

SC REVENUE RULING #96-3 (TAX)

SUBJECT: Electronic Delivery of Computer Software
(Sales and Use Tax)

EFFECTIVE DATE: Applies to all periods open under statute.

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

REFERENCES: S.C. Code Ann. Section 12-36-910 (Supp. 1995)
S.C. Code Ann. Section 12-36-1310 (Supp. 1995)
S.C. Code Ann. Section 12-36-60 (Supp. 1995)

AUTHORITY: S.C. Code Ann. Section 12-4-320 (Supp.1995)
S.C. 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remains in effect until superseded or modified by a change in the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:

Is computer software sold and delivered by electronic means, as described in the facts,
subject to sales and use tax?

Conclusion:

Computer software sold and delivered by electronic means, as described in the facts, is
not subject to sales and use tax.

Facts:

Technology has progressed to the stage that computer software may be sold in many
forms. Software may be sold in traditional forms such as computer diskettes or magnetic

tapes. Today, technology also permits computer software to be sold and delivered electronically as described in the following transaction.

Company A has purchased computer software for its own business use. No portion of the computer software will be delivered on computer disks or magnetic tapes. Instead, the software will be electronically delivered to Company A in South Carolina via a modem and telephone line.

The purpose of this document is to determine whether computer software that is electronically delivered in transactions similar to that described above is subject to South Carolina sales and use tax.

Discussion:

Code Section 12-36-910(A) imposes a sales tax and reads:

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 12-36-1310(A) imposes a use tax and reads:

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.

Therefore, for the sales or use tax to apply there must be a retail sale or retail purchase of tangible personal property.

Code Section 12-36-60 defines the term "tangible personal property" to mean:

...personal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses. It also includes services and intangibles, including communications, laundry and related services, furnishing of accommodations and sales of electricity, the sale or use of which is subject to tax under this chapter and does not include stocks, notes, bonds, mortgages, or other evidences of debt. (Emphasis added).

Therefore, the term tangible personal property includes the sale or use of intangibles, including communications, that are subject to South Carolina sales or use taxes under Chapter 36 of Title 12.

Communications are subject to sales and use taxes under Chapter 36 of Title 12 pursuant to Code Sections 12-36-910(B)(3) and 12-36-1310(B)(3), which impose the tax on the:

gross proceeds accruing or proceeding from the charges for the ways or means for the transmission of the voice or messages, including the charges for use of equipment furnished by the seller or supplier of the ways or means for the transmission of the voice or messages; (Emphasis added).

For the electronic delivery of software to be subject to sales and use taxes, it must be determined that the gross proceeds are derived from the sale of tangible personal property as defined in Code Section 12-36-60. The term tangible personal property includes services and intangibles, such as communications, which are subject to tax under Code Sections 12-36-910 and 12-36-1310.

A review of longstanding administrative policy indicates that computer software sold and delivered in the form of a computer diskette or magnetic tape is tangible personal property subject to taxation. See Citizens and Southern Systems, Inc. v. South Carolina Tax Commission, 280 S.C. 138, 311 S.E. 2d 717 (1984) and also SC Revenue Ruling #93-4.

Unlike computer software delivered in the form of a computer diskette or magnetic tape, computer software sold and delivered by electronic means cannot be seen, weighed, measured, felt, touched or is not otherwise perceptible to the senses. Accordingly, such computer software is an intangible and is subject to taxation only if it is "communications" taxed under Chapter 36 of Title 12 pursuant to Code Sections 12-36-910 and 12-36-1310.

The Code, however, does not provide definitions for various terms or phrase found in Sections 12-36-910(B)(3) and 12-36-1310(B) (3); therefore, it is necessary to determine their "ordinary and popular meaning." It is an accepted practice in South Carolina to resort to the dictionary to determine the literal meaning of words used in statutes. For cases where this has been done, see Hay v. South Carolina Tax Commission, 273 S.C. 269, 255 S.E. 2d 837 (1979); Fennel v. South Carolina Tax Commission, 233 S.C. 43, 102 S.E. 2d 424 (1958); Etiwan Fertilizer Co. v. South Carolina Tax Commission, 217 S.C. 354, 60 S.E. 2d 682 (1950).

The Second College Edition of the American Heritage Dictionary provides the following definitions:

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| "Way" | - A manner of doing something. |
| "Means" | - A method, course of action, or instrument by which an act can be accomplished or some end achieved. |

- "Transmission" - The act or process of transmitting; the state of being transmitted; something transmitted, as a voice or message.
- "Transmit" - To send from one person, thing or place to another; convey;...

In addition, the Second Edition of the American Heritage Dictionary defines "communications," in part as "a means of communicating, esp.: a system for sending and receiving messages, such as mail, telephone or television."

In summary, the statute imposes the sales and use tax on the gross proceeds accruing and proceeding from the charges for the manner, methods and instruments for sending a voice message.

Next, it is important to review the statute again to fully understand, specifically, what is taxed when imposing the tax on the charges for the manner, methods and instruments for sending a voice or message. The statute specifically includes, as taxable, "the charges for use of equipment furnished by the seller or supplier of the ways or means for the transmission of the voice or of messages;..."

The following quote is from 73 Am Jur 2d, Statutes Section 250:

In the interpretation of a statute, the legislature will be presumed to have inserted every part thereof for a purpose.... A statute should not be construed in such manner as to render it partly ineffective or inefficient if another construction will make it effective. Indeed, it is a cardinal rule of statutory construction that significance and effect should, if possible, without destroying the sense or effect of the law, be accorded every part of the act, including every section, paragraph, sentence or clause, phrase, and word....

Applying this rule to the question at hand, it must be presumed that the phrase "including the charges for use of equipment furnished by the seller or supplier of the ways or means for the transmission of the voice or of messages" was inserted in Code Sections 12-36-910(B)(3) and 12-36-1310(B)(3) by the Legislature for a special reason, as such charges were already subject to the tax pursuant to Code Sections 12-36-910(A) and 12-36-1310(A). Therefore, "charges for the ways or means for the transmission of the voice or messages" imposes the tax upon something more than merely communications equipment. If the Legislature had intended to tax only charges for use of the equipment, then Code Sections 12-36-910(B)(3) and 12-36-1310(B)(3) would have been unnecessary, as such charges were already taxable.

Therefore, based on the above discussion, it is reasonable to conclude that charges for the ways or means of communication must be charges for access to, or use of, a communication system, whether this charge is based on a fee per a specific time period or per transmission. (See SC Revenue Ruling #91-10.)

Based upon the statutory language contained in Code Sections 12-36-910(B)(3) and 12-36-1310(B)(3) and the general meaning of the term "communication", the Department of Revenue has taxed communication services such as telephone services, facsimile transmission services, database access transmission (legal research, stock quotes, credit reporting), and electronic voice mail services. All of these communication services and others currently taxed by the Department of Revenue constitute communication systems, both large and small, that the purchaser pays to access or use. (See Commission Decision #89-77 and SC Revenue Ruling #89-14.)

In addressing whether the computer software is a "communication", it must be determined whether the purchaser of computer software sold and delivered by electronic means is paying for access or use of the communication system (e.g. the telephone). Applying the "true object test" provides guidance in making this determination. In this instance, the true object of the sale of computer software electronically delivered, as described in the facts, is the sale of the intangible software: the "true object" is not the access or use of the communication system. To conclude otherwise stretches the statutory language. Accordingly, computer software sold and delivered by electronic means, as described in the facts, does not meet the definition of tangible personal property set forth in Code Section 12-36-60 or fall within the provisions of Code Section 12-36-910 or Code Section 12-36-1310.

SOUTH CAROLINA DEPARTMENT OF REVENUE

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

Columbia, South Carolina
January 12, 1996