



SC REVENUE RULING #91-1

SUBJECT: "Written Contract of Sale"/Long-term Capital Gains
(Income Tax)

TAX MANAGER: John P. McCormack

EFFECTIVE DATE: Applies to all periods open under statute.

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

REFERENCE: S.C. Code Ann. Section 12-7-460 (Supp. 1989)

AUTHORITY: S.C. Code 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 A Revenue Ruling is public information and remains a permanent document until superseded by a Regulation or is rescinded by a subsequent Revenue Ruling.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:

For purposes of Code Section 12-7-460, what constitutes a "written contract of sale executed between January 1, 1987 and June 22, 1987"?

Facts:

In 1988 the Legislature enacted Code Section 12-7-460 to provide a special tax treatment for long-term capital gains recognized in 1987. This section was amended in 1989 to limit the special tax treatment to long-term capital gains recognized in 1987 "pursuant to a written contract of sale executed between January 1, 1987 and June 22, 1987".

The special tax treatment allows taxpayers a refund for the difference between the tax due under this section and the actual tax paid on the gain by taxpayers on their 1987 tax return. This refund is to be paid in two equal annual installments beginning with each taxpayer's 1990 tax return.

Discussion:

Code Section 12-7-460 reads:

(A) Long-term capital gain of individuals, partnerships (including S corporations), estates, and trusts which were recognized in 1987, pursuant to a written contract of sale executed between January 1, 1987, and June 22, 1987, must be determined in accordance with the provisions of Section 1202 of the Internal Revenue Code of 1954, as amended through December 31, 1985.

(B) The difference between the tax paid on the taxpayer's return attributable to this long-term capital gain and the tax attributable to this gain which would have been paid under the provisions of this section is refundable to the taxpayer in two equal installments with the first refund due to be paid when refunds are paid for the 1990 taxable year. The South Carolina Tax Commission may allow a portion or all of a refund installment due to be used as a credit against the taxpayer's liability for that year.

In determining what constitutes a "written contract of sale executed between January 1, 1987, and June 22, 1987" we must answer the following questions:

- (1) What is a "contract of sale"?
- (2) What is meant by "written", and what must be in writing?
- (3) What is meant by "executed", or execution of a contract?

The American Heritage Dictionary, Second College Edition, defines the following words, in whole or in part:

"Contract"	1. An agreement between two or more parties, esp. one that is written and enforceable by law.
"Write"	1. To form (letters, for example) on a surface with a tool such as a pen or pencil. 2. To form (a work, for example) by inscribing letters or symbols on a surface
Execute	1. To carry out; put into effect 2. To make valid, as by signing: execute a deed.

Therefore, a written contract is an agreement between two or more parties formed by inscribing letters and symbols on a surface, which is "executed" when it becomes enforceable by law. Now we must decide what is meant by the word "writing" in the context of modern technology.

“The Federal Rules of Evidence, Section 1001(1), define "writings" to "consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing,

photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.”

In reviewing the Federal Rules of Evidence, the "Notes of Advisory Committee on Proposed Rules", with respect to the definition, reads:

Traditionally, the rule requiring the original centered upon accumulations of data and expressions affecting legal relations set forth in words and figures. This meant that the rule was one essentially related to writings. Present day techniques have expanded methods of storing data, yet the essential form which the information ultimately assumes for usable purposes is words and figures. Hence, the considerations underlying the rule dictate its expansion to include computers, photographic systems, and other modern developments (emphasis added).

In summary, writings may include electronic impulses and other forms of modern technology, as well as paper documents.

Now we must determine what elements of a written contract of sale must be in writing.

The State's Statute of Frauds, found at Code Section 32-3-10, provides that certain contracts must be in writing, and therefore, can be of some guidance. That section provides that no legal action, to enforce certain types of contracts, can be brought "[u]nless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized."

In reviewing the Statute of Frauds, the State Supreme Court, in Goodwin v. Hilton Head Co., 273 S.C. 758, 259 SE2d 681 (1979), held:

It is well settled that form of writing required by the statute is not material. The contract may be evidenced by one writing or more. It may be shown entirely by written correspondence. Whatever form the agreement may assume, if the writing or writings, viewed as a whole, constitute, in essence or substance upon their face, a note or memorandum in writing, subscribed by the party sought to be charged, showing who the contracting parties are, the subject matter of the sale, and the consideration, the statute is satisfied (emphasis added).

In summary, the written contract must contain certain essential elements to make it binding on the parties involved and may be evidenced by one or more writings. Furthermore, although there is no legislative history, it is reasonable to conclude that the June 22, 1987 date was chosen since it was the effective date of Act 170 of 1987 which eliminated the capital gains deduction. This is a common type of transitional rule often used by the U.S. Congress when it amends the federal income tax law. Since the statute specifically uses the term "written contract", it is reasonable to surmise that by limiting the deduction to written contracts that the Legislature wanted to prevent any disputes as to whether or not an oral contract existed, or when an oral contract became binding or valid.

Conclusion:

For purposes of Code Section 12-7-460, a "written contract of sale executed between January 1, 1987 and June 22, 1987" must be an enforceable agreement, which reduces the information to its essential form of words and figures, under which a seller agrees to convey title to property to a buyer for a consideration, usually a sum of money. The contract must also have become binding between January 1, 1987 and June 22, 1987. The contract must contain the names of the contracting parties, a description of the property or item sold, and the consideration given and may be the result of one or more "writings".

A "written contract of sale" certainly includes a formally drafted contract, containing all the terms of the sale, typed or printed on paper and signed by the buyer and the seller (e.g. a contract to sell the shares of stock of a closely held business). In addition to such formally drafted contracts of sale, "written contract[s] of sale", for the purposes of Code Section 12-7-460, may include, but are not limited to:

- (1) Binding contracts created by a series of letters, memoranda, and/or notes.
- (2) Deeds conveying real estate.
- (3) Sales of shares of stock through a recognized stock exchange. The Tax Commission will accept a confirmation statement issued to the seller by the broker as evidence that the transaction qualifies as a "written contract of sale".

Note: The various documents outlined below, the information stored in the exchange's computer, and the information stored in the computers of the seller's and buyer's brokers, constitute "writings" that together may form a "written contract of sale".

Typically, a person selling shares of stock on an exchange signs a customer's agreement with a broker; the seller (or the broker on the seller's behalf) then completes a written sell order; the broker on the seller's behalf wires the order to the broker's employee or representative at the exchange, or directly to the exchange's computer; and the person at the exchange and the various computers used by the exchange and the brokers complete the sale.

SOUTH CAROLINA TAX COMMISSION

s/S. Hunter Howard Jr

S. Hunter Howard, Jr., Chairman

s/A. Crawford Clarkson Jr.

A. Crawford Clarkson, Jr., Commissioner

s/T. R. McConnell

T. R. McConnell, Commissioner

Columbia, South Carolina
January 3, 1991