
State of South Carolina
Department of Revenue
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SC PRIVATE LETTER RULING #11-3

SUBJECT: Buy All, Sell All Arrangement for the Sale of Electric Power
(Electric Power Tax)

REFERENCES: S. C. Code Ann. Section 12-23-10 (2000)
S. C. Code Ann. Section 12-23-20 (2000)
S. C. Code Ann. Section 12-23-60 (2000)
S. C. Code Ann. Section 12-23-130 (2000)
S. C. Code Ann. Section 58-31-80 (Supp. 2010)

AUTHORITY: S. C. Code Ann. Section 12-4-320 (2000)
S. C. Code Ann. Section 1-23-10(4) (2010)
SC Revenue Procedure #09-3

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set forth, and is binding on agency personnel only with respect to the person to whom it was issued and only until superseded or modified by a change in statute, regulation, court decision, or another Departmental advisory opinion, providing the representations made in the request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

Questions:

1. Is the sale of electric power to the South Carolina Public Service Authority by XYZ Manufacturing Company, LLC under the "buy all, sell all" arrangement described in the facts subject to the electric power tax?

2. Is the sale of electric power to XYZ Manufacturing Company, LLC by ABC Electric Cooperative, Inc. under the "buy all, sell all" arrangement described in the facts subject to the electric power tax?

Conclusions:

1. The sale of electric power to the South Carolina Public Service Authority by XYZ Manufacturing Company, LLC under the “buy all, sell all” arrangement described in the facts is not subject to the electric power tax. The sale of electric power to the South Carolina Public Service Authority is exempt from the electric power tax under Code Sections 12-23-130 and 58-31-80.
2. The sale of electric power to XYZ Manufacturing Company, LLC by ABC Electric Cooperative, Inc. under the “buy all, sell all” arrangement described in the facts is subject to the electric power tax under Code Section 12-23-10(2).

However, while the sale of electric power to XYZ Manufacturing Company, LLC by ABC Electric Cooperative, Inc. is subject to the electric power tax, it should be noted that under Code Section 12-23-20(8) electric power sold by ABC Electric Cooperative, Inc. to industrial customers as a class in excess of the amounts of electric power sold by ABC Electric Cooperative, Inc. to industrial customers as a class during the corresponding months of the State's fiscal year 1957-1958 is exempt from the electric power tax. “Industrial customers” means “that class of customer engaged in the business of manufacture, fabrication, processing and related work.”

Facts:

XYZ Manufacturing Company, LLC (“XYZ”) has recently constructed a biomass-fired electric generating unit at its South Carolina manufacturing plant. The unit has a capacity of approximately 51.4 megawatts (“MW”).

Prior to the construction of the biomass-fired electric generating unit, XYZ purchased all the electric power required to run its manufacturing plant from ABC Electric Cooperative, Inc. (“ABC”). The electric power produced by XYZ’s new biomass-fired electric generating unit will all be sold to the South Carolina Public Service Authority (“Santee Cooper”) and a similar amount of electric power will be purchased from ABC to run its manufacturing plant.

Under a “buy all, sell all” arrangement, among XYZ, Santee Cooper and ABC. XYZ will 1) contractually sell all of the capacity, electric power and associated renewable attributes¹ produced by its biomass-fired electric generating unit to Santee Cooper under a Power Purchase Agreement, and 2) contractually buy all of the electric power it needs (approximately 52 MW of electric power) to run its manufacturing plant from ABC under a separate Power Purchase Agreement.

The sale of electric power from XYZ to Santee Cooper is registered on one meter² and the sale of electric power from ABC to XYZ is registered on a separate meter. XYZ produces

¹ For the purposes of this advisory opinion, “renewable attributes” refers to credits for greenhouse gas reduction or producing renewable energy and includes carbon credits or greenhouse gas credits, carbon tax credits or greenhouse gas tax credits, renewable energy certificates, credit certificates, etc. It does not include state or federal production or investment tax credits or other financial incentives specific to the biomass facility.

² Santee Cooper owns this meter, which is located on XYZ’s property at the manufacturing plant immediately adjacent to the XYZ biomass-fired electric generating unit. Santee Cooper does not own any other equipment at the plant.

approximately 40 to 45 MW of electric power that is sold to Santee Cooper and purchases approximately 52 MW of electric power from ABC. The electric power XYZ sells to Santee Cooper is commingled with the additional electric power supplied by ABC to ensure that XYZ has the approximately 52 MW of electric power needed to run its manufacturing plant.

As a member of the 123 Electric Power Cooperative, ABC obtains all of its electric power from the 123 Electric Power Cooperative. In turn, the 123 Electric Power Cooperative obtains the bulk of its electric power from Santee Cooper.

The Power Purchase Agreements between XYZ and Santee Cooper and between XYZ and ABC were both effective September 1, 2010 for 15 years, with the possibility of extending for 5 year periods thereafter.

Discussion:

Code Section 12-23-10 imposes an electric power tax and states:

In addition to all other taxes of every kind imposed by law:

(1) every person, except the State, a county, a municipality, or an agency or political subdivision of it, engaged in the business of selling electric power for resale within the State is subject to the payment of an excise, license, or privilege tax of five-tenths of one mill upon each kilowatt hour of electric power sold for resale within the State, except upon such electric power purchased from a vendor, however remote, previously taxed under this subsection. Sales for resale of an electric cooperative to a customer whose sales are taxed under subsection (2) must not be taxed under this subsection; and

(2) except a municipality, every public utility and electric cooperative engaged in the business of selling electric power within the State to the ultimate user of the power is subject to the payment of an excise, license, or privilege tax of five-tenths of one mill upon each kilowatt hour sold within the State to the ultimate user, except such electric power purchased from vendors, however remote, taxed under subsection (1).

Code Section 12-23-60 requires persons liable for the electric power tax to file monthly returns, and states:

Every person subject to the provisions of this article shall on or before the twentieth day of each month make a true and correct return to the department in such form as it may prescribe, showing the exact amount of electric power manufactured, generated or sold, expressed in kilowatt hours, during the previous month, and remit the tax therewith.

Code Section 12-23-20 provides certain exemptions from the electric power tax, and states:

The provisions of this article shall not apply to:

- (1) Electric power manufactured or generated in another state and brought into this State until such power has lost its interstate character and immunities;
- (2) Electric power or energy generated in the State by plants constructed after May 1, 1951 and exported to another state;
- (3) Any person owning and operating an electric manufacturing or generating plant of ten horsepower or less;
- (4) Any industrial plant manufacturing or generating power for its own use or for use upon its own premises by its bona fide operatives or employees, but the tax shall be paid upon so much thereof as may be sold to other than its employees;
- (5) A municipality manufacturing or generating electricity for the use of its customers; or
- (6) Electric power used in manufacturing or generating hydroelectric power and steam electric power, and electric power used in the operation of such electric power manufacturing or generating plants and auxiliary machinery and equipment necessary thereto; provided, that all such power that is used for generation of power, which is to be exempt from taxation shall be exempt only if it is metered; nor shall they apply:
- (7) When the entire capital stock of a corporation owning and operating a plant manufacturing or generating electric power is owned by an industrial corporation, to such power as may be furnished by such generating corporation to such industrial corporation for use and consumption by such industrial corporation or for use upon the premises of such industrial corporation by its bona fide operatives or employees, but the tax shall be paid upon so much of such power as may be sold to other than such industrial corporation's employees.
- (8) Electric power sold to industrial customers as a class in excess of the amounts of electric power sold to industrial customers as a class during the corresponding months of the State's fiscal year 1957-1958; but all sales of electric power to any class of customer other than industrial customers shall continue to be assessed and taxed as provided in this article. As used in this section, "industrial customers" shall mean that class of customer engaged in the business of manufacture, fabrication, processing and related work.

(9) electricity used by a technology intensive facility as defined in Section 12-6-3360(M)(14)(b) and qualifying for the sales tax exemption provided pursuant to Section 12-36-2120(65), and the equipment and raw materials including, without limitation, fuel used by such qualifying facility to generate, transform, transmit, distribute, or manage electricity for use in such a facility. The running of the periods of limitation within which the department may assess taxes pursuant to Section 12-54-85 is suspended during the same time period it is suspended in item (65)(d) of Section 12-36-2120.

In addition, exemptions for the South Carolina Public Service Authority are provided in two code sections.

Code Section 12-23-130 states:

Nothing contained in Sections 12-23-10, 12-23-20, or 12-37-220, shall be construed or interpreted to impose any tax liability on the South Carolina Public Service Authority, and all property leased to and operated by the South Carolina Public Service Authority for the generation or transmission of electric power shall, for all tax purposes, be considered the property of the Authority.

Code Section 58-31-80 states:

The Public Service Authority is created primarily for the purpose of developing the Cooper River, the Santee River, the Congaree River, and their tributaries upstream to the confluence of the Broad and Saluda Rivers and upstream on the Wateree River to a point at or near Camden and other similar projects as instrumentalities of intrastate, interstate, and foreign commerce and navigation; of reclaiming wastelands by the elimination or control of flood waters, reforesting the watersheds of the rivers and improving public health conditions in those areas. It is found that the project authorized by this chapter is for the aid of intrastate, interstate, and foreign commerce and navigation, and that the aid and improvement of intrastate, interstate, and foreign commerce and navigation, the development, sale, and distribution of hydroelectric power, and the treatment, sale, and distribution of water at wholesale are in all respects for the benefit of all the people of the State, for the improvement of their health and welfare and material prosperity, and are public purposes, and being a corporation owned completely by the people of the State, the Public Service Authority is required to pay no taxes or assessments upon any of the property acquired by it for this project or upon its activities in the operation and maintenance of the project, except as provided in this section. The securities and other obligations issued by the Public Service Authority, their transfer and the income from them at all times are free from taxation. However, unless otherwise provided in any contract with an agency of the United States Government as assists in financing the projects contemplated in this section or any other agency from which the funds may be secured, all electrical energy developed by the authority must be sold at rates in the determination of which the taxes which the project would pay if privately

owned, to the extent provided in this section, as well as other rate-making factors properly entering into the manufacture and distribution of the energy must be considered. After payment of necessary operating expenses and all annual debt requirements on bonds, notes, or other obligations at any time outstanding and the discharge of all annual obligations arising under finance agreements with the United States or any agency or corporation of the United States and indentures or other instruments under which bonds have been, or may be issued, the authority shall pay annually to the various counties of the State a sum of money equivalent to the amount paid for taxes on properties at the time of their acquisition by the authority, acquired, or to be acquired, in the counties, and the authority shall pay to all municipalities and school districts in the counties in which the authority has acquired, or may acquire properties, a sum of money equivalent to the amount paid for taxes to the school districts and municipalities on the properties at the time of their acquisition by the authority; and no other taxes may be considered in the fixing of the rates of the authority. From the funds to be paid under this section the counties, school districts, and municipalities annually shall apply a sum sufficient for the debt requirements for bonds and other obligations of the counties, school districts, and municipalities for which the properties were taxed at the time of their acquisition by the authority, with the remainder of the funds to be expended in accordance with law. (Emphasis added.)

Based on the above, persons engaged in the business of selling electric power for resale (wholesale sales), and public utilities and electric cooperatives (not including municipalities) engaged in the business of selling electric power at retail, are liable for the electric power tax unless the electric power has been previously taxed in South Carolina or the sale is otherwise exempt under Code Sections 12-23-20, 12-23-10 and 58-31-80 or some other provision of law. This applies to all persons selling electric power, including manufacturing plants selling electric power to any persons other than employees. See Code Sections 12-23-10 and 12-23-20(4).

Therefore, it is the opinion of the Department that the sale of electric power to Santee Cooper by XYZ under the “buy all, sell all” arrangement described in the facts is not subject to the electric power tax. Sales of electric power to Santee Cooper are exempt from the electric power tax under Code Sections 12-23-130 and 58-31-80.

The sale of electric power to XYZ by ABC under a “buy all, sell all” arrangement is subject to the electric power tax. Unlike the “net metering” arrangement discussed in SC Revenue Ruling 10-10, XYZ does not retain ownership of the electric power sold to Santee Cooper. XYZ sells the electric power to Santee Cooper and it is not “banked” by XYZ with Santee Cooper as is the case in the “net metering” arrangement described in SC Revenue Ruling #10-10. XYZ is using electric power purchased from a third party, ABC. In fact, as a member of the 123 Electric Power Cooperative, ABC obtains all of its electric power from the 123 Electric Power Cooperative which, in turn, obtains the bulk of its electric power from Santee Cooper. In addition, unlike the “net metering” arrangement described in SC Revenue Ruling #10-10, there are two separate meters to register both sales. As such, the sale of electric power to XYZ by ABC is subject to the electric power tax.

However, while the sale of electric power to XYZ by ABC is subject to the electric power tax, it should be noted that under Code Section 12-23-20(8) electric power sold by ABC to industrial customers as a class in excess of the amounts of electric power sold by ABC to industrial customers as a class during the corresponding months of the State's fiscal year 1957-1958 is exempt from the electric power tax. "Industrial customers" means "that class of customer engaged in the business of manufacture, fabrication, processing and related work."

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/James F. Etter
James F. Etter, Director

July 6, 2011
Columbia, South Carolina