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SC TECHNICAL ADVICE MEMORANDUM #91-2

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

FROM: Jerry Knight, Manager
Tax Policy and Appeals Department

DATE: May 22, 1991

SUBJECT: Modular Homes
(Sales and Use Tax)

REFERENCE: S.C. Code Ann. Section 12-36-910(A) (Supp., 1990)
S.C. Code Ann. Section 12-36-1310(A) (Supp., 1990)
S.C. Code Ann. Section 12-36-2120(34) (Supp., 1990)
S.C. Code Ann. Section 12-36-110 (Supp., 1990)

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.

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Question:

Do the homes marketed by Nationwide Homes, as described in the facts, qualify for the sales and use tax exemption for modular homes under Code Section 12-36-2120(34)?

Facts:

Nationwide Homes offers a variety of custom designed homes from simple ranch style homes to two story homes which are built in five separate units and bricked in with fireplaces and garages.

The basic components of the homes are built in the Nationwide factory and shipped via truck to the home site where they are permanently affixed to the real estate. At the site, foundations are constructed, the houses are roofed, fireplaces are built, and brick veneers are added. Once completed, the homes have similar electrical, plumbing, heating and sanitary facilities as on-site constructed housing.

Nationwide will also sell the components to customers and not perform any of the on-site construction.

Discussion:

Code Section 12-36-910(A) imposes a sales tax "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 "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, ..., regardless of whether the retailer is or is not engaged in business in this State."

Code Section 12-36-110 defines "retail sale" to include, in part:

(a) sales of building materials to construction contractors, builders, or landowners for resale or use in the form of real estate;

* * * *

(d) the use within this State of tangible personal property by its manufacturer as building materials in the performance of a construction contract. The manufacturer must pay the sales tax based on the fair market value at the time and place where used or consumed....

Additionally, Regulation 117-174.45 reads, in part, as follows:

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. The term "building materials" includes such tangible personal property as lumber, timber, nails, screws, bolts, structural steel, elevators, reinforcing steel, cement, lime, sand, gravel, stag, stone, telephone poles, fencing, wire, electrical 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 track 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.

In summary, the sales or use tax is not imposed on sales of real property; rather, the tax is paid on sales of building materials used to construct real property. The components of a modular home are considered building materials, just as the materials used to "finish off" or complete the homes are building materials (e.g. cement for foundations, brick for fireplaces, siding, veneer, etc.). Therefore, when Nationwide assembles the components and performs additional on-site construction work to "finish off" the homes, the component parts are subject to tax under Code Section 12-36-110(1)(d), based upon their fair market value at the time of use.

Sales by Nationwide directly to Nationwide's customers or to other construction contractors, with no additional on-site work performed by Nationwide, are retail sales by Nationwide subject to tax pursuant to Code Sections 12-36-110(1)(a) and 12-36-910(A).

Purchases of building materials (e.g. foundation and fireplace materials, siding, veneer, etc.) by Nationwide or other contractors used to "finish off" the homes are subject to the tax at the time of purchase, pursuant to Code Section 12-36-110(1)(a).

Code Section 12-36-2120(34) provides an exemption from the sales and use tax for "thirty-five percent of the gross proceeds of the sale of modular homes as defined in Section 31-17-20...."

Code Section 31-17-20 has been repealed; however, as a general rule when a statute adopts a part or all of another statute by specific reference, the adoption takes the statute as it exists at that time and does not include modifications to the statute. See, 73 Am Jur 2d Statutes Section 29. In other words, the repeal of Code Section 31-17-20 does not effect the definition of "modular home" for purposes of Code Section 12-36-2120(34).

Prior to its repeal the following definition for "modular home" was provided:

'Modular home' means a manufactured single family dwelling or an integral part over thirty-five feet in length, or over eight feet in width, so constructed that it may be transported from one site to another, temporarily or permanently affixed to real estate, made up of one or more components, and constructed with the same or similar electrical, plumbing, heating and sanitary facilities as on-site constructed housing.

The same definition for "modular home" found in Code Section 31-17-20 was adopted in Regulation 117-178.

An examination of the above definition raises certain questions: (1) What is the meaning of the term "integral part", as used in Code Section 31-17-20; and (2) Does a structure have to be "so constructed that it may be transported from one site to another" even after it has been "permanently affixed to real estate"?

The following quote from 73 Am.Jur. 2d Statutes, Section 258 provides guidance concerning the first question:

It is generally regarded as permissible to consider the consequences of a proposed interpretation of a statute, where the act is ambiguous in terms and fairly susceptible of two constructions. Under such circumstances, it is presumed that undesirable

consequences were not intended; to the contrary, it is presumed that the statute was intended to have the most beneficial operation that the language permits. It is accordingly a reasonable and safe rule of construction to resolve any ambiguity in a statute in favor of a beneficial operation of the law, and a construction of which the statute is fairly susceptible is favored , which will avoid all objectionable, mischievous, indefensible, wrongful, evil, and injurious consequences.

It is reasonable to conclude that a modular home when completed and permanently affixed to realty must be "over thirty-five feet in length or over eight feet in width" to qualify for the partial exemption. It is not necessary that each component of the home meets the size requirements. It is only necessary that the entire home, as a whole, meets the size requirements.

Any subsequent addition to a modular home, when completed and added to the home, constitutes an "integral part" qualifying for the partial exemption if it is "over thirty-five feet in length or over eight feet in width". The addition must also meet the other requirements of the definition of "modular home". It is not necessary that each component of the addition meets the size requirements. It is only necessary that the entire addition, as a whole, meets the size requirements.

As for the second question, we only need look to Code Section 31-17-20 for guidance.

Quoting, again, from that section, the term "modular home" was defined, in part, as "a manufactured single family dwelling....so constructed that it may be transported from one site to another, [and] temporarily or permanently affixed to real estate....". Therefore, it is reasonable and logical to conclude that a home does not have to be transportable after being permanently affixed to realty. It must merely be transportable at the time of purchase.

Conclusion:

The homes marketed by Nationwide Homes, as described in the facts, will qualify for the partial sales and use tax exemption for modular homes under Code Section 12-36-2120(34), if the homes, when completed, are "over thirty-five feet in length or over eight feet in width".

Any subsequent addition to a modular home qualifies for the partial exemption if, when completed and added to a modular home, the addition is "over thirty-five feet in length or over eight feet in width" and meets the other requirements of the definition.

However, purchases of all materials used by Nationwide Homes, or others, at the construction site to complete or "finish off" the homes (e.g. brick and concrete for the foundation, brick for the veneer) are subject to the sales and use tax and do not come within the partial exemption under Code Section 12-36-2120(34).