
State of South Carolina
Department of Revenue
300A Outlet Pointe Blvd., Columbia, South Carolina 29210
P. O. Box 12265, Columbia, South Carolina 29211
Website Address: <http://www.sctax.org>

SC PRIVATE LETTER RULING #13-1

SUBJECT: Disease Management Program – Communications or Data Processing
(Sales and Use Tax)

REFERENCES: S.C. Code Ann. Section 12-36-910 (2000; Supp. 2011)
S.C. Code Section 12-36-1310 (2000; Supp. 2011)
S.C. Code Section 12-36-1110(A) (Supp. 2011)
S.C. Code Section 12-36-60 (2000)
S.C. Code Section 12-36-100 (2000)
S.C. Code Section 12-36-110 (2000)
27 S.C. Code Regs. 117-308.3 (Supp. 2011)
27 S.C. Code Regs. 117-308.8 (Supp. 2011)

AUTHORITY: S. C. Code Ann. Section 12-4-320 (2000)
S. C. Code Ann. Section 1-23-10(4) (2011)
SC Revenue Procedure #09-3

SCOPE: A Private Letter Ruling is an advisory opinion issued to a specific taxpayer by the Department to apply principles of law to a specific set of facts or a particular tax situation. It is the Department's opinion limited to the specific facts set forth, and is binding on agency personnel only with respect to the person to whom it was issued and only until superseded or modified by a change in statute, regulation, court decision, or another Departmental advisory opinion, providing the representations made in the request reflect an accurate statement of the material facts and the transaction was carried out as proposed.

Question:

Are charges by ABC to healthcare providers for their *123! for health* disease management program provided through the telephone, as described in the facts, subject to the sales and use tax?

Conclusion:

The charges by ABC to healthcare providers for their *123! for health* disease management program, as described in the facts, are sales of a nontaxable data processing service as defined in Code Section 12-36-910(C) when the program involves interactive responses by the patients of the healthcare provider, since (1) *123! for health* is a service where information furnished by patients of the healthcare provider is manipulated by ABC through all or part of a series of operations involving an interaction of procedures, processes, methods, personnel, and computers; (2) the data is sorted and combined by patient disease type, alerts for responses falling outside of determined parameters, and other categories as needed by the specific healthcare provider; (3) “data processing” includes “the electronic transfer of or access to that information;” and (4) the web portal used by the healthcare provider is the means through which the healthcare provider has access to the “data processing” performed by ABC.

Facts:

ABC, LLC was founded by health communication specialists from clinical and academic health centers. Its mission is to provide quality content and technology systems to optimize the medical care of patients with serious illnesses. This is accomplished using state of the art communication empowered by audio and interactive technology.

ABC provides voiced and text messages using a variety of technologies. One of the services ABC provides is a disease management program known as *123! for health*. It is a voice messaging disease management program sold to healthcare professionals and institutions. This program seeks to educate, engage, and empower patients about their disease while collecting and monitoring daily clinical information. The platform can be customized to allow interactive delivery communication for a wide variety of health and medical needs.

To implement the program, the healthcare professional or institution receives consent from the patient, subsequently enrolling the patient into the program through a customer specific web-based portal. Messages are, in most cases, sent by telephone to the patient at a specific time of day. The patient listens to the message and responds using their telephone keypad – typically answering questions related to the patient’s weight and symptoms using their telephone keypad.

The patient’s responses are recorded in a database accessible by an authorized healthcare professional via a web-based portal. The data is stored by patient and displayed in standard reporting formats. Examples of standard reporting formats are:

Views by Program, such as only diabetes patients or only surgical patients;

Alerts for responses falling outside determined parameters, for example, weight changes calculated by the system of greater than 2 pounds for congestive heart failure patients;

Views of all patients’ responses; and

Views of all patient responses for specific date.

The data is stored on a per patient basis for each healthcare provider; however, it does, based on user reports, combine data from multiple patients and sorts this data for the healthcare provider to manage their patient load.

Discussion:

Code Section 12-36-910(A) states:

A sales tax, equal to [six]¹ percent of the gross proceeds of sales, is imposed upon every person engaged or continuing within this State in the business of selling tangible personal property at retail. (Emphasis added.)

Code Section 12-36-1310(A) states:

A use tax is imposed on the storage, use, or other consumption in this State of tangible personal property purchased at retail for storage, use, or other consumption in this State, at the rate of [six]² percent of the sales price of the property, regardless of whether the retailer is or is not engaged in business in this State. (Emphasis added.)

Based on the above, for the sales tax or use tax to apply there must be a retail sale of tangible personal property.

Code Section 12-36-100 defines the terms “sale” and “purchase” to mean:

any transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration including:

- (1) a transaction in which possession of tangible personal property is transferred but the seller retains title as security for payment, including installment and credit sales;
- (2) a rental, lease, or other form of agreement;
- (3) a license to use or consume; and
- (4) a transfer of title or possession, or both.

Code Section 12-36-110 defines the terms “retail sale” and “sale at retail” in part as:

Sale at retail and retail sale mean all sales of tangible personal property except those defined as wholesale sales. The quantity or sales price of goods sold is immaterial in determining if a sale is at retail.

¹ Code Section 12-36-1110 increased the sales and use tax rate by 1% beginning June 1, 2007.

² See footnote #1.

(1) The terms include:

* * * *

(i) sales of drugs, prosthetic devices, and other supplies to hospitals, infirmaries, sanitariums, nursing homes, and similar institutions, medical doctors, dentists, optometrists, and veterinarians, if furnished to their patients as a part of the service rendered. These institutions, companies, and professionals are deemed to be the users or consumers of the property;

As such, the sale of tangible personal property to hospitals and doctors are retail sales when such property is furnished to their patients as a part of the service rendered. In addition, hospitals and doctors are deemed to be the users or consumers of such tangible personal property. See also SC Regulations 117-308.3 and 117-308.8.

Code Section 12-36-60 defines the term "tangible personal property" to mean:

...personal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses. It also includes services and intangibles, including communications, laundry and related services, furnishing of accommodations and sales of electricity, the sale or use of which is subject to tax under this chapter and does not include stocks, notes, bonds, mortgages, or other evidences of debt. ... (Emphasis added).

Consequently, the term tangible personal property includes the sale or use of services and intangibles, including communications, that are subject to South Carolina sales or use taxes under Chapter 36 of Title 12.

Communications are subject to sales and use taxes under Chapter 36 of Title 12 pursuant to Code Sections 12-36-910(B)(3) and 12-36-1310(B)(3)³, which impose the tax on the:

gross proceeds accruing or proceeding from the charges for the ways or means for the transmission of the voice or messages, including the charges for use of equipment furnished by the seller or supplier of the ways or means for the transmission of the voice or messages (Emphasis added.)

The Department has long held that Code Sections 12-36-910(B)(3) and 12-36-1310(B)(3) impose the sales and use tax on the total amount of money derived, exclusive of deductions, from a commercial venture and accruing or proceeding from charges for the manner, method or instruments for sending a signal of the voice or of messages. See SC Revenue Ruling #89-14, SC Revenue Ruling #04-15 and SC Revenue Ruling #06-8.

³ See SC Revenue Ruling #06-8 for other statutes concerning communications subject to the sales and use tax. These other communications statutes are not relevant to this discussion.

Furthermore, the definition of tangible personal property, as defined in Code Section 12-36-60, includes services and intangibles "the sale or use of which is subject to tax under [Chapter 36]," such as "communications." The Second College Edition of the American Heritage Dictionary defines "communication," in part, as "[t]he exchange of thoughts, messages or information, as by speech, signals or writing." "Communications" is defined, in part, as, "a means of communicating esp.: a system of sending and receiving messages, such as mail, telephone and television." The Department has long used the definition found in the Second College Edition of the American Heritage Dictionary for the term "communications."

Based on the above discussion, it is the Department's position that charges for the ways or means of communication include charges for access to, or use of, a communication system (the manner, method or instruments for sending or receiving a signal of the voice or of messages), whether this charge is based on a fee per a specific time period or per transmission. This is further supported by the definition of the terms "sale" and "purchase," which are defined in Code Section 12-36-100 to include "a license to use or consume." See SC Revenue Ruling #89-14, SC Revenue Ruling #04-15 and SC Revenue Ruling #06-8.

The Department of Revenue has taxed communication services such as telephone services, paging services, cable television services, satellite programming services (includes, but is not limited to, emergency communication services and television, radio, music or other programming services), fax transmission services, e-mail services, and database access transmission services (on-line information services), such as legal research services, credit reporting/research services, and charges to access an individual website.

Finally, Code Section 12-36-910(C) states:

Notwithstanding other provisions in this article or Article 13, Chapter 36, of this title, the sales or use tax imposed by those articles does not apply to the gross proceeds accruing or proceeding from charges for or use of data processing. As used in this subsection, "data processing" means the manipulation of information furnished by a customer through all or part of a series of operations involving an interaction of procedures, processes, methods, personnel, and computers. It also means the electronic transfer of or access to that information. Examples of the processing include, without limitation, summarizing, computing, extracting, storing, retrieving, sorting, sequencing, and the use of computers.

From time to time it is necessary to determine if the transaction is a sale or rental of tangible personal property or the furnishing of a service. The so-called "true object" test is generally used to delineate sales of services from sales of tangible personal property. In this case, the "true object" test can assist in determining the "true object" of the transaction between ABC and the healthcare providers using their *123! for health* disease management program provided through the telephone.

The "true object" test is best described in 9 *Vanderbilt Law Review* 231 (1956), wherein it is stated:

The true test then is one of basic purpose of the buyer. When the product of the service is not of value to anyone other than the purchaser, either because of the confidential character of the product, or because it is prepared to fit the purchaser's special need - a contract or will prepared by a lawyer, or the accident investigation report prepared for an insurance company - this fact is evidence tending to show that the service is the real purpose of the contract. When the purpose of a contract is to produce an article which is the true object of the agreement, the final transfer of the product should be a sale, regardless of the fact that special skills and knowledge go into its production. Under this analysis, printing work, done on special order, and of significant value only to the particular customer, is still a sale. The purchaser is interested in the product of the services of the printer, not in the services per se. Similarly, it would seem that contracts for custom-produced articles, be they intrinsically valuable or not, should be classified as sales when the product of the contract is transferred.

The *Vanderbilt Law Review* article, in quoting *Snite v Department of Revenue*, 398 Ill. 41, 74 N.E.2d. 877 (1947), also establishes the following general rule:

If the article sold has no value to the purchaser except as a result of services rendered by the vendor, and the transfer of the article to the purchaser is an actual and necessary part of the services rendered, then the vendor is engaged in the business of rendering service, and not in the business of selling at retail. If the article sold is the substance of the transaction and the service rendered is merely incidental to and an inseparable part of the transfer to the purchaser of the article sold, then the vendor is engaged in the business of selling at retail, and the tax which he pays ... [is measured by the total cost of article and services]. If the service rendered in connection with an article does not enhance its value and there is a fixed or ascertainable relation between the value of the article and the value of the service rendered in connection therewith, then the vendor is engaged in the business of selling at retail, and also engaged in the business of furnishing service, and is subject to tax as to the one business and tax exempt as to the other.

While the above quotes do not establish rigid rules, they do provide general guidance in determining the purpose of a transaction, and are particularly helpful in addressing the issues at hand.

Based on the above, the transaction between ABC and healthcare providers, as described in the facts, is the sale of a nontaxable data processing as defined in Code Section 12-36-910(C) when such transaction involve interactive responses by the patients of the healthcare provider, since (1) *123! for health* is a service where information furnished by patients of the healthcare provider is manipulated by ABC through all or part of a series of operations involving an interaction of procedures, processes, methods, personnel, and computers; (2) the data is sorted and combined by patient disease type, alerts for responses falling outside of

determined parameters , and other categories as needed by the specific healthcare provider;
(3) “data processing” includes “the electronic transfer of or access to that information;” and
(4) the web portal used by the healthcare provider is the means through which the healthcare provider has access to the “data processing” performed by ABC.

Therefore, the charge by ABC to healthcare providers, as described in the facts, is for “data processing” - the manipulation of the customer’s information and “the electronic ... access to that information” - and is not subject to the tax based on the facts presented when such transactions involve interactive responses by the patients of the healthcare provider.

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/William M. Blume, Jr.
William M. Blume, Jr.

February 6, 2013
Columbia, South Carolina