
State of South Carolina
Department of Revenue
301 Gervais Street, P. O. Box 125, Columbia, South Carolina 29214

SC REVENUE RULING 95-6 (TAX)

SUBJECT: Purchases by Restaurants
Sales and Use Tax)

EFFECTIVE DATE: Applies to all periods open under statute.

SUPERSEDES: SC Revenue Ruling #92-3

REFERENCE: S.C. Code Ann. Section 12-36-110 (Supp. 1993)
S.C. Code Ann. Section 12-36-120 (Supp. 1993)
S.C. Code Ann. Section 12-36-910(A) (Supp. 1993)
S.C. Code Ann. Section 12-36-1310(A) (Supp. 1993)
S.C. Code Ann. Section 12-36-2120(14) (Supp. 1993)
Regulation 117-174.79

AUTHORITY: S.C. Code Ann. Section 12-4-320 (Supp. 1993)
SC Revenue Procedure #94-1

SCOPE: A Revenue Ruling is the Department of Revenue's official advisory opinion of how laws administered by the Department are to be applied to a specific issue or a specific set of facts, and is provided as guidance for all persons or a particular group. It is valid and remains in effect until superseded or modified by a change in the statute or regulations or a subsequent court decision, Revenue Ruling or Revenue Procedure.

Question:

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

Conclusion:

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

Aluminum Foil	*	Bibs	T
Beverage Ingredients	NT	Cleaning Supplies	T
Coasters	T	Paper Buckets or Pails	*
Coffee Stirrers	T	Paper or Plastic Bags	*
Cooking Equipment	T	Place Mats	T
Cooking Oil	+	Plates (disposable or reusable)	NT
Cooking Utensils	T	Serving Utensils	T
Condiments	NT	Shortening	+

Cups & Lids	NT	Skewers	T
Drinking Glasses	NT	Steak Markers	T
Food Containers & Wraps	*	Table Covers	T
Food Products & Ingredients	NT	Tissue Paper	*
Forks, Knives & Spoons	T	Toothpicks	T
Furniture & Fixtures	T	Towels (paper or cloth)	T
Guest Checks	T	Tray Liners	T
Napkins	T	Trays	T
Office Supplies	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).

+ - These items are not taxable only when used as an ingredient in the food products being sold.

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

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.

Hence, 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 tax.

Commission Decision #95-11 upheld the taxation of utensils, napkins, straws, and tray liners purchased by a restaurant but also addressed the taxation of cooking oil and shortening. In this case the cooking oil and shortening were used for frying food products for sale; however, the shortening was also used as an ingredient to make biscuits. When used for frying, in excess of 70% of the cooking oil and shortening was used or consumed in the process. Thus, the Commission held that the cooking oil and shortening were not subject to tax. The Commission stated that:

The cooking oil and shortening are absorbed by the food. The cooking oil is used as a part of the food being sold. Just as flour, salt or spices become a part of the food item during preparation, the cooking oil and shortening become a part of the food during the cooking portion of the preparation. The Department's established view is that restaurants are making purchases at wholesale when they purchase ingredients of food products sold to customers. We find and conclude the cooking oil and shortening are ingredients of the food products sold, and thus such purchases are made at wholesale and are nontaxable.

For questions concerning the taxation of products purchased by restaurants, contact Steve Hallman at (803) 737-4433 or John McCormack at (803) 737-4438.

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/Burnet R. Maybank III
Burnet R. Maybank, III, Director

Columbia, South Carolina
June 5, 1995