



SC TECHNICAL ADVICE MEMORANDUM #89-10

TO: Mr. Marvin N. Davant, Director
Field Services Division

FROM: Jerry B. Knight, Manager
Tax Policy and Procedures Department

DATE: March 15, 1989

SUBJECT: Direct Pay Certificates/Contractors
(Use Tax)

REFERENCE: S.C. Code Ann. Section 12-35-1240 (1976)
S.C. Code Ann. Section 12-35-810 (1976)
S.C. Code Ann. Section 12-35-515 (Supp. 1987)
S.C. Code Ann. Section 12-35-850 (1976)
S.C. Code Ann. Section 12-35-110 (Supp. 1987)
S.C. Code Ann. Section 12-35-930 (1976)
Regulation 117-174.45

AUTHORITY: S.C. Code Ann. Section 12-3-170 (1976)
SC Revenue Procedure #87-3

SCOPE: A Technical Advice Memorandum is a temporary document issued to an individual within the Commission, upon request, and it applies only to the specific facts or circumstances related in the request. Technical Advice Memoranda have no precedential value and are not intended for general distribution.

Questions:

1. Which party is liable for the use tax, the contractor or manufacturer, when a manufacturer extends a "direct pay" certificate to a contractor?
2. If the contractor is liable, how does the Commission avoid collecting the use tax twice on the same transaction or purchase?

Facts:

ABC, Inc. ("ABC") is a contractor which installs overhead doors. ABC purchases the doors and materials necessary for its contracts from out-of-state vendors and remits the use tax to the State on its quarterly use tax returns. ABC will, from time to time, enter into contracts with manufacturing firms which have been issued so-called "direct pay" certificates by the Commission.

At the request of such manufacturers, ABC will provide a breakdown of materials, labor and tax on the job contract. The manufacturer will then extend its "direct pay" certificate to ABC and report the use tax on its return. ABC then takes credit on its return for taxes originally paid on purchases of the items in question.

Code Section 12-35-1240 authorizes the issuance of such certificates and reads:

Notwithstanding other provisions of this chapter, when in the opinion of the Commission the nature of a taxpayer's business renders it impracticable or inequitable for the taxpayer to account for the taxes imposed by Articles 5 and 7 of this chapter separately, the Commission may issue its certificate to such taxpayer authorizing the sale at wholesale and such taxpayer shall thereupon be accountable for the tax levied by said articles with respect to the gross proceeds of sale of the property withdrawn, used or consumed by such taxpayer for use, consumption or application within this State.

In summary, the holder of a "direct pay" certificate may purchase tangible personal property tax free. However, the purchaser is held accountable for any sales or use tax due.

Discussion:

The first issue to be resolved is where the liability for the use tax falls, upon extension of a "direct pay" certificate by a manufacturer to a contractor.

Code Section 12-35-810 imposes the use tax and reads, in part:

An excise 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 such property, regardless of whether the retailer is or is not engaged in business in this State.

Code Section 2-35-850 reads, in part:

Every person storing, using or otherwise consuming in this State tangible personal property purchased at retail shall be liable for the tax imposed by this article, and the liability shall not be extinguished until the tax has been paid to the State.

In summary, the person storing, using or consuming tangible personal property, which has been purchased at retail, is liable for the use tax.

Code Section 12-35-110 defines "sale at retail" or "retail sale" and reads, in part:

The terms "sale at retail" and "retail sale" shall mean all sales of tangible personal property except those defined ...as wholesale sales.... Sales of building materials to contractors, builders or landowners for resale or use in the form of real estate are retail sales in whatever quantities sold.

Code Section 12-35-170 defines "wholesale sale" and "sale at wholesale" and reads, in part:

The terms "wholesale sale" and "sale at wholesale" mean a sale of tangible personal property by wholesalers to licensed retail merchants, jobbers, dealers or other wholesalers for resale, and do not include a sale by wholesalers to users or consumers, not for resale.

Regulation 117-174.45 reads, in part:

Building materials when purchased by builders, contractors, or landowners for use in adding to, repairing or altering real property are subject to either the sales or use tax at the time of purchase by such builder, contractor, or landowner. "Building materials" as used in the Sales and Use Tax Law includes any material used in making repairs, alterations or additions to real property. "Builders", "contractors", and "landowners" mean and include any person, firm, association or corporation making repairs, or additions to real property. The term "building materials" includes such tangible personal property as lumber, timber, nails, screws, bolts, structural steel, elevators, reinforcing steel, cement, lime, sand, gravel, slag, stone, telephone poles, fencing, wire, electric cable, brick, tile, glass, plumbing supplies, plumbing fixtures, pipe, pipe fittings, prefabricated buildings, electrical fixtures, built-in cabinets and furniture, sheet metal, paint, roofing materials, road building materials, sprinkler systems, air conditioning systems, built-in fans, heating systems, floorings, floor furnaces, crane ways, crossties, railroad rails, railroad trac accessories, tanks, builders hardware, doors, door frames, window frames, water meters, gas meters, well pumps and any and all other tangible personal property which becomes a part of real property. (emphasis added)

Code Section 12-35-930 reads, in part:

It shall be presumed that tangible personal property sold by any person for delivery in this State is sold for storage, use or other consumption in this State .

In summary, purchases by contractors are purchases at retail subject to the use tax. Contractors use, store or consume tangible personal property in the performance of their contracts or services for their customers, pursuant to Code Sections 12-35-110 and 12-35-170.

A review of Code Section 12-35-1240 reveals that:

...the Commission may issue its certificate to such taxpayer authorizing the sale at wholesale and such taxpayer shall thereupon be accountable for the tax (emphasis added).

A direct pay certificate authorizes the sale at wholesale of tangible personal property, to the holder of such certificate. In other words, there must be a sale of tangible personal property to the holder of the certificate.

In summary, since the sale of materials to a contractor is a retail sale, the contractor, as the user or consumer of such material, does not make a sale of tangible personal property to the manufacturer. The "direct pay" certificate is valid only where a sale has occurred. Therefore, a manufacturer may not extend the certificate to a contractor.

The second issue is: If the contractor is liable for the use tax when the holder of a direct pay certificate has improperly extended the certificate, how can the Commission avoid collecting the use tax twice on the same transaction?

It has been long-standing administrative policy that the contractor, liable for the tax, must document that the holder of a direct pay certificate has already remitted the tax to the State. Where this can be documented, the Commission will allow a credit, against the assessed liability on the transaction, for the tax remitted by the holder of the direct pay certificate.

When the administrative interpretation of a statute has been applied for a number of years and has not been changed by the legislature, there is created a strong presumption that such interpretation is correct. *Ryder Truck Lines, Inc. v. South Carolina Tax Commission*, 248 SC 148, 149 S.E. 2d 435 (1966). In *Etiwan Fertilizer Company v. South Carolina Tax Commission*, 217 SC 354, 60 S.E.2d 682 (1950), the Supreme Court of South Carolina held that "where the construction of the statute has been uniform for many years in administrative practice, and has been acquiesced in by the General Assembly or a long period of time, such construction is entitled to weight, and should not be overruled without cogent reasons."

Conclusions:

1. When a manufacturer improperly extends a direct pay certificate to a contractor, the contractor still remains liable for the use tax, pursuant to Code Section 12-35-850 and 12-35-930.
2. In order to avoid collecting the use tax twice on the same transaction, the contractor, as the party liable for the tax, must document that the manufacturer has already remitted the tax as a holder of a direct pay certificate, pursuant to Code Section 12-35-1240. In addition, the manufacturer must assign any right to a credit to the contractor. If the remittance of the use tax, by the manufacturer, can be documented by the contractor and such contractor has received an assignment from the manufacturer, then the Commission will allow the contractor a credit.