

## Chapter 7

### Tangible Personal Property

#### A. General Guidelines

Tangible personal property is personal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses.<sup>1</sup> It also includes services and intangibles the sale or use of which are subject to tax under the sales and use tax law, including

- communications,
- laundry and related services,
- furnishing of accommodations, and
- electricity.

Tangible personal property does not include stocks, notes, bonds, mortgages, or other evidences of debt or the transmission of computer database information by a cooperative service when the database information has been assembled by and for the exclusive use of the members of the cooperative service.<sup>2</sup>

Generally, several issues arise with respect to a transaction involving tangible personal property. For example:

- (1) Was the transaction a sale of a service or the sale of tangible personal property?
- (2) Was the transaction a sale of tangible personal property or an improvement to real property?

#### B. Service vs. Sale of Tangible Personal Property

From time to time it is necessary to determine if the transaction is a sale or rental of tangible personal property or the furnishing of a service. The so-called “true object” test is generally used to delineate sales of services from sales of tangible personal property.

The “true object” test is best described in 9 *Vanderbilt Law Review* 231 (1956). It states:

The true test then is one of basic purpose of the buyer. When the product of the service is not of value to anyone other than the purchaser, either because of the confidential character of the product, or because it is prepared to fit the purchaser’s special need - a contract or will prepared by a lawyer, or the accident investigation report prepared for an

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<sup>1</sup> South Carolina Code §12-36-60.

<sup>2</sup> South Carolina Code §12-36-60.

insurance company - this fact is evidence tending to show that the service is the real purpose of the contract. When the purpose of a contract is to produce an article which is the true object of the agreement, the final transfer of the product should be a sale, regardless of the fact that special skills and knowledge go into its production. Under this analysis, printing work, done on special order and of significant value only to the particular customer, is still a sale. The purchaser is interested in the product of the services of the printer, not in the services per se. Similarly, it would seem that contracts for custom-produced articles, be they intrinsically valuable or not, should be classified as sales when the product of the contract is transferred.

The Vanderbilt Law Review article, in quoting *Snite v. Department of Revenue*, 398 Ill. 41, 74 N.E.2d. 877 (1947), also establishes the following general rule:

If the article sold has no value to the purchaser except as a result of services rendered by the vendor, and the transfer of the article to the purchaser is an actual and necessary part of the services rendered, then the vendor is engaged in the business of rendering service, and not in the business of selling at retail. If the article sold is the substance of the transaction and the service rendered is merely incidental to and an inseparable part of the transfer to the purchaser of the article sold, then the vendor is engaged in the business of selling at retail, and the tax which he pays...[is measured by the total cost of article and services]. If the service rendered in connection with an article does not enhance its value and there is a fixed or ascertainable relation between the value of the article and the value of the service rendered in connection therewith, then the vendor is engaged in the business of selling at retail, and also engaged in the business of furnishing service, and is subject to tax as to the one business and tax exempt as to the other.

While the above quotes do not establish rigid rules, they do provide general guidance in determining the purpose of a transaction, and are particularly helpful in addressing this issue.

### **C. Examples of Persons Engaged in the Business of Selling Tangible Personal Property at Retail**

While the products created by these persons may involve a certain amount of personal or professional service, the “true object” of the transaction is the sale of tangible personal property.

- Photographers<sup>3</sup>
- Artists<sup>4</sup>
- Sellers of Custom-Made Items<sup>5</sup>

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<sup>3</sup> SC Regulation 117-309.2 and Commission Decisions S-D-175 and S-D-148. See also SC Revenue Ruling #15-10 for information on the application of the sales and use tax to photographs sold at retail by a photographer in tangible form (e.g., traditional print form, CD, DVD, flash drive) and electronic form (e.g., email attachment or a download from the photographer’s website).

<sup>4</sup> SC Regulation 117-309.4.

<sup>5</sup> SC Regulation 117-309.5.

- Machine shops<sup>6</sup>
- Undertakers<sup>7</sup>
- Interior decorators<sup>8</sup>
- Sellers of Tax Map Sheets<sup>9</sup>
- Sellers of computer software, whether custom software or “canned” software<sup>10</sup>
- Caterers<sup>11</sup>
- Renters of tangible personal property, such as businesses that rent kayaks and paddle boards<sup>12</sup>
- Opticians<sup>13</sup>

For additional examples of persons engaged in selling tangible personal property at retail, see SC Regulation 117-308. However, it should be noted that in some of these examples, persons selling tangible personal property at retail may also be providing a separate and distinct non-taxable service that is not provided in conjunction with the sale of tangible personal property at retail.

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<sup>6</sup> SC Regulation 117-309.6.

<sup>7</sup> SC Regulation 117-309.8.

<sup>8</sup> SC Regulation 117-309.10.

<sup>9</sup> *Richland County v. South Carolina Tax Commission*, Richland County Court of Common Pleas Case No. 82-CP-40-2143 (1983).

<sup>10</sup> *Citizens and Southern Systems, Incorporated v. The South Carolina Tax Commission*, 280 S.C. 138, 311 S.E.2d 717 (1984), SC Regulation 117-330, South Carolina Revenue Ruling #12-1; South Carolina Revenue Ruling #11-2; South Carolina Revenue Ruling #03-5. Software must be delivered in tangible form, or sold as a communication service such as an Application Service Provider (“ASP”), in order for the transaction to constitute a sale of tangible personal property subject to the tax. Software delivered electronically is not a sale of tangible personal property and therefore not subject to the tax.

<sup>11</sup> See *Tronco’s Catering, Inc. v. South Carolina Department of Revenue*, 09-ALJ-17-0089-CC (April 12, 2010) and *Hamby Catering, Inc. v. South Carolina Department of Revenue*, 08-ALJ-17-0041-CC (June 12, 2009). See also South Carolina Revenue Ruling #12-3. This advisory opinion concerns fundraisers by nonprofit organizations. However, through several of the examples contained in it, this opinion also demonstrates the Department’s longstanding position that caterers are engaged in the business of selling tangible personal property at retail.

<sup>12</sup> See SC Revenue Ruling #15-1. This revenue ruling also provides guidance with respect to businesses that rent kayaks and paddle boards and also conduct tours with the same kayaks and paddle boards and businesses that only conduct tours and do not rent kayaks and paddle boards.

<sup>13</sup> SC Regulation 117-308.7; SC Revenue Ruling #21-14.

## **D. Examples of Persons Engaged in the Business of Selling a Non-Taxable Service<sup>14</sup>**

These persons may provide their customers or clients with tangible personal property, such as a dentist providing dental implants, a lawyer preparing and providing a contract or will, and an architect preparing and providing plans, but the “true object” of the transaction is the professional or personal service. The tangible personal property is incidental to the transaction. As such, these persons do not sell tangible personal property subject to the tax, but use and consume tangible personal property such as the dental implant or paper for the contract, will or plans, in providing a non-taxable service.

- Dentists<sup>15</sup>
- Doctors<sup>16</sup>
- Lawyers<sup>17</sup>
- Veterinarians<sup>18</sup>
- Architects<sup>19</sup>
- Advertising agencies<sup>20</sup>
- Ophthalmologists and Optometrists<sup>21</sup>

For additional examples of persons engaged in providing a non-taxable service, see SC Regulation 117-308. However, it should be noted that in some of these examples, persons providing a non-taxable service may also be selling tangible personal property.

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<sup>14</sup> For purposes of this discussion, “non-taxable services” are services upon which the General Assembly has not specifically imposed the sales and use tax.

<sup>15</sup> SC Regulation 117-308.2.

<sup>16</sup> SC Regulation 117-308.3. However, if a doctor has a stock of drugs from which he makes numerous and substantial retail sales, he is required to have a retail license and to remit sales tax directly to the Department.

<sup>17</sup> SC Regulation 117-308.4.

<sup>18</sup> South Carolina Code §12-36-110(1)(l) and SC Regulation 117-308.5.

<sup>19</sup> SC Regulation 117-308.6. However, sales by architects of all reproductions of their plans, designs or specifications, unaltered or unmodified in any way, are deemed to be subject to the sales or use tax.

<sup>20</sup> SC Regulation 117-308.9.

<sup>21</sup> SC Regulation 117-308.7; SC Revenue Ruling #21-14. However, ophthalmologists and optometrists who make numerous and substantial sales of prescription eyeglasses to non-patients or sales of nonprescription eyewear (e.g., sunglasses) must obtain a retail license and such sales are subject to sales or use tax.

## **E. Sale of Tangible Personal Property vs. Improvement to Real Property**

### Statutes and Regulations

In making the determination as to whether a person is a retailer making sales and installations or a contractor, the following provisions must be considered:

South Carolina Code §12-36-910(A) imposes the sales tax and reads:

A sales tax, equal to [six] 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.

South Carolina Code §12-36-1310(A) imposes the 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 [six] percent of the sales price of the property, regardless of whether the retailer is or is not engaged in business in this State.

South Carolina Code §12-36-1340 concerns the collection of the use tax by the retailer, and states:

Each seller making retail sales of tangible personal property for storage, use, or other consumption in this State shall collect and remit the tax in accordance with this chapter and shall obtain from the department a retail license as provided in this chapter, if the retail seller:

- (1) maintains a place of business;
- (2) qualifies to do business;
- (3) solicits and receives purchases or orders by an agent, an independent contractor, a representative, an Internet website, or any other means;
- (4) distributes catalogs, or other advertising matter, and by reason of that distribution receives and accepts orders from residents within the State;
- (5) operates as a marketplace facilitator; or
- (6) meets constitutional standards for economic nexus with South Carolina for purposes of the sales and use tax.<sup>22</sup>

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<sup>22</sup> The retailer can only be required to register and collect the use tax if the retailer has nexus with South Carolina. See Chapter 13 and SC Revenue Ruling #18-14 for information on nexus.

South Carolina Code §12-36-70 defines the term “retailer” and provides that a “retailer” includes every person:

- (1)(a) selling or auctioning tangible personal property whether owned by the person or others;
  - (b) furnishing accommodations to transients for a consideration, except an individual furnishing accommodations of less than six sleeping rooms on the same premises, which is the individuals [sic] place of abode;
  - (c) renting, leasing, or otherwise furnishing tangible personal property for a consideration;
  - (d) operating a laundry, cleaning, dyeing, or pressing establishment for a consideration;
  - (e) selling electric power or energy;
  - (f) selling or furnishing the ways or means for the transmission of the voice or of messages between persons in this State for a consideration. A person engaged in the business of selling or furnishing the ways or means for the transmission of the voice or messages as used in this subitem (f) is not considered a processor or manufacturer;
- (2)(a) maintaining a place of business or qualifying to do business in this State; or
- (b) not maintaining an office or location in this State but soliciting business by direct or indirect representatives, manufacturers agents, distribution of catalogs, or other advertising matter or by any other means, and by reason thereof receives orders for tangible personal property or for storage, use, consumption, or distribution in this State.
- (3) operating as a marketplace facilitator, as defined in South Carolina Code §12-36-71.<sup>23</sup>

South Carolina Code §12-36-110 defines the term “retail sale” to mean in part:

Sale at retail and retail sale mean all sales of tangible personal property except those defined as wholesale sales. The quantity or sales price of goods sold is immaterial in determining if a sale is at retail.

South Carolina Code §12-36-120 defines the term “wholesale sale,” in part, to mean:

a sale of . . . tangible personal property to licensed retail merchants, jobbers, dealers, or wholesalers for resale, and do not include sales to users or consumers not for resale;

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<sup>23</sup> The retailer can only be required to register and collect the use tax if the retailer has nexus with South Carolina. See Chapter 13 and SC Revenue Ruling #18-14 for information on nexus.

However, South Carolina Code §12-36-110(1) further defines the term “retail sale” to include, in part:

- (a) sales of building materials<sup>24</sup> to construction contractors, builders, or landowners for resale or use in the form of real estate;

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- (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;

- (e) sales to contractors for use in the performance of construction contracts;

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Finally, SC Regulation 117-324, entitled “Dual Business,” states:

Operators of businesses who are both making retail sales and withdrawing for use from the same stock of goods are to purchase at wholesale all of the goods so sold or used and report both retail sales and withdrawals for use under the sales tax law.

This ruling applies only to those who actually carry on a retail business having a substantial number of retail sales and does not apply to contractors, plumbers, repairmen, and others who make isolated or accommodation sales and who have not set themselves up as being engaged in selling. Where only isolated sales are made, tax should be paid on all of the taxable property purchased with no sales tax return being required of the seller making such isolated or “accommodation” sales. (Emphasis added.)

The provisions above establish two types of businesses that may deal with the incorporation of tangible personal property into real property – retailers and contractors.

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<sup>24</sup> SC Regulation 117-314.2 states:

“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 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 other words, any person who sells tangible personal property at retail, or who sets himself up as being engaged in selling tangible personal property at retail, is a retailer. A person who makes improvement to real property but who is not engaged in selling tangible personal property at retail is a contractor.

### Sales and Use Tax Implications for Retailers and Contractors

Based on the above statutes and regulations, if a person is deemed to be a contractor, then the sales and use tax is due at the time all materials are purchased. The sales by a contractor that are isolated or accommodation sales are not subject to the sales and use tax.

If a person is deemed a retailer, then the purchases of materials for resale are not subject to the tax, but the subsequent sales at retail of such materials are subject to the tax based on the “gross proceeds of sales” or “sales price.”<sup>25</sup> However, installation labor, if separately stated on the bill to the customer and reasonable, would not be subject to the tax.

### Retailer vs. Contractor Determination

In South Carolina, the determination as to whether a person is a retailer making sales and installations or a contractor depends on the facts and circumstances.

Factors used in determining whether a person is a retailer making sales and installations or a contractor include, but are not limited to: how the person advertises his business (as a retailer or contractor); are retail sales made in which installation is not performed by the seller or on behalf of the seller; does the person have a showroom to display his products and how would this showroom be perceived by the general public; is the person licensed as a contractor under state law; does the person perform labor for a general contractor as a “subcontractor;” etc.

In addition, the determination as to whether a person is a retailer making sales and installations or a contractor may require a review of the various agreements or contracts between the taxpayer and his customers.

### Retailer-Contractor Making Sales and Installations

Where a person acts as both a retailer and a contractor, the following factors have been examined in determining that the taxpayer is acting as a retailer making sales and installations for particular transactions:

- (1) whether the person provides installation services to customers who have already purchased materials from somewhere else;
- (2) whether the customer purchases materials to be installed in a traditional retail transaction (i.e., the materials are selected from the tangible personal property sold by the person; the customer pays for the materials at the cash register and pays the retail sales price for the

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<sup>25</sup> See *Home Depot U.S.A., Inc. v. South Carolina Dept. of Revenue*, No. 15-ALJ-17-0253-CC (3/12/18) and *Lowe’s Home Center, LLC v. South Carolina Dept. of Revenue*, No. 14-ALJ-17-0552-CC (12/11/20).



materials; and the cost of the materials is listed individually and separately from labor on the invoice);

(3) whether the customer would perceive the transaction any different than a purchase of the identical materials in a traditional transaction; and

(4) whether the person used a resale certificate to purchase the materials.

*See Home Depot U.S.A., Inc. v. South Carolina Dept. of Revenue*, No. 15-ALJ-17-0253-CC (3/12/18) and *Lowe's Home Center, LLC v. South Carolina Dept. of Revenue*, No. 14-ALJ-17-0552-CC (12/11/20).

#### Retailer-Contractor Acting as Contractor

Finally, if a retailer truly serves as a contractor or subcontractor in the traditional sense for some transactions (e.g., bids on a project against others, enters into a contract upon winning the bid process, etc.), then the building materials purchased for those contracts may be purchased tax paid as a contractor. Generally, in order to purchase building material tax paid as a contractor, the retailer would need to demonstrate, based on its books and records and how it operates, that these purchases were purchases at retail for a construction contract. If the retailer is unable to demonstrate that the purchases were for a construction contract, the retailer's purchases are deemed to be wholesale purchases, and the retailer's transactions with its customers will be treated as retail sales.<sup>26</sup>

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<sup>26</sup> See Chapter 6 ("Gross Proceeds of Sales" and "Sales Price"), Section E for a discussion of "withdrawals for use." See also SC Regulation 117-309.17. See also *Home Depot U.S.A., Inc. v. South Carolina Dept. of Revenue*, No. 15-ALJ-17-0253-CC (3/12/18) and *Lowe's Home Center, LLC v. South Carolina Dept. of Revenue*, No. 14-ALJ-17-0552-CC (12/11/20), both holding the transactions in question to be retail sales and installations, rather than withdrawals for use. (Note: As discussed in Chapter 6, Section E, a withdrawal for use of tangible personal property purchased at wholesale constitutes a retail sale.) See Chapter 16 for more information on transactions involving construction contractors.