
State of South Carolina
Department of Revenue
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SC REVENUE RULING #12-1

SUBJECT: Electronically Delivered Software
(Sales & Use Tax)

EFFECTIVE DATE: Applies to all periods open under the statute.

MODIFIES: SC Revenue Ruling #11-2
SC Revenue Ruling #03-5
SC Revenue Ruling #96-3

REFERENCES: S. C. Code Ann. Section 12-36-910 (2000, Supp. 2008)
S. C. Code Ann. Section 12-36-1310 (2000, Supp. 2008)
S. C. Code Ann. Section 12-36-60 (2000)

AUTHORITY: S. C. Code Ann. Section 12-4-320 (2000)
S. C. Code Ann. Section 1-23-10(4) (Supp. 2008)
SC Revenue Procedure #09-3

SCOPE: The purpose of a Revenue Ruling is to provide guidance to the public and to Department personnel. It is an advisory opinion issued to apply principles of tax law to a set of facts or general category of taxpayers. It is the Department's position until superseded or modified by a change in statute, regulation, court decision, or another Departmental advisory opinion.

Questions:

1. If software is sold and delivered electronically whereby the seller personally brings the software to the buyer's location on a laptop computer, establishes a connection between the laptop and the buyer's computer via the Internet, a wireless network, or any other wireless connection in order to download the software into the buyer's computer, and then terminates the connection between the computers and takes the laptop with him when he leaves, is the sales transaction subject to the sales and use tax?

2. If a software programmer personally brings a laptop computer to a customer's location, establishes a connection between the laptop and the customer's computer (wired or wireless), and does not download software but makes changes directly to the source code of the customer's software, is this transaction subject to the sales and use tax?

Conclusions:

1. Software sold and delivered by electronic means via the Internet, a wireless network, or any other wireless connection at the buyer's location, as described in Question #1 above, is not subject to the sales and use tax, provided no part of the software, including back-up tapes, diskettes, or flash drives, is delivered by tangible means.¹

Note: Charges by an Application Service Provider (ASP) that allows a customer to access the ASP website and use the software on that website are subject to the sales and use tax under Code Sections 12-36-910(B)(3) and 12-36-1310(B)(3). See SC Revenue Rulings #06-8 and #03-5 and SC Regulation 117-329.

2. No. If a software programmer personally brings a laptop computer to a customer's location, establishes a connection between the laptop and the customer's computer (wired or wireless), and does not download software but makes changes directly to the source code of the customer's software, this transaction is not subject to the sales and use tax. The software programmer has not sold and delivered software by tangible or electronic means. The software programmer has provided a service by making changes directly to the source code of the customer's software in the manner described in Question #2 above.

Background:

Over the years, the Department has issued several advisory opinions concerning the taxation of software. In 1996, the Department issued an advisory opinion, SC Revenue Ruling #96-3, stating that software delivered electronically via a modem and the telephone lines was not subject to the sales and use tax since it does not constitute the sale of "tangible personal property" as defined in the sales and use tax law.

In subsequent advisory opinions, the Department continued to state that the sale of software delivered electronically from a remote location via a modem and telephone was not subject to the sales and use. See SC Revenue Rulings #11-2 and #03-5.

Recently, questions have arisen as to the taxability of software delivered electronically; not from a remote location, but via the Internet, a wireless network, or any other wireless connection from the seller's laptop at the customer's location. In these circumstances, the seller personally brings the software to the buyer's location on a laptop computer, establishes a connection between the laptop and the buyer's computer via the Internet, a wireless network, or any other wireless connection in order to download the software into the buyer's computer, and then terminates the connection between the computers and takes the laptop with him when he leaves.

In addition, a software programmer may also not download software from a laptop into the customer's computer, but gain access to the customer's computer to make changes directly to the source code of the customer's software.

¹ For information on software delivered by tangible means, see SC Revenue Rulings #11-2 and #03-5.

Law and Discussion:

Code Section 12-36-910(A) states:

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. (Emphasis added.)

Code Section 12-36-1310(A) 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. (Emphasis added.)

Code Section 12-36-60 defines the term "tangible personal property" to mean:

...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. (Emphasis added).

Therefore, the sales and use taxes are imposed with respect to retail sales of tangible personal property. In addition, the term tangible personal property includes the sale or use of intangibles, including communications, that are subject to South Carolina sales or use taxes under Chapter 36 of Title 12.

Furthermore, in *Citizens and Southern Systems, Inc. v. South Carolina Tax Commission*, 280 S.C. 138, 311 S.E.2d 717 (1984), the Supreme Court of South Carolina determined that software sold and delivered to the purchaser by means of magnetic tape was tangible personal property and subject to the sales and use taxes.

In summary, software sold and delivered to a purchaser by tangible means, such as by tape, diskette or flash drive, is a sale subject to the sales or use tax. Software sold and delivered to a purchaser electronically is not subject to the sales and use tax.

Finally, communications are subject to sales and use taxes under Chapter 36 of Title 12 pursuant to Code Sections 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.)

In addressing whether the software is a “communication,” it must be determined whether the purchaser of software that is sold and delivered by electronic means is paying for access or use of the communication system (*e.g.*, the telephone). Applying the “true object test” provides guidance in making this determination. In this instance, the true object of the transaction described in Question #1 is the sale of the intangible software; the “true object” is not the access or use of the communication system. To conclude otherwise stretches the statutory language.

Accordingly, it is the position of the Department that, except for charges by an Application Service Provider (ASP) that allows a customer to access the ASP website and use the software on that website², software sold and delivered by electronic means does not meet the definition of tangible personal property set forth in Code Section 12-36-60 or fall within the provisions taxing communications services under Code Section 12-36-910 or Code Section 12-36-1310 and is therefore not subject to the sales and use tax.

Therefore, if software is sold and delivered electronically whereby the seller personally brings the software to the buyer’s location on a laptop computer, establishes a connection between the laptop and the buyer’s computer via the Internet, a wireless network, or any other wireless connection in order to download the software into the buyer’s computer, and then terminates the connection between the computers and takes the laptop with him when he leaves, the software has been sold and delivered by electronic means (via the Internet, a wireless network, or any other wireless connection at the buyer’s location) and is not subject to the sales and use tax, provided no part of the software, including back-up tapes, diskettes, or flash drives, is delivered by tangible means.

In addition, if a software programmer personally brings a laptop computer to a customer’s location, establishes a connection between the laptop and the customer’s computer (wired or wireless), and does not download software but makes changes directly to the source code of the customer’s software, this transaction is not subject to the sales and use tax since the software programmer has not sold and delivered software by tangible or electronic means. The software programmer has provided a service by making changes directly to the source code of the customer’s software.

For information on software delivered by tangible means, see SC Revenue Rulings #11-2 and #03-5.

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/James F. Etter

James F. Etter, Director

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Columbia, South Carolina

² Charges by an Application Service Provider (ASP) that allows a customer to access the ASP website and use the software on that website are subject to the sales and use tax under Code Sections 12-36-910(B)(3) and 12-36-1310(B)(3). For more information on the taxation of communications services (including Application Service Providers) under the sales and use tax law, see SC Revenue Ruling #06-8 and SC Regulation 117-329.