
State of South Carolina
Department of Revenue
301 Gervais Street, P. O. Box 125, Columbia, South Carolina 29214

SC PRIVATE LETTER RULING #95-4 (TAX)

TO: ABC Inc.

SUBJECT: Food Services
(Sales and Use Taxes)

DATE: May 23, 1995

REFERENCE: S. C. Code Ann. Section 12-36-910 (Supp. 1993)
S. C. Code Ann. Section 12-36-1310 (Supp. 1993)
S. C. Code Ann. Section 12-36-110 (Supp. 1993)
S. C. Code Ann. Section 12-36-120 (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 Inc. liable for sales and use taxes on sales of food and food management services to a hospital, as described in transaction 1 in the facts?
2. Is ABC Inc. liable for sales and use taxes on sales of only food management services to a hospital, as described in transaction 2 in the facts?
3. Is ABC Inc. liable for sales and use taxes on sales of food management services and food in a cafeteria located at a private company, as described in transaction 3 in the facts?

Conclusions:

1. As described in transaction 1 in the facts, ABC Inc. is making a wholesale sale of tangible personal property and is not liable for sales and use taxes on sales of food and food management services to a hospital.

2. As described in transaction 2 in the facts, ABC Inc. is providing a service and is not liable for sales and use taxes when providing food management services to a hospital.
3. As described in transaction 3 in the facts, ABC Inc. is making a retail sale of tangible personal property on behalf of a private company and is liable for sales tax, as a retailer under Code Section 12-36-70, on sales of food in the cafeteria of that company.

Facts:

ABC Inc., a Delaware corporation, is engaged in the business of supplying food and/or food management service to public and private institutions, such as private businesses and hospitals, in connection with the operation of the institutions' food services program. Advice has been requested regarding the taxability of management and food services provided by ABC, Inc. Based upon the terms and conditions set forth in contracts with their clients, ABC, Inc. is seeking guidance with respect to the following transactions:

Transaction 1 -

Under the terms of the contract, ABC and the hospital agree to the following provisions:

1. A consulting and management fee is charged for operating the hospital's food service,
2. The food is purchased by ABC and the hospital reimburses ABC for the food costs,
3. Management personnel are carried as part of ABC's payroll. ABC bills the hospital for salaries and a percentage of payroll charges. The hospital pays the hourly employees who prepare and serve the food,
4. All daily cash sales received from the food service operation are delivered to the hospital's business office daily,
5. Food is provided to patients and substantial sales are made at the cafeteria.

Transaction 2 -

Under the terms of the contract, ABC and the hospital agree to the same provisions described in transaction 1, except that the hospital will purchase the food.

Transaction 3 -

Under the terms of the contact, ABC and the private business agree to the following provisions:

1. ABC's charges a consulting and management fee to operate a cafeteria located at a private business,
2. The business pays ABC for all food purchased by ABC,

3. Management personnel and hourly employees who prepare and serve the food are carried as a part of ABC's payroll. ABC bills the business for salaries and a percentage rate of payroll charges,
4. ABC collects the receipts from the daily cash sales and credits this amount against the business's monthly food service operation.

Discussion:

Code Section 12-36-910(A) imposes the sales tax and reads, in part:

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.

Code Section 12-36-1310(A) imposes the use tax and reads, in part:

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.

According to the law, the sales and use taxes are imposed on retail sales of tangible personal property, but are not imposed on wholesale sales of tangible personal property.

Code Section 12-36-110 defines the terms "sale at retail" and "retail sale", in part, as follows:

Sale at retail and retail sale mean 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:

* * * *

(c) the withdrawal, use, or consumption of tangible personal property by anyone who purchases it at wholesale...

* * * *

(h) sales of prepared meals, or unprepared food products to prepare meals, to hospitals,... educational institutions, boarding houses, and transportation companies, if furnished as part of the service rendered. These institutions and companies are deemed to be the users or consumers of the property....

Code Section 12-36-120 provides the meaning of the term "wholesale sale" and reads, in part:

Wholesale sale and sale at wholesale mean a sale of:

(1) tangible personal property to licensed retail merchants...for resale, and do not include sales to users or consumers not for resale;

The law, therefore, provides that a retail sale includes: (1) sales of tangible personal property, (2) withdrawals of inventory purchased at wholesale, and (3) sales to hospitals of prepared meals or unprepared food products to prepare meals for patients. A retail sale does not include a wholesale sale.

Now, we will review the three transactions described in the facts above and discuss the sales and use tax consequences of each.

Transaction 1 -

As described in the facts, ABC is providing food and food management services to a hospital. Employees of the hospital are preparing and serving the food. The hospital is providing food to patients as part of the medical services, and also sells a substantial amount of food to employees, visitors, and guests in its cafeteria. In other words, the hospital is the user and consumer of the food purchased from ABC based upon Code Section 12-36-110 and is a "retailer" of food purchased from ABC that is resold to guests, employees and visitors in the hospital cafeteria.

Regulation 117-174.82 addresses the imposition of the tax upon businesses making both retail sales and withdrawals for use and reads:

Operators of businesses who are both making retail sales and withdrawing for use from the same stock of goods are to purchase at wholesale all of the goods so sold or used and report both retail sales and withdrawals for use under the sales tax law.

This ruling applies only to those who actually carry on a retail business having a substantial number of retail sales and does not apply to...others who make isolated...sales and who have not set themselves up as being engaged in selling. Where only isolated sales are made, tax should be paid on all of the taxable property purchased with no sales tax returns being required of the seller making such isolated...sales.

Based upon the above, ABC is not liable for sales and use taxes on food and food management services provided to the hospital. In complying with this regulation, the hospital must present ABC a properly completed South Carolina Form ST-8A - Resale Certificate in order to purchase the food tax free. The hospital is then liable for sales and use taxes on both retail sales of food in its cafeteria and the food that is withdrawn for patient meals.¹ (See SC Revenue Ruling #93-9.)

¹The hospital will report retail sales based on gross proceeds of sales of food in its cafeteria and withdrawals for use to patients based upon the property's fair market value (i.e. the amount paid by the hospital to ABC for food costs reimbursed under the terms of the contract).

Transaction 2 -

As described in the facts, ABC is providing food management services only to a hospital. The hospital is purchasing food from outside vendors. The hospital is providing food to patients as part of their medical services and also is selling food to employees, visitors, and guests in its cafeteria. In other words, the hospital is the user and consumer of the food purchased from vendors based upon Code Section 12-36-110 and is a "retailer" of food purchased from ABC that is resold to guests, employees and visitors in the hospital cafeteria.

As stated in the facts, ABC is providing a management service only. ABC is not making a sale of tangible personal property and is not liable for sales and use taxes.

Based upon the discussion in transaction 1, Regulation 117-174.82 is applicable since the hospital is making a substantial amount of retail sales and withdrawing for use from the same stock of goods. The hospital must present its vendors a properly completed South Carolina Form ST-8A - Resale Certificate in order to purchase the food tax free. The hospital is then liable for sales and use taxes on both retail sales of food in its cafeteria and the food that is withdrawn for patient meals.² (See SC Revenue Ruling #93-9.)

Transaction 3 -

As described in the facts, ABC is operating a cafeteria at a private business³. ABC buys the food, employs the management personnel, and employs the hourly personnel that cook and serve the food. ABC also collects the receipts from the daily cash sales and credits this amount against the business's monthly food service operation. Since ABC is making sales on behalf of the private business, ABC is treated as a retailer, and liable for the sales tax, pursuant to the last paragraph of Code Section 12-36-70. ABC may present a properly completed Form ST-8A-Resale Certificate in order to purchase the food tax free. ABC is then liable for sales tax on the gross proceeds from the food sales in the cafeteria of the private business.

²The hospital will report retail sales based on gross proceeds of sales of food in its cafeteria and withdrawals for use to patients based upon the property's fair market value (i.e. the amount paid by the hospital to outside vendors for food costs).

³The business is not a hospital, infirmary, sanitarium, nursing home, similar institution, educational institution, boarding house, or transportation company deemed to be a user or consumer as provided in Code Section 12-36-110(1)(h).