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SC TECHNICAL ADVICE MEMORANDUM #88-14

TO: Mr. Marvin Davant, Director
Field Service Division

FROM: Jerry B. Knight, Manager
Tax Policy and Procedures Department

DATE: June 1, 1988

SUBJECT: Federal Excise Tax on Tires and Fuels
(Sales Tax)

REFERENCE: S.C. Code Ann. Section 12-35-550(16) (1976)
S.C. Code Ann. Section 12-35-30 (Supp. 1987)
S.C. Code Ann. Section 12-35-510 (1976)

AUTHORITY: S.C. Code Ann. Section 12-3-170 (1976)
SC Revenue Procedure #87-3

SCOPE: A Technical Advice Memorandum is a temporary document issued to an individual within the Commission, upon request, and it applies only to the specific facts or circumstances related in the request. Technical Advice Memoranda have no precedential value and are not intended for general distribution.

Question(s):

1. Are the federal excise taxes imposed by I.R.C. Section 4041 or 4091 on diesel fuel and I.R.C. Section 4081 on gasoline includible in gross proceeds of sales, when such fuels are sold to contractors?
2. Is the federal excise tax imposed by I.R.C. Section 4071 on tires includible in gross proceeds of sales, thereby taxable under S.C. Code Section 12-35-510?
3. Does inclusion of the federal manufacturer's excise tax (I.R.C. Section 4071) in gross proceeds of sales of tires constitute double taxation?

Facts:

ABC, Inc., a paving contractor located in South Carolina, has inquired as to the legality of applying the sales tax, in addition to federal excise taxes, on sales of tires and fuel. The company purchases gasoline and diesel fuel for both highway and non-highway use.

S.C. Code Section 12-35-510 imposes "upon every person engaged or continuing within this State in the business of selling at retail any tangible personal property whatsoever,, an amount equal to four percent of the gross proceeds of sales" (emphasis added). Code Section 12-35-515, effective July 1, 1984, imposes an additional one percent tax. Code Section 12-35-30 defines the term "gross proceeds of sales" and reads, in part:

The term shall not include the amount of any tax imposed by the United States upon or with respect to retail sales whether imposed upon the retailer or consumer, except that any manufacturer's or importer's excise tax shall be included in the term.

In other words, federal retailer's excise taxes are not includible in gross proceeds, whereas manufacturer's or importer's excise taxes are includible.

Discussion:

1. Through March 31, 1988, I.R.C. Section 4041 (Supp. 1988) imposed a retailer's excise tax on diesel fuel sold for highway use. Diesel fuel sold for "off-highway business use" is specifically exempt from the tax. The phrase "off-highway business use" is defined at I.R.C. Section 6421(d)(2)(A) (Supp. 1987) as, "...any use by a person in a trade or business of such person or in an activity of such person described in section 212 (relating to production of income) otherwise than as a fuel in a highway vehicle."

Effective April 1, 1988, pursuant to I.R.C. Section 4091 (Supp. 1988), a manufacturer's/importer's excise tax is imposed on sales of diesel fuel upon which the tax under I.R.C. Section 4041 has not been imposed. The exemption for diesel fuel sold for "off-highway business use" is still in effect.

I.R.C. Section 4081 (Supp. 1987) imposes a manufacturer's/importer's excise tax on gasoline sold by the producer or importer thereof.

S.C. Code Section 12-35-550(16) exempts from sales tax "[t]he gross proceeds of the sale of gasoline or other motor vehicle fuels taxed at the same rate as gasoline;....." (emphasis added). Under South Carolina law, diesel fuel sold for highway use is taxed at the same rate as gasoline (fifteen cents per gallon fuel tax); however, diesel fuel sold for non-highway use is not subject to the fuel tax.

2. Title 26 U.S.C.A. Section 4071 (Supp. 1987) imposes a manufacturer's/ importer's excise tax on the sale of tires.

3. As for the "double taxation" issue:

Double taxation in the prohibited sense can exist only if the subject of both taxes is the same; if both taxes are imposed, for the same purpose, by the same state or government, during the same tax period.

68 AmJur 2d Section 36

The manufacturer's/importer's excise tax is imposed by the federal government on the manufacturer or importer, whereas the sales tax is imposed by the State of South Carolina on the retailer.

Further, "gross proceeds of sales", as defined at Code Section 12-35-30, reads, in part:

The term "gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property including merchandise of any kind and character without any deduction on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid or any other expenses what-soever. (emphasis added)

The federal excise tax, which is imposed upon the manufacturer or importer, is merely an expense passed on to the retailer and, subsequently, to the consumer.

Conclusion(s):

1. The gross proceeds of sales of gasoline sold for highway or non-highway use and diesel fuel sold for highway use to a contractor are exempt from sales tax, pursuant to Code Section 12-35-550(16). The gross proceeds of sales of non-highway use diesel fuel are subject to sales tax, but not federal excise taxes under I.R.C. Section 4041 or 4091.
2. The federal manufacturer's excise tax on tires (I.R.C. Section 4071) is includible in gross proceeds of sales, thereby subject to sales tax under S.C. Code Section 12-35-510.
3. Inclusion of the federal manufacturer's excise tax on tires (I.R.C. Section 4071) in gross proceeds of sales is not deemed to be double taxation.