



SC REVENUE RULING #89-9

SUBJECT: Refunds or Credits
(Sales and Use Tax)

EFFECTIVE DATE: Applies to all open periods.

SUPERSEDES: All previous documents and any oral directives in conflict herewith.

REFERENCE: S.C. Code Ann. Section 12-54-80 (Supp. 1987)
S.C. Code Ann. Section 12-47-440 (1976)

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 A Revenue Ruling is public information and remains a permanent document until superseded by a Regulation or is rescinded by a subsequent Revenue Ruling.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. a) Is an in-state lessor, who has failed to file returns, entitled to a refund of sales taxes paid to another in-state retailer more than three years ago?
b) Is an in-state lessor, who has failed to file returns, entitled to a credit for sales taxes paid to another in-state retailer more than three years ago?
2. a) Is an in-state lessor, who has failed to file returns, entitled to a refund of use taxes paid to an out-of-state seller more than three years ago?
b) Is an in-state lessor, who has failed to file returns, entitled to a credit for use taxes paid to an out-of-state seller more than three years ago?

Facts:

A taxpayer has operated for several years as a lessor, but has failed to obtain a retail license and remit the tax on rentals, pursuant to the State's sales and use tax laws. The equipment leased by the taxpayer was purchased from licensed in-state retailers or out-of-state sellers who, the taxpayer contends, charged the tax on such transactions. However, such taxes would have been remitted to the State more than three years ago.

The Commission has conducted an audit of the lessor's business and is prepared to issue an assessment; however, the taxpayer contends that credit should be allowed for the tax paid on purchases of the equipment in question, as such purchases were for resale.

Discussion:

1. "The South Carolina sales tax is a tax upon the vendor and is imposed upon the privilege of selling tangible personal property at retail." (1967-68 Ops. Att'y Gen., No. 2472, p. 14) This opinion cited an opinion issued by the Comptroller of the United States on August 7, 1956, which reads, in part:

It is obvious from the above-cited provisions of South Carolina Law that the tax in question is a tax on the vendor. Although under Section 65-1047 the vendor may pass on the tax to the vendee, this is not mandatory and the vendor's failure to do so does not affect his liability for the tax. Thus, it is clear that the legal incidence of the tax is on the vendor rather than the purchaser....

In Furman University v. Livingston, 244 S.C. 200, 136 S.E. 2d 254 (1964), it was held that "[t]he right...to sue for a refund of taxes erroneously, improperly or illegally assessed is restricted to those on whom the tax liability is imposed." The court further held that:

It is fundamental that one without interest in the subject matter of a law suit has no legal standing to prosecute it. Accordingly, a person who has no financial interest in taxes alleged to have been erroneously collected has no legal standing to sue for their refund.

We must also review the issue as if the in-state retailer has assigned any refund rights he may have to the lessor.

In Slater v. South Carolina Tax Commission, 280 S.C. 584, 314, S.E. 2d 31 (Ct. of Appeals, 1984), the court held that:

it is our opinion that the assignments which Slater received from the sellers from whom it purchased the food supplies are valid transfers of their rights to a refund of taxes which Slater paid.

The law of South Carolina has long recognized that a chose in action can be validly assigned in either law or equity. Forrest v. Warrington 2 Desaus. Eq. 254 (1804).

While our Supreme Court has apparently not ruled specifically on the assignability of a claim for tax refund, the greater weight of authority allows such a claim to be assigned (emphasis added).

The court concluded:

We hold that Slater, as assignee of the various sellers from whom it purchased food supplies, acquired their rights to collect refund of sales taxes erroneously, improperly or illegally assessed, collected or paid as provided by Section 12-47-440. Of course,

Slater, as assignee, would acquire no greater rights than the sellers themselves had, and its right to collect refund is subject to any defense which the Commission might have against them (emphasis added).

Code Section 12-47-440 reads, in part:

Notwithstanding any other provisions of this Title, whenever it shall appear to any taxpayer that any license fee or tax imposed under this Title has been erroneously, improperly or illegally assessed, collected or otherwise paid over to the Commission, the taxpayer, by whom or on whose behalf the license fee or tax was paid, may make application to the Commission to abate or refund in whole or in part such license fee or tax. Should the Commission, after having given such taxpayer a reasonable opportunity to be heard, decline to make such abatement or refund, the taxpayer may, within thirty days of the date of receipt of notice of the Commission's action declining the abatement or refund, bring an action against the Commission for recovery of the license fee or tax. The provisions of this section shall apply whether or not the license fee or tax in question was paid under protest, but shall only be available where the application provided for here is made in writing to the Commission within a period of three years from the date the license fee or tax was due to have been paid, without regard to extensions of time for payment, or if a later date would result, within one year of payment where an additional license fee or tax is assessed and paid (emphasis added).

Further..."a refund of taxes is solely a matter of governmental or legislative grace and any person seeking such relief must bring himself clearly within the terms of the statute authorizing the same." Guaranty Bank and Trust v. South Carolina Tax Commission, 254 S.C. 82, 173 SE 2d 367 (1970).

In summary, where the retailer has sold tangible personal property to the lessor, such retailer may assign his right to the refund to the lessor. However, since the retailer's right to request a refund is limited to three years, by Code Section 12-47-440, the lessor can receive no greater right. Therefore, his right to a refund is also limited to three years.

However, our review cannot be limited to refunds. We must also consider the retailer's right to assign credits. Code Section 12-54-30 reads, in part:

If the Commission discovers on examination of a return or otherwise that the tax, penalty, or interest paid by any person is in excess of the amount legally due, the Commission may order a refund or give credit for the overpayment. Upon the allowance of a credit of [sic] refund of any tax, penalty, or interest paid, interest is allowed and paid on the amount of the credit or refund at the rate provided for in Section 12-54-20 from the date the tax, penalty, or interest was paid to the date the order for refund or credit was issued.

Therefore, the Commission has the authority, under Code Section 12-54-30, "to give credit" for an overpayment. As cited above, the case of Slater v. South Carolina Tax

Commission, supra, held that choses in action are assignable. As such, a right to a credit is assignable where the assignor has sold tangible personal property, upon which the tax was paid, to the assignee.

Revenue Ruling 81-87, infra, of the Internal Revenue Service held that "in order to ascertain whether there has been an overpayment of tax, adjustments that decrease the tax must be considered as well as adjustments that increase the tax."

In summary, the retailer has a right to a credit and if such is assigned to the lessor, the Commission must consider it in determining if taxes are due, just as if the Commission were auditing the retailer who assigned the credit. However, there must be a retailer-purchaser relationship between the assignor and assignee.

2. The second question concerns the use tax paid to an out-of-state seller by an in-state lessor, and the lessor's right to seek a refund of the use tax. In Furman University v. Livingston, supra, the court held that:

A withholding or collection agent who has reimbursed himself by withholding or collecting the amount of the taxes from a third party is not entitled to a refund of such taxes. In such case, the right to a refund is in the "taxpayer" from whom the funds were withheld or collected (emphasis added).

In addition, Code Section 12-35-850, with respect to the use tax, 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,....."

In summary, the purchaser is the taxpayer with respect to use tax collected from him by an out-of-state seller and remitted to the State. As such, the purchaser has a "financial interest in taxes alleged to have been erroneously collected...."

In Argent Lumber Co. v. Query, 178 S.C. 1, 182 S.E. 93, (1935), the court reviewed an income statute (Section 2461) similar to Code Section 12-54-30 (previously cited). The court held:

It will be seen, therefore, that the respondents' position that the Tax Commission has authority to order a refund is limited by the terms of Section 2461 in its scope, and confers the power and authority upon the Tax Commission to refund illegally collected income tax, penalty, or interest, when it discovers from the examination of the return or otherwise that the amount paid by any taxpayer is in excess of the amount legally due. The allowance of such a refund is not made obligatory, and no provision for its enforcement by the taxpayer by suit against the state, without its consent, is contained in this section of the Code.

On the other hand, the taxpayer must file his claim for revision within one year from the filing of the return or receipt of notice of additional tax assessment.

The court therefore concluded that the statute permitted the Commission to issue a refund; however, the taxpayer could not require the Commission to issue a refund since the time for filing a claim had expired. The taxpayer has failed to file returns; therefore, the issue of whether or not credits must be considered along with assessments, for periods beyond the normal three year statute, must be reviewed.

Revenue Ruling 81-87, 1981-1 CB 580, of the Internal Revenue Service, provides an analogous situation. The issue considered was: "Must all adjustments that increase or decrease taxable income be taken into account when determining the amount of an allowable credit or refund?" It was held that:

A taxpayer is not entitled to a refund unless the taxpayer has in fact overpaid the tax. In Lewis v. Reynolds, 284 U.S. 281 (1932), XI-1 C.B. 130, the Supreme Court affirmed the Court of Appeals' holding that, in determining whether a taxpayer has overpaid, it is proper for the Service to redetermine the taxpayer's entire tax liability, although the applicable statute of limitations bars the assessment and collection of any additional tax. The court recognized that, in order to ascertain whether there has been an overpayment of tax, adjustments that decrease the tax must be considered as well as adjustments that increase the tax. The opinion of the court affords no basis for assuming that the tax and overpayment may be computed to the detriment of the taxpayer by including only adjustments that increase the tax (emphasis added).

In summary, when conducting an audit, the Commission must consider adjustments which decrease, as well as increase, the measure or basis for the use tax.

Furthermore, 1979 Op. Atty. Gen. No. 79-46, P.63, which concerns refunds of taxes authorized by the legislature in Section 83 of Act 644 of 1978 reads, in part: "In the absence of proof that the tax was paid, the refund cannot be granted and the Tax Commission thus has the duty to examine the claimant's records for such purposes."

The opinion also cited Asmer v. Livingston, 225 S.C. 341, 82 S.E. 2d 465 (1954), in which the court held that:

A refund of taxes is solely a matter of governmental grace, and any person seeking such relief must bring himself clearly within the terms of the statute authorizing same, and the weight of authority seems to be that such statutes are to be strictly construed against the taxpayer and should not be strictly construed, against the State (emphasis added).

Conclusions:

1. Sales Tax:

- a. Refunds: An in-state lessor is not entitled to a refund of sales tax remitted by another retailer to the State more than three years ago. In addition, an assignment of refund rights cannot be made where a period of time greater than three years has transpired.

- b. Credits: An in-state lessor is entitled to a credit for sales tax remitted by another retailer to the State more than three years ago, where such retailer has assigned his right to the credit to the lessor. However, there must be a retailer-purchaser relationship between the assignor and assignee. Since the lessor is not entitled to a refund of the sales tax in question, the credit for the periods beyond the normal three year statute may not exceed the assessed liability for the audit period, as such would constitute a refund.

2. Use Tax:

- a. Refunds: An in-state lessor is not entitled to a refund of use tax remitted by an out-of-state seller to the State more than three years ago.
- b. Credits: An in-state lessor is entitled to a credit for use tax remitted by an out-of-state seller to the State more than three years ago. Since the lessor is not entitled to a refund of the use tax in question, the credit for the periods beyond the normal three year statute may not exceed the assessed liability for the audit period, as such would constitute a refund.

It is important to note that, with respect to both sales and use tax, he in-state lessor must document that such taxes were paid to another in-state retailer or an out-of-state seller, thereby "[bringing] himself clearly within the statute authorizing [the credit]."

NOTE: SEE SC REVENUE PROCEDURE #89-1

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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