



STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE

300A Outlet Pointe Blvd., Columbia, South Carolina 29210
P.O. Box 125, Columbia, South Carolina 29214-0575

SC REVENUE RULING #20-3

SUBJECT: Buydowns - Tobacco Company Payments to Retailers
(Sales Tax)

EFFECTIVE DATE: For retail sales occurring on or after January 1, 2021.

REFERENCES: S.C. Code Ann. Section 12-36-90 (2014)
S.C. Code Ann. Section 12-36-910 (2014)

AUTHORITY: S.C. Code Ann. Section 12-4-320 (2014)
S.C. Code Ann. Section 1-23-10(4) (2005)
SC Revenue Procedure #09-3

SCOPE: The purpose of a Revenue Ruling is to provide guidance to the public. It is an advisory opinion issued to apply principles of tax law to a set of facts or general category of taxpayers. It is the Department's position until superseded or modified by a change in statute, regulation, court decision, or another Department advisory opinion.

QUESTION

Are tobacco company payments to retailers (commonly known as "buydowns") includable in "gross proceeds of sales" and subject to sales tax?

FACT

Under a tobacco company¹ buydown contract with retailers, the tobacco company agrees to pay the retailer a specified amount for each pack of cigarettes² sold by the retailer provided the retailer agrees to lower the price of a pack of cigarettes sold to the customer (i.e., buydown). In return, the retailer may be required to use special displays and signs provided by the tobacco company. At the end of the buydown period, the tobacco company reimburses the retailer the buydown amount based on actual sales - the difference between the retailer's usual retail sales price and the actual discounted sales price of the cigarettes covered by the agreement.

¹ For purposes of this advisory opinion, the term "tobacco company" refers to tobacco manufacturers and distributors.

² The principles set forth in this advisory opinion also apply to cigars, smoking tobacco, snuff, chewing tobacco, and other types of tobacco.

LAW AND DISCUSSION

The first issue at hand is whether an amount received by the retailer from a third party (i.e., the tobacco company) is includable in the retailer's gross proceeds of sales – the measure of South Carolina's sales tax.

Code Section 12-36-910(A) imposes a sales tax equal to six³ percent of "gross proceeds of sales" upon every person engaged within this State in the business of selling tangible personal property at retail.

Code Section 12-36-90 defines gross proceeds of sales and reads, in part:

Gross proceeds of sales, or any similar term, means the value proceeding or accruing from the sale, lease, or rental of tangible personal property.

(1) The term includes:

* * * *

(b) the proceeds from the sale of tangible personal property without any deduction for:

- (i) the cost of goods sold;
- (ii) the cost of materials, labor, or service;
- (iii) interest paid;
- (iv) losses;
- (v) transportation costs;
- (vi) manufacturers or importers excise taxes imposed by the United States; or
- (vii) any other expenses.

(2) The term does not include:

- (a) a cash discount allowed and taken on sales[.]

The South Carolina Court of Appeals recently held that "South Carolina case law provides that gross proceeds of sales includes all value that comes from or is a direct result of the sale of tangible personal property." *Books-A-Million, Inc. v. South Carolina Department of Revenue*,

³ Code Section 12-36-1110 increased the general sales and use tax rate to 6% from 5% in 2007. In addition, the tax rate may be increased by applicable local sales and use taxes administered and collected by the Department on behalf of a local jurisdiction.

Op. No. 5721 (S.C.Ct.App. filed April 29, 2020). This is consistent with the historical analysis of “gross proceeds” that was established in *Meyers Arnold, Inc. v. South Carolina Tax Commission*, 285 S.C. 303, 328 S.E. 2d 920 (Ct. App. 1985). In this case, the Court of Appeals, in interpreting the definition of “gross proceeds of sales” with respect to lay away fees paid in conjunction with lay away sales, held:

But for the lay away sales, Meyers Arnold would not receive the lay away fees. The fees are obviously charged for the service rendered in making lay away sales. For these reasons, this court holds the lay away fees are part of the gross proceeds and subject to the sales tax.

Therefore, the sales tax is imposed upon a person for the privilege of being engaged in the business of selling at retail and is measured by the amount of business done – the total amount received or earned by a retailer as a result of selling tangible personal property at retail. The source of the amount received or earned is irrelevant. What matters is whether the amount received or earned is the result of a retail sale (i.e., the value proceeding or accruing from the sale, lease, or rental of tangible personal property at retail).

Based on the above, but for the cigarettes sold by the retailer, the retailer would not receive the buydown payments from the tobacco company. The buydown payments from the tobacco company to the retailer based on a retailer’s sales are, therefore, part of the value proceeding or accruing from the sale of tangible personal property. As such, the payments are includable in “gross proceeds of sales” and subject to sales tax.

The second issue concerns the liability for remitting the sales tax when the total amount received by the retailer as a result of selling the cigarettes comes from two sources – the customer and the tobacco company.

As noted above, the sales tax is imposed upon every person engaged within this State in the business of selling tangible personal property at retail. As such, South Carolina’s sales tax is a vendor tax. Code Section 12-36-940(A), however, allows the retailer to pass the tax on by adding the sales tax due to the total sales price of the tangible personal property sold at retail. Typically, a retailer does this by separately stating the sales tax on the receipt provided to the customer. The inability, impracticability, refusal, or failure to add these amounts to the sales price and collect the tax from the purchaser, however, does not relieve the retailer from his sales tax responsibility. See Code Section 12-36-940(B).

CONCLUSION

Buydown payments by tobacco companies to retailers that are based on a retailer’s retail sales are includable in “gross proceeds of sales” and, therefore, subject to sales tax.

For example, assume a retailer usually sells a brand of cigarettes for \$5 a pack. During the buydown period, the retailer agrees to lower the sales price to its customers and sell this brand of cigarettes for \$4.75 a pack. The retailer receives a 25 cent per pack buydown payment from the

tobacco company after the sale at a later date. The gross proceeds of sales, upon which the sales tax is calculated, is \$5 for each pack of cigarettes sold by the retailer (i.e., the \$4.75 sales price received from the customer and the 25 cents to be received from the tobacco company).

Note: The application of the sales tax differs for a retailer receiving tobacco company payments based on the retailer's purchases from a tobacco company. For example, assume a retailer usually sells a brand of cigarettes for \$5 a pack. During the buydown period, the retailer agrees to lower the sales price to its customers and sell this brand of cigarettes for \$4.75 a pack. The retailer receives a 25 cent per pack buydown payment from the tobacco company at the time the cigarettes are purchased from the tobacco company. If the buydown payment is actually based on the retailer's purchases, and not based on the retailer's sales, as evidenced by the facts and documentation of each payment transaction, including contracts and payment calculations, then the buydown payment is not proceeding or accruing from the retail sale of the cigarettes by the retailer and is not subject to sales tax. The gross proceeds of sales, upon which the sales tax is calculated, is \$4.75 for each pack of cigarettes sold by the retailer.

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/W. Hartley Powell

W. Hartley Powell, Director

June 24 _____, 2020
Columbia, South Carolina