

## Chapter 17

### Communications

Communication technology is expanding every day. As such, new and emerging technologies will make available to consumers many new communication services in the future.

Communications are subject to sales and use tax under Chapter 36 of Title 12 pursuant to South Carolina Code §§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.]

It has been the longstanding position of the Department that charges for the ways or means of communication include charges for access to, or use of, a communication system (the manner, method or instruments for sending or receiving a signal of the voice or of messages), whether this charge is based on a fee per a specific time period or per transmission. This is further supported by the definition of the terms “sale” and “purchase,” which are defined in South Carolina Code §12-36-100 to include “a license to use or consume.”

The South Carolina sales and use tax also addresses two other types of communication services by special imposition. South Carolina Code §§12-36-910(B)(5) and 12-36-1310(B)(5) impose the sales and use tax on the gross proceeds accruing or proceeding from the sale or recharge at retail for prepaid wireless calling arrangements.<sup>1</sup>

“Prepaid wireless calling arrangements” means communication services that

- (i) are used exclusively to purchase wireless telecommunications;
- (ii) are purchased in advance;

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<sup>1</sup> See *Unlimited Phone Store, LLC v. South Carolina Dept. of Revenue*, No. 16-ALJ-17-0399-CC (9/21/18), regarding the application of Code Section 12-36-910(B)(5) to sales of prepaid unlimited cellular service plans with unlimited minutes, texting, and data for one or more thirty-day periods. The court held that the plans in question “fall squarely within the definition of ‘prepaid wireless calling arrangements’ pursuant to Section 12-36-910(B)(5),” and that the sales tax applied to the gross proceeds from the sales of those plans.

- (iii) allow the purchaser to originate telephone calls by using an access number, authorization code, or other means entered manually or electronically; and
- (iv) are sold in units or dollars, which decline with use in a known amount.

All charges for prepaid wireless calling arrangements must be sourced to the (i) location in this State where the over-the-counter sale took place; (ii) shipping address if the sale did not take place at the seller's location and an item is shipped; or (iii) either the billing address or location associated with the mobile telephone number if the sale did not take place at the seller's location and no item is shipped.<sup>2</sup>

South Carolina Code §12-36-2645 imposes the sales and use tax on gross proceeds accruing or proceeding from the business of providing 900/976 telephone service except that the applicable rate of the tax is 11%.

## **A. Exemptions and Exclusions**

The sales and use tax law provides several exemptions and exclusions for the charges taxed under South Carolina Code §§12-36-910(B)(3) and 12-36-1310(B)(3).

South Carolina Code §12-36-2120(11) exempts:

- (a) toll charges for the transmission of voice or messages between telephone exchanges;
- (b) charges for telegraph messages;
- (c) carrier access charges and customers access line charges established by the Federal Communications [Commission] or the South Carolina Public Service [Commission]; and
- (d) transactions involving automatic teller machines[.]

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<sup>2</sup> South Carolina Code §§12-36-910(5)(b) and 12-36-1310(5)(b).

South Carolina Code §12-36-60, the definition of “tangible personal property,” includes communications<sup>3</sup> and states in part:

Tangible personal property does not include 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. [Emphasis added.]

South Carolina Code §12-36-910(C) excludes from the sales and use tax the gross proceeds accruing or proceeding from charges for or use of data processing. “Data processing” means the manipulation of information furnished by a customer through all or part of a series of operations involving an interaction of procedures, processes, methods, personnel, and computers. It also means the electronic transfer of or access to that information. Examples of the processing include, without limitation, summarizing, computing, extracting, storing, retrieving, sorting, sequencing, and the use of computers.

South Carolina Code §12-36-2120(3) exempts from the tax:

- (a) textbooks, books, magazines, periodicals, newspapers, and access to on-line information systems used in a course of study in primary and secondary schools and institutions of higher learning or for students’ use in the school library of these schools and institutions;
- (b) books, magazines, periodicals, newspapers, and access to on-line information systems sold to publicly supported state, county, or regional libraries;

Items in this category may be in any form, including microfilm, microfiche, and CD ROM; however, transactions subject to tax under South Carolina Code §§12-36-910(B)(3) and 12-36-1310(B)(3) do not fall within this exemption; [Emphasis added.]

## **B. Taxable Communication Services<sup>4</sup>**

Charges for the following communication services are subject to the sales and use tax pursuant to South Carolina Code §§12-36-910(B)(3) and 12-36-1310(B)(3):

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<sup>3</sup> Also, since communications services are by statute “tangible personal property,” there can be “wholesale sales” of communications services. See *PalmettoNet, Inc. v. South Carolina Tax Commission*, 318 S.C. 102, 456 S.E.2d 385 (1995).

<sup>4</sup> SC Regulation 117-329 and South Carolina Revenue Ruling #17-2.

- Telephone services,<sup>5</sup> including telephone services provided via the traditional circuit-committed protocols of the public switched telephone network (PSTN), a wireless transmission system, a voice over Internet protocol (VoIP) or any of other method<sup>6</sup>
- Teleconferencing services
- Paging services<sup>7</sup>
- Automated Answering Services<sup>8</sup>
- Cable television services<sup>9</sup>
- Satellite programming services<sup>10</sup> and other programming transmission services (includes, but is not limited to, emergency communication services and television, radio, music or other programming services)
- Fax transmission services<sup>11</sup>
- Voice Mail Messaging Services<sup>12</sup>
- E-mail services<sup>13</sup>
- Electronic filing of tax returns when the return is electronically filed by a person who did not prepare the tax return<sup>14</sup>

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<sup>5</sup> See South Carolina Code §12-36-2120(11) for exemptions specifically related to telephone services.

<sup>6</sup> See SC Private Letter Ruling #14-4 concerning a cloud-based service for processing and routing telephone calls within a customer's telephone system.

<sup>7</sup> See South Carolina Information Letter #89-28.

<sup>8</sup> See South Carolina Information Letter #89-28.

<sup>9</sup> Attorney General Opinion #82-41 (6/9/1982).

<sup>10</sup> Under the Telecommunications Act of 1996, a provider of direct-to-home satellite service is exempt from any tax or fee imposed by a local taxing jurisdiction on direct-to-home satellite service. "The term 'direct-to-home satellite service' means only programming transmitted or broadcast by satellite directly to the subscribers' premises without the use of ground receiving or distribution equipment, except at the subscribers' premises or in the uplink process to the satellite." Telecommunications Act of 1996, Pub. L. No. 104-104 (110 Stat. 56), §602.

<sup>11</sup> See South Carolina Revenue Ruling #89-14.

<sup>12</sup> See South Carolina Revenue Ruling #89-14.

<sup>13</sup> See South Carolina Revenue Ruling #89-14.

<sup>14</sup> See South Carolina Revenue Ruling #91-20.

- Database access transmission services (online information services), such as legal research services, credit reporting/research services, charges to access an individual website<sup>15</sup> (including Application Service Providers), etc. (not including computer database information services provided 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>16</sup>
- Streaming services for television programs, movies, music, and other similar content<sup>17</sup>
- Cloud-Based Services for Processing and Routing Telephone Calls within a Customer’s Telephone System<sup>18</sup>

Note: It is the Department’s opinion that charges for mobile satellite communication services, such as automobile satellite radio programming or other mobile communication services, are sourced to the primary place of use of the customer (e.g., the residence of an individual customer) as defined in the Mobile Telecommunications Sourcing Act. (Pursuant to South Carolina Code §§12-36-910(B)(3) and 12-36-1310(B)(3), “charges for mobile telecommunications services ... must be sourced in accordance with the Mobile Telecommunications Sourcing Act as provided in Title 4 of the United States Code.”)

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<sup>15</sup> Note: Charges for the ways or means for the transmission of the voice or messages are subject to the sales and use tax under Code Sections 12-36-910(B)(3) and 12-36-1310(B)(3). Charges by an Internet Service Provider (“ISP”) that allow a customer to access the Internet (“Internet Access”) are charges for the ways and means for the transmission of the voice or messages. However, as discussed below, the Department has not and will not enforce the assessment and collection of the sales and use tax on Internet Access.

In 1998, Congress established a temporary tax moratorium on Internet Access in the Internet Tax Freedom Act. The moratorium was first extended by the Internet Nondiscrimination Act and was later extended several times. The tax moratorium on Internet Access was eventually made permanent as part of the Trade Facilitation and Trade Enforcement Act of 2015. The moratorium prohibits the taxation of Internet Access – a service that allows a user to connect to “the myriad of computer and communications facilities ... which comprise the interconnected world-wide network of networks” known as the Internet (47 U.S.C. Section 1105(4) and (5)).

Since charges to access or use an individual database, such as a website, do not constitute an access to the Internet, these charges do not come within the moratorium and are subject to the tax. Charges to access or use an individual database, such as a website, have been held subject to the tax since 1989 and not subject to the moratorium since 1998. (See SC Revenue Ruling #89-14 which taxed charges to access an individual website as a “database access transmission” as well as SC Revenue Ruling #04-15, SC Revenue Ruling #06-8, and SC Revenue Ruling #17-2.)

Therefore, charges by a third party to access or use that third party’s individual website are subject to the sales and use tax (e.g., monthly charges to access a sports website).

<sup>16</sup> See South Carolina Revenue Ruling #89-14, South Carolina Private Letter Ruling #10-2, and South Carolina Private Letter Ruling #89-21. While the Department has held an ASP (also known as Software as a Service (“SaaS”)) as subject to the sales and use tax as a communications service, see SC Private Letter Ruling #14-2 where the Department held a taxpayer’s Infrastructure as a Service (“IaaS”) was not subject to the sales and use tax as a communications service.

<sup>17</sup> See South Carolina Revenue Ruling #16-5 and South Carolina Private Letter Ruling #18-1.

<sup>18</sup> See South Carolina Private Letter Ruling #14-4.

Charges for the following communication services are subject to the sales and use tax pursuant to South Carolina Code §§12-36-910(B)(5) or 12-36-2645:

- Prepaid wireless calling arrangements (sale or recharge at retail) as defined in South Carolina Code §12-36-910(B)(5)<sup>19</sup> (For information on prepaid telephone calling cards that do not come within the definition of prepaid wireless calling arrangements, see South Carolina Revenue Ruling #04-4.)
- 900/976 telephone services (The State tax rate on this type of communication service is 11%, not 6%)

### C. Non-Taxable Communication Services<sup>20</sup>

Charges for the following communication services are **not** subject to the sales and use tax imposed under South Carolina Code §§12-36-910(B)(3) and 12-36-1310(B)(3):

- Telephone services specifically exempted from the tax, such as toll charges between telephone exchanges and carrier access charges and customers access line charges established by the Federal Communications Commission or the South Carolina Public Service Commission<sup>21</sup>
- Telegraph messages<sup>22</sup>
- Communication services involving automatic teller machines<sup>23</sup>
- Data processing services<sup>24</sup>
- Computer database information services provided 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>25</sup>

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<sup>19</sup> See *Unlimited Phone Store, LLC v. South Carolina Dept. of Revenue*, No. 16-ALJ-17-0399-CC (9/21/18), regarding the application of Code Section 12-36-910(B)(5) to sales of prepaid unlimited cellular service plans with unlimited minutes, texting, and data for one or more thirty-day periods. The court held that the plans in question “fall squarely within the definition of ‘prepaid wireless calling arrangements’ pursuant to Section 12-36-910(B)(5),” and that the sales tax applied to the gross proceeds from the sales of those plans.

<sup>20</sup> SC Regulation 117-329 and South Carolina Revenue Ruling #17-2.

<sup>21</sup> South Carolina Code §12-36-2120(11).

<sup>22</sup> South Carolina Code §12-36-2120(11).

<sup>23</sup> South Carolina Code §12-36-2120(11).

<sup>24</sup> SC Regulation 117-329; South Carolina Revenue Ruling #17-2; South Carolina Private Letter Ruling #13-1; South Carolina Private Letter Ruling #12-2; South Carolina Private Letter Ruling #04-1.

<sup>25</sup> South Carolina Code §12-36-60.

- Electronic filing of tax returns when the return is electronically filed by a person who prepared the tax return<sup>26</sup>
- Internet Access (Services that allow a user to connect to “the myriad of computer and communications facilities ... which comprise the interconnected world-wide network of networks” known as the Internet. This does not include charges to access individual websites, as described above in “Taxable Communication Services.”)
- Non-Automated Voice Mail Messaging Services, including Non-Automated Answering and Messaging Services
- Other charges specifically exempt from the tax under State law or federal law

The Department has also determined that charges for electronically monitoring a customer’s home or business for the purpose of burglary and fire protection were not subject to the sales and use taxes since such charges were not charges for access to, or use of, a communication system (ways or means for the transmission of the voice or messages). The sale or lease of equipment to the customer, or the use of the equipment by the monitoring company, was held subject to the tax based on the specific facts and circumstances.<sup>27</sup>

## D. “Bundled Transactions”

For a customer bill rendered on or after January 1, 2004 that includes telecommunications services in a bundled transaction, where the nonitemized price is attributable to properties or services that are taxable and nontaxable, the portion of the price attributable to any nontaxable property or service is subject to tax unless the provider can reasonably identify that portion from its books and records kept in the regular course of business for purposes other than sales taxes.

Note: A “bundled transaction” is “a transaction consisting of distinct and identifiable properties or services, which are sold for one nonitemized price but which are treated differently for [sales and use] tax purposes.”

**Note: This publication attempts to list as many communication services as possible that the Department has held in the past as subject to the tax, whether through formal advisory opinions, audits or informal advice provided to taxpayers. Charges for other communication services not listed in this publication are still subject to the tax if they constitute charges for the ways or means for the transmission of the voice or messages and are not otherwise exempted under the law.**

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<sup>26</sup> See South Carolina Revenue Ruling #91-20.

<sup>27</sup> See South Carolina Private Letter Ruling #97-4 and South Carolina Technical Advice Memorandum #95-1.