

SC PRIVATE LETTER RULING #07-7

SUBJECT: Sales of Photograph Prints via an Internet Website
(Sales and Use Tax)

REFERENCES: S. C. Code Ann. Section 12-36-910(A) (2000)
S. C. Code Ann. Section 12-36-1310(A) (2000)
S. C. Code Ann. Section 12-36-1110 (Supp. 2006)
S. C. Code Ann. Section 12-36-60 (2000)
S. C. Code Ann. Section 12-36-110 (2000)
S. C. Code Ann. Section 12-36-120 (2000)
S. C. Code Ann. Section 12-36-950 (2000)

AUTHORITY: S. C. Code Ann. Section 12-4-320 (2000)
S. C. Code Ann. Section 1-23-10(4) (2005)
SC Revenue Procedure #05-2

SCOPE: A Private Letter Ruling is an advisory opinion issued to a specific taxpayer by the Department to apply principles of law to a specific set of facts or a particular tax situation. It is the Department's opinion limited to the specific facts set forth, and is binding on agency personnel only with respect to the person to whom it was issued and only until superseded or modified by a change in statute, regulation, court decision, or another Departmental advisory opinion, providing the representations made in the request reflect an accurate statement of the material facts and the transaction was carried out as proposed.

Question:

Are sales by ABC, Inc. of photographic prints to professional photographers, as described in the facts, subject to the sales and use tax?

Conclusion:

Sales by ABC, Inc. of photographic prints to professional photographers, as described in the facts, are wholesale sales not subject to the sales and use tax since the photographer is reselling the photographic prints to his customers, provided ABC, Inc. can document that such sales are wholesale sales or obtains a properly executed resale certificate from the professional photographer.

All charges by ABC, Inc. to the professional photographer that are made in conjunction with, or as part of, the sale at wholesale of the prints, such as shipping, handling, and credit card processing, are not subject to the sales and use tax.

Note: The photographer is liable for the sales tax on the gross proceeds of the sale (total charge for the prints, shipping, handling, and other fees) to the customer, unless the sale is otherwise exempt under the law.

Facts:

ABC, Inc. (“ABC”) operates a business that, among other things, sells cameras, film, and other photographic equipments at retail, provides one hour photo processing services, and provides professional quality photography print services. ABC sells tangible personal property and photographic services to professional photographers.

ABC also provides web hosting that allows the linking of the Internet sites of professional photographers with its own Internet site for the purposes of ordering photographic prints. This system is known as X System (“X”).

X is available primarily to professional photographers who have retail licenses and who provide resale certificates to ABC. ABC collects and remits sales tax on all other sales.

The following are the products and services provided to professional photographers:

ABC’s web hosting service through X includes online proofing, e-commerce shopping, online storage, and direct access to ABC’s lab services for order fulfillment. ABC’s service also allows the photographer to send digital files to the lab for uploading to X. ABC offers several web hosting packages.

X allows the public to access the work of a photographer and order prints and other products offered by the photographer. The ordering process through X works as follows:

1. The photographer uploads a photography database to his or her website hosted by ABC through X.
2. The photographer may have a separate website, but customers are redirected to the X hosted website when ordering.
3. A customer accesses a photographer’s website and select prints to be ordered by filling an online “shopping cart.”
4. Once the customer has completed the ordering process, the customer proceeds to the “checkout.”
5. The customer selects a payment method and shipping preference.

6. ABC makes the prints and ships the prints as directed.
7. ABC, through X, processes the credit card charge and collects the payment. ABC retains the 4% service fee (7% for products not handled by ABC), the print costs charged the photographer by ABC, and the shipping charges if the product is shipped by ABC. The remaining amount of the total proceeds is sent to the photographer. In other words, the receipts from the customer are distributed as follows:
 - (a) Gross Proceeds plus Sales Tax
 - (b) Less: Service Fee (4% or 7%) (This includes the fee charged by *Verisign.*)
 - (c) Net Amount Received by ABC
 - (d) Less: Print Costs charged the photographer by ABC
 - (e) Less: Shipping Costs
 - (f) Net Amount Sent to Photographer

Through this ordering process, the photographer's customer views only the photographer's website. In other words, ABC is essentially an invisible layer between the photographer, the photographer's customer and ABC's lab. If ABC ships the ordered printed directly to the photographer's customer, the shipping documents will not indicate that the package is mailed from ABC.

Discussion:

Code Section 12-36-910(A) imposes the sales tax and states:

A sales tax, equal to [six] percent¹ 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.

Code Section 12-36-1310(A) imposes the use tax and states:

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] percent² of the sales price of the property, regardless of whether the retailer is or is not engaged in business in this State.

¹ Beginning June 1, 2007, the total state sales and use tax rate is 6%. Code Section 12-36-1110, which increased the sales and use tax rate by 1% beginning June 1, 2007, states:

Beginning June 1, 2007, an additional sales, use, and casual excise tax equal to one percent is imposed on amounts taxable pursuant to this chapter, except that this additional one percent tax does not apply to amounts taxed pursuant to Section 12-36-920(A), the tax on accommodations for transients, nor does this additional tax apply to items subject to a maximum sales and use tax pursuant to Section 12-36-2110 nor to the sale of unprepared food which may be lawfully purchased with United States Department of Agriculture food coupons.

² See footnote #1.

Code Section 12-36-60 defines the term “tangible personal property” and states:

“Tangible personal property” means personal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses. It also includes services and intangibles, including communications, laundry and related services, furnishing of accommodations and sales of electricity, the sale or use of which is subject to tax under this chapter and does not include stocks, notes, bonds, mortgages, or other evidences of debt. 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.

Based on the above, in order for the sales or use tax to apply, there must be a retail sale of tangible personal property.

Code Section 12-36-110, defines the terms “retail sale” and “sale at retail” 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.

Code Section 12-36-120 defines the terms a “wholesale sale” and “sale at wholesale” to mean, in part, the sale of

(1) 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.

As such, when a photographer’s customer orders photographs from a photographer via the photographer’s website that is hosted by ABC and ABC prepares the prints as described in the facts, ABC is selling the prints at wholesale to the photographer who in turn is selling the prints at retail to his customer³.

However, Code Section 12-36-950 states:

It is presumed that all gross proceeds are subject to the tax until the contrary is established. The burden of proof that the sale of tangible personal property is not a sale at retail is on the seller.

³ See SC Regulation 117-309.2 which states, in part, that “[p]hotographers ... are primarily engaged in the business of selling tangible personal property to their customers.” See also the last paragraph of Code Section 12-36-70, which defines the terms “retailer” or “seller.” While this provision would allow the Department to consider ABC the retailer for purposes of the transactions in question for the efficient administration of the sales and use tax law, the Department will not exercise that authority in this case.

However, if the seller receives a resale certificate signed by the purchaser stating that the property is purchased for resale, the liability for the sales tax shifts from the seller to the purchaser.

The resale certificate must include the purchaser's name, address, retail sales tax license number, and any other provisions or information considered necessary by the department.

The department may require the seller to provide information it considers necessary for the administration of this section.

Based on the above, sales of prints by ABC are presumed to be sales at retail subject to the sales and use tax unless ABC can prove a sale is a wholesale sale or unless ABC obtains a properly executed resale certificate from the photographer.

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/Ray N. Stevens

Ray N. Stevens, Director

December 14 _____, 2007
Columbia, South Carolina