sales price as defined in Appendix C, Part I, Library of Definitions.

1. Sales price is the measure that is subject to sales tax. Because purchase price, the measure that is subject to use tax, has the same meaning as sales price, this rule applies to use tax as well as to sales tax. The sales and use taxes covered by the Agreement that are applied to the sales price of the retail sale of a product are not included in the sales price of that product, regardless of who bears the legal incidence of tax.

2. A tax imposed on a product prior to the retail sale of that product is an element of the cost to the seller of the product and shall be included in the sales price (measure) for purposes of calculating the sales tax by member states.

Example 1: Federal excise tax imposed on the sale by a manufacturer, producer or importer of tires to resellers. 26 U.S.C. § 4071. The federal excise tax is imposed on the manufacturer, producer or importer and constitutes an element of cost of its tires that is passed down to the retailer and ultimately to the consumer in the selling price. This tax is included in the sales price of the tires.

3. The sales price definition states there is no deduction from the sales price for “The cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller.”

While provisions in the definition identifying the amounts that may not be deducted from the sales price are very broad, the exclusions from sales price are narrow and specific.

A state may elect to exclude from the sales price state and local taxes imposed on retail sales of products that are otherwise imposed on the seller. This election is limited to only those taxes for which the state statutes authorizing or imposing the tax provide that the seller may, but is not required, to collect such tax from the consumer. This election applies only to such taxes that are separately stated on the invoice, billing, or similar document given to the purchaser.

A state making this election may not select individual taxes to include or exclude from the sales price. This election applies to all state and local taxes imposed on retail sales by the seller that the state statutes authorizing or imposing the taxes provides that the seller may, but is not required, to collect from the consumer.

Example 1: State A requires every cable television provider operating in its state to obtain a statewide cable television franchise license. The fee to obtain a franchise license is a flat fee that is based on whether the cable television provider has more or less than 10,000 subscribers. State law provides that a cable television service provider may recover the costs of its franchise license fee by separately stating the amount being

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recovered on each subscriber's cable bill. The separately stated franchise license fee is included in the "sales price" since that is a tax that is imposed on the seller prior to the retail sale of the product.

4. The sales price definition also states that the sales price shall not include "Any taxes legally imposed directly on the consumer that are separately stated on the invoice, bill of sale or similar document given to the purchaser." A tax imposed directly on the consumer that is not separately stated on the invoice, bill of sale, or similar document given to the consumer is a cost or expense of the seller and is included in the sales price.

A tax is legally imposed directly on the consumer if the imposition statute specifies the tax is:

- a. imposed on the consumer;
- b. the seller is required to collect from or bill the consumer for the tax; or
- c. the tax is to be paid by or is due by the consumer.

Such tax shall be considered a tax imposed directly on the consumer regardless of whether the statute provides that the seller is liable for the tax if the consumer does not pay the tax to the seller.

A tax that does not meet the criteria as a tax imposed directly on the consumer as explained in this rule is a tax imposed on the seller or an expense of the seller.

Example 1: Federal Excise Tax on indoor tanning services. Chapter 49, Section 5000B, states the tax "imposed by this section shall be paid by the individual on whom the service is performed". This tax is imposed directly on the consumer and when itemized on the invoice the tax is not included in the sales price.

Example 2: A municipality in State A imposes a 3% tax based on the retail sale of lodging services. The statutes in State A provide that the seller may collect this tax from the consumer and if the seller collects this tax from the consumer, it must be separately stated on the invoice the seller provides to the consumer. This tax is imposed on the seller and is included in the sales price. Such tax is excluded from sales price only in states electing the option available under the sales price definition and subsection A.3. of this rule.

5. State law that allows the local jurisdictions to impose a tax will be used to determine if the tax is imposed directly on the consumer or imposed on the seller. The state law controls whether those taxes are included or excluded from the sales price, regardless of whether the local jurisdiction's law or ordinance adopted provides that:

- a. The tax is imposed on the consumer;
- b. The tax must be collected from or billed to the consumer; or
- c. The tax may be collected from the consumer.

If the state law is silent as to the collection or imposition of tax, the tax is considered imposed on the seller and is included in the sales price.

Example 1: State Law 1. Additional municipal non-ad valorem tax authorized--Rate. Any municipality may impose an additional municipal non-ad valorem tax at the rate of one percent upon the gross receipts of all leases or rentals of hotel, motel, campsites, or other lodging accommodations within the municipality for periods of less than twenty-eight consecutive days. Any person or retailer subject to taxation under this chapter may add the tax under this chapter, or the average equivalent thereof, to the price or charge.

Based on State Law 1, this tax is imposed on the seller and is included in the sales price. However, it is excluded from the sales price only in states electing the option available under the sales price definition and subsection A.3. of this rule, if the tax is separately stated on the invoice, bill of sale, or similar document given by the seller to the consumer, regardless of what the municipal ordinance says.

Example 2: State Law 2. The council shall have power to tax for revenue, license, and regulate pawnbrokers, peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, innkeepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express companies and vendors of patents. Such tax may include both a tax for revenue and license. The city council shall have power to raise revenue by levying and collecting a tax on any occupation or business within the limits of the city and regulate the same by ordinance. All such taxes shall be uniform in respect to the class upon which they are imposed. It shall be the duty of the city clerk to deliver to the city treasurer the certified copy of the ordinance levying such tax, and the city clerk shall append thereto a warrant requiring the city treasurer to collect such tax.

Based on State Law 2, this tax is imposed on the seller and is included in the sales price since the state law is silent as to the collection or imposition of the tax.

Example 3: State Law 3 provides that municipalities may impose a local room tax. The state law indicates that these taxes may be passed on to or collected from the consumer, based on the ordinance passed by each municipality. Municipality A passes an ordinance to impose the local room tax and that the tax may be passed on to or collected from the consumer. Municipality B passes an ordinance to impose the local room tax and that the tax may not be passed on to the consumer.

Based on State Law 3, these taxes are imposed on the seller and included in the sales price in both Municipality A and Municipality B. However, these taxes will be excluded from the sales price in those states electing the option available under the sales price definition and subsection A.3. of this rule, if the taxes are separately stated on the invoice, bill of sale, or similar document given by the seller to the consumer, regardless of what the municipal ordinance says.

6. Contracts between a seller and consumer will not alter upon whom the legal incidence of the tax is statutorily imposed.

7. As of January 1, 2011, Federal taxes that are legally imposed directly on the consumer based on the above rules are excluded from the "sales price" when separately stated on the invoice, bill of sale, or other similar document given by the seller to the consumer.

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- A. Telecommunications Excise Tax. 26 U.S.C. § 4251.
- B. Transportation of Persons by Air. 26 U.S.C. § 4261.
- C. Transportation of Property by Air. 26 U.S.C. § 4271.
- D. Tanning Service. H.R. 3590, § 10907 Chapter 49, § 5000B.

8. As of January 1, 2011, the following are examples of ~~f~~Federal taxes and fees that are included in the sales price, regardless of whether they are separately stated on the invoice, bill of sale, or other similar document given by the seller to the consumer. These are imposed on the seller or are a cost ~~of~~ expense of the seller.

- A. Federal Universal Service Fund Fee 47 U.S.C. § 254.
- B. Federal Subscriber Line Charge. This is not a government charge or tax. The FCC caps the maximum price a company may charge for this.
- C. Federal Retail Tax on Heavy Trucks 31 U.S.C § 4051.
- D. Federal Alcohol Tax Title 27.
- E. Federal Tobacco Tax Title 27.
- F. Federal Firearms and Ammunition Excise Tax 26 U.S.C. § 4181.
- G. Federal Gas Guzzler Tax § 48.4064-1.
- H. Federal Motor Fuel Tax § 48.4081.

B. The purpose of this section is to explain that a partial exclusion of a definition is prohibited.

1. A member state that has adopted the Sales Price definition shall use the definition contained in the Agreement and shall not exclude from the sales price any amount or measure that is included in the sales price definition unless the Agreement specifically permits such a variation.

Example 1: A state imposes an excise tax on the receipts from wireless telecommunication services. The law does not state the consumer is to pay the tax or that the seller is required to collect the tax from the consumer. The law is silent concerning an authorization to pass the tax on to or collect the tax from the consumer. A state passing a sales tax statute to exclude the excise tax on wireless telecommunication services from the sales price is not in compliance with the Agreement.

Example 2: A state law allows municipalities to enact an ordinance or resolution imposing a tax on the privilege of furnishing, at retail, rooms or lodging to transients by hotelkeepers, motel operators and other persons furnishing accommodations that are available to the public. The state law provides the tax imposed under this law is not subject to the sales tax imposed by their state sales tax statutes. There is no language stating the tax must be collected from or paid by the consumer and no language stating the seller may pass the tax on or collect the tax from the consumer. Instead, each municipality's ordinance or resolution indicates whether the tax may or may not be collected from the consumer.

Because the law is silent concerning an authorization to ~~pass the tax on to or~~ collect the tax from the consumer, this tax is imposed on the seller. The state excluding this tax from the sales price is not in compliance with the Agreement.

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