

SC PRIVATE LETTER RULING #04-4

**SUBJECT:** Rental Fee for LP Gas Storage Tank  
(Sales and Use Tax)

**REFERENCES:** S. C. Code Ann. Section 12-36-910 (2000, Supp. 2002)  
S. C. Code Ann. Section 12-36-60 (2000)  
S. C. Code Ann. Section 12-36-110 (2000)  
S. C. Code Ann. Section 12-36-100 (2000)

**AUTHORITY:** S. C. Code Ann. Section 12-4-320 (2000)  
S. C. Code Ann. Section 1-23-10(4) (Supp. 2002)  
SC Revenue Procedure #03-1

**SCOPE:** A Private Letter Ruling is a written statement issued to a specific taxpayer by the Department to apply principles of law to a specific set 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set forth, and is binding on agency personnel only with respect to the person to whom it was issued and only until superseded or modified by a change in statute, regulation, court decision, or advisory opinion, providing the representations made in the request reflect an accurate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.

Question:

Is a recurring fee charged by ABC Gas Company, Inc., as described in the facts, subject to the sales tax?

Conclusion:

When the tank is owned by ABC Gas Company, Inc., the recurring fee charged by ABC Gas Company, Inc., as described in the facts, is subject to the sales tax.

Facts:

ABC Gas Company, Inc. ("ABC") is in the business of selling heating fuel to residential customers. ABC owns the storage tanks that are located on the premises of the customers and routinely refills the tanks and checks the tanks for damage and makes repairs if necessary. ABC charges the customer a recurring fee of \$12.50 per month for six months of the year for the purpose of covering the cost of service maintenance and upkeep of the tank. The fee is paid during the six month period of October through March.

At the time of initiating service with ABC, a customer completes a “Credit Application” that also serves as a contract between the customer and ABC. With respect to the ABC tank to be located on the customer’s premises, the customer certifies that “all LP Gas Tanks, regulators and related equipment [are] the sole property of ABC Gas Company. Said property may not be filled or used by any other company or individual without prior approval.” The customer also agrees and grants ABC the authority “to remove said property at their sole discretion, and to pay the cost for removal of the underground tanks.”

While the “Credit Application” contains a provision regarding “customer-owned equipment,” at this time all customers use tanks supplied by ABC. If, however, a customer who owns his own tank purchases LP Gas from ABC, ABC may offer that customer the opportunity to pay the same fee of \$12.50 per month for six months of the year for the purpose of providing service maintenance for the customer-owned tank

Furthermore, the following should be noted:

1. If the customer no longer needs the tank, the tank will be picked up, at no charge to the customer, except for underground tanks, and returned to ABC’s location.
2. If the customer fails to pay the recurring fee, the tank would be picked up by the taxpayer and returned to ABC’s location.
3. If the tank needs to be replaced, it is replaced at no charge to the customer.
4. The only other fee that a customer would be charged in addition to the price of the gas, the recurring fee, and the charge to remove an underground tank, is a charge if the account is past due.

#### Discussion:

Code Section 12-36-910(A) imposes the sales tax and states:

A sales tax, equal to five 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.

Code Section 12-36-60 defines the term “tangible personal property” and states:

“Tangible personal property” means 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. Tangible personal property does not include the transmission of computer database information by a cooperative service when the database information has been assembled by and for the exclusive use of the members of the cooperative service.

Code Section 12-36-110 defines the terms “sale at retail” and “retail sale” 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.

Code Section 12-36-100 defines the term “sale” as:

“Sale” and “purchase” 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.

Based on the above, in order for the sales tax to apply, there must be a retail sale of tangible personal property for a consideration. A retail sale includes any transfer, exchange, or barter of tangible personal property for a consideration, such as rentals, leases, licenses to use or consume, or any other agreements whereby tangible personal property is transferred for a consideration.

Furthermore, in Commission Decision S-D-175 the Department held:

Sale is defined at § [12-36-100] as any transfer of tangible personal property for a consideration. What is required is the transfer of possession by delivery of the tangible personal property. See *International Harvester Co. v. Wasson*, 316 S.C.2d 378 (1984) cert. den. 105 S.Ct. 250. It does not matter that the transfer or delivery is for a temporary period. For example, a person who leases or rents tangible personal property is a retailer subject to sales tax, notwithstanding the fact that such transfer is only for the temporary term of the lease. See *Edisto Fleets, Inc. v. South Carolina Tax Commission*, 256 S.C. 350, 182 S.E.2d 713. In fact, § [12-36-100(2)] imposes liability upon any person who furnished tangible personal property for a consideration not only by leases but also by "other form of agreement." Based upon the above, "X" has made a sale since by its agreement it has transferred to another the transparencies or prints.

Having found a sale, we must next determine if the transfer is that of tangible personal property. "X" asserts it is not selling tangible personal property but rather is selling services and thus is not subject to tax. We disagree and find that "X's" customers are buying and paying for the transparencies and prints and not for services.

It is not enough to assert that because personal services are a significant part of a transaction the transaction is nontaxable. There is no article fabricated by machine or fashioned by human hand that is not the fruit of the application of individual ability and

skill. See *Voss v. Gray*, 298 N.W. 1 (1941). Section [12-36-90] specifically includes as a part of the gross proceeds of a sale all materials and labor used in consummating the sale. The significant point is whether the customer requires only a service or does the customer require the tangible personal property that results from the application of the service. See *Larry v. Dungan-Allen, Inc.*, 428 S.W.2d 71 (1968). Here, it is obvious the services alone are of no value to the customer. The customer seeks and pays for the transparency or the print. Only the transparency or print satisfies his need. The services incurred in producing the transparency are a part of the sale and may not be exempted from the gross proceeds of sale. See *Meyers Arnold, Inc. v. South Carolina Tax Commission*, 328 S.E.2d 920 (S.C. App. 1985). Based on the above, we find and conclude the sales tax liability determined by the Field Services Division is proper. (Emphasis added.)

In addition, Black's Law Dictionary, Seventh Edition, defines the term "rent" in part as "[c]onsideration paid, [usually], periodically, for the use or occupancy of property."

Finally, the tank is owned by the taxpayer, not the customer. The customer seeks the use of the tank since the customer does not own or does not want to purchase his own tank to store the gas. Only the tank satisfies this need. As a result, possession of the tank is transferred to the customer upon the customer agreeing to pay a fee. If the customer fails to pay the charge in question, the tank would be picked up by the taxpayer and returned to the taxpayer's location.

Based on the above, when the tank is owned by ABC Gas Company, Inc., the transaction in question, which is equivalent to a rental, is a sale at retail under Code Sections 12-36-100 and 12-36-110 of the sales and use tax law and is subject to the tax.

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/Burnet R. Maybank III  
Burnet R. Maybank III, Director

May 13, 2004  
Columbia, South Carolina