
State of South Carolina
Department of Revenue
301 Gervais Street, P.O. Box 125, Columbia, South Carolina 29214

SC PRIVATE REVENUE OPINION #00-3

SUBJECT: Proficiency Testing Materials
(Sales & Use)

REFERENCES: S. C. Code Ann. Section 12-36-1310(A) (Supp. 1999)
S. C. Code Ann. Section 12-36-1310(C) (Supp. 1999)
S. C. Code Ann. Section 12-36-1330(C) (Supp. 1999)
S. C. Code Ann. Section 12-36-110 (Supp. 1999)
S. C. Code Ann. Section 12-36-120(A) (Supp. 1999)
S. C. Code Ann. Section 12-36-140 (Supp. 1999)

AUTHORITY: S. C. Code Ann. Section 12-4-320 (Supp. 1999)
S. C. Code Ann. Section 1-23-10(4) (Supp. 1999)
SC Revenue Procedure #99-4

SCOPE: A Private Revenue Opinion is a written statement issued to a specific taxpayer by the Department to apply principles of law to a specific set of facts or a particular tax situation. A Private Revenue Opinion does not have the force and effect of law, and is not binding on the person who requested it or the public. It is, however, 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set forth, and is binding on agency personnel only with respect to the person to whom it was issued and only until superseded or modified by a change in statute, regulation, court decision, or advisory opinion, providing the representations made in the request reflect an accurate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. Is ABC making retail sales of proficiency testing materials ("PT Materials") to laboratories located in South Carolina, or is ABC using the materials in providing its testing services?
2. If the PT Materials are being used by ABC, as opposed to being sold by ABC, is ABC using the materials in South Carolina?
3. If ABC is using the materials in South Carolina, thereby being liable for the use tax, is ABC entitled to a credit for taxes paid to the state in which the PT Materials were purchased?

Conclusions:

1. It is the department's opinion that ABC is using the PT Materials in providing its testing services, as opposed to selling them to the laboratories.

2. It is also the department's opinion that ABC is using the materials in South Carolina and is, therefore, required to pay the use tax to the department.
3. If a sales or use tax is paid by ABC to another state on ABC's retail purchases of the PT Materials, ABC may take a credit against the South Carolina use tax for those taxes that are "due and paid" to the other state.

Facts:

ABC is incorporated in the State of X and is headquartered in that State. It also has an office in Washington, D.C. ABC has members in every state who pay an annual subscription fee. It holds national meetings, puts on programs, produces and sells publications and certain other information services, and lobbies the federal government on issues of importance to its members and the public.

The principal activity of ABC is providing a proficiency testing program. This program consists of the testing of a particular laboratories to determine whether they meet certain standards required by the federal government and by ABC. Under federal law, all of these laboratories in the United States must be accredited periodically by the federal agency or another organization recognized by that agency as having standards that are equivalent to or more stringent than federal accreditation standards. The only entities the federal agency has recognized for these purposes are ABC, certain other non-profit organizations, and agencies of a few state governments.

In order to obtain accreditation, a laboratory must participate in a proficiency testing program. A proficiency testing program evaluates the ability of participating laboratories to accurately perform diagnostic services for patients. Specifically, the proficiency testing program involves (1) the transfer to a participating laboratory of a specimen (i.e. the PT Materials) the composition of which is unknown to the laboratory, (2) the analysis of the PT Materials by the laboratory and transmission of the laboratory's findings to ABC, and (3) the processing and evaluation of the laboratory's findings by ABC. By federal law, the furnishing of the PT Materials to the laboratory must be by a governmental agency or a not-for-profit entity.

Most of the PT Materials consist of a serum or other base that is "spiked" with the materials for which each participating laboratory must test. ABC purchases the PT Materials from various manufacturers.

The manufacturer generally delivers the PT Materials by common carrier to a third party repackager retained by ABC or ships the PT Materials by common carrier directly to each participating laboratory. The manufacturer invoices ABC for the PT Materials at the time the manufacturer ships the PT Materials to the repackager or directly to the laboratories. The repackager breaks down the manufacturer's bulk shipment into individual packages for shipment to the laboratories, adds printed instructions supplied by ABC, and then ships the materials by U.S. Mail or by common carrier to the participating laboratories.

The laboratory has no independent use of the PT Materials apart from participating in the testing program. Once a participating laboratory has concluded its analysis of the PT Materials, the laboratory generally disposes of those materials. The laboratory sends a report of its analysis to ABC at its headquarters in State X, where ABC reviews the laboratory's report. ABC evaluates the laboratory's analysis, and it provides its findings to the laboratory and to the accreditation organization designated by the laboratory. When ABC provides the laboratory with its results for each test, ABC also provides certain statistical data and other quantitative information.

ABC bills the laboratories a single amount for each test. ABC does not separately state an amount for the testing service and the PT Materials on the bill.

ABC recently registered with the department to collect the use tax pursuant to a voluntary disclosure statement through the Multistate Tax Commission's National Nexus Program. One of the terms of ABC's proposal to voluntarily register to collect the use tax was that it would treat the transfer of PT Materials to the laboratories as taxable retail sales. However, ABC reserved the right to file a follow-up ruling request seeking guidance as to the proper tax treatment of its testing program. The purpose of this document is to provide that guidance.

Discussion:

The South Carolina use tax is imposed under Code Section 12-36-1310, and reads, in part:

(A) 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 five percent of the sales price of the property, regardless of whether the retailer is or is not engaged in business in this State.

As for the party that is liable for the use tax, Code Section 12-36-1330 reads, in part:

(A) Every person storing, using, or otherwise consuming in this State tangible personal property purchased at retail, is liable for the use tax, until the tax is paid to the State.

In summary, the use tax is imposed on the storage, use or consumption of tangible personal property in this state if the property was purchased at retail for storage, use or consumption in this state.

As for when there is a retail purchase¹ of tangible personal property, we look to Code Sections 12-36-110 and 12-36-120. Section 12-36-110 provides the term "retail sale" means "all sales of tangible personal property except those defined as wholesale sales." Section 12-36-120 provides that a "wholesale sale" is a sale of tangible personal property for resale and "do[es] not include sales to users or consumers not for resale."

¹ Code Section 12-36-100 defines the terms "sale" and "purchase" as meaning - "any transfer...of tangible personal property for a consideration." Per Edisto Fleets, Inc. v. SCTC, 182 SE2d 713 (1971), the terms "are inextricably related and bound together and must be so construed."

In other words, a transaction is a retail purchase when the property purchased is to be used or consumed by the purchaser, as opposed to being resold by the purchaser.

As stated above, the use tax is imposed on the use of tangible personal property in this state. The definition of the term “use” is found in Code Section 12-36-140 and includes “the exercise of any right or power over tangible personal property incident to the ownership of that property.”

As for whether ABC is making retail sales of the PT Materials to the laboratories or is, instead, using the materials, we agree with the position of ABC as stated in its ruling request. ABC stated:

At issue is the proper taxation of ABC’s proficiency testing program. The testing itself is a service and is therefore exempt from sales tax (unless your state taxes testing services). ABC does, however, transfer tangible personal property - i.e. the PT Materials - to a participating laboratory as an incident to providing the testing service. In those instances in which the service provider also transfers tangible personal property to the customer, the taxability of the transaction is generally determined under the “true object” or “essence of the sale” test...

In the present case, the “true object” of ABC’s proficiency testing program is the provision of a service - i.e., assessment of a laboratory’s proficiency in analyzing unknown analytes. A participating laboratory has no use for the PT Materials apart from the proficiency testing service. Indeed, the laboratory generally disposes of such materials upon completing the testing. Accordingly, ABC’s furnishing of the PT Materials is merely incident to the sale of the nontaxable proficiency testing service and thus there is no sale of tangible personal property [from ABC to the laboratory].

Based on the above, ABC takes the position that, ABC is the user of the PT Materials. It is the department’s opinion that ABC is correct. ABC is the user of the PT Materials, therefore, the transactions between the manufacturers and ABC are retail transactions. Transfers of the materials to the laboratories are not retail sales.

Having agreed that ABC is using the PT Materials in providing its testing services, as opposed to selling them to the laboratories, it must be determined if ABC is using or consuming the materials in South Carolina. As stated in Code Section 12-36-1310(A), the use tax is imposed on the use of tangible personal property ‘in this State. ‘

In Union Oil Company of California v. State Board of Equalization, 386 P.2d 496 (1963), the Supreme Court of California dealt with the issue of ‘use ‘ of two oil tankers in that State by a company located outside California when that company did not have actual physical possession of the tankers in California. California’s sales and use tax law, just as South Carolina’s law, defines “Use” to include “the exercise of any right or power over tangible personal property incident to the ownership of that property.”

To quote from that case:

The statutory definition recognizes that the term ‘use’ covers the utilization of property for profit-making purposes...; the word ‘use’ is by no means restricted to physical manipulation. Thus Webster’s New Twentieth Century Dictionary (1950) states as one of the meanings of the word, ‘The act of handling or employing in any manner, and for any purpose, but especially for a profitable purpose; the state of being employed; employment; application; conversion to a purpose;***.’

To further quote from Union Oil, supra:

The concept that [the owner of the tankers] used...the vessels in California effectuates the basic purposes of the use tax and the broad statutory construction which we must accord its provisions. As we stated in Chicago Bridge & Iron, Co. v. Johnson, (1941) 119 P.2d 945, 947: ‘One of the purposes is to make the coverage of the tax complete to the end that the retail sales tax *** will not result in a unfair burden being placed upon the local retailer engaged solely in intrastate commerce as compared with the case where the property is purchased for use or storage in California and is used or stored in this state. The two taxes are complementary to each other with the aim of placing the local retailers and their out-of-state competitors on an equal footing.

If the California businessman, intending to buy property for use in California, could avoid the sales tax merely by purchasing the product outside the state, the local retailer would suffer severe commercial disadvantage. Hence California imposes an excise tax upon the purchaser of tangible personal property in the event that, having paid no sales tax to California on the purchase, he proposes to and actually does store, use, or otherwise consume such property in this state.

...the Legislature designed the Sales and Use Tax law as an integrated whole. Such a design is incompatible with an interpretation of the statutes which would leave a loophole of competitive advantage for the interstate over the intrastate [owner of property]. The use tax, correctly applied, constitutes a legitimate expense exacted for the privilege of enjoying the advantages of the California economy.

...’When a person buys property in one state for the purpose of...transporting it to a person in another state where a use tax law is in effect, the [owner of the property] is considered as using the property in the second state for the production of income and hence is subject to such state’s use tax even though he personally makes no physical use of the property in such state.’ [Source omitted.]

Having determined that [the owner of the vessels] used the property in California and that the transaction under the sales tax laws would be a taxable sale, we believe that the state properly assessed the use tax upon the sales price which the purchaser paid for the vessels.

In this instance, the department applies the reasoning used in Union Oil. The fact that ABC has the PT Materials sent to laboratories located in South Carolina for a profit-making purpose establishes that ABC is using the materials in this state. Only by the PT Materials being in the state is ABC able to perform its testing services from which it receives income for the purpose of making a profit.

Further, as stated in State v. Byrnes, 66 S.E. 2d 33 (1951), a South Carolina State Supreme Court case:

...the [1951 General Appropriation] Act levies a use tax which is manifestly for the purpose of preventing evasion by purchases at retail from without the State or under other circumstances which might or would avoid application of the retail sales tax. The use tax thus complements the sales tax.

The reasoning in Byrnes was expressed in Union Oil. The purpose of the use tax is to preclude a purchaser from avoiding tax on an otherwise taxable transaction by buying from an out-of-state retailer or by other means.

As for whether ABC can take a credit against the South Carolina use tax for taxes paid to another state, Code Section 12-36-1310(C) provides:

When a taxpayer is liable for the use tax imposed by this section on tangible personal property purchased in another state, upon which a sales or use tax was due and paid in the other state, the amount of the sales or use tax due and paid in the other state is allowed as a credit against the use tax due this State, upon proof of payment of the sales or use tax. The provisions of this section do not apply if the state in which the property was purchased does not allow substantially similar tax credits for tangible personal property purchased in this State. If the amount of the sales or use tax paid the other state is less than the amount of use tax imposed by this article, the user shall pay the difference to the commission.

If the requirements of the above-quoted code section are met, ABC can take credit for sale or use taxes due and paid in another state against the South Carolina use tax.

CAVEAT: This advisory opinion is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances, as stated, are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting the advisory opinion may not rely on it. If the taxpayer relies on this advisory opinion, and the Department discovers, upon examination, that the facts and circumstances are different in any material respect from the facts and circumstances given in this advisory opinion, then the advisory opinion will not afford the taxpayer any protection. It should be noted that subsequent to the publication of this advisory opinion, changes in a statute, a regulation, or case law could void the advisory opinion.

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/Elizabeth Carpentier
Elizabeth Carpentier, Director

June 8, 2000
Columbia, South Carolina