

SC PRIVATE LETTER RULING #07-6

SUBJECT: Compliance and Filing Service for Forms filed with the Securities and Exchange Commission
(Sales and Use Tax)

REFERENCES: S. C. Code Ann. Section 12-36-910(B)(3)(a) (Supp. 2006)
S. C. Code Ann. Section 12-36-1310(B)(3)(a) (Supp. 2006)
S. C. Code Ann. Section 12-36-100 (2000)
S. C. Code Ann. Section 12-36-60 (2000)

AUTHORITY: S. C. Code Ann. Section 12-4-320 (2000)
S. C. Code Ann. Section 1-23-10(4) (2006)
SC Revenue Procedure #05-2

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set forth, and is binding on agency personnel only with respect to the person to whom it was issued and only until superseded or modified by a change in statute, regulation, court decision, or another Departmental advisory opinion, providing the representations made in the request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.

Question:

Are charges by ABC, Inc., d/b/a XYZ of Charlotte, to its customer for providing its "JKL" service subject to the sales and use tax?

Conclusions:

Charges by ABC, Inc., d/b/a XYZ of Charlotte, to its customers for providing its "JKL" service are charges for a personal service and not a communications service; therefore, the charges to its customers for the "JKL" service, as discussed in the facts, are not subject to the sales and use tax.

Note: XYZ provides other services related to SEC EDGAR filings. This private letter ruling only concerns the JKL service described in this document and is not applicable to any other services provided by XYZ, including any other service (if any) in which XYZ electronically files financial documents prepared to be SEC compliant by another person.

Facts:

ABC Inc. d/b/a/ XYZ of Charlotte (“XYZ”) is a financial printer and is licensed in South Carolina for sales and use tax purposes. XYZ also provides a compliance and electronic filing service on behalf of some of its customers. This service is provided to non-print clients of XYZ and does not involve the delivery of printed material or other tangible personal property.

The service involves the periodic required filing by companies of various financial documents with the Security and Exchange Commission (“SEC”). The SEC utilizes a filing system known as the Electronic Data Gathering, Analysis and Retrieval System, or EDGAR, to gather such information. The EDGAR database performs automated collection, validation, indexing, acceptance and forwarding of many of the documents submitted electronically by the companies required by law to file information with the SEC. Information in the database can be accessed via the Internet at www.sec.gov/edgar.

The service XYZ provides to its customers involves making sure the customer’s documents are filed with the SEC in accordance with SEC requirements. The purpose of XYZ’s EDGAR Filing Service is to affect timely compliant filing of the customer’s document. XYZ’s role is to provide document formatting and affect the filing, both of which are accomplished electronically. The specific service in question is XYZ’s “JKL” service which is accomplished without the distribution of tangible personal property and which consists of the following:

1. Conversion of the customer’s document into SEC compliant HTML.

A XYZ employee will receive the customer’s document as an attachment to the customer’s e-mail and then processes it using XYZ’s proprietary conversion software tools.

2. Providing electronic proof of the converted document.

The XYZ employee generates a PDF or html proof of the document and e-mails its back to the customer, if requested. Customers usually request the proof of the document.

3. Incorporating customer-directed alterations into the document.

The XYZ employee receives instructions to edit the document, either over the phone or as additional text or edits conveyed in an e-mail. The employee makes the changes to XYZ’s copy of the document, using

XYZ's proprietary typesetting tools. Another e-mail proof of the documents may be provided to the customer at this point.

4. Providing the customer an electronic copy of the SEC submission.

The XYZ employee generates the SEC submission using XYZ's copy of the final document, and provides an electronic copy of the submission to the customer via e-mail.

5. Submitting the final document to the SEC.

The XYZ employee receives instructions from the customer to file the submission, either over the phone or via e-mail, and conveys it electronically to the SEC. The SEC responds with a confirmation via e-mail that the filing has been accepted.

6. Electronic conversion of the submitted document into a source format.

The XYZ employee receives a request from the customer, via e-mail or the telephone, to provide a copy of the SEC-submitted document in the format of their original source document (usually MS Word). The employee uses XYZ's electronic copy of the filed document and proprietary conversion software tools to produce the document in an MS Word (rtf) format. This part of the JKL service does not occur with every document.

7. Providing an electronic copy of the submitted document in a source format.

The XYZ employee sends the customer an e-mail with the requested document attached in the MS Word format. This part of the JKL service only occurs if the electronic conversion of the document into the MS Word format occurs (Item No. 6 above).

For the JKL service, XYZ charges the following fees:

<u>Item Description</u>	<u>Price</u>
EDGAR II Conversion from Word, Excel or PowerPoint (includes embedded graphics (logos and charts))	\$12/page
Conversions between 12:00 pm EST and 5:30 pm EST on the day of filing	\$24/page
Alterations	\$12/page

Alterations between 12:00 pm EST and 5:30 pm EST on the day of filing	\$24/page
Initial E-Mail Proof	No Charge
Subsequent E-Mail Proofs	\$25/proof
SEC Filing Fee	\$150/filing
<u>Additional Services</u>	<u>Price</u>
Conversions from PDF	\$12/page
Conversions from PDF between 12:00 pm EST and 5:30 pm EST on the day of filing	\$24/page
Reverse Conversions (Price depends how much clean-up by employee is required)	\$12 or \$24/pg
Incorporating parts of previously filed documents into Current documents (cloning)	\$50

Discussion:

Since XYZ does not transfer “traditional” tangible personal property to its customer, the SEC, or any other person as part of its JKL Service, the issue is whether the service constitutes a communication service subject to the tax¹.

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)², 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. Gross proceeds from the sale of prepaid wireless calling arrangements subject to tax at retail

¹ Communication services subject to the sales and use tax are, by definition, tangible personal property for South Carolina sales and use tax purposes. See Code Sections 12-36-910(B)(3), 12-36-1310(B)(3), and 12-36-60 as well as SC Revenue Ruling #06-8. In addition, computer software is subject to the sales and use tax if it is delivered in tangible form or constitutes a communications service. Computer software delivered electronically is not subject to the sales and use tax. For more information concerning the taxation of computer software, see SC Revenue Ruling #05-13.

² Other code sections in the sales and use tax code impose the tax on specific communication services; however, such code sections are not relevant to this discussion. For information on such communication services, see SC Revenue Ruling #06-8.

pursuant to item (5) of this subsection are not subject to tax pursuant to this item. Effective for bills rendered after August 1, 2002, charges for mobile telecommunications services subject to the tax under this item must be sourced in accordance with the Mobile Telecommunications Sourcing Act as provided in Title 4 of the United States Code. The term “charges for mobile telecommunications services” is defined for purposes of this section the same as it is defined in the Mobile Telecommunications Sourcing Act. All other definitions and provisions of the Mobile Telecommunications Sourcing Act as provided in Title 4 of the United States Code are adopted; (Emphasis added.)

Based on the above, it is the Department’s position that charges for the ways or means of communication 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), whether this charge is based on a fee per a specific time period or per transmission. This is further supported by the definition of the terms "sale" and "purchase," which are defined in Code Section 12-36-100 to include "a license to use or consume."

The Department of Revenue has taxed communication services such as telephone services, paging services, answering services, cable television services, satellite programming services (includes, but is not limited to, 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.

For a more detailed discussion of the taxation of communications services, see SC revenue Ruling #06-8.

The so-called “true object” test is generally used to delineate sales of services from sales of tangible personal property. Applying this test to the matter at hand, it must be determined whether XYZ is providing a personal service or a taxable communication service with respect to its JKL service.

The “true object” test is best described in 9 Vanderbilt Law Review 231 (1956), wherein it is stated:

The true test then is one of basic purpose of the buyer. When the product of the service is not of value to anyone other than the purchaser, either because of the confidential character of the product, or because it is prepared to fit the purchaser’s special need - a contract or will prepared by a lawyer, or the accident investigation report prepared for an insurance company - this fact is evidence tending to show that the service is the real purpose of the contract. When the purpose of the contract is to produce an article which is the true object of the agreement, the final transfer of the

product should be a sale, regardless of the fact that special skills and knowledge go into its production. Under this analysis, printing work, done on special order, and of significant value only to the particular customer, is still a sale. The purchaser is interested in the product of the services of the printer, not in the services per se. Similarly, it would seem that contracts for custom-produced articles, be they intrinsically valuable or not, should be classified as sales when the product of the contract is transferred.

The Vanderbilt Law Review article, in quoting Snite v. Department of Revenue, 398 Ill. 41, 74 N.E. 2d. 877 (1947), also establishes the following general rule:

If the article sold has no value to the purchaser except as a result of services rendered by the vendor, and the transfer of the article to the purchaser is an actual and necessary part of the services rendered, then the vendor is engaged in the business of rendering service, and not in the business of selling at retail. If the article sold is the substance of the transaction and the service rendered is merely incidental to and an inseparable part of the transfer to the purchaser of the article sold, then the vendor is engaged in the business of selling at retail, and the tax which he pays . . . [is measured by the total cost of the article and services]. If the service rendered in connection with an article does not enhance its value and there is a fixed or ascertainable relation between the value of the article and the value of the service rendered in connection therewith, then the vendor is engaged in the business of selling at retail and also engaged in the business of furnishing service, and is subject to tax as to the one business and tax exempt as to the other.

While the above quotes do not establish rigid rules, they do provide general guidance in determining the purpose of a transaction, and are particularly helpful in addressing the issue at hand.

In addition, in an advisory opinion, SC Revenue Ruling #91-20, that concerned the electronic filing of tax returns, the Department held that “in those instances when a preparer both prepares and electronically files a return for a client, the filing is merely “incidental” to the preparing of the return and, therefore, not a retail sale of [a communications service].” This advisory opinion concluded that:

When a preparer both prepares and electronically files a return, charges for preparing and filing the return are not subject to the sales tax. However, if a preparer electronically files a return prepared by any other person, then charges for filing the return are subject to the sales tax, as filing the return would not be “incidental to a special service [preparing the return]”. It would be a sale of tangible personal property (communications).

Based on the above, it is the opinion of the Department that the “true object” of the JKL service provided by XYZ is not a communications service. XYZ is providing a personal service. Just as the personal service of an accountant preparing a tax return is not taxable merely because the accountant electronically files the tax return he has prepared for the client, the JKL service of XYZ is not taxable merely because XYZ electronically files the financial documents with the SEC on behalf of its client upon completion of its service.

Therefore, charges by XYZ to its customers for providing its “JKL” service are charges for a personal service and not a communications service. As such, the charges to its customers for the “JKL” service, as discussed in the facts, are not subject to the sales and use tax.

Note: XYZ provides other services related to SEC EDGAR filings. This private letter ruling only concerns the JKL service described in this document and is not applicable to any other services provided by XYZ, including any other service (if any) in which XYZ electronically files financial documents prepared to be SEC compliant by another person.

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/Ray N. Stevens

Ray N. Stevens, Director

November 16 _____, 2007
Columbia, South Carolina