



301 Gervais Street, P.O. Box 125, Columbia, South Carolina 29214

SC PRIVATE LETTER RULING #94-10 (TAX)

TO: ABC Company

SUBJECT: Manufacturer/Contractor
(Sales and Use Tax)

DATE: October 15, 1994

REFERENCE: S. C. Code Ann. Section 12-36-110 (Supp. 1993)
S. C. Code Ann. Section 12-36-910 (Supp. 1993)
S. C. Code Ann. Section 12-36-1310 (Supp. 1993)

AUTHORITY: S. C. Code Ann. Section 12-4-320 (Supp. 1993)
SC Revenue Procedure #94-1

SCOPE: A Private Letter Ruling is an official advisory opinion issued by the Department of Revenue to a specific person.

NOTE: A Private Letter Ruling may only be relied upon by the person to whom it is issued and only for the transaction or transactions to which it relates. A Private Letter Ruling has no precedential value.

Question:

How does the State sales and use tax apply to the ornamental railing system fabricated and installed by XYZ Company for X at Y, an automobile dealership?

Conclusion:

The ornamental railing system fabricated and installed by XYZ Company for X at Y, an automobile dealership, is a "unique product". As such, XYZ Company is considered a contractor for purposes of the Y projects and purchases of building materials to fabricate the ornamental railing system are retail transactions.

Therefore, since the ornamental railing system was fabricated out of state and the materials used to fabricate the ornamental railing system were not sold and delivered to the contractor within South Carolina, sales to or purchases by the XYZ Company of the materials used to fabricate the unique product are not subject to the sales and use tax. However, purchases in South Carolina (if any) of materials used to install the railing system are subject to the tax.

Note: Since the ABC Company remitted sales tax on behalf of the XYZ Company with respect to this project, the XYZ Company is entitled to a refund of the taxes paid provided a claim for refund is filed within the time limits set forth in Code Section 12-47-440.

Facts:

The ABC Company is an independent sales organization which, by mutual agreement, is involved in the promotion and sales of construction materials produced by a number of different companies. Usually these materials are unique in nature in that they cannot be used except within the project for which they have been designed and built.

On occasion, these companies may contract with a general contractor to provide and install the product.

The question at hand involves a recently completed project at Y, an automobile dealership in South Carolina.

In that project, XYZ Company entered into a sub-contract with X, the general contractor of the Y project. This sub-contract was the result of the ABC Company's efforts as the XYZ Company's representative in this area.

The project required the XYZ Company to fabricate an ornamental railing system which required the expertise and labor of XYZ Company to install. In addition, the ornamental railing system was fabricated in another state and the materials used to fabricate the ornamental railing system were not sold and delivered to the contractor within South Carolina.

The ABC Company advised XYZ Company that sales tax was due the State of South Carolina. Since the ABC Company is registered to pay sales tax in South Carolina and XYZ Company is not, XYZ Company paid the tax to the ABC Company which, acting as a conduit, remitted the tax to the State. ABC Company did not take title or possession of the product at any time.

Discussion:

Code Section 12-36-910(A) reads:

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. (emphasis added)

Code Section 12-36-1310(A) reads:

A use tax is imposed on the storage, use, or other consumption in this State of tangible personal property purchased at retail for storage, use, or other consumption in this State at the rate of five percent of the sales price of the property, regardless of whether the retailer is or is not engaged in business in this State. (emphasis added)

Thus, for the sales or use tax to be imposed, there must be a retail sale or a retail purchase of tangible personal property.

The terms "sale at retail" and "retail sale" are defined at Code Section 12-36-110 as:

...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.

(1) The terms include:

(a) sales of building materials to construction contractors, builders or landowners for resale or use in the form of real estate;

* * * *

(d) the use within this State of tangible personal property by its manufacturer as building materials in the performance of a construction contract. The manufacturer must pay

the sales tax based on the fair market value at the time and place where used or consumed; (emphasis added)

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The term "building materials" is defined at Regulation 117-174.45 as "tangible personal property...which becomes a part of real property."

In summary, purchases of building materials by a contractor are retail transactions and the tax is due on the material's purchase price. However, if a contractor is the manufacturer of his own building materials, the use of the building materials by the contractor is a retail sale, with the tax being due on the fair market value of the building materials at the time of use.

The Department of Revenue addressed this issue in SC Revenue Ruling #94-2, in which the above statutes and various court cases and Commission Decisions were reviewed. In the ruling it was determined that the statute drew a distinction between "unique products" and "standard finished products", and therefore the following definitions were established:

"Unique products" are items that are specifically designed for use on a particular construction project. Such items are not standard or interchangeable in any sense and have no resale value and no reasonable fair market value.

"Standard finished products" are items that are not specifically designed for use on a particular construction project. Such items are standard or interchangeable and have a resale value and a fair market value. These items are generally mass-produced and are suitable for use on many construction projects.

Based on these definitions, SC Revenue Ruling #94-2 concludes in part:

The State sales and use taxes apply to businesses that manufacture or fabricate items, that they will use in constructing real property, as follows:

Standard Finished Products:

If the taxpayer produces "standard finished products" that it sells at wholesale or at retail on a regular and continuous basis; creates "a new and substantially different article having a distinctive name and substantially different character or use" than that of the raw materials from which it was made; and, is commonly thought of as a manufacturer, then the taxpayer is a "manufacturer" of "building materials". As a manufacturer, if the taxpayer uses such building materials in the performance of a construction contract, then the taxpayer is a "manufacturer/contractor", and is liable for the sales tax based on the fair market value of the building materials at the time and place where used or consumed - the job site. However, if the job site is located outside of South Carolina, then no tax is due.

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Unique Products:

If the taxpayer produces "unique products" that it uses in the performance of a construction contract, then the taxpayer is a contractor. As such, sales to, and purchases by, the taxpayer of the raw materials used to fabricate (within South Carolina) the unique product are subject to the sales and use tax. However, if the fabricated item will be used, and become a part of realty, at a job site located outside of South Carolina, then the sales to, and purchases by, the taxpayer of the raw materials used in the fabrication of that unique product are not subject to the sales and use tax.

If the unique product is fabricated out of state, sales to or purchases by the contractor of the materials used to fabricate the unique product are not subject to the sales and use tax, provided the materials were not sold and delivered to the contractor within South Carolina.

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Note: Sales of "standard finished products" or "unique products" to contractors and other consumers who use them in the performance of a construction contract, or to otherwise make improvements to realty, are subject to the sales and use tax based upon gross proceeds of sales or sales price, unless otherwise excluded or exempted from the tax.

Based on the above, a review of the contract between the XYZ Company and X, and a review of photographs of the completed project, the ornamental railing system installed at Y is a unique product.

Therefore, since the ornamental railing system was fabricated out of state and the materials used to fabricate the ornamental railing system were not sold and delivered to the XYZ Company within South Carolina, sales to or purchases by the XYZ Company of the materials used to fabricate the unique product are not subject to the sales and use tax. However, purchases in South Carolina (if any) of materials used to install the railing system are subject to the tax.

For questions concerning manufacturer/contractors and contractors, please call John P. McCormack at (803) 737-4438.