



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

SC PRIVATE LETTER RULING #94-3 (TAX)

TO: ABC Company

SUBJECT: Materials Used in Road Construction
(Sales Tax)

DATE: April 12, 1994

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

Questions:

1. Is ABC Company subject to sales tax on gravel and crushed rock mined and quarried from its own property for use in performing its road construction contracts?
2. Is ABC Company subject to sales tax on asphalt it makes and uses in performing its road construction contracts?

Conclusions:

1. ABC Company is not subject to sales tax with respect to gravel and crushed rock mined and quarried from its own property for use in performing its road construction contracts. The removal of gravel or crushed rock by ABC Company from its own property is not a retail sale under Code Section 12-36-110.

2. ABC Company is not subject to sales tax with respect to the asphalt it makes for use in performing its road construction contracts, as ABC does not sell asphalt to others on a regular and continuous basis.

However, if ABC Company were to become a manufacturer of asphalt, ABC would be subject to sales tax on its use of the asphalt it manufactures and uses in the performance of any construction contracts. The tax would be based on the fair market value of the asphalt at the time of use. In addition, as a "manufacturer/ contractor" of asphalt, ABC would be entitled to the exemptions and exclusion provided in Code Sections 12-36-2120(9), 12-36-2120(17), 12-36-2120(19) and 12-36-120, for fuel, machinery, electricity, ingredients, etc., to the extent applicable.

Facts:

ABC Company, principally engaged in the business of mining, quarrying and selling sand, gravel and crushed rock from property it owns. Most of ABC's sales are to contractors for use in road construction. ABC pays South Carolina sales tax on sales of sand, gravel and crushed rock to these contractors.

In addition, ABC is involved in the road construction business. The gravel and crushed rock mined and quarried from property it owns are used by ABC as subgrade materials or are incorporated into the asphalt for use in the road construction business. When incorporating the aggregate into asphalt, ABC purchases liquid asphalt from suppliers and blends it with the gravel and crushed rock to produce asphalt suitable for paving. ABC is charged sales tax on purchases of liquid asphalt from suppliers. In the facts presented by the taxpayer, ABC stated that sales of asphalt to other paving contractors are rarely made and that these sales are not made on a regular and continuous basis.

ABC has requested advice concerning the taxability of the gravel and crushed rock from property it owns that will be used by ABC in performing their own road construction contracts.

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.

Therefore, for the sales tax to be imposed, there must be a retail sale 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...

(1) The terms include:

* * *

- (c) the withdrawal, use, or consumption of tangible personal property by anyone who purchases it at wholesale...
- (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;
- (e) sales to contractors for use in the performance of construction contracts;

Regulation 117-174.45 defines the term "building materials", in parts as:

...The term "building materials" includes such tangible personal property as...sand, gravel, slag, stone...and any other tangible personal property which becomes part of real property.

Based on the above, 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.

With this in mind, we will determine whether ABC is subject to sales tax on gravel and crushed rock removed from ABC's property. As previously discussed, ABC will use the gravel and rock either as subgrade material or as part of the asphalt in connection with its road construction contracts.

First, we must determine whether there has been a retail sale of gravel and rock. ABC is principally engaged in mining and quarrying sand, gravel and crushed rock from property which it owns. ABC has not previously purchased the gravel and rock at wholesale. Accordingly, there has not been a retail sale pursuant to Code Section 12-36-110(1)(c).

Next, we must determine whether ABC is subject to sales tax on asphalt it uses in performing road construction contracts.

In addressing this question, we must determine whether ABC is a manufacturer of asphalt and, therefore, subject to the provisions of Code Section 12-36-110(1)(d). SC Revenue Ruling #94-2 addressed the sales and use tax applicability to manufacturers and construction contractors and provides guidance in addressing the question at hand. SC Revenue Ruling #94-2 concluded that "to be a manufacturer, one must be in the business of producing tangible personal property for sale to others on a regular and continuous basis; create 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, be commonly thought of as a manufacturer."

ABC has stated that sales of asphalt to other paving contractors are rarely made and that these sales are not made on a regular and continuous basis. Based upon SC Revenue Ruling #94-2, ABC is not a manufacturer of asphalt since they are not in the business of producing asphalt for sale to others on a regular and continuous basis.

Finally, our discussion would not be complete without briefly discussing the taxing implications of a manufacturer/contractor. If ABC becomes a manufacturer/contractor of asphalt, ABC would be liable for the sales tax on its use of the asphalt it manufactures and uses in the performance of any construction contracts. The tax would be based on the fair market value of the asphalt at the time and place where used or consumed - the job site. The asphalt used by ABC in the performance of a construction contract is a standard finished product (see SC Revenue Ruling #94-2). As a "manufacturer/contractor" of asphalt, ABC would be entitled to the exemptions and exclusion provided in Code Sections 12-36-2120(9), 12-36-2120(17), 12-36-2120(19) and 12-36-120, for fuel, machinery, electricity, ingredients, etc., to the extent applicable to its asphalt business.

Furthermore, with respect to its business of mining, quarrying and selling sand, gravel and crushed rock from property it owns, ABC is entitled to the exemptions and exclusion provided in Code Sections 12-36-2120(9), 12-36-2120(17), 12-36-2120(19) and 12-36-120, for fuel, machinery, electricity, ingredients, etc., to the extent applicable in its mining and quarrying business.

For questions concerning materials used in road construction, contact Gary Heuer at 803-737-4744.