



SC REVENUE RULING #88-12

- SUBJECT:** Out-of-State Furniture Dealers
(Use Tax)
- EFFECTIVE DATE:** Applies to all periods open under the statute
- SUPERSEDES:** All previous documents and any oral directives in conflict herewith.
- REFERENCE:** S.C. Code Ann. Section 12-35-80 (1976)
S.C. Code Ann. Section 12-35-90 (1976)
S.C. Code Ann. Section 12-35-810 (1976)
S.C. Code Ann. Section 12-35-830 (1976)
S.C. Code Ann. Section 12-35-870 (1976)
- AUTHORITY:** S.C. Code Ann. Section 12-3-170 (1976)
SC Revenue Procedure #87-3
- SCOPE:** A Revenue Ruling is the Commission's official interpretation of how tax law is to be applied to a specific set of facts. A Revenue Ruling is public information and remains a permanent document until superseded by a Regulation or is rescinded by a subsequent Revenue Ruling.

Question:

When are out-of-state furniture dealers required to collect South Carolina's use tax on sales to in-state customers?

Facts:

Certain furniture dealers, located in North Carolina, are making sales to South Carolina residents and subsequently making deliveries into this State.

S.C. Code Section 12-35-810 imposes a use tax 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,....., regardless of whether the retailer is or is not engaged in business in this State."

Code Section 12-35-830 reads, in part:

Every seller engaged in making retail sales of tangible personal property for storage, use or other consumption in this State who:

(1) Maintains a place of business;

* * * *

Shall obtain from the Commission a retail license as provided for by Article 3 of this chapter.

Code Section 12-35-80 reads:

"Retailer maintaining a place of business in this State" or any like term shall include any retailer having or maintaining within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business or any agent operating within this State under the authority of the retailer or its subsidiary, regardless of whether such place of business or agent is located here permanently or temporarily or whether such retailer or subsidiary is admitted to do business within this State. (emphasis added).

Code Section 12-35-90(2) defines "retailer", in part, as "[e]very person engaged in the business of making sales for storage, use or other consumption...."

The second paragraph in Code Section 12-35-90 reads:

When, in the opinion of the commission, it is necessary for the efficient administration of this chapter to regard any salesmen, representatives, truckers, peddlers, or canvassers as the agents of the dealers, distributors, supervisors, employers or persons under whom they operate or from whom they obtain the tangible personal property sold by them, regardless of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors, employers or persons, the Commission may so regard them and may regard such dealers, distributors, supervisors, employers or persons as retailers for purposes of this chapter (emphasis added).

Code Section 12-35-870 reads, in part:

Every such seller making sales of tangible personal property for storage, use or other consumption in this State, shall,....collect the tax imposed by this article from the purchaser.....,The tax required in this article to be collected by the seller shall constitute a debt owed by the seller to this State.

Discussion:

To answer the question at hand, it is necessary to determine whether there is "nexus" between this State and the out-of-state furniture dealers. "Nexus" refers to the minimum connection between the State and an out-of-state retailer necessary in order to require the retailer to collect our use tax.

A 1986 Iowa Supreme Court case, Good's Furniture House, Inc. v. Iowa State Board of Tax Review, 382 N.W. 2d 145 (Iowa 1986); cert. denied 107 S.Ct. 76 (1986), is on point.

Good's Furniture ("Good's") is an Illinois corporation with its principal place of business at its retail store in Kewawee, Illinois, which is located about fifty-five miles east of the Iowa-Illinois border. At its store, Good's sells furniture, carpet and draperies. The company, during the assessment period, made approximately ten percent of its retail sales to Iowa residents. Good's regularly solicited customers through intensive television advertising on stations broadcasting into Iowa, and also made regular deliveries into Iowa using its own trucks.

The Iowa Department of Revenue found that Good's activities warranted assessment of the Iowa use tax against the company. Good's paid the tax under protest and filed a claim for refund which was denied. The Board of Tax Review upheld the Department's denial. The District Court of Polk County affirmed, and the Supreme Court of Iowa held there was statutory authority to assess the use tax against Good's. On October 6, 1986, the U.S. Supreme Court denied a writ of certiorari.

The Iowa Supreme Court, in its decision, examined the pertinent sections of the Iowa use tax statute.

Iowa Code Section 423.2 imposes the use tax on the use in Iowa of tangible personal property purchased for use in that state.

Code Section 423.9 imposes the duty to collect and remit the tax on retailers who "maintain a place of business" in Iowa, and a subparagraph of that Section extends the obligation to a retailer who has "any agent operating within this state under the authority of the retailer." Iowa Code Section 423.1(6), which defines "retailer maintaining a place of business in this state", reads:

[A]ny retailer having or maintaining within this state, directly or by a subsidiary, an office, distribution house, sales house, warehouse, or other place of business, or any agent operating within this state under the authorization of the retailer or its subsidiary, irrespective of whether such place of business or agent is located here permanently or temporarily, or whether such retailer or subsidiary is admitted to do business within this state... (emphasis added)

Further, Iowa Code Section 423.1(5) reads, in part:

[W]hen, in the opinion of the director it is necessary for the efficient administration of this chapter to regard any...truckers...as the agents of the dealers... or persons under whom they operate or from whom they obtain the...property sold by them, irrespective of

whether they are making sales on their own behalf or on behalf of such dealers,....., the director may so regard them and may regard the dealers...or persons as retailers for purposes of this chapter. (emphasis added).

Good's contended that it was not a "retailer" as defined at Section 423.1(5), because its employees delivering merchandise by truck were not salespersons and made no sales. Good's read the phrase "irrespective of whether they are making sales on their own behalf or on behalf of [other persons]" to mean that the employees in Iowa must at a minimum be persons "making sales" to qualify them as agents of a retailer.

The Court rejected this argument, because it ignored the reference to "truckers" as persons who may be deemed agents. Also, the argument ignored the fact that the phrase "property sold by them" is stated in the alternative to the phrase "under whom they operate," indicating that a person may be an agent without being a seller of merchandise.

Further, it was found that it was apparent that the Iowa legislature intended non-selling truckers delivering goods into Iowa to be agents of persons by whom they are employed, in order that out-of-state retailers would not have an unfair advantage over Iowa retailers.

The Court also determined that the nexus test established in Miller Brothers Co. v. Maryland, 347 U.S. 340, 74 S. Ct. 535, 98 L. Ed. 744(1954), was met. The test being, there must "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." The same nexus test was applied in Scripto, Inc. v. Carson, 362 U.S. 207, 80 S.Ct. 619, 4 L.Ed. 2d 660(1980); National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505(1987); and, National Geographic Society v. California Board of Equalization, 430 U.S. 551, 97 S.Ct. 1386, 51 L.Ed.2d 631(1977).

In its decision, the Iowa Supreme Court ruled:

[3] We conclude that the Miller Brothers nexus test, as refined by these later Supreme Court cases, was satisfied by the department's showing that Good's Furniture directly solicited a large volume of Iowa sales by intensive television advertising, then regularly serviced its Iowa customers by delivering merchandise in its own trucks with its own employees.

A comparison of South Carolina Code Sections 12-35-810, 12-35-830, 12-35-870 and 12-35-80 with Iowa Code Sections 423.2, 423.9, 423.1(5) and 423.1(6) reveals that our states' use tax schemes are practically identical. More specifically, Iowa Code Section 423.9 imposes a duty on a retailer to collect the tax if the retailer "maintains a place of business" in that State. Our Section 12-35-830 contains the same requirement. As a matter of fact, Iowa's definition of the phrase "retailer maintaining a place of business in this State" [Section 423.1(6)] reads almost word-for- word as South Carolina's Code Section 12-35-80. Furthermore, Iowa Code Section 423.1(5) contains language almost identical to that found in the second paragraph of South Carolina Code Section 12-35-90. These sections provide authority for the taxing agencies in each state to consider any salesmen, representatives, truckers, peddlers, or canvassers as the agents of dealers, when necessary for the efficient administration of their respective tax chapters.

Conclusion:

When an out-of-state furniture dealer solicits sales in South Carolina by intensive advertising and makes regular deliveries into this State, using its own trucks and employees, the dealer is required to collect and remit the use tax.

However, there may be activities, other than intensive advertising and regular deliveries, which may constitute nexus. Such activities must be considered on a case by case basis.

SOUTH CAROLINA TAX COMMISSION

s/S. Hunter Howard Jr. _____
S. Hunter Howard, Jr., Chairman

s/A. Crawford Clarkson Jr. _____
A. Crawford Clarkson, Jr., Commissioner

Columbia, South Carolina
October 26, 1988