



STATE OF SOUTH CAROLINA  
DEPARTMENT OF REVENUE

300A Outlet Pointe Blvd., Columbia, South Carolina 29210  
P.O. Box 12265, Columbia, South Carolina 29211

SC PRIVATE LETTER RULING #16-1

**SUBJECT:** Website Shopping Membership Fee – Free Trial Membership or Annual Membership  
(Sales and Use Tax)

**REFERENCES:** S.C. Code Ann. Section 12-36-910 (2014)  
S.C. Code Ann. Section 12-36-1310 (2014)  
S.C. Code Ann. Section 12-36-60 (2014)  
S.C. Code Ann. Section 12-36-90 (2014)  
S.C. Code Ann. Section 12-36-130 (2014)  
S.C. Code Ann. Section 12-36-100 (2014)  
S.C. Regulation 117-310 (2012)

**AUTHORITY:** S.C. Code Ann. Section 12-4-320 (2014)  
S.C. Code Ann. Section 1-23-10(4) (2005)  
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set forth, and is binding on agency personnel only with respect to the person to whom it was issued and only until superseded or modified by a change in statute, regulation, court decision, or another Departmental advisory opinion, providing the representations made in the request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.

**Questions**

1. Are annual membership fees paid to ABC LLC that allow members to receive the benefits listed in the facts below that are associated with shopping on-line subject to South Carolina sales and use tax?
2. Are free one month trial memberships offered by ABC LLC that allow individuals to receive the same benefits listed in the facts below as other members that are associated with shopping on line subject to South Carolina sales and use tax?

## **Conclusions**

1. The annual membership fees paid to ABC LLC that allow members to receive the benefits listed in the facts below that are associated with shopping on-line are subject to South Carolina sales tax as part of the consideration paid for the purchase of tangible personal property pursuant to Code Section 12-36-60.
2. The free one month trial membership offered by ABC LLC that allows individuals to receive the same benefits listed in the facts below as other members that are associated with shopping on-line is not a sale of tangible personal property for a consideration under Code Section 12-36-100 and, therefore, is not subject to South Carolina sales and use tax.

## **Facts**

ABC, LLC (“ABC”), an affiliate of XYZ, Inc., offers a membership program known as “membership”. While ABC does not directly provide the benefits, it is contractually obligated to ensure the benefits are provided to the members. To meet its contractual obligations, ABC pays its affiliates to provide the underlying service related to each benefit.

Participants in the program are referred to as “members” and are required to agree to the terms and conditions provided by ABC and/or its affiliates to activate their membership. The public may sign up for a free one-month trial or annual paid membership to receive certain benefits associated with shopping on-line. The membership benefits are the same for both trial and paid members.

The membership entitles members to a variety of benefits (e.g., free and discounted shipping, ability to download and stream digital content, certain website pricing and purchase benefits). Members do not purchase a bundle of distinct and identifiable products as part of their membership. At the time of purchase, neither the member nor the company knows how many, or if any, of the benefits the member will use. The membership fee is charged in advance of the year to which it applies and is not refunded if members do not use their membership or use some but not all of the benefits.

The membership benefits currently available are:

- Access – Access is a line of premium, everyday essential products (currently limited to baby wipes) available for purchase only by Members.
- Pricing – Pricing provides Members discounts on certain items of tangible personal property. For example, Members can purchase certain televisions and software at a discount. The suite of products offered to Members at a discount continues to expand.
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- Store – The heavy/bulky items in Store are available for purchase only by Members. The Store benefit allows Members to ship up to 45 pounds of heavy/bulky items for a flat shipping fee of \$5.99.
- Shipping – Members are entitled to receive free two-day shipping and other discounted shipping benefits on eligible purchases made on the Website. Products eligible for these shipping benefits are designated as such on the Website. Also, certain products sold by third-party merchants participating in the “Joy” program are eligible for shipping benefits.
- Videos – Members may view movies and television shows, designated as “Videos,” an unlimited number of times at no additional cost during the course of their Membership. Videos can be viewed on the Member’s television, computer, gaming system, or other compatible device. All Members are permitted to stream Videos; Members with a specific device can also download Videos if their phone or tablet is registered to the same XYZ account as their Membership. In compliance with the content agreements, there are restrictions on how much time Members are allotted to access downloaded Videos without an Internet connection.
- Music – Music provides Members with unlimited, ad-free access to more than a million songs and albums. Music may be played on the Member’s computer, or other compatible device. Music may be streamed or downloaded for listening without an Internet connection. If a Member allows his Membership to lapse or expire, he will lose access to the downloaded Music titles.
- Owners’ – The Owners’ allows Members who own specific devices to choose from thousands of electronic books (“e-books”) to borrow for free, as frequently as a book a month, with no due dates. Members can only borrow one e-book at a time, and must own a device that is registered to the same XYZ account as the Membership to access this benefit. If a Member cancels his Membership, or the Membership expires after a book is borrowed, the Member will lose access to the borrowed book.
- First – The First feature allows Members who own specified devices to receive one free e-book per month from four e-books selected by ABC. The selected e-book becomes a permanent part of the Member’s device library. To access this benefit, Members must own a specified device that is registered to the same XYZ account as the Membership.
- Sunrise – Members receive 30 minute early access to select “Deals” on-line and sales events on [www.myplace.com](http://www.myplace.com). The deals and sales events are designated as such on the product detail page or on the respective websites.

- Photos – Members receive unlimited storage for photos in the Cloud and 5GB of storage for videos and files. Members must have a Cloud account registered to the same XYZ account as their Membership to activate this benefit. As long as the Membership is active, photos uploaded to the Member’s Cloud will not count against the Member’s 5GB of fixed storage capacity in the Cloud for files and videos.

## **Discussion**

### **A. Yearly Membership Fee**

Code Section 12-36-910(A) imposes a sales tax upon every person engaged or continuing within this State in the business of selling tangible personal property at retail and Code Section 12-36-1310(A) imposes a use tax 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, regardless of whether the retailer is or is not engaged in business in this State.

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, the sale or use of which is subject to South Carolina sales and 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), 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.

It is the Department’s longstanding position that charges for the ways or means of communications 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). SC Revenue Ruling #06-8 addresses the application of the sales and use tax to a wide variety of communication services. It provides that communication services such as telephone services, paging services, answering services, cable television services, satellite programming services (including emergency communication services and television, radio, music or other programming services), fax transmission services, voice mail messaging 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 are communication services subject to the sales and use tax pursuant to Code Sections 12-36-910(B)(3) and 12-36-1310(B)(3). In addition, it provides that charges for other communication services not listed in the advisory opinion are taxable if they constitute charges for the ways or means for the transmission of the voice or messages and are not otherwise exempted under the law. While the streaming of audio and video is not specifically discussed in SC Revenue Ruling

#06-8, “streaming”<sup>1</sup> is the “transmission of the voice or messages” and, therefore, is subject to the sales and use tax. It is a communication service similar to cable or satellite radio and television services. See SC Revenue Ruling #16-5 for a discussion of streaming television programs, movies, music, and other similar content.

Based on the above, ABC is in the business of selling tangible personal property at retail. In addition, persons who pay the membership fee have the right, for no additional consideration, to access or use streaming audio and video, which is a communication service (tangible personal property) subject to sales and use tax.

The next issue is whether the membership fee is includable in “gross proceeds of sales,” the measure of South Carolina’s sales tax.

Code Section 12-36-90 provides that gross proceeds is the value proceeding or accruing from the sale of tangible personal property. It includes the proceeds from the sale of tangible personal property without any deduction for the cost of goods sold, cost of materials, labor, or service, transportation costs, or any other expenses. Similarly, the use tax is calculated on the “sales price” of tangible personal property. Code Section 12-36-130 provides that sales price is the total amount for which tangible personal property is sold, without any deduction for the cost of the property sold, the cost of the materials used, labor or service cost, any services or transportation costs that are a part of the sale, or any other expenses.

The Department has determined, in certain instances, membership fees related to the anticipated sales of tangible personal property are includable in gross proceeds of sales, the measure of the sales tax and, therefore, are subject to the sales and use tax. Examples of membership fees held to be taxable by the Department include:

1. A membership fee that allows for the purchase of tangible personal property for no additional consideration (i.e., the membership fee is the sales price of the tangible personal property).

For example, if a direct mail movie rental company charges a monthly or annual membership fee that allows members to receive movies for short term use and no other charges are paid by the members to receive the movies, then the monthly or annual membership fee is the sales price of the tangible personal property and subject to the tax.<sup>2</sup>

2. A membership fee that allows members to receive a discount on the purchase of tangible personal property (e.g., allows members a lower product purchase price, free shipping, or receive free downloads of books) that nonmembers or other categories of paying or nonpaying members, if any, do not also receive.

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<sup>1</sup>*The American Heritage Dictionary, Fifth Ed.* (2011) defines the word “stream” as “to transmit (audio or video content), especially over the Internet, in small, sequential packets that permit the content to be played continuously, as it is being received and without saving it to a hard disk.”

<sup>2</sup> *South Carolina Sales and Use Tax Manual* (2015 Edition), Chapter 6.

For example, if a video rental club charges a monthly membership fee that allows members to receive “free” or discount movie rentals while nonmembers rent movies at a higher price, then the membership fee is considered subject to the sales tax as part of the consideration paid for the rental of tangible personal property.<sup>3</sup>

In certain circumstances, the Department has determined that membership fees related to the anticipated sales of tangible personal property are not includable in gross proceeds of sales and, therefore, are not subject to the sales and use tax. Examples include:

1. A retailer sells its product only to members and charges a membership fee that is in lieu of a security deposit or constitutes only a nominal processing fee.
2. A retailer sells its product only to members and charges a membership fee that allows all members to purchase the tangible personal property at the same lower price.
3. A retailer only sells products that are exempt from South Carolina sales and use tax.

The membership fees charged by ABC do not fall within these exceptions.

The term “gross proceeds of sales” also includes certain delivery charges. Regulation 117-310 provides that whether or not delivery charges may be deducted by the seller from the selling price of tangible personal property does not depend on whether the charges are separately billed, but depends on whether the services rendered by the transportation agency are rendered to the seller or the purchaser. Since ABC contracts to deliver the tangible personal property to the buyer’s home or business (i.e., F.O.B. point of destination), the delivery charges are not deductible by the seller in computing its South Carolina sales tax liability.

Based upon the above, the measure of the sales and use tax is the total proceeds of a sale; i.e., it is the sum total of all consideration received for the sale of tangible personal property, regardless of what the payment may be called, without any deductions whatsoever. The annual membership fees paid to ABC that allow members to receive the benefits listed in the facts above are subject to South Carolina sales tax since it entitles members to receive tangible personal property (i.e., streaming video and audio) subject to South Carolina tax as a benefit of membership. Since the membership fee also entitles members to receive discounts on the purchase price and cost of delivery of items that are subject to the sales and use tax, and these benefits are not available to nonmembers, the membership fee is subject to South Carolina sales and use tax. The fact that the membership fee entitles the member the right to receive certain benefits that may not be subject to sales and use tax does not change the result.

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<sup>3</sup> SC Private Letter Ruling #90-6.

## **B. One Month Free Membership**

Code Section 12-36-100 defines the terms “sale” and “purchase” to mean any transfer, exchange, barter, conditional or otherwise, of tangible personal property for a consideration. The one month trial membership is a promotional membership. Trial members may at any time choose not to continue to paid membership at the end of the trial period. Since there is no consideration for the one month trial membership, there is no retail sale in South Carolina, and therefore no South Carolina sales tax is due.

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/Rick Reames III

Rick Reames III, Director

July 6, 2016  
Columbia, South Carolina