



SC REVENUE RULING #89-16

- SUBJECT:** Out-of-State Retailers' Liability for Use Tax
(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 12-35-110 (1987 Supp. 1988)
S.C. Code Ann. Section 12-35-810 (1976)
S.C. Code Ann. Section 12-35-850 (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 A Revenue Ruling is public information and remains a permanent document until superseded by a Regulation or is rescinded by a subsequent Revenue Ruling.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:

Which party (retailer or contractor) may be held accountable for use tax due on purchases of tangible personal property from an out-of-state retailer by a South Carolina contractor (Code Section 12-35-810)?

Facts:

S.C. Code Section 12-35-810, which imposes the use tax, reads, in part:

An excise 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 such property, regardless of whether the retailer is or is not engaged in business in this State.

Code Section 12-35-850 reads:

Every person storing, using or otherwise consuming in this State tangible personal property purchased at retail shall be liable for the tax imposed by this article, and the liability shall not be extinguished until the tax has been paid to the State. But a receipt from a retailer maintaining a place of business in this State, or a retailer authorized by the Commission, under such rules and regulations as it may prescribe, to collect the tax imposed by this article and who shall for the purposes of this article be regarded as a retailer maintaining a place of business in this State, given to the purchaser in accordance with the provisions of this chapter, shall be sufficient to relieve the purchaser from further liability for a tax to which such receipt may refer.

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 from the purchaser and give to the purchaser a receipt.... The tax required in this article to be collected by the seller shall constitute a debt owed by the seller to this State.

Code Section 12-35-110, which defines "sale at retail" or "retail sale", reads, in part:

....Sales of building materials to contractors, builders or landowners for resale or use in the form of real estate are retail sales in whatever quantity sold.....

* * * *

Notwithstanding any other provision of law, sales of any tangible personal property to contractors purchasing such property for use in the performance of contracts,.....are purchases at retail for storage, use, or other consumption in this State subject to the tax as provided by this chapter.

Discussion:

The question to be addressed is which party (the out-of-state retailer or in-state contractor) may be held accountable for use tax due on purchases of building materials?

A 1962 court case, Bank of America National Trust and Savings Association v. State Board of Equalization, 26 Cal. Rptr. 348, 209 Cal. App. 2d 780, dealt with this issue. The California code sections referred to by the Court were:

Section 6201. An excise tax is hereby imposed on the storage use, or other consumption in this State of tangible personal property purchased from any retailer * * * for storage, use, or other consumption in this State at the rate of 3 percent of the sales price of the property * * *.

Section 6202. Every person storing, using, or otherwise consuming in this State tangible personal property purchased from a retailer is liable for the tax. * * *

Section 6203. Every retailer maintaining a place of business in this State and making sales of tangible personal property for storage, use, or other consumption in this State * * shall, at the time of making the sale or, if the storage, use, or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use, or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the board.

Section 6204. The tax required to be collected by the retailer constitutes a debt owed by the retailer to this State.

In its decision, the court posed, and then answered, two questions - (1) "Is the liability imposed by Section 6204 a tax upon the retailer?"; and (2) "Is a retailer who has failed to collect use taxes liable to the state for such taxes?"

The court's answer to question (1) reads, in part:

As we have hereinabove discussed the use tax is a tax levied upon the purchaser. It is not a tax on the retailer; nor does it shift to him because he has the duty to collect it from the consumer. The retailer is merely the agent through which the collection is made * * * * The provision making the tax a debt of the retailer to the State, where he is required to collect it, is part of a valid statutory scheme making the retailer an agent of the State for collection, and its effect, where such collection is not made, is merely to hold the collection agent liable for his default in the performance of his duty as such. (Brandtjen & Kluge v. Fincher, supra, 44 Cal. App.2d Supp. 939, 942-943, iii P.2d 979.) As said in Brandtjen & Kluge, the unpaid tax may yet be collected by the state from the purchaser under sections * * * * which provide proceedings looking to such collection. The liability of the retailer is not, therefore, for the use tax itself but for an amount equivalent to it because of this default in his duty as collection agent. The taxpayer is the person ultimately liable for the tax itself, and not the person who pays the tax liability. (See Colorado Bank v. Bedford, 310 U.S. 41, 60 S.Ct. 800, 84 L.Ed. 1067.) And, as pointed out in Brandtjen & Kluge, the retailer is merely paying the debt of another when he pays the purchaser's tax, and as such stands in a position analogous to that of a surety for the purchaser so as to entitle him to reimbursement. Accordingly, the liability of the retailer under Section 6204, by virtue of its wording and as construed by the cases, is for a debt rather than for taxes. (emphasis added).

The court's answer to question (2) reads, in part:

This question appears to be clearly answered by Section 6203 which states that the retailer shall collect the tax and by Section 6204 which provides that 'The tax required to be collected by the retailer constitutes a debt owed by the retailer to this State.' ...In the face of this language, the Bank contends that a retailer is not obliged to collect the tax, and that he becomes indebted to the State only if he has actually collected the tax

from the purchaser. This contention is effectively answered by Beneficial Standard Life and Brndtjen & Kluge (199 Cal. App. 1d 18, 18 Cal. Rptr. 432). In Beneficial Standard Life the retailer who had failed to collect the use tax from its vendees was held liable to the state for its collection and payment (emphasis added).

Note that the language found in California's Code Sections 6201, 6202, 6203 and 6204 are very similar to Sections 12-35-810, 12-35-850 and 12-35-870 of the Code of Laws of South Carolina. In addition, language contained in S.C. Code Section 12-35-110 specifically states that sales of building materials to contractors are retail sales and subject to the sales or use tax.

Conclusion:

Use tax found to be due on purchases of building materials by an in-state contractor from an out-of-state retailer is the liability of the contractor. However, if the out-of-state retailer is required or authorized to collect the tax, then either party may be assessed.

If the contractor has a receipt (invoice) from an out-of-state retailer, who is either required or authorized to collect the tax, and the receipt shows South Carolina's tax was in fact charged, then the contractor's liability is extinguished. However, the retailer still owes a debt to the State "for an amount equivalent to [the tax]".

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

July 5, _____ 1989