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

SC REVENUE RULING # 98-4

SUBJECT: Late Fees Charged by Utilities
(Sales and Use)

EFFECTIVE DATE: Applies to all periods open under the statute.

SUPERSEDES: All previous documents and any oral directives in conflict herewith.

REFERENCES: S. C. Code Ann. Section 12-36-90 (Supp. 1997)
S. C. Code Ann. Section 37-3-109(a) (1976)
S. C. Regulation #117-174.59

AUTHORITY: S. C. Code Ann. Section 12-4-320 (Supp. 1997)
SC Revenue Procedure #94-1

SCOPE: A Revenue Ruling is the Department of Revenue's official advisory opinion of how laws administered by the Department are to be applied to a specific issue or a specific set of facts, and is provided as guidance for all persons or a particular group. It is valid and remains in effect until superseded or modified by a change in the statute or regulations or a subsequent court decision, Revenue Ruling or Revenue Procedure.

Question:

Is the fee charged by an electric power company, cable television company or telephone company (“utility”) when a customer does not pay his bill on time a finance charge and, therefore, not includible in the utility’s gross proceeds of sales and not subject to the sales tax?

Conclusion:

The fee charged by a utility when a customer does not pay his bill on time is **not** a finance charge. Therefore, such charges are includible in the utility’s gross proceeds of sales and are subject to the sales tax.

Facts:

Utilities generally charge their customers an additional amount when they do not pay their bills on time. This additional amount may be applied as a fixed dollar amount (e.g. \$5); a percentage of the amount due for each month the bill remains unpaid (e.g. 1% per month); a fixed dollar amount per month for each month the bill remains unpaid (e.g. \$5 per month); or by some other method. The question has arisen whether such charges are includible in a utility's gross proceeds of sales and, therefore, subject to sales tax.

Discussion:

The measure, or basis, for the South Carolina sales tax is a retailer's "gross proceeds of sales," which is defined in Code Section 12-36-90, in part, as "the value proceeding or accruing from the sale, lease, or rental of tangible personal property." But for certain exceptions contained in that section, all charges by a retailer to his customers are subject to the sales tax. However, Regulation #117-174.59 provides, in pertinent part:

Where the seller has an established cash price and when selling on an extended payment basis, adds a separate charge for financing, the additional charge is not to be included in gross proceeds of sales.

The issue to be addressed is whether, per Regulation #117-174.59, fees imposed by utilities when customers fail to pay their bills on time are finance charges. If they are finance charges, then they are not includible in gross proceeds of sales. If they are not finance charges, then they are includible in gross proceeds of sales.

While the term "finance charge" is not defined in the South Carolina Code of Laws, the terms "credit service charge" and "loan finance charge" are defined. "Credit finance charges" are applicable to "consumer credit sales" as defined in Chapter 2 of the Consumer Protection Code. "Loan finance charges" apply to "consumer loans," as defined in Section 37-3-104 of the Consumer Protection Code.

Section 37-2-109(1) of the South Carolina Consumer Protection Code defines "credit service charges," in part, as "all charges payable directly or indirectly by the buyer and imposed directly or indirectly by the seller as an incident to the extension of credit." Subsection (2) of that section provides that "[t]he term does not include charges as a result of default...."

Section 37-3-109(a) of the South Carolina Consumer Protection Code defines "loan finance charges," in part, as "all charges payable directly or indirectly by the debtor and imposed directly or indirectly by the lender as an incident to the extension of credit." Subsection (b) of that section provides that "[t]he term does not include charges as a result of default...."

Although South Carolina does not specifically define the term “finance charge,” federal regulations, Black’s Law Dictionary, and several court cases have.

Regulation Z, Section 226.4(a), which implements the federal Truth-in-Lending Act, defines the term “finance charge” using the same language as contained in the above-quoted South Carolina Code Sections 37-2-109(1) and 37-3-109(a). Also, item (c) of that same federal regulatory section states that “[a] late payment, delinquency, default, reinstatement, or other such charge is not a finance charge if imposed for actual unanticipated late payment, delinquency, default, or other such occurrence.”

Also, Black’s Law Dictionary, Fifth Edition, defines the term “finance charge,” in part, as:

The consideration for privilege of deferring payment of purchase price. The amount however denominated or expressed which the retail buyer contracts to pay or pays for the privilege of purchasing goods or services to be paid for by the buyer in installments; it does not include the amounts, if any, charged for....delinquency charges....

In summary, to classify a charge as a “finance charge” infers there is an agreement between a seller and a buyer, in advance of a sale, whereby the buyer can pay over a period of time and the buyer must pay an amount to the seller for that privilege. This position is supported by Berryhill v. Rich Plan of Pensacola, 578 F.2d 1092 (5th Cir. 1978), which dealt with the issue of what constitutes a “finance charge” under the federal Truth-in-Lending Act, 15 U.S.C. Section 1605(a) (1976), Regulation Z, 12 C.F.R. Section 226.4(a) and the Alabama Consumer Finance law¹. In that case, the court ruled because Rich Plan required its customers to purchase a certain service agreement in order to buy food on credit, the charge for the service agreement was a “finance charge.” It was a charge “payable...by the debtor and imposed...by the lender as an incident to the extension of credit.”

Berryhill was cited in the case of Campbell v. General Finance Corporation of Virginia, 523 F.Supp. 989 (W.D. Va.1981) in ruling:

A ‘tying relationship’ between the imposition of a charge and the extension of credit renders the former a finance charge. Mondik v. DiSimo, 386 F.Supp. 537 (W.D. Pa. 1974). The major question in determining whether a charge is a ‘finance charge’ required to be disclosed under the Truth-in-Lending Act is whether the seller refuses to extend credit unless the customer agrees to pay.

¹ The definition of “finance charge” in the Alabama Consumer Finance law is the same as that in Regulation Z and is the same definition for “loan finance charge” in the South Carolina Consumer Protection Code.

The Eleventh Circuit Court of Appeals, in Hahn v. Hank's Ambulance Service, Inc., 787 F.2d 543 (11th Cir.1986), dealt with the issue of whether a five dollar charge by an ambulance company for a customer failing to pay at the time services were rendered was a "finance charge." The Court, in ruling that the charge was not a finance charge, stated:

The company does not grant a right to defer payment of a debt or to incur debt and defer its payment. It simply assesses a charge in light of the customer's failure to pay the company at the time the service is performed, in accordance with customary policy.

It is also important to note that Regulation Z, Section 226.4(c) provides that a charge is not a "finance charge" if imposed due to "[a] late payment, delinquency, default, reinstatement, or other such charge....imposed for actual unanticipated late payment, delinquency, default, or other such occurrence." (Emphasis added.)

The U.S. Court of Appeals, Seventh Circuit, dealt with the issue of "unanticipated late payments" in Bright v. Ball Memorial Hospital Ass'n, Inc., 616 F.2d 328 (7th Cir.1980).

Quoting from that case, the court reasoned:

Appellants [the hospital association] argue initially that the monthly charges imposed on their accounts were 'anticipated' within the meaning of Section 226.4(c) because the Hospital obtained approximately \$78,000 in revenue from such charges during the period from July 1, 1977 through September 1978, and because it budgets for this revenue in the annual budget. This argument, however, misconstrues the meaning of 'unanticipated' in Section 226.4(c). The fact that a business may expect to have delinquent accounts and anticipate the possible receipt of some revenues from the charges imposed on such accounts does not automatically render such charges 'finance charges.' Rather 'unanticipated' within Section 226.4(c) means that the failure of any customer to pay his bill on time is not anticipated in any particular case.

Based on the above discussion, the fees in question are not imposed as a condition for the extension of credit (i.e. not finance charges). They are imposed for failure to pay on time. Therefore, the fees are includible in gross proceeds of sales and subject to the sales and use taxes

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/Burnet R. Maybank III

Burnet R. Maybank, III, Director

Columbia, South Carolina
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