

SC REVENUE RULING #05-13

SUBJECT: Software and Software Maintenance Contracts
(Sales & Use Tax)

EFFECTIVE DATE: October 1, 2005

SUPERSEDES: SC Revenue Ruling #93-4, SC Revenue Ruling #03-5, and all previous advisory opinions and any oral directives in conflict herewith.

REFERENCES: Chapter 36 of Title 12 (2000 and Supp. 2004)
House Bill 3767, Section 19 (Act No, 161) of 2005

AUTHORITY: S. C. Code Ann. Section 12-4-320 (2000)
S. C. Code Ann. Section 1-23-10(4) (Supp. 2004)
SC Revenue Procedure #03-1

SCOPE: The purpose of a Revenue Ruling is to provide guidance to the public and to Department personnel. It is a written statement issued to apply principles of tax law to a specific set of facts or a general category of taxpayers. A Revenue Ruling does not have the force or effect of law, and is not binding on the public. It is, however, the Department's position and is binding on agency personnel until superseded or modified by a change in statute, regulation, court decision, or advisory opinion.

EFFECTIVE DATE NOTICE:

This advisory opinion is effective for transactions occurring on or after October 1, 2005. SC Revenue Rulings #93-4 and #03-5 are still valid with respect to transactions occurring prior to October 1, 2005. (See House Bill 3767, Section 19 (Act No, 161) of 2005.)

INTRODUCTION:

Technology has progressed to the stage that computer software may be sold or provided in many forms. Software may be sold in traditional forms such as on computer diskettes or magnetic tape. Computer software may also be sold and delivered electronically as described in the following transaction. Company A purchases computer software for its own business use. No portion of the computer software will be delivered on computer disks or magnetic tapes. Instead, the software will be electronically delivered from a remote location to Company A in South Carolina via a modem and telephone line.

In addition, some Internet websites also allow a customer use of software on that website. Companies that provide customers access or use of software in this manner are generally referred to as Application Service Providers (ASP).

Finally, when computer software is purchased or a license to use software is granted, the purchasers or licensees may enter into agreements for the maintenance or support of the software. These agreements generally entitle the purchasers or licensees to one or more of the following benefits:

1. Telephone assistance on standby or during certain hours.
2. Updated or new versions of the software as they become available.
3. Coding or modifications to fit specific hardware needs.
4. Debugging of programs or correction of errors.
5. Training concerning use of the software.
6. Installation of the software.

In addition to the various benefits that may be available through software maintenance or support agreements, diverse conditions exist in conjunction with the terms of these agreements. For instance, some agreements are entered into when the software is purchased or a license to use is granted and others are entered into some later time; some agreements are optional while other agreements are mandatory; etc.

LAW AND DISCUSSION:

Computer Software Sold and Delivered by Tangible Means

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

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.)

In *Citizens and Southern Systems, Inc. v. South Carolina Tax Commission*, 280 S.C. 138, 311 S.E.2d 717 (1984), the Supreme Court of South Carolina determined that computer software sold and delivered to the purchaser by means of magnetic tape was tangible personal property and subject to the State's sales and use taxes.

Regulation 117-330, "Automatic Data Processing" states, in part:

* * * *

Prewritten Programs

The tax applies to total charges for coding, punching or otherwise reproducing prewritten programs including charges for the tapes or other properties when furnished by the seller or producer.

The temporary transfer of possession of a program for a consideration for the purpose of direct use by the customer or to be reproduced by the customer on or into tapes or other properties is a lease of tangible personal property subject to the tax on the total amount paid even though the consideration may be labeled a license fee or royalty payment; and even though royalty payments or payments for a license to use may be paid long after the original programs are returned to the seller.

Custom Programs

Custom programs are programs prepared to the special order of a customer, the gross proceeds therefrom being subject to the tax. Also considered to be custom programs are sales of programs developed through modification of existing prewritten programs to meet a customer's specific needs. Charges to modify and adapt these programs to a customer's equipment (including testing) or translating a program to a language compatible with a customer's equipment are services that are a part of the sale price of tangible personal property and likewise subject to the tax.

In summary, computer software sold and delivered to a purchaser by tangible means, such as by magnetic tape or on a disk, is a sale subject to the sales or use tax.

Computer Software Sold and Delivered by Electronic Means

Code Section 12-36-60 defines the term "tangible personal property" to mean:

...personal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses. It also includes services and intangibles, including communications, laundry and related services, furnishing of accommodations and sales of electricity, the sale or use of which is subject to tax under this chapter and does not include stocks, notes, bonds, mortgages, or other evidences of debt. (Emphasis added).

Therefore, the term tangible personal property includes the sale or use of intangibles, including communications, that are subject to South Carolina sales or use taxes under Chapter 36 of Title 12.

Communications are subject to sales and use taxes under Chapter 36 of Title 12 pursuant to Code Sections 12-36-910(B)(3) and 12-36-1310(B)(3), which impose the tax on the:

gross proceeds accruing or proceeding from the charges for the ways or means for the transmission of the voice or messages, including the charges for use of equipment furnished by the seller or supplier of the ways or means for the transmission of the voice or messages (Emphasis added.)

For the electronic delivery of software to be subject to sales and use taxes, it must be determined that the gross proceeds are derived from the sale of tangible personal property as defined in Code Section 12-36-60. The term tangible personal property includes services and intangibles, such as communications, which are subject to tax under Code Sections 12-36-910 and 12-36-1310.

A review of longstanding administrative policy indicates that computer software sold and delivered in the form of a computer diskette or magnetic tape is tangible personal property subject to taxation. See *Citizens and Southern Systems, Inc. v. South Carolina Tax Commission*, 280 S.C. 138, 311 S.E. 2d 717 (1984) and also SC Revenue Ruling #93-4.

In addition, it has been the longstanding policy of the Department that computer software sold and delivered by electronic means is an intangible and is subject to taxation only if it is "communications" taxed under Chapter 36 of Title 12 pursuant to Code Sections 12-36-910 and 12-36-1310 or if any portion of the software is delivered by tangible means (e.g., back-up disks or tapes).

The Code does not provide definitions for various terms or phrases found in Code Sections 12-36-910(B)(3) and 12-36-1310(B)(3); therefore, it is necessary to determine their "ordinary and popular meaning." The Department, in interpreting Code Sections 12-36-910(B)(3) and 12-36-1310(B)(3) (and their predecessors), has long used the definitions found in the Second College Edition of the American Heritage Dictionary for defining these terms and phrases. Substituting the definitions in the Second College Edition of the American Heritage Dictionary for terms found in Sections 12-36-910(B)(3) and 12-36-1310(B)(3), the literal meaning becomes the total amount of money derived, exclusive of deductions, from a commercial venture and accruing or proceeding from charges for the manner, method or instruments for sending a signal of the voice or of messages is subject to the sales and use tax. See SC Revenue Ruling #89-14.

Furthermore, the definition of tangible personal property, as defined in Code Section 12-36-60, includes services and intangibles "the sale or use of which is subject to tax under [Chapter 36]," such as "communications." The Second College Edition of the American Heritage Dictionary defines "communication," in part, as "[t]he exchange of thoughts, messages or information, as by speech, signals or writing." "Communications" is defined, in part, as, "a means of communicating esp.: a system of sending and receiving messages, such as mail, telephone and television." As with the above definitions, the Department has long used the definition found in the Second College Edition of the American Heritage Dictionary for the term "communications."

Based on the above discussion, it is the Department's position that charges for the ways or means of communication include charges for access to, or use of, a communication system (the manner, method or instruments for sending or receiving a signal of the voice or of messages), whether this charge is based on a fee per a specific time period or per transmission. This is further supported by the definition of the terms "sale" and "purchase," which are defined in Code Section 12-36-100 to include "a license to use or consume."

The Department of Revenue has taxed communication services such as telephone services, facsimile transmission services, database access transmission (legal research, stock quotes, credit reporting), and electronic voice mail services. All of these communication services and others currently taxed by the Department of Revenue constitute communication systems that the purchaser pays to access or use. (See Commission Decision #89-77; SC Revenue Ruling #89-14; and SC Revenue Ruling #04-15.)

In addressing whether the computer software is a "communication", it must be determined whether the purchaser of computer software that is sold and delivered by electronic means is paying for access or use of the communication system (e.g. the telephone). Applying the "true object test" provides guidance in making this determination. In this instance, the true object of the sale of computer software electronically delivered, as described in the facts, is the sale of the intangible software: the "true object" is not the access or use of the communication system. To conclude otherwise stretches the statutory language. Accordingly, computer software sold and delivered by electronic means, as described in the facts, does not meet the definition of tangible personal property set forth in Code Section 12-36-60 or fall within the provisions of Code Section 12-36-910 or Code Section 12-36-1310 and is therefore not subject to the sales and use tax.

Computer Software Provided through an Application Service Provider

Code Sections 12-36-910(B)(3) and 12-36-1310(B)(3) impose the sales and use tax upon:

the gross proceeds accruing or proceeding from the charges for the ways or means for the transmission of the voice or of messages, including the charges for use of equipment furnished by the seller or supplier of the ways or means for the transmission of the voice or of messages

The term "tangible personal property", as used in Chapter 36, is defined at Code Section 12-36-60, in part, as "personal property which may be seen, weighed, measured, felt, touched or which is in any other manner perceptible to the senses." The next sentence of that section reads in part:

It also includes services and intangibles, including communications, laundry and related services, furnishing of accommodations and sales of electricity, the sale or use of which is subject to tax under this chapter (Emphasis added.)

The statute provides several exemptions and exclusions for the charges taxed under Sections 12-36-910(B)(3) and 12-36-1310(B)(3).

Code Section 12-36-2120(11) exempts:

- (a) toll charges for the transmission of voice or messages between telephone exchanges;
- (b) charges for telegraph messages;
- (c) carrier access charges and customers access line charges established by the Federal Communications Commission or the South Carolina Public Service Commission; and
- (d) transactions involving automatic teller machines;

Code Section 12-36-60, the definition of “tangible personal property” which by statute includes communications, states in part:

Tangible personal property does not include the transmission of computer database information by a cooperative service when the database information has been assembled by and for the exclusive use of the members of the cooperative service.

Code Section 12-36-910(C) states:

Notwithstanding any other provisions of this article or Article 13, Chapter 36 of this title, the sales or use tax imposed by those articles does not apply to the gross proceeds accruing or proceeding from charges for or use of data processing. As used in this subsection, “data processing” means the manipulation of information furnished by a customer through all or part of a series of operations involving an interaction of procedures, processes, methods, personnel, and computers. It also means the electronic transfer of or access to that information. Examples of the processing include, without limitation, summarizing, computing, extracting, storing, retrieving, sorting, sequencing, and the use of computers.

In Revenue Ruling #89-14 (see also SC Revenue Ruling #04-15), the Department determined that certain communication services fall within the provisions of Code Sections 12-36-910(B)(3) and 12-36-1310(B)(3) for sales and use tax purposes. One of the services held subject to the tax was "Database Access Transmissions", which the department defined as:

Transmission of computer database information and programs by and through a modem and telephone lines, whether automatically transmitted or transmitted as a result of a subscriber accessing a computer. Charges may be based on the amount of time the transmission is utilized.

Based on the above, charges by the Application Service Provider are similar to charges by database access services and are therefore subject to the sales and use tax under the provisions of Code Sections 12-36-910(B)(3) and 12-36-1310(B)(3). Finally, the Application Service Provider is not charging “for ... data processing” as defined in Code Section 12-36-910(C).

Charges for Maintenance Contracts

Effective for sales or renewals on or after October 1, 2005, Code Sections 12-36-910(B) and 12-36-1310(B) impose the sales and use tax on the:

gross proceeds accruing or proceeding from the sale or renewal of warranty, maintenance, or similar service contracts for tangible personal property, whether or not such contracts are purchased in conjunction with the sale of tangible personal property.

As such, a charge for the sale or renewal of a warranty, maintenance, or similar service contract for computer software that was delivered in tangible form (tangible personal property) is subject to the sales and use tax, whether or not such contract was purchased in conjunction with the sale of computer software that was delivered in tangible form. A charge for the sale or renewal of a warranty, maintenance, or similar service contract for computer software that was delivered solely by electronic means is not subject to the sales and use tax, provided no part of the software (including back-up diskettes and tapes) that is covered by the maintenance agreement is software delivered by tangible means and provided the “true object” of the maintenance agreement is to acquire services and is not to acquire tangible personal property (e.g. software updates provided by tangible means).

QUESTIONS AND ANSWERS:

Software Delivered by Tangible Means

1. Is “canned” software sold and delivered by tangible means, such as a tape or a diskette, subject to the sales and use tax?

Yes.

2. Is “customized” software sold and delivered by tangible means, such as a tape or a diskette, subject to the sales and use tax?

Yes.

3. If “canned” software is modified and sold and delivered by tangible means, such as a tape or a diskette, is the additional charge for modifying the “canned” software subject to the sales and use tax?

Yes. For example, if “canned” software that is normally sold for \$500.00 is modified for an additional \$200.00, then the total charge of \$700.00 is subject to the sales and use tax.

4. If software is sold and delivered by a “load and leave” method whereby the seller personally brings the software to the buyer’s location on a diskette, inserts the disk into the buyer’s computer to download the software into computer, and then removes the diskette and takes it with him when he leaves, is the sales transaction subject to the tax?

Yes. The sale of software delivered by a tangible means, the diskette, constitutes the sale of tangible personal property subject to the tax.

5. If software is sold and delivered by a “load and leave” method whereby the seller personally brings the software to the buyer’s location on a laptop computer, connects the laptop with the buyer’s computer with a cable in order to download the software into computer, and then disconnects the computers and takes the laptop with him when he leaves, is the sales transaction subject to the tax?

Yes. The sale of software delivered by a tangible means, the laptop computer, constitutes the sale of tangible personal property subject to the tax.

6. If software is sold and delivered in a method described in Questions #4 and #5 above, are separately listed charges on the bill to the customer for delivery, hotel accommodations, and other fees associated with the cost of having the seller’s employee personally deliver the software subject to the sales and use tax?

Yes. Charges for delivery, hotel accommodations, and other fees associated with the cost of having the seller’s employee personally deliver the software are a part of “gross proceeds of sales” or “sales price” and subject to the tax. See Code Sections 12-36-90 and 12-36-130.

Note: Charges for installation (not delivery charges) incident to the sale of tangible personal property are not subject to the sales or use tax when such charges are separately stated from the sales price of the property on billing to customers and provided the seller's books and records of account show the reasonableness of such labor in relation to the sales price of the property. See SC Regulation 117-313.3.

Software Delivered by Electronic Means from a Remote Location

7. Is “canned” software sold and delivered by electronic means via a modem and telephone line from a remote location subject to the sales and use tax?

Software sold and delivered by electronic means via a modem and telephone from a remote location is not subject to the sales and use tax, provided no part of the software, including back-up diskettes and tapes, is delivered by tangible means.

8. Is “customized” software sold and delivered by electronic means via a modem and telephone line from a remote location subject to the sales and use tax?

Software sold and delivered by electronic means via a modem and telephone from a remote location is not subject to the sales and use tax, provided no part of the software, including back-up diskettes and tapes and prewritten maintenance repairs or patches, is delivered by tangible means.

9. If software is sold and delivered to the customer by electronic means via a modem and telephone line from a remote location, and no part of the software, including back-up diskettes and tapes, is delivered in a tangible form, is the transaction subject to the sales and use tax if written documentation or publications are provided in tangible form?

No.

10. If software is sold and delivered to the customer by electronic means via a modem and telephone line from a remote location, and no part of the software, including back-up diskettes and tapes, is delivered in a tangible form in the initial transfer, is the transaction subject to the sales and use tax if under the contract the seller is obligated to restore the customer's "crashed" computer with replacement software (the same software originally delivered by electronic means), and the contract does not specify whether the restoration will be performed by electronic or tangible means?

No.

11. If software is sold and delivered to the customer by electronic means via a modem and telephone line from a remote location, and no part of the software, including back-up diskettes and tapes, is delivered in a tangible form, is the transaction subject to the sales and use tax if the seller provides an employee on-site at the customer's location to execute, or assist in executing, the remote electronic download and installation of the software?

No.

12. If software is sold and delivered to the customer by electronic means via a modem and telephone line from a remote location, is the transaction subject to the sales and use tax if under the contract the seller is obligated to provide to the customer at a later date pre-written major or minor software releases in tangible form?

Yes. Since it is known that the customer will receive major and minor software releases in tangible form, the true object of the transaction is the sale of tangible personal property and is therefore subject to the tax.

13. If software is sold and delivered to the customer by electronic means via a modem and telephone line from a remote location and pre-written major or minor software releases will be provided under a maintenance contract sold in conjunction with the software, is the transaction subject to the sales and use tax if under the maintenance agreement the seller is obligated to provide to the customer at a later date pre-written major or minor software releases in tangible form?

Yes. Since it is known that the customer will receive major and minor software releases in tangible form, the true object of the transaction is the sale of tangible personal property and is therefore subject to the tax.

14. If software is sold and delivered to the customer by electronic means via a modem and telephone line from a remote location and pre-written major or minor software releases will be provided under a maintenance contract that was not sold in conjunction with the software, is the transaction subject to the sales and use tax if under the maintenance agreement the seller is obligated and actually provides to the customer at a later date pre-written major or minor software releases in tangible form?

The initial sale of the software is not subject to the tax since it was transferred by electronic means via a modem and telephone line from a remote location, provided no part of the software, including back-up diskettes and tapes, is delivered in a tangible form pursuant to the original contract.

Charges for maintenance agreements (whether optional or mandatory) are subject to the tax since under the maintenance agreement the seller is obligated and actually provides to the customer at a later date pre-written major or minor software releases in tangible form. (See House Bill 3767, Section 19 (Act No. 161) of 2005.)

Software Provided through an Application Service Provider

15. Is a charge by Application Service Provider (ASP) that allows a customer to access the ASP website and use the software on that website subject to the sales and use tax?

Yes. Charges by an Application Service Provider are similar to charges by database access services and are therefore subject to the sales and use tax under the provisions of Code Sections 12-36-910(B)(3) and 12-36-1310(B)(3).

Software Sold as Part of the Sale of Computer Hardware

16. If a seller is selling both computer hardware and computer software, and the seller, before title or possession of the hardware is transferred to the customer, downloads the software from one of its computers to the computer that will be transferred to the customer, is a separately stated charge for software on the bill to the customer subject to the sales and use tax?

Yes. The separately stated charge on the bill to the customer for software is a part of the “gross proceeds of sales” or “sales price” of the computer hardware when it is sold and delivered to the customer and is therefore subject to the tax. See Code Sections 12-36-90 and 12-36-130.

17. If a customer purchases a computer system (including separately priced and contracted for software) after testing the computer system on a short-term loaned basis, is the sale subject to the sales and use tax if the customer has the seller remove the software from the computer and the customer’s premises and then has the seller re-deliver the software by electronic means from a remote location?

Yes. The separately stated charge on the bill to the customer for software is a part of the “gross proceeds of sales” or “sales price” of the computer hardware when it is sold and delivered to the customer and is therefore subject to the tax. See Code Sections 12-36-90 and 12-36-130.

18. If a customer purchases a computer system (including separately priced and contracted for software) after testing the computer system on a short-term loaned basis, is the sale subject to the sales and use tax if the customer has the seller re-deliver the software by electronic means from a remote location such that the previously loaned software would not be removed from the computer but that the electronically delivered software would “overlay” the original software?

Yes. The separately stated charge on the bill to the customer for software is a part of the “gross proceeds of sales” or “sales price” of the computer hardware when it is sold and delivered to the customer and is therefore subject to the tax. See Code Sections 12-36-90 and 12-36-130.

Maintenance Contracts for Software Delivered by Tangible Means

19. Are charges for maintenance agreements (whether optional or mandatory) that are made in conjunction with, or as part of the sale of, computer software sold and delivered by tangible means includable in "gross proceeds of sales" or "sales price", and, therefore, subject to the tax?

Yes. Code Sections 12-36-910(B) and 12-36-1310(B) impose the sales and use tax on the “gross proceeds accruing or proceeding from the sale or renewal of warranty, maintenance, or similar service contracts for tangible personal property, whether or not such contracts are purchased in conjunction with the sale of tangible personal property.”

20. Are charges for maintenance contracts that are not made in conjunction with or as part of the sale of, computer software sold and delivered by tangible means (e.g. contracts sold by a third party and contracts sold at a later date) includable in "gross proceeds of sales" or "sales price", and, therefore, subject to the tax?

Yes. Code Sections 12-36-910(B) and 12-36-1310(B) impose the sales and use tax on the “gross proceeds accruing or proceeding from the sale or renewal of warranty, maintenance, or similar service contracts for tangible personal property, whether or not such contracts are purchased in conjunction with the sale of tangible personal property.”

21. Are charges for maintenance agreements that are not made in conjunction with, or as part of the sale of, computer software sold and delivered by tangible means but are mandatory renewals of maintenance agreements that were made in conjunction with, or as part of the sale of, computer software sold and delivered by tangible means includable in "gross proceeds of sales" or "sales price", and, therefore, subject to the tax?

Yes. Code Sections 12-36-910(B) and 12-36-1310(B) impose the sales and use tax on the “gross proceeds accruing or proceeding from the sale or renewal of warranty, maintenance, or similar service contracts for tangible personal property, whether or not such contracts are purchased in conjunction with the sale of tangible personal property.”

22. Are charges for maintenance agreements that are not made in conjunction with, or as part of the sale of, computer software sold and delivered by tangible means but are optional renewals of maintenance agreements includable in "gross proceeds of sales" or "sales price", and, therefore, subject to the tax?

Yes. Code Sections 12-36-910(B) and 12-36-1310(B) impose the sales and use tax on the “gross proceeds accruing or proceeding from the sale or renewal of warranty, maintenance, or similar service contracts for tangible personal property, whether or not such contracts are purchased in conjunction with the sale of tangible personal property.”

Maintenance Contracts for Software Delivered by Electronic Means from a Remote Location

23. Are charges for maintenance agreements (whether optional or mandatory) for computer software sold and delivered by electronic means via a modem and telephone line from a remote location subject to the tax?

Charges for maintenance agreements (whether optional or mandatory) for computer software sold and delivered by electronic means via a modem and telephone line from a remote location are not subject to the tax, provided no part of the software (including back-up diskettes and tapes) that is covered by the maintenance agreement is software delivered by tangible means and provided the “true object” of the maintenance agreement is to acquire services and is not to acquire tangible personal property (e.g. software updates provided by tangible means).

Renewals of a License to Use

24. If the user of a computer software program pays a periodic “license to use,” is the periodic charge paid for this “license to use” subject to the sales and use tax?

Yes, provided the software for which the periodic “license to use” is paid was delivered in whole or part by tangible means (as discussed in this document) or constitutes a charge by an Application Service Provider (ASP) for access to the ASP website or use of the software on that website (see Question #15).

Note: If the software for which the periodic “license to use” is paid was sold and delivered by electronic means via a modem and telephone from a remote location is not subject to the sales and use tax, whereby no part of the software, including back-up diskettes and tapes, updates, and prewritten maintenance repairs or patches, was or will be delivered by tangible means, then the periodic charge paid for the “license to use” is not subject to the sales and use tax.

Systems

25. If a customer negotiates the purchase of a large computer system whereby the parties identify all the significant components of the system (hardware, operating software, application software, maintenance agreements, etc.) and establish a price for the entire system, can the buyer avoid sales and use tax on part of the purchase if various parts of the system are separately contracted for, priced, ordered and invoiced? For example, what is the application of the tax if the hardware and certain operating software are separately contracted for, priced, ordered and invoiced from any application software delivered electronically separate from the hardware?

The purchase of the computer system was one negotiated transaction. As such, the total sales price is subject to the tax and separately contracting for, pricing, ordering and invoicing will not change the application of the tax.

For example, if a customer negotiates the purchase of a large computer system whereby the parties identify all the significant components of the system and establish a price for the entire system, but the hardware and certain operating software are separately contracted for, priced, ordered and invoiced from any application software delivered electronically separate from the hardware, the total sales price is subject to the tax.

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/Burnet R. Maybank III
Burnet R. Maybank III, Director

August 21, 2005
Columbia, South Carolina