301 Gervais Street, P.O. Box 125, Columbia, South Carolina 29214

SC REVENUE RULING #89-13

SUBJECT:	Nexus (Use Tax)
EFFECTIVE DATE:	Applies to all periods open under statute.
SUPERSEDES:	All previous documents and any oral directives in conflict herewith.
REFERENCE:	S.C. Code Ann. Section 12-35-810 (1976) S.C. Code Ann. Section 12-35-80 (1976) S.C. Code Ann. Section 12-35-90 (1976) S.C. Code Ann. Section 12-35-815 (Supp. 1988) S.C. Code Ann. Section 12-35-850 (1976) S.C. Code Ann. Section 12-35-890 (Supp. 1988) S.C. Code Ann. Section 12-35-920 (1976) S.C. Code Ann. Section 12-35-870 (1976) S.C. Code Ann. Section 12-35-900 (Supp. 1988) S.C. Code Ann. Section 12-35-95 (Supp. 1988)
AUTHORITY:	S.C. Code Ann. Section 12-3-170 (1976) SC Revenue Procedure #87-3
SCOPE:	A Revenue Ruling is the Commission's official interpretation of how tax law is to be applied to a specific set of facts. A Revenue Ruling is public information and remains a permanent document until superseded by a Regulation or is rescinded by a subsequent Revenue Ruling.

Questions:

1. If residents of South Carolina travel to a foreign state to purchase goods from a retailer not authorized to operate in South Carolina and whose only contacts with South Carolina are through advertising and the delivery of goods, may South Carolina require the out-of-state retailer to collect a use tax with respect to sales and deliveries made to South Carolina residents?

2. If an out-of-state retailer's only contact with South Carolina is through its resident salesman/agent who directly solicits orders from South Carolina residents, may South Carolina require the out-of-state retailer to collect a use tax with respect to sales made to South Carolina residents?

3. If an out-of-state retailer operates a mail-order sales business in a state other than South Carolina, but maintains an office, retail outlet or warehouse in South Carolina which is completely unrelated to the mail-order business, can South Carolina require the out-of-state retailer to collect a use tax with respect to mail-order sales made to South Carolina residents?

Facts:

Certain out-of-state retailers are making sales to South Carolina residents; and, it is questionable as to when such retailers are required to collect and report this State's use tax.

Discussion:

The state's use tax is imposed at Code Section 12-35-810, which reads, in part:

> An excise 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 consump- tion in this State, at the rate of [five] percent of the sales price of such property, regardless of whether the retailer is or is not engaged in business in this State.

Liability for the use tax is provided at Code Section 12-35-850, and reads, in part:

> Every person storing, using or otherwise consuming in this State tangible personal property purchased at retail shall be liable for the tax imposed by this article, and the liability shall not be extinguished until the tax has been paid to the State.

In summary, for the use tax to be applicable, there must be a purchase, at retail, of tangible personal property for storage, use or consumption in this State, and; the property must, in fact, be stored, used or consumed in this State. Also, per Code Section 12-35-850, the liability for the tax is upon the person storing, using or consuming such property.

As for who is required to collect and remit the use tax, Code Section 12-35-890 provides:

> Every seller engaged in making retail sales of tangible personal property for storage, use or other consumption in this State who:
>
> (1) maintains a place of business;
> (2) qualifies to do business;
> (3) solicits and receives purchases or orders by an agent or salesman; or
> (4) distributes catalogs or other advertising matter and by reason thereof receives and accepts orders from residents within the State;
>
> Shall,....., file with the commission a return.....

Further, Code Section 12-35-920 requires the tax to be paid with the return.

Also, the last paragraph of Code Section 12-35-90 provides:

> When, in the opinion of the Commission, it is necessary for the efficient administration of this chapter to regard any salesmen, representatives, truckers, peddlers, or canvassers as the agents of the dealers, distributors, supervisors, employers or persons under whom they operate or from whom they obtain the tangible personal property sold by them, regardless of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors, employers or persons, the Commission may so regard them and may regard such dealers, distributors, supervisors, employers or persons as retailers for purposes of this chapter.

As for what constitutes a retailer who "maintains a place of business" in this State, as used in Code Section 12-35-890(1), Code Section 12-35-80 defines the phrase as:

> .....any retailer having or maintaining within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business or any agent operating within this State under the authority of the retailer or its subsidiary, regardless of whether such place of business or agent is located here permanently or temporarily or whether such retailer or subsidiary is admitted to do business within this State.

Furthermore, Code Section 12-35-870 provides that "[t]he tax required in this article to be collected by the seller shall constitute a debt owed by the seller to this State".

In addition, the Legislature reinforced its intention to require certain out-of-state sellers to collect and remit the use tax when it enacted Code Section 12-35-95. That section reads:

> Retailer, as defined in [Section] 12-35-90, includes a "nonresident retailer" as defined in this section. A nonresident retailer means and includes every person who does not maintain an office or location in this State but who solicits business either by direct representa- tives, indirect representatives, or manufacturers' agents, or by distribution of catalogs or other advertising matter or by any other means whatsoever and by reason thereof receives orders for tangible personal property from consumers for use, consumption, distribution, and storage for use or consumption in this State. This nonresident retailer shall collect the tax imposed by this chapter from the purchaser, and no action either in law or in equity on a sale or transaction as provided by the terms of this chapter may be had in this State by nonresident retailer unless it is affirmatively shown that the provisions of this chapter have been fully complied with.
>
> A nonresident retailer also shall obtain a retail license required by this chapter and, in obtaining this license, he is considered to have one branch or location in this State.

In the event the tax has not been paid to a seller required or authorized to collect the tax, the purchaser must file a return and pay the tax (Code Sections 12-35-900 and 12-35-920).

In summary, while the in-state purchaser is liable for the use tax, an out-of-state seller may be required to collect the tax. In addition, the out-of-state retailer incurs a debt to the state for the taxes required to be collected, if such retailer is required or authorized to collect the tax. To determine whether an out-of-state retailer may be <u>required</u> to collect this State's tax, one must

look to the statute and case law to determine if there is sufficient "nexus"; or, "some definite link, or minimal connection between the person, property or transaction [the State] seeks to tax".

1. The following discussion concerns those situations where an out-of- state retailer advertises in this State and makes deliveries; but whose customers travel to the retailer's out-of-state location to make purchases.

   To determine whether sufficient "nexus" exists in such situations, it is necessary to review pertinent case law.

   In Miller Brothers v. Maryland, 347 U.S. 340, 347 (1954), the U.S. Supreme Court ruled "[t]he occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising" does not satisfy the requisite minimal connection between the taxing state and the out-of-state retailer. Such activities do not constitute "an invasion or exploitation of the consumer market" in the taxing state. Id.

   However, when confronted with the same issue, several state courts distinguished the Miller Bros. decision and found the requisite minimal connection between the taxing state and the out-of-state retailer. See In re Weber Furniture, 290 N.W.2d 865, 868-69 (1980); Rowe-Genereux, Inc. v. Vermont Dept. of Taxes, 138 Vt. 130, 134-39, 411 A.2d 1345, 1348-50 (1980); Cooey-Bentz Co. v. Lindley, 66 Ohio 54, 55-6, 419 N.E.2d 1087, 1088 (1981); Goods Furniture v. Iowa Bd. of Equal., 382 N.W.2d 145, 149-50 (1986), cert. denied, 479 U.S. 817 (1986). In distinguishing the Miller Bros. decision, the courts focused primarily upon: (1) how frequently deliveries were made to the taxing state via company truck(s), and (2) to what extent did the retailer's advertising reach residents of the taxing state.

   There is a strong presumption of minimal connection when the out-of-state retailer delivers goods to the taxing state via company truck on a regular or persistent basis. By making deliveries via company truck, the out-of-state retailer takes advantage of the taxing state's police protection as well as the roads it built for its residents' use. The presumption becomes even stronger when the retailer's employees install or assemble the goods they deliver. Entry to service or repair previously delivered goods furthers the presumption as well. Id.

   The following in-state activities also serve to strengthen the presumption of a minimal connection between the out-of-state retailer and the taxing state. One court held the out-of-state retailer's "free delivery" policy was instrumental in creating a market within the taxing state. In re Weber Furniture, 290 N.W.2d at 869. Another court held the retailer's personal financing of sales to out-of-state customers provided the retailer with a perfected security interest in consumer goods located in the taxing state. Thus, the retailer was deemed to have an ownership interest in goods located in the taxing state. The same court held that the use of the taxing state's courts and sheriff to repossess such goods also contributed to their finding of the requisite minimal connection. Rowe-Genereux, Inc., 411 A.2d at 1350. Two of the courts reasoned that the delivery men were agents of the out-of-state retailer and concluded the retailer was "doing business" within the taxing state. In re Weber Furniture, 290 N.W.2d at 867-68 and Goods Furniture, 382 N.W.2d 147-48. (See Revenue Ruling #88-12)

When the out-of-state retailer uses the taxing state's advertising media (ie; newspapers, radio and/or television stations, billboards, etc.), there is a strong presumption the retailer actively sought to create a market in the taxing state via direct solicitation of its residents. See Rowe-Genereux, Inc., 411 A.2d 1349-50; In re Weber 290 N.W.2d at 866; Cooey-Bentz Co., 419 N.E.2d at 1088; Goods Furniture, 382 N.W.2d at 150. The presumption is not so strong, however, when the retailer uses the advertising media of the state in which his business is located, but whose circulation or coverage extends to residents of the taxing state. A question arises as to whether such extension is incidental or extensive. If incidental, the retailer's connection with the taxing state would be insufficient. Miller Bros., 347 U.S. at 347. The state courts distinguishing Miller Bros. did not address this question.

The state courts qualified their decisions by requiring the out-of-state retailer to collect a use tax only on those sales involving delivery of goods to the taxing state via retailer's truck. This qualification dealt with the argument set forth in Miller Bros. that it was too difficult for the retailer to ascertain the destination of the goods sold. 347 U.S. at 344. When the retailer delivers goods via company truck, their destination is readily apparent and the burden is said to be minimal. See Rowe-Genereux, Inc., 411 A.2d at 1350; In re Weber Furniture, 290 N.W.2d at 869; Cooey-Bentz Co., 419 N.E.2d 1088.

2. We now turn to a discussion of those situations where an out-of-state retailer has an agent or salesman who directly solicits orders from residents of South Carolina.

An important distinction exists between Questions #1 and #2 as to the location of the sales transaction. In #1, residents of the taxing state travel to the out-of-state retailer's store to place their orders. In #2, the out-of-state retailer travels to the taxing state, via its salesmen, to solicit orders. Scripto, Inc. v. Carson, 362 U.S. 207, 212-13 (1960). This distinction is important for determining whether to levy a sales or a use tax. McLeod v. J. E. Dilworth, 322 U.S. 327 (1944). In #1, the "sale" was obviously consummated at the retailer's store. Since the store is located beyond the taxing state's borders, the taxing state does not have jurisdiction to tax the transaction. The taxing state may have jurisdiction, however, to tax the use and enjoyment of those goods once they have come to rest in the taxing state. Thus, the imposition of a use tax may be appropriate.

In #2, a question arises as to where the sale was consummated. If the retailer's agent is authorized to accept the orders solicited, the sale is said to occur within the taxing state's borders. Thus, the taxing state would have jurisdiction over the transaction and the imposition of a sales tax would be appropriate. See McGoldrick v. Berwind White Coal Ming Co., 309 U.S. 33 (1940) (Pennsylvania Corporation held liable for collection of a New York City sales tax since orders were accepted in N.Y.C. by corporation's agent operating in N.Y.C.). If, however, the agent must remit all solicited orders to the retailer's home office for approval, acceptance of the order occurs out-of-state and the taxing state loses its jurisdiction to impose the sales tax. However, if the goods subsequently come to rest in the taxing state, then the taxing state may impose the use tax.

Salesmen entering the taxing state to solicit sales on behalf of the out-of-state retailer are considered the retailer's agents. Through its agents' activities, the out-of-state retailer is said to be maintaining a place of business in the taxing state." S.C. Code Sections 12-

35-80 and 12-35-90 and General Trading Co. v. State Tax Commission, 322 U.S. 335, 336 (1944). Therefore, South Carolina is statutorily authorized to require the out-of-state retailer to collect its use tax; provided a sufficient minimal connection exists between the retailer and South Carolina.

The test for ascertaining the existence of a sufficient minimal connection is the "nature and extent of the corporation's activities" in the taxing state. Scripto, Inc., 362 U.S. at 211-12. A crucial factor "is whether the activities performed in the taxing state on behalf of the retailer are significantly associated with its ability to establish and maintain a market in the state for its sales." Tyler Pipe Indus. v. Washington State Dept. of Rev., 483 U.S. 232, 107 S.Ct. 2810, 2822 (1987). The daily calling on customers and solicitation of orders on behalf of the corporation constituted such activities and provided the requisite minimal connection. Id.

The old notion that "mere solicitation" is not "doing business" when it is regular, continuous and persistent is fast losing its force. Such activities have the same "economic consequences as does maintaining an office for soliciting and even contracting purposes or maintaining a place of business, where the goods actually are shipped into the state from without for delivery to the particular buyer." General Trading Co., 322 U.S. at 354 (Rutledge, J., concurring). Thus, if "continuous, regular and not intermittent or casual", the solicita- tion of orders provides the requisite minimal connection between the retailer and the taxing state. Id. However, the goods acquired out-of-state must come to rest within the taxing state as well.

3. The third situation to be addressed is when an out-of-state mail order operation, which makes sales into South Carolina, maintains an office, retail outlet or warehouse in this State (whether related or unrelated to the mail-order activities).

   The courts have established that a retailer may not departmentalize its in-state retail and out-of-state mail-order operations to avoid collection of the taxing state's use tax on retailer's mail-order sales. Retailers' in-state and out-of-state operations are to be considered in the aggregate for purposes of use tax collection. Nelson v. Montgomery Ward Co., 312 U.S. 373, 375 (1941); Nelson v. Sears, Roebuck and Co., 312 U.S. 359, 364 (1941); National Geographic Society v. California Bd. of Equal., 430 U.S. 551, 560-61 (1977). Therefore, mail-order sales administered out-of-state are to be considered a part of the retailer's in-state operations.

   However, the retailer's in-state activities must be sufficient to establish the requisite minimal connection between the retailer and the taxing state. This minimal connection is easily satisfied when the retailer maintains a retail outlet, office or warehouse within the taxing state. The fact that mail-order goods are delivered by common carrier or the mails is not relevant. National Geographic Society, 430 U.S. at 560-61. However, delivery by common carrier or the mails would be relevant if the retailer's in-state activities did not provide the requisite minimal connection between the retailer and the taxing state. National Bellas Hess v. Department of Rev., 386 U.S. 753 (1967).

Conclusions:

1. The State may require an out-of-state retailer to collect and remit the use tax when the retailer: (1) delivers goods into South Carolina via company truck on a regular or persistent basis and (2) uses South Carolina's advertising media to solicit its residents to create a market within this State. Under such circumstances, South Carolina may require the out-of-state retailer to collect its use tax on goods sold to South Carolina residents; even though, such residents travel to the retailer's location to make purchases.

   NOTE: In those situations where an out-of-state retailer does not use South Carolina advertising media, but the media's coverage or circulation extends into South Carolina, a written determination should be requested as to whether such advertising is "extensive".

2. The State may require an out-of-state retailer to remit the sales tax when the retailer has a salesman/agent who: (1) solicits orders within this State, on a regular, continuous and persistent basis; and, (2) has authority to accept such orders on behalf of the retailer.

   If the salesman/agent (who solicits orders within this State on a regular, continuous and persistent basis) does not have authority to accept orders, but must seek approval from the out-of-state retailer, then the use tax would be applicable.

3. The State may require an out-of-state mail-order retailer to collect and remit the use tax, if such retailer has an office, retail outlet or warehouse located in South Carolina. This is so, even if the in-state and out-of-state activities are unrelated.

SOUTH CAROLINA TAX COMMISSION

s/S. Hunter Howard Jr.
S. Hunter Howard, Jr., Chairman

s/A. Crawford Clarkson Jr.
A. Crawford Clarkson, Jr., Commissioner

s/T. R. McConnell
T. R. McConnell, Commissioner

Columbia, South Carolina
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