



301 Gervais Street, P.O. Box 125, Columbia, South Carolina 29214

SC REVENUE RULING #90-6

SUBJECT: Video Club Memberships and Late Fees
(Sales and Use Tax)

TAX ANALYST: Jean P. Croft

EFFECTIVE DATE: With respect to membership fees, the effective date is January 1, 1991.
With respect to late fees, this ruling applies to all periods open under statute.

SUPERSEDES: All previous documents and any oral directives in conflict herewith.

REFERENCE: S.C. Code Ann. Section 12-36-90(1)(b)
S.C. Code Ann. Section 12-36-100
S.C. Code Ann. Section 12-36-910(A)
(As Enacted June 1990)

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 A Revenue Ruling is public information and remains a permanent document until superseded by a Regulation or is rescinded by a subsequent Revenue Ruling.

Questions:

1. Are membership fees paid to a video rental "club" subject to sales tax pursuant to Code Section 12-36-910?
2. Are late fee charges paid to a video rental "club" subject to sales tax, pursuant to Code Section 12-36-910?

Facts:

Some video rental businesses charge a membership fee to their customers. In some cases this membership fee entitles a customer to one of the following benefits:

- a) A specified number of free video and/or VCR rentals;
- b) A reduced rental rate; or
- c) Such "membership" fee may be charged in lieu of a security deposit.

Video "clubs" typically charge a late fee for videos which are returned past the due date. For example, a \$2 late fee may be charged for each day the video is late on a normal rental of \$2.50. Others may charge a full day's rental for each day the video is late.

Discussions:

The issue is whether membership fees and late fees are includable in "gross proceeds of sales", which is the measure of the sales tax.

Code Section 12-36-910(A) states that "[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 12-36-90 defines "gross proceeds of sales", in part, as:

[T]he 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;

In State v. Byrnes 219 SC 485, 66 S.E.2d 33 (1951) the Supreme Court of South Carolina stated:

In general, the sales tax is an imposition upon the privilege of the business of selling at retail and measured by the amount of business done, which is a clear case of an excise tax ... (emphasis added).

In summary, the measure of the sales tax is the total proceeds of a sale; i.e., it is the sum total of all consideration received for the sale, lease, or rental of tangible personal property, regardless of what the payment may be called, without any deductions whatsoever.

The term "sale" is defined at Code Section 12-36-100, in part, as "[a]ny transfer . . . of tangible personal property for a consideration". Therefore, it must be determined if membership fees and late fees are part of the "consideration" which must be paid for use of the videos.

With respect to membership fees, the Virginia Department of Revenue determined that if "a membership entitles one to rent tapes at lower rates than nonmembers, the club membership fee would be subject to the tax" (Ruling of the Commissioner, P.D. 87-50, February 26, 1987). In reaching its decision, the Virginia Department of Revenue reasoned:

the [Virginia] statutes . . . contemplate the imposition of tax upon virtually any type of transaction under which tangible personal property is or can be . . . rented for a consideration. [Therefore,] one must first determine whether either type of video club membership fee entails the right to rent or receive tapes or other tangible personal property...

If membership in . . . [a] club is a membership which entitles one to rent tapes at lower rates than nonmembers, the club membership fee would be subject to the tax. However, club membership fees would not be taxable if membership merely entitles one to rent tapes without placing a security deposit.

With respect to late fees, the Vermont Department of Taxes, in Ruling 87-13 dated September 28, 1987, provides an analogous situation. The Department held that a "lease cancellation fee" was a receipt from the rental of tangible personal property. The Department stated:

. . . the cancellation fee you have described is a "receipt" from the rental of tangible personal property and is therefore subject to tax. In effect the Lessor has simply agreed to accept less than it is legally entitled to receive under the lease agreement. The amount that is paid, whether it is nominated rental payments or a "cancellation fee", is subject to tax as part of the consideration for the lease (emphasis added).

The Tax Commission also held such fees were subject to taxation in SC Private Letter Ruling #88-5.

In addition, the decision of the Court of Appeals of South Carolina in Meyers Arnold, Inc. v. South Carolina Tax Comm'n., 285 S.C. 303, 328 S.E.2d 920 (1985, App.), provides insight concerning this question. The court, in determining if lay away fees were includable in "gross proceeds of sales", held:

But for the lay away sales, Meyers Arnold would not receive the lay away fees. The fees are obviously charged for their service rendered in making lay away sales. For these reasons, this court holds the lay away fees are part of the gross proceeds of sales and subject to the sales tax. Id. at 306, 328 S.E.2d at 923.

Conclusion:

1. Membership fees paid to a video rental "club" are subject to the sales tax as part of the consideration paid for the rental of tangible personal property, pursuant to Code Section 12-36-910, only if the payment of such fee entitles the purchaser to "free" or discount movie rentals.

However, if such fee is in lieu of a security deposit or constitutes only a nominal processing fee and does not include "free" or discount movie rentals, the fee is not subject to the tax.

The Commission has determined that the imposition of the sales tax on video club membership fees will be effective for membership fees received on or after January 1, 1991.

2. Late fee charges paid to a video rental "club" are subject to the sales tax pursuant to Code Section 12-36-910, as such charges are part of "gross proceeds of sales", and also constitute additional rental charges.

SOUTH CAROLINA TAX COMMISSION

S. Hunter Howard, Jr., Chairman

A. Crawford Clarkson, Jr., Commissioner

T. R. McConnell, Commissioner

Columbia, South Carolina
August 14 _____, 1990