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

S.C. REVENUE RULING #91-12

SUBJECT:	Refund for Use Tax Collected and Remitted by an Out-of-State Retailer (Use Tax)
TAX ANALYST:	Steve Hallman
EFFECTIVE DATE:	Applies to all periods open under the statute.
SUPERSEDES:	All previous documents and any oral directives in conflict herewith.
REFERENCE:	S.C. Code Ann. Section 12-36-1310 (Supp. 1990) S.C. Code Ann. Section 12-36-1330 (Supp. 1990) S.C. Code Ann. Section 12-36-1350 (Supp. 1990) S.C. Code Ann. Section 12-36-1370 (Supp. 1990)
AUTHORITY:	S.C. Code Ann. Section 12-4-320 (1976) S.C. 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 A Revenue Ruling is public information and remains a permanent document until superseded by a Regulation or is rescinded by a subsequent Revenue Ruling.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. Is an out-of-state retailer required to collect and remit the South Carolina use tax on a sale of tangible personal property if delivery is made to the purchaser in the state where the retailer is located?

2. If an out-of-state retailer is not required to collect the use tax on such transactions, then can he obtain a refund from the Commission for use tax erroneously remitted to the State?

3. If an out-of-state retailer is not required to collect the use tax on such transactions, then can the purchaser obtain a refund from the Commission for use tax erroneously collected by the out-of-state retailer?

Facts:

An out-of-state retailer, who is licensed to collect the South Carolina use tax, makes delivery to a South Carolina customer outside South Carolina (e.g. customer pickup, over-the-counter sales, etc.) and the customer subsequently brings the property into South Carolina for storage, use or consumption. When audited by the taxing authority of the state where the retailer is located, the retailer is assessed that state's sales tax.

Discussion:

Prior to discussing the various issues, we must review the basic theory of the use tax - imposition of the tax, liability for the tax, and the responsibilities of the seller.

Code Section 12-36-1310(A) 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 five percent of the sales price of the property, regardless of whether the retailer is or is not engaged in business in this State.

Pursuant to Code Section 12-36-1330:

(A) Every person storing, using, or otherwise consuming in this State tangible personal property purchased at retail, is liable for the use tax, until the tax is paid to the State.

(B) A receipt from a retailer:

(1) maintaining a place of business in this State, or

(2) authorized by the commission to collect the use tax, is sufficient to relieve the purchaser from further liability for tax to which the receipt refers.

* * * *

Code Section 12-36-1350 reads, in part:

(A) Every seller making sales of tangible personal property for storage, use, or other consumption in this State...shall... collect the use tax from the purchaser...

* * * *

(C) The tax required in this article to be collected by the seller constitutes a debt owed by the seller to this State. (emphasis added)

Further, Code Section 12-36-1370 states:

(A) It is presumed that tangible personal property sold by any person for delivery in this State is sold for storage, use, or other consumption in this State, unless the seller

takes from the purchaser a certificate, signed by and bearing the name and address of the purchaser, to the effect that the purchase was for resale.

(B) It is also presumed that tangible personal property received in this State by its purchaser was purchased for storage, use, or other consumption in this State.(emphasis added)

In Bank of America National Trust and Savings Association v. State Board of Equalization, 26 Cal. Rptr. 348, 209 Cal. App. 2d 780 (1962), the question of whether a use tax liability is imposed upon the retailer or consumer was addressed by the court in California. In reaching its decision, the court considered language from portions of the California statute relative to use tax that is very similar to language found at Sections 12-36-1310, 12-36-1330, and 12-36-1350 of the Code of Laws of South Carolina. The finding states in part:

> ...As we have hereinabove discussed the use tax is a tax levied upon the purchaser. It is not a tax on the retailer; nor does it shift to him because he has the duty to collect it from the consumer. The retailer is merely the agent through which the collection is made... The provision making the tax a debt of the retailer to the State, where he is required to collect it, is part of a valid statutory scheme making the retailer an agent of the State for collection, and its effect, where such collection is not made, is merely to hold the collection agent liable for his default in the performance of his duty as such. (Brandtjen & Kluge v. Fincher, supra, 44 Cal. App.2d Supp. 939, 942-943, 111 P.2d 979.) As said in Brandtjen & Kluge, "the unpaid tax may yet be collected by the state from the purchaser under sections * * * which provide proceedings looking to such collection." The liability of the retailer is not, therefore, for the use tax itself but for an amount equivalent to it because of this default in his duty as collection agent. The taxpayer is the person ultimately liable for the tax itself, and not the person who pays the tax liability. (See Colorado Bank v. Bedford, 310 U.S. 41, 60 S.Ct. 800, 84 L.Ed. 1067) And, as pointed out in Brandtjen & Kluge, the retailer is merely paying the debt of another when he pays the purchaser's tax, and as such stands in a position analogous to that of a surety for the purchaser so as to entitle him to reimbursement. Accordingly, the liability of the retailer under section 6204, by virtue of its wording and as construed by the cases, is for a debt rather than for taxes....(emphasis added)

In summary, the purchaser is the taxpayer and has the liability for the use tax unless he has a receipt showing the tax was paid to an out-of-state retailer who is required or authorized to collect the tax or the purchase was for resale. The retailer acts as a collection agent for the State and is not the party liable for the tax, but has a debt to the State for an amount equivalent to the tax he is required to collect.

Retailer's Requirement to Collect and Remit Use Tax

The first issue to be addressed is whether or not the out-of-state retailer is required to collect and remit the use tax when the South Carolina purchaser travels to the out-of-state retailer's location to accept delivery.

In Miller Bros. Co. v. State of Maryland, 347 U.S. 340, 74 S.Ct. 535 (1954), the United States Supreme Court considered the power of a state to impose a duty upon an out-of-state merchant to collect and remit a purchaser's use tax. The opinion states in part:

> ...liability [for the use tax] arises only upon importation of the merchandise to the taxing state, an event which occurs after the sale is complete and one as to which the vendor may have no control or even knowledge, at least as to merchandise carried away by the buyer....

Thus, an out-of-state retailer cannot be required to collect this State's use tax unless delivery is made to the purchaser within South Carolina.

Refund to Out-of-State Retailer For Use TaxCollected and Paid In Error

As for whether an out-of-state retailer may obtain a refund of use tax erroneously collected and paid, the Supreme Court of South Carolina in Furman University v. Livingston, 244 S.C. 200, 136 S.E.2d 254 (1964), an admissions tax case, ruled:

> ... A withholding or collection agent who has reimbursed himself by withholding or collecting the amount of the taxes from a third person 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....

Since the purchaser is liable for the use tax (Code Section 12-36-1330) and, therefore, is the "taxpayer" (see Code Section 12-36-40 and Bank of America National Trust and Savings Association v. State Board of Equalization, supra), the right to a refund of use tax is that of the purchaser, not the retailer.

This discussion would not be complete without a review of so-called "assignments".

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

> ...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....

Having established that the right to a refund may be assigned, it must be determined if the taxpayer (the purchaser) has any rights to assign.

Again quoting from Code Section 12-36-1310, the "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...." Therefore, unless a particular transaction is exempted or excluded, the use tax is due upon the property being stored, used or consumed in this State. Once the purchaser has stored, used or consumed the property in South Carolina, the purchaser (the taxpayer) has no refund rights to assign to the out-of-state retailer as the tax is due.

Refund to Purchaser For Use TaxErroneously Paid to Retailer

The third question concerns whether or not the purchaser (the retailer's South Carolina customer) may be given a refund for use tax erroneously collected by the out-of-state retailer.

As previously stated, Code Section 12-36-1330 imposes the use tax upon "[e]very person storing, using, or otherwise consuming in this State tangible personal property purchased at retail...." Therefore, once the purchaser has stored, used or consumed tangible personal property in this State, the use tax is due and a refund is not warranted. (Since the purchaser has paid the tax to the out-of-state retailer who, in turn, has remitted it to South Carolina, the purchaser has no further liability.)

Conclusions:

1. An out-of-state retailer is not required to collect this State's use tax when a South Carolina customer takes delivery of tangible personal property in the state where the retailer is located.

2. An out-of-state retailer may not obtain a refund for use tax erroneously collected from the purchaser and remitted to this State.

3. A purchaser may obtain a refund for use tax erroneously paid to an out-of-state retailer if the property is not, in fact, stored, used or consumed in South Carolina.

   However, a purchaser may not obtain a refund for use tax erroneously paid to an out-of-state retailer if the property is, in fact, stored, used, or consumed in South Carolina.

   NOTE: Code Section 12-36-1310(C) allows the purchaser to take "as a credit against the use tax due this State" any "sales or use tax... due and paid in [another] state." To take the credit, the purchaser must substantiate payment of the other state's tax.