



SC TECHNICAL ADVICE MEMORADUM #90-1

TO: Mr. Marvin Davant, Director
Field Services Division

FROM: John McCormack, Manager
Tax Policy and Appeals Department

DATE: January 22, 1990

SUBJECT: XYZ Reports
(Sales and Use Tax)

REFERENCE: S.C. Code Ann. Section 12-35-510 (1976)
S.C. Code Ann. Section 12-35-810 (1976)
S.C. Code Ann. Section 12-35-140 (1976)
S.C. Code Ann. Section 12-35-30 (1976; Supp. 1988)
S.C. Code Ann. Section 12-35-120 (1976)
S.C. Code Ann. Section 12-35-110 (Supp. 1988)

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.

Question:

Are sales of "XYZ Reports" subject to the sales and use tax, pursuant to Code Sections 12-35-510 and 12-35-810?

Facts:

"XYZ Reports" are produced by XYZ, a division of ABC, Inc. XYZ supplies information to individuals and firms in the construction industry, as well as to their suppliers, concerning new and ongoing construction projects. These reports are used by XYZ's customers for the purpose of bidding on construction projects or to sell goods and services to construction companies.

XYZ accumulates information by category and, based upon selections made by its customers, sends out information at regular intervals, on slips of mimeograph paper.

XYZ's contracts provide that the information supplied by XYZ shall remain confidential; that title to the information shall not pass to the client; and that the information shall only be used for limited purposes.

An important feature of the package provided by XYZ is an individual analysis of the sales potential of a customer's goods or services. XYZ's representatives also make recommendations concerning use of the information in the client's selling efforts. XYZ supplies such information to its customers by telephone, telegraph, personal interviews and written communications. The "Special Inquiry Department", and other representatives, respond to telephone inquiries for urgently needed information. In addition, if a customer loses a report, he can obtain the same information by telephone, at no extra cost.

XYZ also operates "plan rooms", where customers can, with assistance from trained personnel, inspect plans and specifications for various construction projects.

Discussion:

The question is whether "XYZ Reports" constitute tangible personal property, the sale of which are subject to the tax, or whether they are a nontaxable service?

South Carolina Code Section 12-35-510 imposes the sales tax, and reads, in part:

In addition to all other licenses, taxes, and charges imposed, there is levied..., upon every person engaged ...within this State in the business of selling at retail any tangible personal property whatsoever, including merchandise of every kind and character, an amount equal to [five] percent of the gross proceeds of sales of the business (emphasis added).

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,. (emphasis added).

A review of the above imposition sections requires a consideration of certain terms and phrases.

Code Section 12-35-140, which defines "tangible personal property", reads:

The term "tangible personal property" means personal property which may be seen, weighed, measured, felt or touched or which is in any other manner perceptible to the senses, except notes, bonds, mortgages or other evidences of debt and stocks and shall include rooms, lodgings or accommodations furnished to transients for a consideration.

For the purposes of this chapter the term "tangible personal property" shall be interchangeable with and apply with equal force and effect to services, accommodations and intangibles, including communications, as are specifically provided for in this chapter.

Code Section 12-35-30, which defines "gross proceeds of sales" (the measure of the sales tax), reads, in part:

The term "gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property (and including the proceeds from the sale of any property handled on consignment by the taxpayer), including merchandise of any kind and character without any deduction on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid or any other expenses whatsoever and without any deductions on account of losses;.... (emphasis added).

Code Section 12-35-120, which defines "sales price" (the measure of the use tax), reads, in part:

The term "sales price" means the total amount for which tangible personal property is sold, including any services (including transportation) that are a part of the sale, valued in money, whether paid in money or otherwise, and includes any amount for which credit is given to the purchaser by the seller, without any deduction therefrom on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest charged, losses or any other expenses whatsoever;.....(emphasis added).

In summary, the sale or use, within South Carolina, of "any tangible personal property whatsoever", unless otherwise exempt or excluded, is subject to the sales or use tax.

As for determining what constitutes a sale of tangible personal property, as opposed to providing a service, we may look to the courts.

In *Citizens and Southern Systems, Inc. v. South Carolina Tax Commission*, 280 S.C. 138, 311 S.E. 2d 717 (1984), a case concerning computer software, the Supreme Court of South Carolina held:

The trial judge found that the magnetic tape which delivered the information to the purchaser could be seen, weighed, measured, felt, and touched, and therefore, came within the definition of "tangible personal property", [Section] 12-35-140 of the Code.

The judge compared the sale of magnetic tapes to a sale of books or phonograph records. He observed that if a professor were to convey knowledge or information to students in person, a sales tax would not be assessed upon the fees charged; however, if the professor published that knowledge or information in a book or recorded it on a phonograph disc, a sales tax would be assessed upon the sale of the book or record. Generally, the value of books and records is the matter which is contained in them, an intangible; the value is not in the paper, binding, or printer's ink.

Furthermore, concerning the above analogy, the trial judge reasoned:

What makes the book valuable is not the paper, binding, and printer's ink, but the knowledge or information contained. But, having been reduced to tangible form, the knowledge is subject to the tax (emphasis added).

The Supreme Court agreed with the trial judge in ruling:

...that the computer software was delivered to C & S in a form which could be seen, weighed, measured, felt, and touched and was therefore tangible personal property, a sale of which is subject to the State's sales and use taxes.

In *Richland County v. South Carolina Tax Commission*, Court of Common Pleas, Case No. 82-CP-40-2143, the court held:

In as much as the Plaintiff used the tax map sheets in South Carolina, the Defendant levied the use tax based on the sales price of the same. The Plaintiff's Complaint does not deny that it is using the sheets. Rather, it alleges that the subject taxes are improper in that they are based upon the sales price of personal services rendered by Kucera, not tangible personal property. This allegation is without merit.

In *Recording Devices v. Porterfield*, 283 N.E. 2d 626, 30 Ohio St. 2d 208 (1972), personal services were defined as "an act done personally by a particular individual; it is, in effect, an economic service involving either the intellectual or manual personal effort of an individual not the saleable product of his skill". The facts before the Court indicate that the Plaintiff contracted with Kucera for the purchase of tax map sheets. These tax map sheets were thus made and delivered by Kucera. They were the "saleable product of its skill". Such facts do not lend themselves to the conclusion that their acquisition represents a personal service transaction.

In point of fact, it was the end product, the tax sheets, that the Plaintiff contracted for. This was the substance of the matter and in tax matters substance governs. *Southern Weaving Co. v. Query*, 206 S.C. 307, 34 S.E. 2d 51 (1945) and *Beard v. South Carolina Tax Commission*, 230 S.C. 357, 95 S.E. 2d 628 (1965).

The court further held that:

...although the Plaintiff has indicated that the tax map sheets are highly unique and of little value to anyone save itself, such does not preclude taxation.

"An exemption from the sales tax is never presumed but must be expressly and clearly conferred in plain terms...one who claims exemption from the sales tax must bring himself within the exemption provision and the letter of the statute..." 68 Am. Jur. 2d, Sales and Use Taxes, Section 100, p. 147.

In summary, where an intangible, such as knowledge, is reduced to a tangible form and is the end product sought by the purchaser, such is subject to the tax. In addition, the fact that a product is highly unique, or of value only to the purchaser, is of no consequence under the South Carolina Sales and Use Tax Law.

As stated in the "FACTS", XYZ's contracts, with its customers, provide that title to the information remains with XYZ. Paragraph four of the contract reads:

OWNERSHIP AND USE OF INFORMATION. All information either written or oral, supplied to Subscriber under this Contract (hereinafter the "Information"). remains the exclusively owned, unpublished property of XYZ, both before and after its receipt by Subscriber, which has only a limited non-exclusive and non-transferable license to use the Information on the terms and conditions hereinafter set forth. The Information is solely and exclusively for the internal use of Subscriber. The Information is not for use by any other person or entity, including, but not limited to, employees, agents, members, customers or other entities affiliated with Subscriber. Subscriber shall not, without the prior written consent of XYZ, transfer, assign, publish, reproduce, divulge, distribute, disseminate or convey any of the Information supplied and licensed under this Agreement, or any derivation, revision or combination of such Information.

The Subscriber expressly acknowledges that the Information, supplied and licensed under this Contract, was compiled, prepared, revised, selected and arranged by XYZ through the application of methods and standards of judgment developed and applied through the expenditure of substantial time, effort and money, and constitute valuable industrial property and trade secrets of XYZ. Subscriber agrees to protect the copyright and/or other proprietary rights of XYZ in the Information both during and after the term of this Contract; and Subscriber shall honor and comply with reasonable written requests made by XYZ to protect these contractual, statutory and common law rights in the Information licensed hereunder.

In *Edisto Fleets, Inc. v. South Carolina Tax Commission*, 256 S.C. 350, 182 S.E. 2d 713 (1971) the court held that:

The terms "sale" and "purchase" are inextricably related and bound together and must be so construed....

Code Section 12-35-100, which defines "sale", reads:

The term "sale" includes;

- (1) Any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration;
- (2) A transaction whereby the possession of tangible personal property is transferred but the seller retains the title as security for the payment of the price; and

- (3) Installment sales and credit sales and the exchange of tangible personal properties as well as a sale for money, every closed transaction constituting a sale (emphasis added).

Code Section 12-35-70, which defines "purchase", reads;

The term "purchase" means acquired for a consideration, whether (a) such acquisition was affected by a transfer of title or of possession, or of both, or a license to use or consume, (b) such transfer shall have been absolute or conditional and by whatever means it shall have been effected and (c) such consideration be a price or rental in money or by way of exchange or barter (emphasis added).

Code Section 12-35-90, which defines "retailer" and "seller", reads, in part:

The terms "retailer" and "seller" include:

* * * * *

- (5) Every person engaged in the business of renting or leasing or otherwise furnishing any tangible personal property for a consideration, either by lease or rental or other form of agreement; (emphasis added)

In summary, a "license to use" tangible personal property, where possession, but not title, is transferred for a consideration, is subject to the State's sales and use tax.

Conclusion:

"XYZ Reports", provided to customers by ABC, Inc., constitute tangible personal property subject to the sales or use tax, pursuant to Code Sections 12-35-510 and 12-35-810.

Since use tax has been collected from ABC's customers, the Commission has determined that ABC's requirement to collect the use tax shall be effective April 1, 1990. Customers of ABC, Inc. are still liable for the use tax on purchases of XYZ Reports made prior to April 1, 1990.