



SC PRIVATE LETTER RULING #89-12

TO: XYZ

SUBJECT: Sales at Military Post Exchange/Liability for the Tax
(Sales Tax)

REFERENCE: S.C. Code Ann. Section 12-35-550(1) (1976)
S.C. Code Ann. Section 12-35-510 (1976)
S.C. Code Ann. Section 12-35-30 (1976 & Supp. 1988)

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

SCOPE: A Private Letter Ruling is a temporary document issued to a taxpayer, upon request, and it applies only to the specific facts or circumstances related in the request. Private Letter Rulings have no precedential value and are not intended for general distribution.

Question:

Is XYZ liable for the sales tax, on sales made at a military post exchange located in South Carolina?

Facts:

XYZ has entered into an agreement with a post exchange, located on a military base, in South Carolina. The contract stipulates that XYZ will provide the equipment for a rental facility, which will be operated by exchange personnel. The exchange will forward all monies to XYZ and receive a commission.

Ultimate customers will be military personnel, retirees, and their family members. The general public may not rent items from the facility.

Discussion:

The question is whether the retailer is XYZ or the post exchange.

A military post exchange is a non-appropriated fund activity. In Bowen v. Culotta, D.C. Va. 1968, 294 F. Supp. 183, the court stated: A non-appropriated fund activity is one to which the

government has initially provided funds to permit it to begin operations. The governmental loan is repaid out of the profits earned by the activity. Thus, the activity is created by the government with government funds for government personnel, and is administered by government employees for the use and benefit of the United States.

The court further held:

Plaintiff was employed in a non-appropriated fund activity. These activities are instrumentalities of the United States and are integral parts of the government's military services. Standard Oil Company of California v. Johnson, 316 U.S. 481, 62 S.Ct 1168, 86 L.Fd. 1611; United States v. Holcombe, 176 F. Supp. 297, 303 (E.D. Va. 1959) affirmed 277 F.2d 143 (4th Cir. 1960); United States v. Forfari, supra; Nimco v. Davis, 92 U.S. App. D.C. 293, 204 F.2d 734 (1953); Edelstein v. South Post Officers Club, 118 F. Supp. 40 (E.D. Va. 1951). Non-appropriated fund activities of the government "share in fulfilling the duties entrusted to it and partake of whatever immunities it may have under the constitution and federal statutes." Standard Oil Co. of California v. Johnson, 316 U.S. 481, 485, 62 S.Ct. 1168, 1170 (emphasis added).

In Opinion of Attorney General S-OAG-78 (September 6, 1984), the case of United States v. State Tax Commission of Mississippi, 421 U.S. 599, 44 L. Ed 2d 404, 95 S.Ct 1872 (1975) was cited, and reads, in part:

...post exchanges and similar facilities are instrumentalities of the United States: 'it is clear that the ship's stores, officers' clubs and post exchanges "as operated are arms of the government deemed by it essential for the performance of governmental function..."' (Citations omitted)

Furthermore, "without congressional action there is immunity from state and local taxation, implied from the Constitution itself, of all properties, functions, and instrumentalities of the Federal Government. It necessarily follows that a state and the subordinate taxing units thereof are without power to subject to taxation the property of the Federal Government or the means, instrumentalities, and agencies thereof which it employs to carry out its proper functions, unless Congress expressly confers a right upon the states to tax such agencies, instrumentalities, or property." 71 AM Jur 2d State and Local Taxation, Section 221 (Kern Limerick, Inc. v. Scurlock, 347 US 110, 98 L.Ed 546, 74 S.Ct 403; Mayo v. United States, 319 US 441, 87 L.Ed 1504, 63 S.Ct 1137, 147 ALR 761).

In addition, Code Section 12-35-550(1) exempts from the sales tax:

The gross proceeds of the sale of tangible personal property or the gross receipts of any business which the State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State.

In summary, if the person making the sales (the retailer) is the post exchange, then such sales are by the United States Government and are, therefore, immune and exempt from taxation.

To determine which party is the retailer, an examination of the contract, as well as case law, is required.

Section 1 of the "..... Rental Contract" is entitled "ITEMS AND SERVICES TO BE PERFORMED BY THE CONTRACTOR [XYZ]" and reads, in part:

- A. The Contractor shall offer goods and services which are customarily offered in the rental industry.
- B. The Contractor shall provide all forms necessary to perform all services.....
- C. The Contractor shall provide a current price list. Prices charged to Exchange patrons shall be (10) ten percent less than those indicated on the price list and shall be free of all taxes.
- D. The Contractor shall provide training for Exchange employees as necessary to efficiently execute rental contracts on behalf of the Contractor.....

* * * *

- I. The Contractor shall assume full responsibility for all losses occurring within the rental facility due to theft or break-in (emphasis added).

Section 2 is entitled "ITEMS AND SERVICES PROVIDED BY THE EXCHANGE", and reads, in part:

- A. The Exchange shall provide adequate space for a rental operation.
- B. The Exchange shall operate the rental operation utilizing Contractor supplied equipment and Exchange supplied personnel.

* * * *

- D. The Exchange agrees to comply with Contractor's procedures regarding completion of user contracts, issuance of User's Code, and collection of fees.
- E. The Exchange agrees to perform Contractor required documentation in support of all rental transactions and accountability of equipment inventory.
- F. The Exchange shall collect and account for all monies due for goods and services provided hereunder. On a weekly basis the Exchange will forward all monies collected from rentals and related transactions along with supporting paperwork to an address provided by the Contractor (emphasis added).

Attachment "C" of the contract, entitled "DECLARATION OF COMMISSION" reads, in part:

The Contractor agrees to pay the Exchange a commission as set forth below for the operation of a rental facility...

Furthermore, 68 Am.Jur. 2d Sales and Use Taxes, Section 95 reads, in part:

Where commodities are sold by the producer or manufacturer thereof through the services of another party employed by the former under a definite contract, the questions may arise (1) whether the contract creates a principal and agent relationship between the parties, and (2) if so, what bearing this circumstance has upon the question of which of the parties is liable for a tax imposed upon the making of the sale. One whose property is sold through an agent is, in contemplation of law, the seller, and he is liable for the sales tax to the same extent he would be if he sold the property himself, and the agent is not liable for the tax on such sales,....(emphasis added)

In summary, in an agency relationship, the principle, not the agent, is considered to be the retailer.

In addition, the "Local Equipment Rental Contract" and the "One-Way Equipment Rental Contract" refer only to XYZ and the customer. The Exchange is not referred to in these contracts. Items 11 and 13 of these contracts read, respectively:

XYZ may terminate this contract and enter customer's property to recover equipment at anytime.

* * * *

This contract may not be changed except in writing, signed by a XYZ official (emphasis added).

Therefore, the contract, signed by the ultimate customer, is with XYZ.

In summary, the sales (rentals) in question are sales by XYZ, as the retailer.

Conclusion:

The subject sales, at the post exchange, are sales by XYZ and are, therefore, subject to taxation.

SOUTH CAROLINA TAX COMMISSION

s/S. Hunter Howard Jr.

S. Hunter Howard, Jr., Chairman

s/A. Crawford Clarkson Jr.

A. Crawford Clarkson, Jr., Commissioner

s/T. R. McConnell

T. R. McConnell, Commissioner

Columbia, South Carolina
June 7, 1989