



SC REVENUE RULING 92-3

SUBJECT: Purchases by Restaurants
(Sales and Use Tax)

TAX ANALYST: Steve Hallman

EFFECTIVE DATE: Applies to all periods open under the statute.

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

REFERENCE: S.C. Code Ann. Section 12-36-110 (Supp. 1991)
S.C. Code Ann. Section 12-36-120 (Supp. 1991)
S.C. Code Ann. Section 12-36-910(A) (Supp. 1991)
S.C. Code Ann. Section 12-36-1310(A) (Supp. 1991)
S.C. Code Ann. Section 12-36-2120(14) (Supp. 1991)
Regulation 117-174.79

AUTHORITY: S.C. Code Ann. Section 12-4-320 (Supp. 1991)
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 A Revenue Ruling is public information and remains a permanent document until superseded by a Regulation or is rescinded by a subsequent Revenue Ruling.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:

What guidelines can the Commission provide that will assist restaurants in determining their sales and use tax liability on purchases of tangible personal property?

Facts:

Advice has been requested by restaurants with regard to their sales and use tax liability on purchases of tangible personal property. In addition to selling food and beverage products, many restaurants provide their customers with napkins, straws, utensils, condiments (salt, pepper, ketchup, etc.) and other ancillary items, which facilitate the consumption of the food or beverage products. Most restaurants make these items readily accessible to their customers for self service (e.g. placing individual serving size packages of condiments or plastic utensils on counters for use with the food products at the customer's discretion) and others attempt to regulate or limit the

quantity of such items available to customers by providing them only upon request or including them in the food or beverage package transferred to the customer. Also, restaurants use a variety of containers, packaging materials, and supplies in their business of selling food and beverage products.

Discussion:

Pursuant to Code Section 12-36-910(A):

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. (Emphasis added)

In accordance with Code Section 12-36-1310(A):

A use 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 the property, regardless of whether the retailer is or is not engaged in business in this State. (Emphasis added)

The terms "sale at retail" and "retail sale" are defined at Code Section 12-36-110, in part, as "all sales of tangible personal property except those defined as wholesale sales". Further, the terms are defined to include (with certain exceptions) the withdrawal, use, or consumption of tangible personal property by anyone who purchases it at wholesale.

Code Section 12-36-120 provides, in pertinent part:

"Wholesale sale" and "sale at wholesale" mean a sale of:

- (1) tangible personal property to licensed retail merchants, jobbers, dealers, or wholesalers for resale, and do not include sales to users or consumers;

* * * *

- (4) materials, containers, cores, labels, sacks, or bags, used incident to the sale and delivery of tangible personal property.

Code Section 12-36-2120(14) exempts from the sales and use taxes sales or purchases of:

wrapping paper, wrapping twine, paper bags, and containers, used incident to the sale and delivery of tangible personal property.

In summary, in order for either the sales or use tax to apply, there must be a retail sale of tangible personal property. Sales of tangible personal property to users or consumers are retail sales subject to tax. Sales of tangible personal property to licensed retailers for resale and sales of materials, containers, sacks or bags used incident to the sale and delivery of tangible personal

property are not taxable. In considering this issue, it must be determined whether tangible personal property is used or consumed by restaurants, purchased for resale, or used incident to the sale and delivery of the restaurants' food and beverage products.

Regulation 117-174.79, provides guidance and reads:

Licensed retailers purchase free of sales or use taxes wrapping paper, wrapping twine, paper bags and containers for use incident to the delivery of tangible personal property sold by them. They also purchase tax-free materials used in packaging personal property sold by them. They also purchase tax-free materials used in packaging tangible personal property for shipment or sale.

The list below while illustrative of items falling within the Rule announced above is not exhaustive:

Souffle cups, butter chips, paper cups, paper plates, boxes and crates and glazed tissue used to package articles of food.

It will be seen that items such as straws, napkins, wooden or paper spoons and forks do not meet the requirements outlined above and, hence, must bear the tax. Such items are rather in the nature of supplies used or consumed by the retailer in the operation of his or its business.

In summary, purchases of tangible personal property for resale and purchases of materials, containers, cores, labels, sacks, or bags used incident to the sale and delivery of tangible personal property are not subject to the sales or use taxes. Purchases of straws, napkins, and utensils are made at retail and are, therefore, subject to the tax.

Conclusion:

The Commission provides the following guidelines with respect to the sales and use taxes on purchases by restaurants ("NT" - Not Taxable, "T" - Taxable):

Aluminum Foil	*	Cups & Lids	NT
Beverage Ingredients	NT	Drinking Glasses	NT
Bibs	T	Food Containers & Wraps	*
Cleaning Supplies	T	Food Products & Ingredients	NT
Coasters	T	Forks, Knives & Spoons	T
Coffee Stirers	T	Furniture & Fixtures	T
Cooking Equipment	T	Guest Checks	T
Cooking Utensils	T	Napkins	T
Condiments	NT	Office Supplies	T
Paper Buckets or Pails	*	Table Covers	T
Paper or Plastic Bags	*	Tissue Paper	*
Place Mats	T	Toothpicks	T
Plates (disposable or reusable)	NT	Towels (paper or cloth)	T

Serving Utensils	T	Tray Liners	T
Skewers	T	Trays	T
Steak Markers	T	Uniforms	T
		Waxed Paper	*

* - Materials and containers used incident to the sale and delivery of food and drink products are not taxable; however, materials and containers used for other purposes are taxable (e.g. storage containers).

NOTE: Other items are to be considered on a case-by-case basis.

SOUTH CAROLINA TAX COMMISSION

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s/James M. Waddell Jr.

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