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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

Case No. 14-ALJ-17-0552-CC

Appellate Case No. 2021-000031

Lowe's Home Centers, LLC

Appellant,

v.

South Carolina Department of Revenue

Respondent.

RECORD ON APPEAL
Volume 10 of 12

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State of South Carolina
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SC REVENUE RULING #08-11

SUBJECT: Withdrawals from Inventory for Use in South Carolina or Outside of South Carolina (Sales and Use Tax)

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

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

REFERENCES: S. C. Code Ann. Section 12-36-910(A) (2000)
S. C. Code Ann. Section 12-36-1310 (2000; Supp. 2007)
S. C. Code Ann. Section 12-36-1110 (Supp. 2007)
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 12-36-90 (2000, Supp. 2007)
S. C. Code Ann. Section 12-36-130 (2000, Supp. 2007)
S. C. Code Ann. Section 12-36-2120(36) (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: 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 It is the Department's position until superseded or modified by a change in statute, regulation, court decision, or another Departmental advisory opinion.

Question:

What is the application of the sales and use tax with respect to tangible personal property purchased at wholesale that is withdrawn from inventory and used or consumed in connection with the business, or used or consumed by the person withdrawing it, whether such tangible personal property is withdrawn, used or consumed within or without South Carolina?

Conclusion:

Since a withdrawal, use, or consumption of tangible personal property purchased at wholesale each constitute a "retail sale," any one such event occurring in South Carolina constitutes a "retail sale" within South Carolina and is subject to the tax based on the fair market value of the tangible personal property that is withdrawn, used or consumed in connection with the business or used or consumed by the person withdrawing it.

For example:

(1) If tangible personal property is withdrawn from inventory in South Carolina for use or consumption inside or outside of South Carolina, then the sales tax is due based on the fair market value of the tangible personal property since the withdrawal ("retail sale") of the tangible personal property occurred within South Carolina. See Exhibit "A" for more details.

(2) If tangible personal property is withdrawn from inventory outside of South Carolina for use or consumption in South Carolina and then used and consumed in South Carolina, then the use tax is due based on the fair market value of the tangible personal property since the withdrawal outside of South Carolina constitutes a "purchase at retail" and the use or consumption of the tangible personal property occurred within South Carolina.

However, a credit under Code Section 12-36-1310(C) will be allowed against the South Carolina use tax for any tax legally due and paid in the other state on the withdrawal occurring in that state.

See Exhibit "A" for more details.

(3) If tangible personal property is transferred from inventory in South Carolina to an inventory outside of South Carolina where it will be held for sale, then no sales tax is due if any tangible personal property is subsequently withdrawn, used, or consumed outside of South Carolina since a withdrawal, use or consumption ("retail sale") of the tangible personal property has not occurred in South Carolina. If, however, any tangible personal property is subsequently withdrawn from the inventory outside of South Carolina for use or consumption in South Carolina, see Example #2 above for guidance. See Exhibit "A" for more details.

(4) If tangible personal property is transferred from inventory outside of South Carolina to an inventory in South Carolina where it will be held for sale, then the no sales tax is due until the tangible personal property is either sold at retail in South Carolina or is withdrawn, used or consumed ("retail sale") in South Carolina. See Exhibit "A" for more details.

Tangible personal property withdrawn from inventory and used or consumed in connection with the business or used or consumed by the person withdrawing it includes, but is not limited to, tangible personal property used by the business, given to employees

for their personal use, or given to employees to give away to customers or potential customers as a promotion or for purposes of goodwill.

For more detailed examples, see the attached charts in Exhibit "A" of this advisory opinion.

Facts:

Tangible personal property is purchased at wholesale by a wholesaler or retailer for resale to retailers or consumers. The tangible personal property will be stored in inventory at a distribution facility, warehouse, or retail facility.

Some items in inventory will not be sold, but withdrawn from the inventory and sent to employees to personally use or consume. Examples include, but are not limited to, clothing, sporting equipment, or household items the employee will wear or use or consume. Other items in inventory will also not be sold, but withdrawn from the inventory and sent to employees to give away free of charge to customers as a promotion.

In some cases, the items will be withdrawn from inventory held in South Carolina and sent to employees outside of South Carolina to be used, consumed or given away as a promotion outside of South Carolina. In other cases, the items will be withdrawn from inventory held outside of South Carolina and sent to employees in South Carolina to be used, consumed or given away as a promotion in South Carolina.

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

¹ Beginning June 1, 2007, the total state sales and use tax rate increased to 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.

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

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.

* * * *

(1) The terms include:

* * * *

(c) the withdrawal, use, or consumption of tangible personal property by anyone who purchases it at wholesale, except:¹

(i) withdrawal of tangible personal property previously withdrawn and taxed by such business or person,

(ii) tangible personal property which becomes an ingredient or component part of tangible personal property manufactured or compounded for sale,

¹ The exceptions listed in this provision are not discussed in this document for purposes of simplifying the discussion.

(iii) tangible personal property used directly in manufacturing, compounding, or processing tangible personal property for sale,

(iv) materials, containers, cores, labels, sacks, or bags used incident to the sale and delivery of tangible personal property;

(v) a motor vehicle operated with a dealer, transporter, or manufacturer, or education license plate and used in accordance with the provisions of Section 56-3-2320 or 56-3-2330; (Emphasis added.)

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

... 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;

Based on the above, a "retail sale" includes:

(1) the withdrawal of tangible personal property by anyone who purchased it at wholesale;

(2) the use of tangible personal property by anyone who purchased it at wholesale; or,

(3) the consumption of tangible personal property by anyone who purchased it at wholesale.

Code Section 12-36-90 defines the term "gross proceeds of sales," which is the basis for calculating the sales tax, in part as:

... the value proceeding or accruing from the sale, lease, or rental of tangible personal property.

(1) The term includes:

* * * *

(c) the fair market value of tangible personal property previously purchased at wholesale which is withdrawn from the business or stock and used or consumed in connection with the business or used or consumed by any person withdrawing it, except for:⁴

⁴ The exceptions listed in this provision are not discussed in this document for purposes of simplifying the discussion.

(i) withdrawal of tangible personal property previously withdrawn and taxed by such business or person;

(ii) tangible personal property which becomes an ingredient or component part of tangible personal property manufactured or compounded for sale;

(iii) tangible personal property replacing defective parts under written warranty contracts if:

(A) the warranty, maintenance, service, or similar contract is given without charge, at the time of original purchase of the defective property, or the tax was paid on the sale or renewal of warranty, maintenance, or similar service contract for tangible personal property of which the defective part was a component, whether or not such contract was purchased in conjunction with the sale of tangible personal property,

(B) in the case of a warranty, maintenance, service, or similar contract that is given without charge at the time of original purchase of the defective property, the tax was paid on the sale of the defective part or on the sale of the property of which the defective part was a component, and

(C) the warrantee is not charged for any labor or materials,

(iv) an automobile furnished without charge to a high school for use solely in student driver training programs;

(v) a new motor vehicle used by a dealer as a demonstrator.
(Emphasis added.)

Based on the above, tangible personal property purchased at wholesale is subject to the sales tax based upon its fair market value⁵ when it is (1) withdrawn from the business or stock and (2) used or consumed in connection with the business or used or consumed by the person withdrawing it.

⁵ SC Regulation 117-309.17, concerning withdrawals from stock by merchants, states:

To be included in gross proceeds of sales is the money value of property purchased at wholesale for resale purposes and subsequently withdrawn from stock for use or consumption by the purchaser.

The value to be placed upon such goods is the price at which these goods are offered for sale by the person withdrawing them. All cash or other customary discounts which he would allow to his customers may be deducted; however, in no event can the amount used as gross proceeds of sales be less than the amount paid for the goods by the person making the withdrawal.

In considering these two provisions together, the statute does not require that withdrawal, use and consumption all take place in South Carolina. Since a withdrawal, use, or consumption of tangible personal property purchased at wholesale each constitute a "retail sale," any one such event occurring in South Carolina constitutes a "retail sale" within South Carolina and is subject to the tax based on the fair market value of the tangible personal property that is or will be used or consumed in connection with the business or used or consumed by the person withdrawing it.

Furthermore, with respect to tangible personal property withdrawn outside of South Carolina for use or consumption in South Carolina, we must consider whether the sales tax or use tax is imposed and whether a credit allowed for a sales tax or use tax paid in another state on the withdrawal in that state?

As stated above, a withdrawal, use or consumption of tangible personal property by anyone who purchases it at wholesale is a retail sale.

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] percent⁶ 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 12-36-130 defines "sales price" in part as:

... the total amount for which tangible personal property is sold, without any deduction for the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, losses, or any other expenses.

Code Section 12-36-1310(C) authorizes a credit for taxes paid in another state and reads:

When a taxpayer is liable for the use tax imposed by this section on tangible personal property purchased in another state, upon which a sales or use tax was due and paid in the other state, the amount of the sales or use tax due and paid in the other state is allowed as a credit against the use tax due this State, upon proof that the sales or use tax was due and paid in the other state. If the amount of the sales or use tax paid in the other state is less than the amount of use tax imposed by this article, the user shall pay the difference to the department. (Emphasis added.)

Therefore, since a withdrawal is a retail sale under Code Section 12-36-110, it also constitutes a "purchase at retail."

Based on the above, the use or consumption of tangible personal property withdrawn outside of South Carolina is subject to the use tax when the withdrawal outside the state

⁶ See footnote #1.

is for the purpose of using or consuming the tangible personal property in South Carolina. The withdrawal outside the state is a "purchase at retail" under Code Section 12-36-1310(A) and Code Section 12-36-110 and the fair market value upon which the tax is based is the "sales price" (the amount for which tangible personal property was sold under Code Sections 12-36-110 and 12-36-130) for purposes of the South Carolina use tax.

In addition, a credit under Code Section 12-36-1310(C) will be allowed against the South Carolina use tax for any sales or use tax legally due and paid in the other state on the withdrawal occurring in that state.

Finally, with respect to tangible personal property withdrawn in South Carolina for use or consumption outside of South Carolina, we must consider whether Code Section 12-36-2120(36) is applicable.

Code Section 12-36-2120(36) exempts from the tax:

tangible personal property where the seller, by contract of sale, is obligated to deliver to the buyer, or to an agent or donee of the buyer, at a point outside this State or to deliver it to a carrier or to the mails for transportation to the buyer, or to an agent or donee of the buyer, at a point outside this State;

While a withdrawal is a retail sale under the law, a contract – an agreement between two or more parties – does not exist. Therefore, the exemption in Code Section 12-36-2120(36) does not apply to tangible personal property withdrawn in South Carolina for use or consumption outside of South Carolina by the business or person withdrawing it.

The attached charts shown as Exhibit "A" should provide guidance.

Note: This advisory opinion concerns tangible personal property purchased at wholesale for resale, but withdrawn from inventory and used and consumed by the business or the person withdrawing it. It does not address tangible personal property manufactured for sale by a manufacturer but used and consumed by the manufacturer. For information on manufacturers using and consuming tangible personal property they manufacture, see Code Section 12-36-910(B)(4) and Code Section 12-36-1310(B)(4).

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/Ray N. Stevens

Ray N. Stevens, Director

July 18, 2008
Columbia, South Carolina

Exhibit A

(The attached charts are intended to provide guidance for most taxpayers who withdraw, use or consume tangible personal property from inventory in connection with their business or who withdraw, use or consume tangible personal property from inventory for their personal use. It is not intended to provide all possible examples of the withdrawal, use, or consumption of tangible personal property from a taxpayer's inventory.)

Situation #1 – Employee's Personal Use: Tangible personal property has been purchased at wholesale by a wholesaler or retailer for resale to retailers or consumers. The tangible personal property will be stored in inventory at a distribution facility, warehouse, or retail facility. Some items in inventory will not be sold, but withdrawn from the inventory and sent to employees to personally use or consume. Examples include, but are not limited to, clothing, sporting equipment, or household items the employee will wear or use or consume.

Event in South Carolina	Event Outside of South Carolina	Taxability of Situation #1
The tangible personal property is withdrawn from inventory in South Carolina and given to or shipped to an employee in South Carolina for use or consumption either in South Carolina or outside of South Carolina.	None	The taxable event is the <u>withdrawal from inventory in South Carolina</u> and the sales tax is due based upon the fair market value of tangible personal property.
The tangible personal property is withdrawn from inventory in South Carolina and shipped to an employee outside of South Carolina.	The employee receives the tangible personal property outside of South Carolina and personally uses or consumes the tangible personal property either inside or outside of South Carolina.	The taxable event is the <u>withdrawal from inventory in South Carolina</u> and the sales tax is due based upon the fair market value of tangible personal property.
The employee receives the tangible personal property from an inventory located outside of South Carolina and personally uses or consumes the tangible personal property in South Carolina.	The tangible personal property is withdrawn from inventory outside of South Carolina and shipped to an employee in South Carolina.	The taxable event is the <u>use or consumption of the tangible personal property in South Carolina</u> and the use tax is due based upon the fair market value of tangible personal property. A credit under Code Section 12-36-1310(C) will be allowed against the SC use tax for any tax legally due and paid in the other state on the withdrawal in that state.

Situation #2 – Sent to Employee to Give Away as Promotion: Tangible personal property has been purchased at wholesale by a wholesaler or retailer for resale to retailers or consumers. The tangible personal property will be stored in inventory at a distribution facility, warehouse, or retail facility. Some items in inventory will not be sold, but withdrawn from the inventory and sent to employees to give away free of charge to customers as a promotion. Examples include, but are not limited to, clothing, sporting equipment, or household items.

Event in South Carolina	Event Outside of South Carolina	Taxability of Situation #2
The tangible personal property is withdrawn from inventory in South Carolina and shipped to an employee in South Carolina to give away to a customer located either inside or outside of South Carolina as a promotion. The employee receives the tangible personal property and gives it away as a promotion to a customer for the customer to use or consume.	None	The taxable event is the <u>withdrawal from inventory in South Carolina</u> and the sales tax is due based upon the fair market value of tangible personal property.
The tangible personal property is withdrawn from inventory in South Carolina and shipped to an employee outside of South Carolina to give away to a customer located either inside or outside of South Carolina as a promotion.	The employee receives the tangible personal property outside of South Carolina and gives it away as a promotion to a customer located either inside or outside of South Carolina for the customer to use or consume inside or outside of South Carolina.	The taxable event is the <u>withdrawal from inventory in South Carolina</u> and the sales tax is due based upon the fair market value of tangible personal property.
The employee receives the tangible personal property from an inventory located outside of South Carolina and gives it away as a promotion to a customer in South Carolina for the customer to use or consume in South Carolina.	The tangible personal property is withdrawn from inventory outside of South Carolina and shipped to an employee in South Carolina to give away to a customer as a promotion.	The taxable event is the <u>use or consumption of the tangible personal property in South Carolina (when the employee gave it away to a customer as a promotion)</u> and the use tax is due based upon the fair market value of tangible personal property. A credit under Code Section 12-36-1310(C) will be allowed against the SC use tax for any tax legally due and paid in the other state on the withdrawal in that state.

Situation #3 – Sent to Employee to Sell, but Given Away as a Promotion: Tangible personal property has been purchased at wholesale by a wholesaler or retailer for resale to retailers or consumers. The tangible personal property will be stored in inventory at a distribution facility, warehouse, or retail facility. Some items in inventory are transferred from inventory in the store, warehouse or distribution center to an employee outside of South Carolina. The employee maintains an inventory of tangible personal property for sale and has the authority to give away some inventory free of charge to customers as a promotion. Examples include, but are not limited to, clothing, sporting equipment, or household items.

Event in South Carolina	Event Outside of South Carolina	Taxability of Situation #3
The tangible personal property is transferred from inventory in the store or warehouse in South Carolina to an employee in South Carolina who maintains an inventory of tangible personal property for sale. The tangible personal property is withdrawn from the employee's inventory located in South Carolina and is given away as a promotion to a customer located either inside or outside of South Carolina for the customer to use or consume.	None	The taxable event is the <u>withdrawal from the employee's inventory in South Carolina</u> and the sales tax is due based upon the fair market value of tangible personal property.
The tangible personal property is transferred from inventory in the store or warehouse in South Carolina to an employee outside of South Carolina who maintains an inventory of the tangible personal property for sale.	The tangible personal property is withdrawn from the employee's inventory located outside of South Carolina and is given away as a promotion to an out-of-state customer for the customer to use or consume outside of South Carolina.	The taxable event is the <u>withdrawal from the employee's inventory outside of South Carolina</u> . Since the withdrawal, use and consumption of the tangible personal property occurs outside of South Carolina, no sales or use tax is due.
The tangible personal property is withdrawn from the employee's inventory in South Carolina and is given away as a promotion to a customer located either inside or outside of South Carolina for the customer to use or consume inside or outside of South Carolina.	The tangible personal property is transferred from inventory in the store or warehouse outside of South Carolina to an employee in South Carolina who maintains an inventory of the tangible personal property for sale.	The taxable event is the <u>withdrawal from the employee's inventory in South Carolina</u> and the sales tax is due based upon the fair market value of tangible personal property.

Situation #4 – Sent to Employee to Show or Display as a Sample: Tangible personal property has been purchased at wholesale by a wholesaler or retailer for resale to retailers or consumers. The tangible personal property will be stored in inventory at a distribution facility, warehouse, or retail facility. Some items in inventory will not be sold, but withdrawn from the inventory and sent to employees as a sample to show or display to customers; however, the sample will not be available for sale while being shown or displayed by the employee. Examples include, but are not limited to, clothing, sporting equipment, or household items.

Event in South Carolina	Event Outside of South Carolina	Taxability of Situation #4
The tangible personal property is withdrawn from inventory in South Carolina and shipped to an employee in South Carolina as a sample to show or display to customers located either inside or outside of South Carolina. The sample is not available for sale while being shown or displayed by the employee.	None	The taxable event is the <u>withdrawal from inventory in South Carolina</u> and the sales tax is due based upon the fair market value of tangible personal property. ⁷
The tangible personal property is withdrawn from inventory in South Carolina and shipped to an employee outside of South Carolina as a sample to show or display to customers located either inside or outside of South Carolina.	The employee receives the tangible personal property outside of South Carolina and shows or displays the sample to customers located either inside or outside of South Carolina. The sample is not available for sale while being shown or displayed by the employee.	The taxable event is the <u>withdrawal from inventory in South Carolina</u> and the sales tax is due based upon the fair market value of tangible personal property. ⁸
The employee receives the tangible personal property from an inventory located outside of South Carolina and shows or displays the sample to customers located either inside or outside of South Carolina. The sample is not available for sale while being shown or displayed by the employee.	The tangible personal property is withdrawn from inventory outside of South Carolina and shipped to an employee in South Carolina as a sample to show or display to customers located either inside or outside of South Carolina.	The taxable event is the <u>use, consumption or storage of the tangible personal property in South Carolina</u> and the use tax is due based upon the fair market value of tangible personal property. A credit under Code Section 12-36-1310(C) will be allowed against the SC use tax for any tax legally due and paid in the other state on the withdrawal, use or consumption in that state. ⁹

⁷ The sales tax is a transactional tax. The withdrawal from inventory is a transaction subject to the sales tax. If the sample is returned to the distribution facility, warehouse, or retail facility for sale, this sale is a second, separate and distinct transaction that is subject to the sales tax based on the discounted price provided the sale is a retail sale occurring in South Carolina.

⁸ See footnote #6.

⁹ The sales tax and the use tax are transactional taxes. The use, storage or consumption of the tangible personal property is a transaction subject to the use tax. If the sample is returned to the distribution facility, warehouse, or retail facility for sale, this sale is a second, separate and distinct transaction that is subject to the sales tax based on the discounted price provided the sale is a retail sale occurring in South Carolina.

Situation #5 – Sent to Employee to Show or Display as a Sample: Tangible personal property has been purchased at wholesale by a wholesaler or retailer for resale to retailers or consumers. The tangible personal property will be stored in inventory at a distribution facility, warehouse, or retail facility. Some items in inventory will not be sold, but withdrawn from the inventory and sent to employees as a sample to show or display to customers; however, the sample will be available for sale while being shown or displayed by the employee.¹⁰ Examples include, but are not limited to, clothing, sporting equipment, or household items.

Event in South Carolina	Event Outside of South Carolina	Taxability of Situation #5
The tangible personal property is shipped from the distribution facility, warehouse or retail facility in South Carolina to an employee in South Carolina as a sample to show or display to customers located either inside or outside of South Carolina. The sample is available for sale while being shown or displayed by the employee.	None	Since the sample is available for sale, it is not subject to the tax unless otherwise used or consumed by the employee or business in South Carolina or until sold at retail in South Carolina. If used or consumed in South Carolina, <u>the taxable event is the use or consumption in South Carolina</u> and the sales tax is due based upon the fair market value of tangible personal property. If sold at retail in South Carolina, the sales tax is due on the "gross proceeds" of the sale. ¹¹
The tangible personal property is shipped from the distribution facility, warehouse or retail facility in South Carolina to an employee outside of South Carolina as a sample to show or display to customers located either inside or outside of South Carolina.	The employee receives the tangible personal property outside of South Carolina and shows or displays the sample to customers located either inside or outside of South Carolina. The sample is available for sale while being shown or displayed by the employee.	Since the sample is available for sale, it is not subject to the tax unless otherwise used or consumed by the employee or business in South Carolina or until sold at retail in South Carolina. If used or consumed in South Carolina, <u>the taxable event is the use or consumption in South Carolina</u> and the sales tax is due based upon the fair market value of tangible personal property. If sold at retail in South Carolina, the sales tax is due on the "gross proceeds" of the sale. ¹²

¹⁰ The determination that tangible personal property is available for sale while being shown or displayed by an employee will be based on the facts and circumstance as supported by the taxpayer's records. Factors to consider in making this determination include but are limited to, the taxpayer's operational requirements or restrictions, whether the product is subsequently discounted when sold due to use (see "Note" below), the employees' history of selling or not selling the samples, etc. If the facts and circumstances and the taxpayer's records do not support that the tangible personal property is available for sale, the Department will apply the tax as set forth in Scenario #4.

¹¹ See footnote #6.

¹² See footnote #6.

Situation #5 – Sent to Employee to Show or Display as a Sample – Continued:

Event in South Carolina	Event Outside of South Carolina	Taxability of Situation #5
The employee receives the tangible personal property from outside of South Carolina and shows or displays the sample to customers located either inside or outside of South Carolina. The sample is available for sale while being shown or displayed by the employee.	The tangible personal property is shipped from the distribution facility, warehouse or retail facility outside of South Carolina to an employee in South Carolina as a sample to show or display to customers located either inside or outside of South Carolina.	Since the sample is available for sale, it is not subject to the tax unless otherwise used or consumed by the employee or business in South Carolina or until sold at retail in South Carolina. If used or consumed in South Carolina, <u>the taxable event is the use or consumption in South Carolina</u> and the use tax is due based upon the fair market value of tangible personal property. A credit under Code Section 12-36-1310(C) will be allowed against the SC use tax for any tax legally due and paid in the other state on the withdrawal, use or consumption in that state. If sold at retail in South Carolina, the sales tax is due on the "gross proceeds" of the sale.¹³

Note: In this Scenario #5, it states that tangible personal property sent to employees as a sample to show or display to customers is not subject to the tax if the sample is still available for sale while being shown or displayed by the employee, unless "otherwise used or consumed by the employee or business in South Carolina." Examples of samples available for sales that are "otherwise used or consumed by the employee or business in South Carolina" include, but are not limited to (1) an employee who shows or displays the sample but also demonstrates how the product is used such as demonstrating the effectiveness of a vacuum cleaner, (2) an employee who shows and displays the sample but gives it away to the customer as a promotion or an enticement to buy the product, and (3) an employee who shows or displays the sample but also uses a sample for his own personal use. The determination as to whether samples that are available for sale are "otherwise used or consumed by the employee or business in South Carolina" will be based on the facts and circumstances.

¹³ See footnote #8.

JOINT EXHIBIT 58

Policy Folder re:

SC PLR #07-4

State of South Carolina
Department of Revenue
301 Gervais Street, P.O. Box 125, Columbia, South Carolina 29214
Website Address: <http://www.sctax.org>

SC PRIVATE LETTER RULING #07-4

SUBJECT: Signs - Sales of Tangible Personal Property or Improvements to Realty
(Sales and Use Tax)

REFERENCES: S. C. Code Ann. Section 12-2-25(B) (Supp. 2006)
S. C. Code Ann. Section 12-36-910 (2000; Supp. 2006)
S. C. Code Ann. Section 12-36-1310 (2000; 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 12-36-90 (2000; Supp. 2006)
S. C. Code Ann. Section 12-36-130 (2000; Supp. 2006)
SC Regulation 117-309.9 (Supp. 2006)
SC Regulation 117-314.2 (Supp. 2006)
SC Regulation 117-313.3 (Supp. 2006)

AUTHORITY: S. C. Code Ann. Section 12-4-320 (2000)
S. C. Code Ann. Section 1-23-10(4) (2006)
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.

DOR RESP LOWE'S2523

Questions:

1. Is [REDACTED] a retailer selling and installing signs or a contractor making improvements to real property with respect to the types of signs described in the facts?
2. If [REDACTED] is a retailer selling and installing signs, what is the basis for the tax?
3. If [REDACTED] contracts with a manufacturer in South Carolina to manufacture a sign instead of [REDACTED], is the taxation of the transaction treated the same as those in which [REDACTED] is the manufacturer?

Conclusions:

1. [REDACTED] is a retailer engaged in the business of selling tangible personal property at retail.

However, since [REDACTED] is a single member limited liability company that is disregarded for federal and state income tax purposes, it is disregarded for all South Carolina tax purposes and the taxpayer for sales and use tax purposes is [REDACTED]. As the taxpayer for sales and use tax purposes and the person liable for the tax, [REDACTED] must obtain the retail license in its name. In completing the application form (Form SCTC-111), [REDACTED] should be listed as the "Owner" on Line 1 of the form with [REDACTED] listed as the "Trade Name (Doing Business As)" on Line 2 of the form.

2. Sales at retail of signs by [REDACTED] as described in the facts, are subject to the tax based upon "gross proceeds of sales" as follows:

(a) Sales at retail of the signs are subject to the tax, unless otherwise exempt under the law.

(b) All charges by [REDACTED] to customers for services provided in conjunction with, or as a part of, sales at retail of signs are includable in "gross proceeds of sales" and, therefore, subject to the tax unless the sale of the sign is otherwise exempt under the law. This would include, but is not limited to, charges by [REDACTED] to its customers for consultation, engineering and design, surveys, and permits.

However, the following charges are not subject to the tax:

(i) Charges to install signs (whether installed by [REDACTED] or another person on its behalf), provided "such charges are separately stated from the sales price of the property on billing to customers and provided the seller's books and records of account show the reasonableness of such labor in relation to the sales price of the property;" and,

(ii) Charges to customers for tangible personal property which becomes a part of the real property, such as concrete used for the foundation of a stand alone sign, provided such charges are separately stated from the sales price of the property on billing to customers and provided such charges are reasonable. However, sales to, or purchases by, [REDACTED] of such tangible personal property are subject to the tax.

[REDACTED] provides services that are not provided in conjunction with, or as a part of, the sale of a sign, then charges to customers for such services are not subject to the sales and use tax. For example, if [REDACTED] charges a customer to remove a sign, and this transaction is not associated with the sale of a new sign, then the charge for the sign removal service is not subject to the tax.

Note: For information concerning the taxability of charges for freight and delivery, repairs, and warranty and maintenance contracts, see SC Regulation 117-310, SC Regulation 117-306, and SC Revenue Ruling #06-9 respectively.

3. If [REDACTED] contracts with a manufacturer in South Carolina to manufacture a sign instead of [REDACTED], the taxation of the sale at retail of the sign is treated the same as those in which [REDACTED], Inc. is the manufacturer of the sign. In other words, [REDACTED] is still the retailer liable for the tax.

Facts:

[REDACTED] is a Florida S Corporation. It manufactures signs in Florida for out-of-state customers as well as Florida customers. [REDACTED] also has the signs installed at the out-of-state customer's location using a subcontractor. [REDACTED] contracts with and pays the subcontractor for installing the sign and then bills the customer for the sign and installation costs and collects sales tax on the transaction in accordance with the law of the state where the sign is delivered. This sales tax is remitted to the taxing authorities in the state where the sign is installed.

To address Florida sales and use tax issues, [REDACTED] is creating a Florida single-member limited liability company. The new LLC will be named [REDACTED]. [REDACTED] will be disregarded for federal and state income tax purposes and, therefore, treated as a division of the [REDACTED]. However, for Florida sales tax purposes, [REDACTED] will be legally distinct. [REDACTED] will purchase signs from [REDACTED] for delivery to its out-of-state customers. [REDACTED] will deliver the signs by a common carrier or pursuant to the terms of the sales contract deliver the property using [REDACTED] own mode of transportation. [REDACTED] will contract with and pay a subcontractor for installing the sign and then will bill the customer for the sign and installation costs and collect sales tax on the transaction in accordance with the law of the state where the sign is delivered.

[REDACTED] manufactures six distinct signage products: channel letters, back-lit letters, pylon signs, monument signs, and electronic display systems, and banners. In addition, [REDACTED] offers total customer packages which include an array of signage products custom tailored to meet the demands of a diverse range of businesses.

Channel Letters are individually illuminated letters and graphics. These letters are found everywhere, from shopping malls to exterior storefront identification. There are three types of channel letters:

The most common type is **Standard Channel Letters**. These letters are made up of a U-channel base, with colored Plexiglas faces.

Reverse Channel Letters have metal faces and returns (sides of letters) and have a clear plastic backing. These letters are designed to be mounted an inch or two away from the wall. At night, these letters create a halo-lit effect.

The third type of **Channel Letters** have "open" faces. Though not actually open, the faces of these letters are clear plastic with the balance of the letters built just like **Standard Channel Letters**. This allows for the raw neon to be seen, as well as the inside of the U-channel letterform itself.

Back-Lit Letters are individual letters and graphics that are illuminated from a source that is located behind the letters. The usage of back lighting creates a halo effect around the letters.

Pylon signs are an effective way to provide advance notice of the location of a business or to feature a business name or logo. It is very common to see pylon signs on or near main streets. Manufactured of aluminum & steel, the structures are made for long term usage.

Monument signs are free-standing signs constructed on the ground with a continuous footing or foundation and a base at grade level.

Electronic display systems utilize digital media to display information. The use of electronic display systems has rapidly increased due to their ability to display information rapidly, fluidly and in a more esthetically pleasing manner. Electronic displays are often utilized by companies needing to communicate large amounts of information, such as airports, bus terminals, and stadiums. However, their use has also increased rapidly in mainstream commerce.

Banners are temporary signs until the actual sign is manufactured.

Window Graphics are vinyl signs applied inside the windows or on the doors that are used to tell store hours and emergency contact information.

[REDACTED] performs design and engineering services. The marketing design department provides clients with creative artwork concepts.

Finally, from time to time, [REDACTED] may contract with a sign manufacturer in South Carolina to manufacture a sign instead of contracting with [REDACTED] to manufacture the sign.

Discussion:

[REDACTED] is a single member limited liability whose single member is [REDACTED], a Florida S corporation. [REDACTED] will be disregarded for federal and state income tax purposes and will, therefore, be treated as a division of [REDACTED].

Code Section 12-2-25(B) states that "[f]or South Carolina tax purposes ... a single member limited liability company, which is not taxed for South Carolina income tax purposes as a corporation, is not regarded as an entity separate from its owner."

Based on the above, the taxpayer for South Carolina sales and use tax purposes is [REDACTED] since [REDACTED] C "is not regarded as an entity separate from its owner."

For purposes of this advisory opinion, the taxpayer will be referred to as [REDACTED].

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.

(1) The terms include:

(a) sales of building materials to construction contractors, builders, or landowners for resale or use in the form of real estate;

SC Regulation 117-309.9 concerns sign companies, and states:

A person engaged in the business of erecting, on properties owned or controlled by him, signs for the display of products of a second party for a consideration is deemed to be engaged in the business of selling a service. A tax is due measured by the purchase price of all tangible personal property used or consumed by such person as additions or improvements to realty.

A person engaged in the business of designing, fabricating and erecting signs on properties of another, for the display of that person's products, is deemed to be a retailer. The gross proceeds of the sale of such signs are subject to the tax. If the signs are leased or rented, the lease or rental proceeds are subject to the tax.

A person engaged in both of the above businesses shall pay the tax in accordance with the applicable provisions as set forth hereinabove.

A person who designs and constructs a sign as defined in the second paragraph above may, if all statutory requirements are met, be considered a manufacturer. (Emphasis added.)

In addition, in Commission Decision #89-70 the Department held that a taxpayer engaged in the business of designing, fabricating and erecting signs was a retailer of tangible personal property.

Based on the above and the facts set forth above, [REDACTED] is selling tangible personal property at retail.

However, we must consider the application of the tax with respect to tangible personal property which becomes a part of real property. SC Regulation 117-314.2 addresses this matter and states:

Building materials when purchased by builders, contractors, or landowners for use in adding to, repairing or altering real property are subject to either the sales or use tax at the time of purchase by such builder, contractor, or landowner. "Building materials" as used in the Sales and Use Tax Law includes any material used in making repairs, alterations or additions to real property. "Builders," "contractors," and "landowners" mean and include any person, firm, association or corporation making repairs, or additions to real property. The term "building materials" includes such tangible personal property as lumber, timber, nails, screws, bolts, structural steel, elevators, reinforcing steel, cement, lime, sand, gravel, slag, stone, telephone poles, fencing, wire, electric cable, brick, tile, glass, plumbing supplies, plumbing fixtures, pipe, pipe fittings, prefabricated buildings, electrical fixtures, built-in cabinets and furniture, sheet metal, paint, roofing materials, road building materials, sprinkler systems, air conditioning systems, built-in fans, heating systems, floorings, floor furnaces, crane ways, crossties, railroad rails, railroad track accessories, tanks, builders hardware, doors, door frames, window frames, water meters, gas meters, well pumps, and any and all other tangible personal property which becomes a part of real property.

For additional guidance in this matter, we refer to *City of North Charleston v. Claxton*, 315 S.C. 36, 431 S.E.2d 610 (1993). While that case dealt with the value of property in a condemnation proceeding, it also addressed the issue of real (fixtures) versus personal property.

Quoting from that case:

Criteria for determining whether an item remains personalty or becomes a fixture when affixed to realty includes: (1) the mode of attachment; (2) the character of the structure of the article; (3) the intent of the parties making the annexation; and, (4) the relationship of the parties. Creative Displays, 272 S.C. at 72, 248 S.E.2d at 918.

The Court, in *C'luxton*, referenced *Rebel Manufacturing and Marketing Corporation*, 54 B.R. 674 (Bkrcty. D.S.C. 1985). In that case, a bank argued that the sale of a mobile home was subject to a mortgage on the realty because it was a fixture [real property]. The mobile home was underpinned, anchored, and connected to sewerage, water and electric lines. Also, the home had a screened porch attached and was adjacent to several large trees.

In ruling for the bank, the Court reasoned:

The various substantial structures and trees surrounding the mobile home would be severely damaged, if not destroyed, should the mobile home be removed.

* * * *

It seems clear that the debtor's positioning the mobile home among the trees, and adding the construction [the porch] warrants the inference that the intent of the debtor was for the mobile home to become a part of the realty.

Paris Mountain Water Company v. Woodside, 133 S.C. 383, 131 S.E. 37 (1925), a South Carolina State Supreme Court case, was concerned with whether water pipes placed in lands belonging to others were to be taxed as realty or personalty. The Court, in holding that the pipe was to be taxed as realty, stated:

In the requirement of an intention to make the article annexed a permanent accession to the land, the expression of permanent does not, it seems, imply that the annexation must be intended to be perpetual, but rather that the article shall appear to be intended to remain where fastened until worn out, until the purpose to which the realty is devoted has been accomplished, or until the article is superseded by another article more suitable for the purpose.

Based on the above, if a tangible personal property becomes a part of real property, such as concrete used for the foundation of a stand alone sign, then such tangible personal property is considered used and consumed by [REDACTED] and not sold by [REDACTED]

The next issue concerns the basis for the tax on sales of tangible personal property at retail.

The sales tax is imposed upon a retailer's "gross proceeds of sales" which is defined at Code Section 12-36-90, in part, as:

...the value proceeding or accruing from the sale, lease, or rental of tangible personal property... without any deduction for... the cost of materials, labor, or service... [or] any other expenses....

The use tax is based upon the "sales price" of tangible personal property. The term "sales price" is defined at Code Section 12-36-130, in part, as:

...the total amount for which tangible personal property is sold, without any deduction for the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, losses, or any other expenses.

(1) The term includes:

- (a) any services or transportation costs that are a part of the sale, whether paid in money or otherwise; ...

In *Meyers Arnold, Inc. v. South Carolina Tax Commission*, 285 S.C. 303, 328 S.E.2d 920, 923 (1985), the Court of Appeals of South Carolina held the element of service involved in a lay away sale was subject to tax as being part of the sale of tangible personal property. The test used by the court was as follows:

...But for the lay away sales, Meyers Arnold would not receive the lay away fees. The fees are obviously charged for the service rendered in making lay away sales. For these reasons, this court holds the lay away fees are part of the gross proceeds and subject to the sales tax.

Accordingly, the total amount charged in conjunction with the sale or purchase of tangible personal property is subject to the tax.

A similar conclusion was reached in *Regency Towers Association, Inc. v. South Carolina Tax Commission*, 88-CP-26-1109 (1989), where the Horry County Court of Common Pleas held charges for maid service were not deductible from gross proceeds derived from charges for accommodations. In Commission Decision #92-37, the Commission held that charges for maid services, which were optional, were a part of the accommodations furnished to transients and therefore subject to the accommodations tax. (See Code Section 12-36-920(B) and SC Regulation 117-307 for subsequent changes in the statute concerning "additional guest charges," such as maid service, at places furnishing accommodations.)

In Commission Decision #90-38, the Commission held that charges for engraving services, even though optional, were a part of the sale of plaques and trophies by the retailer and includible in gross proceeds of sales. The decision states, in part:

... We find and conclude that here the "engraving charges" are part of the sale of tangible personal property since the customer is not seeking a professional service but is seeking an engraved trophy or plaque....

* * *

... The Courts have held that although the amount of materials used may be inconsequential with respect to the labor involved where the customer seeks to purchase custom made or designed tangible personal property, the artistic skill of the craftsman is a part of the sales price of the product and is inextricably linked....

In summary, charges for services that are made in conjunction with, or as part of the sale of, tangible personal property are includable in "gross proceeds of sales" or "sales price," and, therefore, subject to the tax.

However, it is important to note two additional issues with respect to the basis for the tax.

First, SC Regulation 117-313.3, concerning installation charges, states:

Not subject to the sales or use tax are charges for installation incident to the sale of tangible personal property when such charges are separately stated from the sales price of the property on billing to customers and provided the seller's books and records of account show the reasonableness of such labor in relation to the sales price of the property.

Second, since some tangible personal property used in the transaction becomes a part of the real property, such as concrete used for foundations of stand alone signs, then such tangible personal property is considered used and consumed by [REDACTED] and not sold by [REDACTED]. As such, the sales to, or purchases by, [REDACTED] of such tangible personal property are subject to the tax.

Based on the above, sales at retail of signs by [REDACTED], as described in the facts, are subject to the tax based upon "gross proceeds of sales" as follows:

(a) Sales at retail of the signs are subject to the tax, unless otherwise exempt under the law.

(b) All charges by [REDACTED] to customers for services provided in conjunction with, or as a part of, sales at retail of signs are includable in "gross proceeds of sales" and, therefore, subject to the tax unless the sale of the sign is otherwise exempt under the law. This would include, but is not limited to, charges by [REDACTED] to its customers for consultation, engineering and design, surveys, and permits.

However, the following charges are not subject to the tax:

(i) Charges to install signs (whether installed by [REDACTED] or another person on its behalf), provided "such charges are separately stated from the sales price of the property on billing to customers and provided the seller's books and records of account show the reasonableness of such labor in relation to the sales price of the property;" and,

(ii) Charges to customers for tangible personal property which becomes a part of the real property, such as concrete used for the foundation of a stand alone sign, provided such charges are separately stated from the sales price of the property on billing to customers and provided such charges are reasonable. However, sale to, or purchases by, [REDACTED] of such tangible personal property are subject to the tax.

If [REDACTED] provides services that are not provided in conjunction with, or as a part of, the sale of a sign, then charges to customers for such services are not subject to the sales and use tax. For example, if [REDACTED] charges a customer to remove a sign, and this transaction is not associated with the sale of a new sign, then the charge for the sign removal service is not subject to the tax.

And finally, if [REDACTED] contracts with a manufacturer in South Carolina to manufacture a sign instead of [REDACTED], the taxation of the sale at retail of the sign is treated the same as those in which [REDACTED], Inc. is the manufacturer of the sign. In other words, [REDACTED] is still the retailer liable for the tax.

Note: For information concerning the taxability of charges for freight and delivery, repairs, warranty and maintenance contracts, see SC Regulation 117-310, SC Regulation 117-306, and SC Revenue Ruling #06-9 respectively.

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/Ray N. Stevens
Ray N. Stevens, Director

July 13, 2007
Columbia, South Carolina

State of South Carolina
Department of Revenue
301 Gervais Street, P.O. Box 125, Columbia, South Carolina 29214
Website Address: <http://www.sctax.org>

SC PRIVATE LETTER RULING #07-4

SUBJECT:

Signs - Sales of Tangible Personal Property or Improvements to
Realty
(Sales and Use Tax)

REFERENCES:

S. C. Code Ann. Section 12-2-25(B) (Supp. 2006)
S. C. Code Ann. Section 12-36-910 (2000; Supp. 2006)
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SC Regulation 117-314.2 (Supp. 2006)
SC Regulation 117-313.3 (Supp. 2006)

AUTHORITY:

S. C. Code Ann. Section 12-4-320 (2000)
S. C. Code Ann. Section 1-23-10(4) (2006)
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.

Questions:

1. Is XYZ, LLC ("XYZ") a retailer selling and installing signs or a contractor making improvements to real property with respect to the types of signs described in the facts?

2. If XYZ, LLC is a retailer selling and installing signs, what is the basis for the tax?
3. If XYZ, LLC contracts with a manufacturer in South Carolina to manufacture a sign instead of ABC, Inc., is the taxation of the transaction treated the same as those in which ABC, Inc. is the manufacturer?

Conclusions:

1. XYZ, LLC is a retailer engaged in the business of selling tangible personal property at retail.

However, since XYZ, LLC is a single member limited liability company that is disregarded for federal and state income tax purposes, it is disregarded for all South Carolina tax purposes and the taxpayer for sales and use tax purposes is ABC, Inc. As the taxpayer for sales and use tax purposes and the person liable for the tax, ABC, Inc. must obtain the retail license in its name. In completing the application form (Form SCTC - 111), ABC, Inc. should be listed as the "Owner" on Line 1 of the form with XYZ, LLC listed as the "Trade Name (Doing Business As)" on Line 2 of the form.

2. Sales at retail of signs by ABC, Inc. d/b/a XYZ, LLC ("XYZ"), as described in the facts, are subject to the tax based upon "gross proceeds of sales" as follows:

(a) Sales at retail of the signs are subject to the tax, unless otherwise exempt under the law.

(b) All charges by XYZ to customers for services provided in conjunction with, or as a part of, sales at retail of signs are includable in "gross proceeds of sales" and, therefore, subject to the tax unless the sale of the sign is otherwise exempt under the law. This would include, but is not limited to, charges by XYZ to its customers for consultation, engineering and design, surveys, and permits.

However, the following charges are not subject to the tax:

(i) Charges to install signs (whether installed by XYZ or another person on its behalf), provided "such charges are separately stated from the sales price of the property on billing to customers and provided the seller's books and records of account show the reasonableness of such labor in relation to the sales price of the property;" and,

(ii) Charges to customers for tangible personal property which becomes a part of the real property, such as concrete used for the foundation of a stand alone sign, provided such charges are separately stated from the sales price of the property on billing to customers and provided such charges are reasonable. However, sales to, or purchases by, XYZ of such tangible personal property are subject to the tax.

If XYZ provides services that are not provided in conjunction with, or as a part of, the sale of a sign, then charges to customers for such services are not subject to the sales and use tax. For example, if XYZ charges a customer to remove a sign, and this transaction is not associated with the sale of a new sign, then the charge for the sign removal service is not subject to the tax.

Note: For information concerning the taxability of charges for freight and delivery, repairs, and warranty and maintenance contracts, see SC Regulation 117-310, SC Regulation 117-306, and SC Revenue Ruling #06-9 respectively.

3. If XYZ, LLC contracts with a manufacturer in South Carolina to manufacture a sign instead of ABC, Inc., the taxation of the sale at retail of the sign is treated the same as those in which ABC, Inc. is the manufacturer of the sign. In other words, XYZ is still the retailer liable for the tax.

Facts:

ABC, Inc. is a Florida S Corporation. It manufactures signs in Florida for out-of-state customers as well as Florida customers. ABC, Inc. also has the signs installed at the out-of-state customer's location using a subcontractor. ABC, Inc. contracts with and pays the subcontractor for installing the sign and then bills the customer for the sign and installation costs and collects sales tax on the transaction in accordance with the law of the state where the sign is delivered. This sales tax is remitted to the taxing authorities in the state where the sign is installed.

To address Florida sales and use tax issues, ABC, Inc. is creating a Florida single-member limited liability company. The new LLC will be named XYZ, LLC. XYZ, LLC will be disregarded for federal and state income tax purposes and, therefore, treated as a division of the ABC, Inc. However, for Florida sales tax purposes, ABC, Inc. and XYZ, LLC will be legally distinct. XYZ, LLC will purchase signs from ABC, Inc. for delivery to its out-of-state customers. ABC, Inc. will deliver the signs by a common carrier or pursuant to the terms of the sales contract deliver the property using ABC, Inc.'s own mode of transportation. XYZ, LLC will contract with and pay a subcontractor for installing the sign and then will bill the customer for the sign and installation costs and collect sales tax on the transaction in accordance with the law of the state where the sign is delivered.

ABC, Inc. manufactures six distinct signage products: channel letters, back-lit letters, pylon signs, monument signs, and electronic display systems, and banners. In addition, ABC, Inc. offers total customer packages which include an array of signage products custom tailored to meet the demands of a diverse range of businesses.

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The most common type is Standard Channel Letters. These letters are made up of a U-channel base, with colored Plexiglas faces.

Reverse Channel Letters have metal faces and returns (sides of letters) and have a clear plastic backing. These letters are designed to be mounted an inch or two away from the wall. At night, these letters create a halo-lit effect.

The third type of Channel Letters have "open" faces. Though not actually open, the faces of these letters are clear plastic with the balance of the letters built just like Standard Channel Letters. This allows for the raw neon to be seen, as well as the inside of the U-channel letterform itself.

Back-Lit Letters are individual letters and graphics that are illuminated from a source that is located behind the letters. The usage of back lighting creates a halo effect around the letters.

Pylon signs are an effective way to provide advance notice of the location of a business or to feature a business name or logo. It is very common to see pylon signs on or near main streets. Manufactured of aluminum & steel, the structures are made for long term usage.

Monument signs are free-standing signs constructed on the ground with a continuous footing or foundation and a base at grade level.

Electronic display systems utilize digital media to display information. The use of electronic display systems has rapidly increased due to their ability to display information rapidly, fluidly and in a more esthetically pleasing manner. Electronic displays are often utilized by companies needing to communicate large amounts of information, such as airports, bus terminals, and stadiums. However, their use has also increased rapidly in mainstream commerce.

Banners are temporary signs until the actual sign is manufactured.

Window Graphics are vinyl signs applied inside the windows or on the doors that are used to tell store hours and emergency contact information.

ABC, Inc. performs design and engineering services. The marketing design department provides clients with creative artwork concepts.

Finally, from time to time, XYZ, LLC may contract with a sign manufacturer in South Carolina to manufacture a sign instead of contracting with ABC, Inc. to manufacture the sign.

Discussion:

XYZ, LLC is a single member limited liability whose single member is ABC, Inc., a Florida S corporation. XYZ, LLC will be disregarded for federal and state income tax purposes and will, therefore, be treated as a division of ABC, Inc.

Code Section 12-2-25(B) states that "[f]or South Carolina tax purposes ... a single member limited liability company, which is not taxed for South Carolina income tax purposes as a corporation, is not regarded as an entity separate from its owner."

Based on the above, the taxpayer for South Carolina sales and use tax purposes is ABC, Inc. since XYZ, LLC "is not regarded as an entity separate from its owner."

For purposes of this advisory opinion, the taxpayer will be referred to as "XYZ."

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.

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

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.

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.

(1) The terms include:

(a) sales of building materials to construction contractors, builders, or landowners for resale or use in the form of real estate;

SC Regulation 117-309.9 concerns sign companies, and states:

A person engaged in the business of erecting, on properties owned or controlled by him, signs for the display of products of a second party for a consideration is deemed to be engaged in the business of selling a service. A tax is due measured by the purchase price of all tangible personal property used or consumed by such person as additions or improvements to realty.

A person engaged in the business of designing, fabricating and erecting signs on properties of another, for the display of that person's products, is deemed to be a retailer. The gross proceeds of the sale of such signs are subject to the tax. If the signs are leased or rented, the lease or rental proceeds are subject to the tax.

A person engaged in both of the above businesses shall pay the tax in accordance with the applicable provisions as set forth hereinabove.

A person who designs and constructs a sign as defined in the second paragraph above may, if all statutory requirements are met, be considered a manufacturer. (Emphasis added.)

In addition, in Commission Decision #89-70 the Department held that a taxpayer engaged in the business of designing, fabricating and erecting signs was a retailer of tangible personal property.

Based on the above and the facts set forth above, XYZ is selling tangible personal property at retail.

However, we must consider the application of the tax with respect to tangible personal property which becomes a part of real property. SC Regulation 117-314.2 addresses this matter and states:

Building materials when purchased by builders, contractors, or landowners for use in adding to, repairing or altering real property are subject to either the sales or use tax at the time of purchase by such builder, contractor, or landowner. "Building materials" as used in the Sales and Use Tax Law includes any material used in making repairs, alterations or additions to real property. "Builders," "contractors," and "landowners" mean and include any person, firm, association or corporation making repairs, or additions to real property. The term "building materials" includes such tangible personal property as lumber, timber, nails, screws, bolts, structural steel, elevators, reinforcing steel, cement, lime, sand, gravel, slag, stone, telephone poles, fencing, wire, electric cable, brick, tile, glass, plumbing supplies, plumbing fixtures, pipe, pipe fittings, prefabricated buildings, electrical fixtures, built-in cabinets and furniture, sheet metal, paint, roofing materials, road building materials, sprinkler systems, air conditioning systems, built-in-fans, heating systems, floorings, floor furnaces, crane ways, crossties, railroad rails, railroad track accessories, tanks, builders hardware, doors, door frames, window frames, water meters, gas meters, well pumps, and any and all other tangible personal property which becomes a part of real property.

For additional guidance in this matter, we refer to *City of North Charleston v. Claxton*, 315 S.C. 56, 431 S.E.2d 610 (1993). While that case dealt with the value of property in a condemnation proceeding, it also addressed the issue of real (fixtures) versus personal property.

Quoting from that case:

Criteria for determining whether an item remains personalty or becomes a fixture when affixed to realty includes: (1) the mode of attachment; (2) the character of the structure of the article; (3) the intent of the parties making the annexation; and, (4) the relationship of the parties. Creative Displays, 272 S.C. at 72, 248 S.E.2d at 918.

The Court, in *Claxton*, referenced *Rebel Manufacturing and Marketing Corporation*, 54 B.R. 674 (Bkrcty. D.S.C. 1985). In that case, a bank argued that the sale of a mobile

home was subject to a mortgage on the realty because it was a fixture [real property]. The mobile home was underpinned, anchored, and connected to sewerage, water and electric lines. Also, the home had a screened porch attached and was adjacent to several large trees.

In ruling for the bank, the Court reasoned:

The various substantial structures and trees surrounding the mobile home would be severely damaged, if not destroyed, should the mobile home be removed.

* * * *

It seems clear that the debtor's positioning the mobile home among the trees, and adding the construction [the porch] warrants the inference that the intent of the debtor was for the mobile home to become a part of the realty.

Paris Mountain Water Company v. Woodside, 133 S.C. 383, 131 S.E. 37 (1925), a South Carolina State Supreme Court case, was concerned with whether water pipes placed in lands belonging to others were to be taxed as realty or personalty. The Court, in holding that the pipe was to be taxed as realty, stated:

In the requirement of an intention to make the article annexed a permanent accession to the land, the expression of permanent does not, it seems, imply that the annexation must be intended to be perpetual, but rather that the article shall appear to be intended to remain where fastened until worn out, until the purpose to which the realty is devoted has been accomplished, or until the article is superseded by another article more suitable for the purpose.

Based on the above, if a tangible personal property becomes a part of real property, such as concrete used for the foundation of a stand alone sign, then such tangible personal property is considered used and consumed by XYZ and not sold by XYZ.

The next issue concerns the basis for the tax on sales of tangible personal property at retail.

The sales tax is imposed upon a retailer's "gross proceeds of sales" which is defined at Code Section 12-36-90, in part, as:

...the value proceeding or accruing from the sale, lease, or rental of tangible personal property... without any deduction for... the cost of materials, labor, or service... [or] any other expenses....

The use tax is based upon the "sales price" of tangible personal property. The term "sales price" is defined at Code Section 12-36-130, in part, as:

...the total amount for which tangible personal property is sold, without any deduction for the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, losses, or any other expenses.

(1) The term includes:

(a) any services or transportation costs that are a part of the sale, whether paid in money or otherwise: ...

In *Meyers Arnold, Inc. v. South Carolina Tax Commission*, 285 S.C. 303, 328 S.E.2d 920, 923 (1985), the Court of Appeals of South Carolina held the element of service involved in a lay away sale was subject to tax as being part of the sale of tangible personal property. The test used by the court was as follows:

...But for the lay away sales, Meyers Arnold would not receive the lay away fees. The fees are obviously charged for the service rendered in making lay away sales. For these reasons, this court holds the lay away fees are part of the gross proceeds and subject to the sales tax.

Accordingly, the total amount charged in conjunction with the sale or purchase of tangible personal property is subject to the tax.

A similar conclusion was reached in *Regency Towers Association, Inc. v. South Carolina Tax Commission*, 88-CP-26-1109 (1989), where the Horry County Court of Common Pleas held charges for maid service were not deductible from gross proceeds derived from charges for accommodations. In Commission Decision #92-37, the Commission held that charges for maid services, which were optional, were a part of the accommodations furnished to transients and therefore subject to the accommodations tax. (See Code Section 12-36-920(B) and SC Regulation 117-307 for subsequent changes in the statute concerning "additional guest charges," such as maid service, at places furnishing accommodations.)

In Commission Decision #90-38, the Commission held that charges for engraving services, even though optional, were a part of the sale of plaques and trophies by the retailer and includible in gross proceeds of sales. The decision states, in part:

...We find and conclude that here the "engraving charges" are part of the sale of tangible personal property since the customer is not seeking a professional service but is seeking an engraved trophy or plaque....

* * * *

...The Courts have held that although the amount of materials used may be inconsequential with respect to the labor involved where the customer seeks to purchase custom made or designed tangible personal property, the artistic skill of the craftsman is a part of the sales price of the product and is inextricably linked....

In summary, charges for services that are made in conjunction with, or as part of the sale of, tangible personal property are includable in "gross proceeds of sales" or "sales price," and, therefore, subject to the tax.

However, it is important to note two additional issues with respect to the basis for the tax.

First, SC Regulation 117-313.3, concerning installation charges, states:

Not subject to the sales or use tax are charges for installation incident to the sale of tangible personal property when such charges are separately stated from the sales price of the property on billing to customers and provided the seller's books and records of account show the reasonableness of such labor in relation to the sales price of the property.

Second, since some tangible personal property used in the transaction becomes a part of the real property, such as concrete used for foundations of stand alone signs, then such tangible personal property is considered used and consumed by XYZ and not sold by XYZ. As such, the sales to, or purchases by, XYZ of such tangible personal property are subject to the tax.

Based on the above, sales at retail of signs by XYZ, as described in the facts, are subject to the tax based upon "gross proceeds of sales" as follows:

- (a) Sales at retail of the signs are subject to the tax, unless otherwise exempt under the law.
- (b) All charges by XYZ to customers for services provided in conjunction with, or as a part of, sales at retail of signs are includable in "gross proceeds of sales" and, therefore, subject to the tax unless the sale of the sign is otherwise exempt under the law. This would include, but is not limited to, charges by XYZ to its customers for consultation, engineering and design, surveys, and permits.

However, the following charges are not subject to the tax:

- (i) Charges to install signs (whether installed by XYZ or another person on its behalf), provided "such charges are separately stated from the sales price of the property on billing to customers and provided the seller's books and records of account show the reasonableness of such labor in relation to the sales price of the property;" and,

John McCormack

From: [REDACTED]
Sent: Wednesday, July 11, 2007 4:35 PM

To: John McCormack

Subject: FW: [REDACTED]

We have the ok. You can finalize the letter ruling.

Thanks,
[REDACTED]

From: [REDACTED]
Sent: Wednesday, July 11, 2007 2:58 PM
To: [REDACTED]
Cc: [REDACTED]
Subject: RE: [REDACTED] Letter Ruling Request

okay
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

From: [REDACTED]
Sent: Wednesday, July 11, 2007 2:05 PM
To: [REDACTED]
Cc: [REDACTED]
Subject: FW: [REDACTED] Letter Ruling Request
[REDACTED]

South Carolina would like to finalize their PLR. Will you give me the go ahead to tell them to go ahead and finalize their ruling? We had some email correspondence about this a few weeks ago. I included our email correspondence at the bottom of this email.

Thanks
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

7/12/2007

DOR RESP LOWE'S2544

In compliance with IRS Circular 230:

Any statements or tax advice that are contained in this email are not intended or written to be used, and cannot be used by any taxpayer, for the purpose of avoiding penalties that may be imposed on the taxpayer.

The information contained in this message may be privileged and confidential and protected from disclosure. It is intended exclusively for the individual or entity to which it is addressed. This communication may contain information that is proprietary, privileged or confidential or otherwise legally exempt from disclosure. If the reader of this message is not the intended recipient, or an employee or agent responsible for delivering this message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by replying to the message and deleting it from your computer. Thank you [REDACTED]

From: John McCormack [mailto:MCCORMJ@sctax.org]

Sent: Wednesday, July 11, 2007 1:47 PM

To: [REDACTED]

Subject: [REDACTED] Letter Ruling Request

July 11, 2007

Dear Ms Sale:

On June 25th we discussed your client's [REDACTED] private letter ruling request and you were planning on forwarding the draft to your client for their review. Please let me know what the status of your client's review of the draft private letter ruling. Is your client ready to proceed so that I can present the draft to our Director for final approval? If so, I can try to discuss the matter with the Director next week and if he approves we can issue the official response.

Thank you for your consideration of this matter

Yours very truly,

John P. McCormack
Policy Section
SC Department of Revenue
(803) 898-5138
mccormj@sctax.org

7/12/2007

DOR RESP LOWE'S2545

1554

John McCormack

From: John McCormack
Sent: Wednesday, July 11, 2007 2:47 PM
To: [REDACTED]
Subject: [REDACTED] Letter Ruling Request

July 11, 2007

Dear [REDACTED]:

On June 25th we discussed your client's [REDACTED] private letter ruling request and you were planning on forwarding the draft to your client for their review. Please let me know what the status of your client's review of the draft private letter ruling. Is your client ready to proceed so that I can present the draft to our Director for final approval? If so, I can try to discuss the matter with the Director next week and if he approves we can issue the official response.

Thank you for your consideration of this matter.

Yours very truly,

John P. McCormack
Policy Section
SC Department of Revenue
(803) 898-5138
mccormj@sctax.org

7/11/2007

DOR RESP LOWE'S2546

1555

State of South Carolina
Department of Revenue
Office of General Counsel
701 Gervais Street, P. O. Box 12265, Columbia, South Carolina 29211
Website Address: <http://www.sctax.org>

June 6, 2007

[REDACTED]

RE: Signs - Sales of Tangible Personal Property or Improvements to Realty
(Sales and Use Tax)

Dear [REDACTED]:

Enclosed is a preliminary draft Private Letter Ruling concerning the above referenced matter for your review prior to consideration by the Director of the Department of Revenue. This draft is in no way to be construed as the Department's official opinion on this matter. It is merely Policy's preliminary finding based on the information provided at this time.

Please let me know within 30 days if you agree with the draft and would like to continue the advisory opinion process, or if you disagree with the draft please let us know if you would like to (1) provide additional information or arguments or (2) withdraw the request for the advisory opinion. If additional information is provided, Policy may modify the draft based on any new information provided. If the request is withdrawn, all correspondence and documents may be retained for future reference.

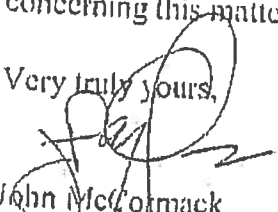
Also enclosed is a copy of a sanitized version of the draft Private Letter Ruling. A sanitized version is for dissemination within and without the Department and is without reference to the taxpayer. Please review the sanitization and let me know if there is any other information in it that should remain confidential. Lack of response on the sanitization will be construed as acceptance of this sanitized version.

DOR RESP LOWE'S2547


Page 2

I look forward to hearing from you soon. Please call me if you have any questions concerning this matter.

Very truly yours,


John McCormack
Office of General Counsel
803-898-5138

Enclosures

DOR RESP LOWE'S2548

STAFF DRAFT

State of South Carolina
Department of Revenue
301 Cervais Street, P.O. Box 125, Columbia, South Carolina 29214
Website Address: <http://www.sctax.org>

SC PRIVATE LETTER RULING #07-Draft

SUBJECT:

Signs - Sales of Tangible Personal Property or Improvements to Realty
(Sales and Use Tax)

REFERENCES:

S. C. Code Ann. Section 12-2-25(B) (Supp. 2006)
S. C. Code Ann. Section 12-36-910 (2000; Supp. 2006)
S. C. Code Ann. Section 12-36-1310 (2000; 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 12-36-90 (2000; Supp. 2006)
S. C. Code Ann. Section 12-36-130 (2000; Supp. 2006)
SC Regulation 117-309.9 (Supp. 2006)
SC Regulation 117-314.2 (Supp. 2006)
SC Regulation 117-313.3 (Supp. 2006)

AUTHORITY:

S. C. Code Ann. Section 12-4-320 (2000)
S. C. Code Ann. Section 1-23-10(4) (2006)
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.

DOR RESP LOWE'S2549

STAFF DRAFT

Questions:

1. Is [REDACTED] a retailer selling and installing signs or a contractor making improvements to real property with respect to the types of signs described in the facts?
2. If [REDACTED] is a retailer selling and installing signs, what is the basis for the tax?
3. If [REDACTED] contracts with a manufacturer in South Carolina to manufacture a sign instead of [REDACTED], is the taxation of the transaction treated the same as those in which [REDACTED] is the manufacturer?

Conclusions:

1. [REDACTED] is a retailer engaged in the business of selling tangible personal property at retail.

However, since [REDACTED] is a single member limited liability company that is disregarded for federal and state income tax purposes, it is disregarded for all South Carolina tax purposes and the taxpayer for sales and use tax purposes is [REDACTED]. As the taxpayer for sales and use tax purposes and the person liable for the tax, [REDACTED] must obtain the retail license in its name. In completing the application form (Form SCTC -111), [REDACTED] should be listed as the "Owner" on Line 1 of the form with [REDACTED] listed as the "Trade Name (Doing Business As)" on Line 2 of the form.

2. Sales at retail of signs by [REDACTED] as described in the facts, are subject to the tax based upon "gross proceeds of sales" as follows:

(a) Sales at retail of the signs are subject to the tax, unless otherwise exempt under the law.

(b) All charges by [REDACTED] to customers for services provided in conjunction with, or as a part of, sales at retail of signs are includable in "gross proceeds of sales" and, therefore, subject to the tax unless the sale of the sign is otherwise exempt under the law. This would include, but is not limited to, charges by [REDACTED] to its customers for consultation, engineering and design, surveys, and permits.

However, the following charges are not subject to the tax:

(i) Charges to install signs (whether installed by [REDACTED] or another person on its behalf), provided "such charges are separately stated from the sales price of the property on billing to customers and provided the seller's books and records of account show the reasonableness of such labor in relation to the sales price of the property;" and,

STAFF DRAFT

(ii) Charges to customers for tangible personal property which becomes a part of the real property, such as concrete used for the foundation of a stand alone sign, provided such charges are separately stated from the sales price of the property on billing to customers and provided such charges are reasonable. However, sales to, or purchases by, [REDACTED] of such tangible personal property are subject to the tax.

If [REDACTED] provides services that are not provided in conjunction with, or as a part of, the sale of a sign, then charges to customers for such services are not subject to the sales and use tax. For example, if [REDACTED] charges a customer to remove a sign, and this transaction is not associated with the sale of a new sign, then the charge for the sign removal service is not subject to the tax.

Note: For information concerning the taxability of charges for freight and delivery, repairs, and warranty and maintenance contracts, see SC Regulation 117-310, SC Regulation 117-306, and SC Revenue Ruling #06-9 respectively.

3. If [REDACTED] contracts with a manufacturer in South Carolina to manufacture a sign instead of [REDACTED], the taxation of the sale at retail of the sign is treated the same as those in which [REDACTED] is the manufacturer of the sign. In other words, [REDACTED] is still the retailer liable for the tax.

Facts:

[REDACTED] is a Florida S Corporation. It manufactures signs in Florida for out-of-state customers as well as Florida customers. [REDACTED] also has the signs installed at the out-of-state customer's location using a subcontractor. [REDACTED] contracts with and pays the subcontractor for installing the sign and then bills the customer for the sign and installation costs and collects sales tax on the transaction in accordance with the law of the state where the sign is delivered. This sales tax is remitted to the taxing authorities in the state where the sign is installed.

To address Florida sales and use tax issues, [REDACTED] is creating a Florida single-member limited liability company. The new LLC will be named [REDACTED]. [REDACTED] will be disregarded for federal and state income tax purposes and, therefore, treated as a division of the [REDACTED]. However, for Florida sales tax purposes, [REDACTED] will be legally distinct. [REDACTED] will purchase signs from [REDACTED] for delivery to its out-of-state customers. [REDACTED] will deliver the signs by a common carrier or pursuant to the terms of the sales contract deliver the property using [REDACTED] own mode of transportation. [REDACTED] will contract with and pay a subcontractor for installing the sign and then will bill the customer for the sign and installation costs and collect sales tax on the transaction in accordance with the law of the state where the sign is delivered.

STAFF DRAFT

[REDACTED] manufactures six distinct signage products: channel letters, back-lit letters, pylon signs, monument signs, and electronic display systems, and banners. In addition, [REDACTED] offers total customer packages which include an array of signage products custom tailored to meet the demands of a diverse range of businesses.

Channel Letters are individually illuminated letters and graphics. These letters are found everywhere, from shopping malls to exterior storefront identification. There are three types of channel letters:

The most common type is Standard Channel Letters. These letters are made up of a U-channel base, with colored Plexiglas faces.

Reverse Channel Letters have metal faces and returns (sides of letters) and have a clear plastic backing. These letters are designed to be mounted an inch or two away from the wall. At night, these letters create a halo-lit effect.

The third type of Channel Letters have "open" faces. Though not actually open, the faces of these letters are clear plastic with the balance of the letters built just like Standard Channel Letters. This allows for the raw neon to be seen, as well as the inside of the U-channel letterform itself.

Back-Lit Letters are individual letters and graphics that are illuminated from a source that is located behind the letters. The usage of back lighting creates a halo effect around the letters.

Pylon signs are an effective way to provide advance notice of the location of a business or to feature a business name or logo. It is very common to see pylon signs on or near main streets. Manufactured of aluminum & steel, the structures are made for long term usage.

Monument signs are free-standing signs constructed on the ground with a continuous footing or foundation and a base at grade level.

Electronic display systems utilize digital media to display information. The use of electronic display systems has rapidly increased due to their ability to display information rapidly, fluidly and in a more esthetically pleasing manner. Electronic displays are often utilized by companies needing to communicate large amounts of information, such as airports, bus terminals, and stadiums. However, their use has also increased rapidly in mainstream commerce.

Banners are temporary signs until the actual sign is manufactured.

Window Graphics are vinyl signs applied inside the windows or on the doors that are used to tell store hours and emergency contact information.

STAFF DRAFT

[REDACTED] performs design and engineering services. The marketing design department provides clients with creative artwork concepts.

Finally, from time to time, [REDACTED] may contract with a sign manufacturer in South Carolina to manufacture a sign instead of contracting with [REDACTED] Inc. to manufacture the sign.

Discussion:

[REDACTED] is a single member limited liability whose single member is [REDACTED], a Florida S corporation. [REDACTED] will be disregarded for federal and state income tax purposes and will, therefore, be treated as a division of [REDACTED].

Code Section 12-2-25(B) states that "[f]or South Carolina tax purposes ... a single member limited liability company, which is not taxed for South Carolina income tax purposes as a corporation, is not regarded as an entity separate from its owner."

Based on the above, the taxpayer for South Carolina sales and use tax purposes is [REDACTED]. [REDACTED] is not regarded as an entity separate from its owner."

For purposes of this advisory opinion, the taxpayer will be referred to as "[REDACTED]".

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

A sales tax, equal to five 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 five percent² of the sales

¹ ~~At the time this document was issued, the total state sales and use tax rate was 5%.~~ ^{became was increased} Beginning June 1, 2007, the total state sales and use tax rate will be 6%. Code Section 12-36-1110, which increases 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.

STAFF DRAFT

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

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.

(1) The terms include:

(a) sales of building materials to construction contractors, builders, or landowners for resale or use in the form of real estate;

SC Regulation 117-309.9 concerns sign companies, and states:

A person engaged in the business of erecting, on properties owned or controlled by him, signs for the display of products of a second party for a consideration is deemed to be engaged in the business of selling a service. A tax is due measured by the purchase price of all tangible personal property used or consumed by such person as additions or improvements to realty.

A person engaged in the business of designing, fabricating and erecting signs on properties of another, for the display of that person's products, is deemed to be a retailer. The gross proceeds of the sale of such signs are subject to the tax. If the signs are leased or rented, the lease or rental proceeds are subject to the tax.

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A person engaged in both of the above businesses shall pay the tax in accordance with the applicable provisions as set forth hereinabove.

A person who designs and constructs a sign as defined in the second paragraph above may, if all statutory requirements are met, be considered a manufacturer. (Emphasis added.)

In addition, in Commission Decision #89-70 the Department held that a taxpayer engaged in the business of designing, fabricating and erecting signs was a retailer of tangible personal property.

Based on the above and the facts set forth above, [REDACTED] selling tangible personal property at retail.

However, we must consider the application of the tax with respect to tangible personal property which becomes a part of real property. SC Regulation 117-314.2 addresses this matter and states:

Building materials when purchased by builders, contractors, or landowners for use in adding to, repairing or altering real property are subject to either the sales or use tax at the time of purchase by such builder, contractor, or landowner. "Building materials" as used in the Sales and Use Tax Law includes any material used in making repairs, alterations or additions to real property. "Builders," "contractors," and "landowners" mean and include any person, firm, association or corporation making repairs, or additions to real property. The term "building materials" includes such tangible personal property as lumber, timber, nails, screws, bolts, structural steel, elevators, reinforcing steel, cement, lime, sand, gravel, slag, stone, telephone poles, fencing, wire, electric cable, brick, tile, glass, plumbing supplies, plumbing fixtures, pipe, pipe fittings, prefabricated buildings, electrical fixtures, built-in cabinets and furniture, sheet metal, paint, roofing materials, road building materials, sprinkler systems, air conditioning systems, built-in fans, heating systems, floorings, floor furnaces, crane ways, crossties, railroad rails, railroad track accessories, tanks, builders hardware, doors, door frames, window frames, water meters, gas meters, well pumps, and any and all other tangible personal property which becomes a part of real property.

For additional guidance in this matter, we refer to *City of North Charleston v. Claxton*, 315 S.C. 56, 431 S.E.2d 610 (1993). While that case dealt with the value of property in a condemnation proceeding, it also addressed the issue of real (fixtures) versus personal property.

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Quoting from that case:

Criteria for determining whether an item remains personalty or becomes a fixture when affixed to realty includes: (1) the mode of attachment; (2) the character of the structure of the article; (3) the intent of the parties making the annexation; and, (4) the relationship of the parties. Creative Displays, 272 S.C. at 72, 248 S.E.2d at 918.

The Court, in *Claxton*, referenced *Rebel Manufacturing and Marketing Corporation*, 54 B.R. 674 (Bkrcty, D.S.C. 1985). In that case, a bank argued that the sale of a mobile home was subject to a mortgage on the realty because it was a fixture [real property]. The mobile home was underpinned, anchored, and connected to sewerage, water and electric lines. Also, the home had a screened porch attached and was adjacent to several large trees.

In ruling for the bank, the Court reasoned:

The various substantial structures and trees surrounding the mobile home would be severely damaged, if not destroyed, should the mobile home be removed.

* * * *

It seems clear that the debtor's positioning the mobile home among the trees, and adding the construction [the porch] warrants the inference that the intent of the debtor was for the mobile home to become a part of the realty.

Paris Mountain Water Company v. Woodside, 133 S.C. 383, 131 S.E. 37 (1925), a South Carolina State Supreme Court case, was concerned with whether water pipes placed in lands belonging to others were to be taxed as realty or personalty. The Court, in holding that the pipe was to be taxed as realty, stated:

In the requirement of an intention to make the article annexed a permanent accession to the land, the expression of permanent does not, it seems, imply that the annexation must be intended to be perpetual, but rather that the article shall appear to be intended to remain where fastened until worn out, until the purpose to which the realty is devoted has been accomplished, or until the article is superseded by another article more suitable for the purpose.

Based on the above, if a tangible personal property becomes a part of real property, such as concrete used for the foundation of a stand alone sign, then such tangible personal property is considered used and consumed by [REDACTED]s and not sold by [REDACTED].

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The next issue concerns the basis for the tax on sales of tangible personal property at retail.

The sales tax is imposed upon a retailer's "gross proceeds of sales" which is defined at Code Section 12-36-90, in part, as:

...the value proceeding or accruing from the sale, lease, or rental of tangible personal property... without any deduction for... the cost of materials, labor, or service... [or] any other expenses...

The use tax is based upon the "sales price" of tangible personal property. The term "sales price" is defined at Code Section 12-36-130, in part, as:

...the total amount for which tangible personal property is sold, without any deduction for the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, losses, or any other expenses.

(1) The term includes:

- (a) any services or transportation costs that are a part of the sale, whether paid in money or otherwise; ...

In *Meyers Arnold, Inc. v. South Carolina Tax Commission*, 285 S.C. 303, 328 S.E.2d 920, 923 (1985), the Court of Appeals of South Carolina held the element of service involved in a lay away sale was subject to tax as being part of the sale of tangible personal property. The test used by the court was as follows:

...But for the lay away sales, Meyers Arnold would not receive the lay away fees. The fees are obviously charged for the service rendered in making lay away sales. For these reasons, this court holds the lay away fees are part of the gross proceeds and subject to the sales tax.

Accordingly, the total amount charged in conjunction with the sale or purchase of tangible personal property is subject to the tax.

A similar conclusion was reached in *Regency Towers Association, Inc. v. South Carolina Tax Commission*, 88-CP-26-1109 (1989), where the Horry County Court of Common Pleas held charges for maid service were not deductible from gross proceeds derived from charges for accommodations. In Commission Decision #92-37, the Commission held that charges for maid services, which were optional, were a part of the accommodations furnished to transients and therefore subject to the accommodations tax. (See Code Section 12-36-920(B) and SC Regulation 117-307 for subsequent changes in the statute concerning "additional guest charges," such as maid service, at places furnishing accommodations.)

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In Commission Decision #90-38, the Commission held that charges for engraving services, even though optional, were a part of the sale of plaques and trophies by the retailer and includible in gross proceeds of sales. The decision states, in part:

...We find and conclude that here the "engraving charges" are part of the sale of tangible personal property since the customer is not seeking a professional service but is seeking an engraved trophy or plaque....

* * * *

...The Courts have held that although the amount of materials used may be inconsequential with respect to the labor involved where the customer seeks to purchase custom made or designed tangible personal property, the artistic skill of the craftsman is a part of the sales price of the product and is inextricably linked....

In summary, charges for services that are made in conjunction with, or as part of the sale of, tangible personal property are includable in "gross proceeds of sales" or "sales price," and, therefore, subject to the tax.

However, it is important to note two additional issues with respect to the basis for the tax.

First, SC Regulation 117-313.3, concerning installation charges, states:

Not subject to the sales or use tax are charges for installation incident to the sale of tangible personal property when such charges are separately stated from the sales price of the property on billing to customers and provided the seller's books and records of account show the reasonableness of such labor in relation to the sales price of the property.

Second, since some tangible personal property used in the transaction becomes a part of the real property, such as concrete used for foundations of stand alone signs, then such tangible personal property is considered used and consumed by [REDACTED] and not sold by [REDACTED]. As such, the sales to, or purchases by, [REDACTED] of such tangible personal property are subject to the tax.

Based on the above, sales at retail of signs by [REDACTED], as described in the facts, are subject to the tax based upon "gross proceeds of sales" as follows:

(a) Sales at retail of the signs are subject to the tax, unless otherwise exempt under the law.

(b) All charges by [REDACTED] to customers for services provided in conjunction with, or as a part of, sales at retail of signs are includable in "gross proceeds of sales" and, therefore, subject to the tax unless the sale of the sign is otherwise exempt under the

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law. This would include, but is not limited to, charges by [REDACTED] to its customers for consultation, engineering and design, surveys, and permits.

However, the following charges are not subject to the tax:

(i) Charges to install signs (whether installed by [REDACTED] or another person on its behalf); provided "such charges are separately stated from the sales price of the property on billing to customers and provided the seller's books and records of account show the reasonableness of such labor in relation to the sales price of the property;" and;

(ii) Charges to customers for tangible personal property which becomes a part of the real property, such as concrete used for the foundation of a stand alone sign, provided such charges are separately stated from the sales price of the property on billing to customers and provided such charges are reasonable. However, sale to, or purchases by, [REDACTED] of such tangible personal property are subject to the tax.

If [REDACTED] provides services that are not provided in conjunction with, or as a part of, the sale of a sign, then charges to customers for such services are not subject to the sales and use tax. For example, if [REDACTED] charges a customer to remove a sign, and this transaction is not associated with the sale of a new sign, then the charge for the sign removal service is not subject to the tax.

And finally, if [REDACTED] contracts with a manufacturer in South Carolina to manufacture a sign instead of [REDACTED], the taxation of the sale at retail of the sign is treated the same as those in which [REDACTED] is the manufacturer of the sign. In other words, [REDACTED] is still the retailer liable for the tax.

Note: For information concerning the taxability of charges for freight and delivery, repairs, warranty and maintenance contracts, see SC Regulation 117-310, SC Regulation 117-306, and SC Revenue Ruling #06-9 respectively.

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State of South Carolina
Department of Revenue
301 Gervais Street, P.O. Box 125, Columbia, South Carolina 29214
Website Address: <http://www.sctax.org>

SC PRIVATE LETTER RULING #07-Draft

SUBJECT: Signs -- Sales of Tangible Personal Property or Improvements to Realty
(Sales and Use Tax)

REFERENCES: S. C. Code Ann. Section 12-2-25(B) (Supp. 2006)
S. C. Code Ann. Section 12-36-910 (2000; Supp. 2006)
S. C. Code Ann. Section 12-36-1310 (2000; 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 12-36-90 (2000; Supp. 2006)
S. C. Code Ann. Section 12-36-130 (2000; Supp. 2006)
SC Regulation 117-309.9 (Supp. 2006)
SC Regulation 117-314.2 (Supp. 2006)
SC Regulation 117-313.3 (Supp. 2006)

AUTHORITY: S. C. Code Ann. Section 12-4-320 (2000)
S. C. Code Ann. Section 1-23-10(4) (2006)
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.

Questions:

1. Is XYZ, LLC ("XYZ") a retailer selling and installing signs or a contractor making improvements to real property with respect to the types of signs described in the facts?

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2. If XYZ, LLC is a retailer selling and installing signs, what is the basis for the tax?
3. If XYZ, LLC contracts with a manufacturer in South Carolina to manufacture a sign instead of ABC, Inc., is the taxation of the transaction treated the same as those in which ABC, Inc. is the manufacturer?

Conclusions:

1. XYZ, LLC is a retailer engaged in the business of selling tangible personal property at retail.

However, since XYZ, LLC is a single member limited liability company that is disregarded for federal and state income tax purposes, it is disregarded for all South Carolina tax purposes and the taxpayer for sales and use tax purposes is ABC, Inc. As the taxpayer for sales and use tax purposes and the person liable for the tax, ABC, Inc. must obtain the retail license in its name. In completing the application form (Form SCTC - 111), ABC, Inc. should be listed as the "Owner" on Line 1 of the form with XYZ, LLC listed as the "Trade Name (Doing Business As)" on Line 2 of the form.

2. Sales at retail of signs by ABC, Inc. d/b/a XYZ, LLC ("XYZ"), as described in the facts, are subject to the tax based upon "gross proceeds of sales" as follows:

- (a) Sales at retail of the signs are subject to the tax, unless otherwise exempt under the law.

- (b) All charges by XYZ to customers for services provided in conjunction with, or as a part of, sales at retail of signs are includable in "gross proceeds of sales" and, therefore, subject to the tax unless the sale of the sign is otherwise exempt under the law. This would include, but is not limited to, charges by XYZ to its customers for consultation, engineering and design, surveys, and permits.

However, the following charges are not subject to the tax:

- (i) Charges to install signs (whether installed by XYZ or another person on its behalf), provided "such charges are separately stated from the sales price of the property on billing to customers and provided the seller's books and records of account show the reasonableness of such labor in relation to the sales price of the property;" and,

- (ii) Charges to customers for tangible personal property which becomes a part of the real property, such as concrete used for the foundation of a stand alone sign, provided such charges are separately stated from the sales price of the property on billing to customers and provided such charges are reasonable. However, sales to, or purchases by, XYZ of such tangible personal property are subject to the tax.

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If XYZ provides services that are not provided in conjunction with, or as a part of, the sale of a sign, then charges to customers for such services are not subject to the sales and use tax. For example, if XYZ charges a customer to remove a sign, and this transaction is not associated with the sale of a new sign, then the charge for the sign removal service is not subject to the tax.

Note: For information concerning the taxability of charges for freight and delivery, repairs, and warranty and maintenance contracts, see SC Regulation 117-310, SC Regulation 117-306, and SC Revenue Ruling #06-9 respectively.

3. If XYZ, LLC contracts with a manufacturer in South Carolina to manufacture a sign instead of ABC, Inc., the taxation of the sale at retail of the sign is treated the same as those in which ABC, Inc. is the manufacturer of the sign. In other words, XYZ is still the retailer liable for the tax.

Facts:

ABC, Inc. is a Florida S Corporation. It manufactures signs in Florida for out-of-state customers as well as Florida customers. ABC, Inc. also has the signs installed at the out-of-state customer's location using a subcontractor. ABC, Inc. contracts with and pays the subcontractor for installing the sign and then bills the customer for the sign and installation costs and collects sales tax on the transaction in accordance with the law of the state where the sign is delivered. This sales tax is remitted to the taxing authorities in the state where the sign is installed.

To address Florida sales and use tax issues, ABC, Inc. is creating a Florida single-member limited liability company. The new LLC will be named XYZ, LLC. XYZ, LLC will be disregarded for federal and state income tax purposes and, therefore, treated as a division of the ABC, Inc. However, for Florida sales tax purposes, ABC, Inc. and XYZ, LLC will be legally distinct. XYZ, LLC will purchase signs from ABC, Inc. for delivery to its out-of-state customers. ABC, Inc. will deliver the signs by a common carrier or pursuant to the terms of the sales contract deliver the property using ABC, Inc.'s own mode of transportation. XYZ, LLC will contract with and pay a subcontractor for installing the sign and then will bill the customer for the sign and installation costs and collect sales tax on the transaction in accordance with the law of the state where the sign is delivered.

ABC, Inc. manufactures six distinct signage products: channel letters, back-lit letters, pylon signs, monument signs, and electronic display systems, and banners. In addition, ABC, Inc. offers total customer packages which include an array of signage products custom tailored to meet the demands of a diverse range of businesses.

Channel Letters are individually illuminated letters and graphics. These letters are found everywhere, from shopping malls to exterior storefront identification. There are three types of channel letters:

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The most common type is Standard Channel Letters. These letters are made up of a U-channel base, with colored Plexiglas faces.

Reverse Channel Letters have metal faces and returns (sides of letters) and have a clear plastic backing. These letters are designed to be mounted an inch or two away from the wall. At night, these letters create a halo-lit effect.

The third type of Channel Letters have "open" faces. Though not actually open, the faces of these letters are clear plastic with the balance of the letters built just like Standard Channel Letters. This allows for the raw neon to be seen, as well as the inside of the U-channel letterform itself.

Back-Lit Letters are individual letters and graphics that are illuminated from a source that is located behind the letters. The usage of back lighting creates a halo effect around the letters.

Pylon signs are an effective way to provide advance notice of the location of a business or to feature a business name or logo. It is very common to see pylon signs on or near main streets. Manufactured of aluminum & steel, the structures are made for long term usage.

Monument signs are free-standing signs constructed on the ground with a continuous footing or foundation and a base at grade level.

Electronic display systems utilize digital media to display information. The use of electronic display systems has rapidly increased due to their ability to display information rapidly, fluidly and in a more esthetically pleasing manner. Electronic displays are often utilized by companies needing to communicate large amounts of information, such as airports, bus terminals, and stadiums. However, their use has also increased rapidly in mainstream commerce.

Banners are temporary signs until the actual sign is manufactured.

Window Graphics are vinyl signs applied inside the windows or on the doors that are used to tell store hours and emergency contact information.

ABC, Inc. performs design and engineering services. The marketing design department provides clients with creative artwork concepts.

Finally, from time to time, XYZ, LLC may contract with a sign manufacturer in South Carolina to manufacture a sign instead of contracting with ABC, Inc. to manufacture the sign.

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Discussion:

XYZ, LLC is a single member limited liability whose single member is ABC, Inc., a Florida S corporation. XYZ, LLC will be disregarded for federal and state income tax purposes and will, therefore, be treated as a division of ABC, Inc.

Code Section 12-2-25(B) states that "[f]or South Carolina tax purposes ... a single member limited liability company, which is not taxed for South Carolina income tax purposes as a corporation, is not regarded as an entity separate from its owner."

Based on the above, the taxpayer for South Carolina sales and use tax purposes is ABC, Inc. since XYZ, LLC "is not regarded as an entity separate from its owner."

For purposes of this advisory opinion, the taxpayer will be referred to as "XYZ."

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

A sales tax, equal to five 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 five percent² of the sales price of the property, regardless of whether the retailer is or is not engaged in business in this State.

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.

¹ At the time this document was issued, the total state sales and use tax rate was 5%. Beginning June 1, 2007, the total state sales and use tax rate will be 6%. Code Section 12-36-1110, which increases 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.

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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.

(1) The terms include:

(a) sales of building materials to construction contractors, builders, or landowners for resale or use in the form of real estate;

SC Regulation 117-309.9 concerns sign companies, and states:

A person engaged in the business of erecting, on properties owned or controlled by him, signs for the display of products of a second party for a consideration is deemed to be engaged in the business of selling a service. A tax is due measured by the purchase price of all tangible personal property used or consumed by such person as additions or improvements to realty.

A person engaged in the business of designing, fabricating and erecting signs on properties of another, for the display of that person's products, is deemed to be a retailer. The gross proceeds of the sale of such signs are subject to the tax. If the signs are leased or rented, the lease or rental proceeds are subject to the tax.

A person engaged in both of the above businesses shall pay the tax in accordance with the applicable provisions as set forth hereinabove.

A person who designs and constructs a sign as defined in the second paragraph above may, if all statutory requirements are met, be considered a manufacturer. (Emphasis added.)

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In addition, in Commission Decision #89-70 the Department held that a taxpayer engaged in the business of designing, fabricating and erecting signs was a retailer of tangible personal property.

Based on the above and the facts set forth above, XYZ is selling tangible personal property at retail.

However, we must consider the application of the tax with respect to tangible personal property which becomes a part of real property. SC Regulation 117-314.2 addresses this matter and states:

Building materials when purchased by builders, contractors, or landowners for use in adding to, repairing or altering real property are subject to either the sales or use tax at the time of purchase by such builder, contractor, or landowner. "Building materials" as used in the Sales and Use Tax Law includes any material used in making repairs, alterations or additions to real property. "Builders," "contractors," and "landowners" mean and include any person, firm, association or corporation making repairs, or additions to real property. The term "building materials" includes such tangible personal property as lumber, timber, nails, screws, bolts, structural steel, elevators, reinforcing steel, cement, lime, sand, gravel, slag, stone, telephone poles, fencing, wire, electric cable, brick, tile, glass, plumbing supplies, plumbing fixtures, pipe, pipe fittings, prefabricated buildings, electrical fixtures, built-in cabinets and furniture, sheet metal, paint, roofing materials, road building materials, sprinkler systems, air conditioning systems, built-in fans, heating systems, floorings, floor furnaces, crane ways, crossties, railroad rails, railroad track accessories, tanks, builders hardware, doors, door frames, window frames, water meters, gas meters, well pumps, and any and all other tangible personal property which becomes a part of real property.

For additional guidance in this matter, we refer to *City of North Charleston v. Claxton*, 315 S.C. 56, 431 S.E.2d 610 (1993). While that case dealt with the value of property in a condemnation proceeding, it also addressed the issue of real (fixtures) versus personal property.

Quoting from that case:

Criteria for determining whether an item remains personalty or becomes a fixture when affixed to realty includes: (1) the mode of attachment; (2) the character of the structure of the article; (3) the intent of the parties making the annexation; and, (4) the relationship of the parties. Creative Displays, 272 S.C. at 72, 248 S.E.2d at 918.

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home was subject to a mortgage on the realty because it was a fixture [real property]. The mobile home was underpinned, anchored, and connected to sewerage, water and electric lines. Also, the home had a screened porch attached and was adjacent to several large trees.

In ruling for the bank, the Court reasoned:

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* * * *

It seems clear that the debtor's positioning the mobile home among the trees, and adding the construction [the porch] warrants the inference that the intent of the debtor was for the mobile home to become a part of the realty.

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In the requirement of an intention to make the article annexed a permanent accession to the land, the expression of permanent does not, it seems, imply that the annexation must be intended to be perpetual, but rather that the article shall appear to be intended to remain where fastened until worn out, until the purpose to which the realty is devoted has been accomplished, or until the article is superseded by another article more suitable for the purpose.

Based on the above, if a tangible personal property becomes a part of real property, such as concrete used for the foundation of a stand alone sign, then such tangible personal property is considered used and consumed by XYZ and not sold by XYZ.

The next issue concerns the basis for the tax on sales of tangible personal property at retail.

The sales tax is imposed upon a retailer's "gross proceeds of sales" which is defined at Code Section 12-36-90, in part, as:

...the value proceeding or accruing from the sale, lease, or rental of tangible personal property... without any deduction for... the cost of materials, labor, or service... [or] any other expenses....

STAFF DRAFT

The use tax is based upon the "sales price" of tangible personal property. The term "sales price" is defined at Code Section 12-36-130, in part, as:

...the total amount for which tangible personal property is sold, without any deduction for the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, losses, or any other expenses.

(1) The term includes:

- (a) any services or transportation costs that are a part of the sale, whether paid in money or otherwise; ...

In *Meyers Arnold, Inc. v. South Carolina Tax Commission*, 285 S.C. 303, 328 S.E.2d 920, 923 (1985), the Court of Appeals of South Carolina held the element of service involved in a lay away sale was subject to tax as being part of the sale of tangible personal property. The test used by the court was as follows:

...But for the lay away sales, Meyers Arnold would not receive the lay away fees. The fees are obviously charged for the service rendered in making lay away sales. For these reasons, this court holds the lay away fees are part of the gross proceeds and subject to the sales tax.

Accordingly, the total amount charged in conjunction with the sale or purchase of tangible personal property is subject to the tax.

A similar conclusion was reached in *Regency Towers Association, Inc. v. South Carolina Tax Commission*, 88-C.P.-26-1109 (1989), where the Horry County Court of Common Pleas held charges for maid service were not deductible from gross proceeds derived from charges for accommodations. In Commission Decision #92-37, the Commission held that charges for maid services, which were optional, were a part of the accommodations furnished to transients and therefore subject to the accommodations tax. (See Code Section 12-36-920(B) and SC Regulation 117-307 for subsequent changes in the statute concerning "additional guest charges," such as maid service, at places furnishing accommodations.)

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...We find and conclude that here the "engraving charges" are part of the sale of tangible personal property since the customer is not seeking a professional service but is seeking an engraved trophy or plaque....

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...The Courts have held that although the amount of materials used may be inconsequential with respect to the labor involved where the customer seeks to purchase custom made or designed tangible personal property, the artistic skill of the craftsman is a part of the sales price of the product and is inextricably linked....

In summary, charges for services that are made in conjunction with, or as part of the sale of, tangible personal property are includable in "gross proceeds of sales" or "sales price," and, therefore, subject to the tax.

However, it is important to note two additional issues with respect to the basis for the tax.

First, SC Regulation 117-313.3, concerning installation charges, states:

Not subject to the sales or use tax are charges for installation incident to the sale of tangible personal property when such charges are separately stated from the sales price of the property on billing to customers and provided the seller's books and records of account show the reasonableness of such labor in relation to the sales price of the property.

Second, since some tangible personal property used in the transaction becomes a part of the real property, such as concrete used for foundations of stand alone signs, then such tangible personal property is considered used and consumed by XYZ and not sold by XYZ. As such, the sales to, or purchases by, XYZ of such tangible personal property are subject to the tax.

Based on the above, sales at retail of signs by XYZ, as described in the facts, are subject to the tax based upon "gross proceeds of sales" as follows:

(a) Sales at retail of the signs are subject to the tax, unless otherwise exempt under the law.

(b) All charges by XYZ to customers for services provided in conjunction with, or as a part of, sales at retail of signs are includable in "gross proceeds of sales" and, therefore, subject to the tax unless the sale of the sign is otherwise exempt under the law. This would include, but is not limited to, charges by XYZ to its customers for consultation, engineering and design, surveys, and permits.

However, the following charges are not subject to the tax:

(i) Charges to install signs (whether installed by XYZ or another person on its behalf), provided "such charges are separately stated from the sales price of the property on billing to customers and provided the seller's books and records of account show the reasonableness of such labor in relation to the sales price of the property;" and,

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(ii) Charges to customers for tangible personal property which becomes a part of the real property, such as concrete used for the foundation of a stand alone sign, provided such charges are separately stated from the sales price of the property on billing to customers and provided such charges are reasonable. However, sale to, or purchases by, XYZ of such tangible personal property are subject to the tax.

If XYZ provides services that are not provided in conjunction with, or as a part of, the sale of a sign, then charges to customers for such services are not subject to the sales and use tax. For example, if XYZ charges a customer to remove a sign, and this transaction is not associated with the sale of a new sign, then the charge for the sign removal service is not subject to the tax.

And finally, if XYZ, LLC contracts with a manufacturer in South Carolina to manufacture a sign instead of ABC, Inc., the taxation of the sale at retail of the sign is treated the same as those in which ABC, Inc. is the manufacturer of the sign. In other words, XYZ is still the retailer liable for the tax.

Note: For information concerning the taxability of charges for freight and delivery, repairs, warranty and maintenance contracts, see SC Regulation 117-310, SC Regulation 117-306, and SC Revenue Ruling #06-9 respectively.

6/6/87

[REDACTED]

Please prepare the 30 day letters for the attached two draft PLRs. Also, please prepare a sanitized version of the "Sign" PLR. On the [REDACTED] do not sanitize it and add to the PLR the following above the question:

PRIVATE LETTER RULINGS ARE GENERALLY EDITED FOR CONFIDENTIALITY.
THE TAXPAYER HAS GRANTED THE DEPARTMENT PERMISSION TO PUBLISH THIS DOCUMENT UNEDITED.

And delete references to the sanitized version in the letter and add to the letter:

As a result of citing the federal law, we thought it would be obvious as to who requested and was issued the private letter ruling. As such, we are suggesting that the private letter ruling be published unsanitized and that we add to the document the following statement: PRIVATE LETTER RULINGS ARE GENERALLY EDITED FOR CONFIDENTIALITY. THE TAXPAYER HAS GRANTED THE DEPARTMENT PERMISSION TO PUBLISH THIS DOCUMENT UNEDITED. If this is acceptable, please let me know in writing within the next 30 days. If your client wants the request sanitized, please let me know.

The Sign PLR should be addressed to:

[REDACTED] buntant
[REDACTED]
[REDACTED]

The [REDACTED] should be addressed to:

[REDACTED]
[REDACTED]
[REDACTED]

Thanks.

John

STAFF DRAFT

State of South Carolina
Department of Revenue
301 Gervais Street, P.O. Box 125, Columbia, South Carolina 29214
Website Address: <http://www.sctax.org>

SC PRIVATE LETTER RULING #07-Draft

SUBJECT: Signs - Sales of Tangible Personal Property or Improvements to Realty
(Sales and Use Tax)

REFERENCES: S. C. Code Ann. Section 12-2-25(B) (Supp. 2006)
S. C. Code Ann. Section 12-36-910 (2000; Supp. 2006)
S. C. Code Ann. Section 12-36-1310 (2000; 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 12-36-90 (2000; Supp. 2006)
S. C. Code Ann. Section 12-36-130 (2000; Supp. 2006)
SC Regulation 117-309.9 (Supp. 2006)
SC Regulation 117-314.2 (Supp. 2006)
SC Regulation 117-313.3 (Supp. 2006)

AUTHORITY: S. C. Code Ann. Section 12-4-320 (2000)
S. C. Code Ann. Section 1-23-10(4) (2006)
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.

Questions:

1. [REDACTED] a retailer selling and installing signs or a contractor making improvements to real property with respect to the types of signs described in the facts?

DOR RESP LOWE'S2572

STAFF DRAFT

2. If [REDACTED] is a retailer selling and installing signs, what is the basis for the tax?
3. If [REDACTED] contracts with a manufacturer in South Carolina to manufacture a sign instead of [REDACTED], Inc., is the taxation of the transaction treated the same as those in which [REDACTED] is the manufacturer?

Conclusions:

1. [REDACTED] is a retailer engaged in the business of selling tangible personal property at retail.

However, since [REDACTED] C is a single member limited liability company that is disregarded for federal and state income tax purposes, it is disregarded for all South Carolina tax purposes and the taxpayer for sales and use tax purposes is [REDACTED]. As the taxpayer for sales and use tax purposes and the person liable for the tax, [REDACTED] c. must obtain the retail license in its name. In completing the application form (Form SCTC -111), [REDACTED] should be listed as the "Owner" on Line 1 of the form with [REDACTED] LLC listed as the "Trade Name (Doing Business As)" on Line 2 of the form.

2. Sales at retail of signs by [REDACTED], as described in the facts, are subject to the tax based upon "gross proceeds of sales" as follows:

- (a) Sales at retail of the signs are subject to the tax, unless otherwise exempt under the law.
- (b) All charges by [REDACTED] to customers for services provided in conjunction with, or as a part of, sales at retail of signs are includable in "gross proceeds of sales" and, therefore, subject to the tax unless the sale of the sign is otherwise exempt under the law. This would include, but is not limited to, charges by [REDACTED] to its customers for consultation, engineering and design, surveys, and permits.

However, the following charges are not subject to the tax:

- (i) Charges to install signs (whether installed by [REDACTED] or another person on its behalf), provided "such charges are separately stated from the sales price of the property on billing to customers and provided the seller's books and records of account show the reasonableness of such labor in relation to the sales price of the property;" and,
- (ii) Charges to customers for tangible personal property which becomes a part of the real property, such as concrete used for the foundation of a stand alone sign, provided such charges are separately stated from the sales price of the property on billing to customers and provided such charges are reasonable. However, sales to,

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or purchases by, [REDACTED] of such tangible personal property are subject to the tax.

If [REDACTED] provides services that are not provided in conjunction with, or as a part of, the sale of a sign, then charges to customers for such services are not subject to the sales and use tax. For example, if [REDACTED] charges a customer to remove a sign, and this transaction is not associated with the sale of a new sign, then the charge for the sign removal service is not subject to the tax.

Note: For information concerning the taxability of charges for freight and delivery, repairs, and warranty and maintenance contracts, see SC Regulation 117-310, SC Regulation 117-306, and SC Revenue Ruling #06-9 respectively.

3. [REDACTED] contracts with a manufacturer in South Carolina to manufacture a sign instead of [REDACTED]. The taxation of the sale at retail of the sign is treated the same as those in which [REDACTED] is the manufacturer of the sign. In other words, [REDACTED] is still the retailer liable for the tax.

Facts:

[REDACTED] is a Florida S Corporation. It manufactures signs in Florida for out-of-state customers as well as Florida customers. [REDACTED] also has the signs installed at the out-of-state customer's location using a subcontractor. [REDACTED] Inc. contracts with and pays the subcontractor for installing the sign and then bills the customer for the sign and installation costs and collects sales tax on the transaction in accordance with the law of the state where the sign is delivered. This sales tax is remitted to the taxing authorities in the state where the sign is installed.

To address Florida sales and use tax issues, [REDACTED] is creating a Florida single-member limited liability company. The new LLC will be named [REDACTED]. [REDACTED] will be disregarded for federal and state income tax purposes and, therefore, treated as a division of the [REDACTED]. However, for Florida sales tax purposes, [REDACTED] will be legally distinct. [REDACTED] will purchase signs from [REDACTED] for delivery to its out-of-state customers. [REDACTED] will deliver the signs by a common carrier or pursuant to the terms of the sales contract deliver the property using [REDACTED] own mode of transportation. [REDACTED] will contract with and pay a subcontractor for installing the sign and then will bill the customer for the sign and installation costs and collect sales tax on the transaction in accordance with the law of the state where the sign is delivered.

[REDACTED] manufactures six distinct signage products: channel letters, back-fit letters, pylon signs, monument signs, and electronic display systems, and banners. In addition, [REDACTED] offers total customer packages which include an array of signage products custom tailored to meet the demands of a diverse range of businesses.

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Channel Letters are individually illuminated letters and graphics. These letters are found everywhere, from shopping malls to exterior storefront identification. There are three types of channel letters:

The most common type is Standard Channel Letters. These letters are made up of a U-channel base, with colored Plexiglas faces.

Reverse Channel Letters have metal faces and returns (sides of letters) and have a clear plastic backing. These letters are designed to be mounted an inch or two away from the wall. At night, these letters create a halo-lit effect.

The third type of Channel Letters have "open" faces. Though not actually open, the faces of these letters are clear plastic with the balance of the letters built just like Standard Channel Letters. This allows for the raw neon to be seen, as well as the inside of the U-channel letterform itself.

Back-Lit Letters are individual letters and graphics that are illuminated from a source that is located behind the letters. The usage of back lighting creates a halo effect around the letters.

Pylon signs are an effective way to provide advance notice of the location of a business or to feature a business name or logo. It is very common to see pylon signs on or near main streets. Manufactured of aluminum & steel, the structures are made for long term usage.

Monument signs are free-standing signs constructed on the ground with a continuous footing or foundation and a base at grade level.

Electronic display systems utilize digital media to display information. The use of electronic display systems has rapidly increased due to their ability to display information rapidly, fluidly and in a more esthetically pleasing manner. Electronic displays are often utilized by companies needing to communicate large amounts of information, such as airports, bus terminals, and stadiums. However, their use has also increased rapidly in mainstream commerce.

Banners are temporary signs until the actual sign is manufactured.

Window Graphics are vinyl signs applied inside the windows or on the doors that are used to tell store hours and emergency contact information.

[REDACTED] performs design and engineering services. The marketing design department provides clients with creative artwork concepts.

Finally, from time to time, [REDACTED] may contract with a sign manufacturer in South Carolina to manufacture a sign instead of contracting with [REDACTED] to manufacture the sign.

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Discussion:

[REDACTED] is a single member limited liability whose single member is [REDACTED] Inc., a Florida S corporation. [REDACTED] will be disregarded for federal and state income tax purposes and will, therefore, be treated as a division of [REDACTED]

Code Section 12-2-25(B) states that "[f]or South Carolina tax purposes ... a single member limited liability company, which is not taxed for South Carolina income tax purposes as a corporation, is not regarded as an entity separate from its owner."

Based on the above, the taxpayer for South Carolina sales and use tax purposes is [REDACTED] since [REDACTED] is not regarded as an entity separate from its owner."

For purposes of this advisory opinion, the taxpayer will be referred to as "[REDACTED]"

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

A sales tax, equal to five 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 five percent² of the sales price of the property, regardless of whether the retailer is or is not engaged in business in this State.

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

¹ At the time this document was issued, the total state sales and use tax rate was 5%. Beginning June 1, 2007, the total state sales and use tax rate will be 6%. Code Section 12-36-1110, which increases 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.

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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.

(1) The terms include:

(a) sales of building materials to construction contractors, builders, or landowners for resale or use in the form of real estate;

SC Regulation 117-309.9 concerns sign companies, and states:

A person engaged in the business of erecting, on properties owned or controlled by him, signs for the display of products of a second party for a consideration is deemed to be engaged in the business of selling a service. A tax is due measured by the purchase price of all tangible personal property used or consumed by such person as additions or improvements to realty.

A person engaged in the business of designing, fabricating and erecting signs on properties of another, for the display of that person's products, is deemed to be a retailer. The gross proceeds of the sale of such signs are subject to the tax. If the signs are leased or rented, the lease or rental proceeds are subject to the tax.

A person engaged in both of the above businesses shall pay the tax in accordance with the applicable provisions as set forth hereinabove.

A person who designs and constructs a sign as defined in the second paragraph above may, if all statutory requirements are met, be considered a manufacturer. (Emphasis added.)

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In addition, in Commission Decision #89-70 the Department held that a taxpayer engaged in the business of designing, fabricating and erecting signs was a retailer of tangible personal property.

Based on the above and the facts set forth above, [REDACTED] is selling tangible personal property at retail.

However, we must consider the application of the tax with respect to tangible personal property which becomes a part of real property. SC Regulation 117-314.2 addresses this matter and states:

Building materials when purchased by builders, contractors, or landowners for use in adding to, repairing or altering real property are subject to either the sales or use tax at the time of purchase by such builder, contractor, or landowner. "Building materials" as used in the Sales and Use Tax Law includes any material used in making repairs, alterations or additions to real property. "Builders," "contractors," and "landowners" mean and include any person, firm, association or corporation making repairs, or additions to real property. The term "building materials" includes such tangible personal property as lumber, timber, nails, screws, bolts, structural steel, elevators, reinforcing steel, cement, lime, sand, gravel, slag, stone, telephone poles, fencing, wire, electric cable, brick, tile, glass, plumbing supplies, plumbing fixtures, pipe, pipe fittings, prefabricated buildings, electrical fixtures, built-in cabinets and furniture, sheet metal, paint, roofing materials, road building materials, sprinkler systems, air conditioning systems, built-in-fans, heating systems, floorings, floor furnaces, crane ways, cross-ties, railroad rails, railroad track accessories, tanks, builders hardware, doors, door frames, window frames, water meters, gas meters, well pumps, and any and all other tangible personal property which becomes a part of real property.

For additional guidance in this matter, we refer to *City of North Charleston v. Claxton*, 315 S.C. 56, 431 S.E.2d 610 (1993). While that case dealt with the value of property in a condemnation proceeding, it also addressed the issue of real (fixtures) versus personal property.

Quoting from that case:

Criteria for determining whether an item remains personalty or becomes a fixture when affixed to realty includes: (1) the mode of attachment; (2) the character of the structure of the article; (3) the intent of the parties making the annexation; and, (4) the relationship of the parties. Creative Displays, 272 S.C. at 72, 248 S.E.2d at 918.

The Court, in *Claxton*, referenced *Rebel Manufacturing and Marketing Corporation*, 54 B.R. 674 (Bkrtcy. D.S.C. 1985). In that case, a bank argued that the sale of a mobile

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home was subject to a mortgage on the realty because it was a fixture [real property]. The mobile home was underpinned, anchored, and connected to sewerage, water and electric lines. Also, the home had a screened porch attached and was adjacent to several large trees.

In ruling for the bank, the Court reasoned:

The various substantial structures and trees surrounding the mobile home would be severely damaged, if not destroyed, should the mobile home be removed.

* * * *

It seems clear that the debtor's positioning the mobile home among the trees, and adding the construction [the porch] warrants the inference that the intent of the debtor was for the mobile home to become a part of the realty.

Paris Mountain Water Company v. Woodside, 133 S.C. 383, 131 S.E. 37 (1925), a South Carolina State Supreme Court case, was concerned with whether water pipes placed in lands belonging to others were to be taxed as realty or personalty. The Court, in holding that the pipe was to be taxed as realty, stated:

In the requirement of an intention to make the article annexed a permanent accession to the land, the expression of permanent does not, it seems, imply that the annexation must be intended to be perpetual, but rather that the article shall appear to be intended to remain where fastened until worn out, until the purpose to which the realty is devoted has been accomplished, or until the article is superseded by another article more suitable for the purpose.

Based on the above, if a tangible personal property becomes a part of real property, such as concrete used for the foundation of a stand alone sign, then such tangible personal property is considered used and consumed by ~~the realty~~ and not sold by ~~the realty~~.

The next issue concerns the basis for the tax on sales of tangible personal property at retail.

The sales tax is imposed upon a retailer's "gross proceeds of sales" which is defined at Code Section 12-36-90, in part, as:

...the value proceeding or accruing from the sale, lease, or rental of tangible personal property... without any deduction for... the cost of materials, labor, or service... [or] any other expenses....

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The use tax is based upon the "sales price" of tangible personal property. The term "sales price" is defined at Code Section 12-36-130, in part, as:

...the total amount for which tangible personal property is sold, without any deduction for the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, losses, or any other expenses.

(1) The term includes:

- (a) any services or transportation costs that are a part of the sale, whether paid in money or otherwise; ...

In *Meyers Arnold, Inc. v. South Carolina Tax Commission*, 285 S.C. 303, 328 S.E.2d 920, 923 (1985), the Court of Appeals of South Carolina held the element of service involved in a lay away sale was subject to tax as being part of the sale of tangible personal property. The test used by the court was as follows:

...But for the lay away sales, Meyers Arnold would not receive the lay away fees. The fees are obviously charged for the service rendered in making lay away sales. For these reasons, this court holds the lay away fees are part of the gross proceeds and subject to the sales tax.

Accordingly, the total amount charged in conjunction with the sale or purchase of tangible personal property is subject to the tax.

A similar conclusion was reached in *Regency Towers Association, Inc. v. South Carolina Tax Commission*, 88-CP-26-1109 (1989), where the Horry County Court of Common Pleas held charges for maid service were not deductible from gross proceeds derived from charges for accommodations. In Commission Decision #92-37, the Commission held that charges for maid services, which were optional, were a part of the accommodations furnished to transients and therefore subject to the accommodations tax. (See Code Section 12-36-920(B) and SC Regulation 117-307 for subsequent changes in the statute concerning "additional guest charges," such as maid service, at places furnishing accommodations.)

In Commission Decision #90-38, the Commission held that charges for engraving services, even though optional, were a part of the sale of plaques and trophies by the retailer and includible in gross proceeds of sales. The decision states, in part:

...We find and conclude that here the "engraving charges" are part of the sale of tangible personal property since the customer is not seeking a professional service but is seeking an engraved trophy or plaque....

* * * *

STAFF DRAFT

...The Courts have held that although the amount of materials used may be inconsequential with respect to the labor involved where the customer seeks to purchase custom made or designed tangible personal property, the artistic skill of the craftsman is a part of the sales price of the product and is inextricably linked....

In summary, charges for services that are made in conjunction with, or as part of the sale of, tangible personal property are includable in "gross proceeds of sales" or "sales price," and, therefore, subject to the tax.

However, it is important to note two additional issues with respect to the basis for the tax.

First, SC Regulation 117-313.3, concerning installation charges, states:

Not subject to the sales or use tax are charges for installation incident to the sale of tangible personal property when such charges are separately stated from the sales price of the property on billing to customers and provided the seller's books and records of account show the reasonableness of such labor in relation to the sales price of the property.

Second, since some tangible personal property used in the transaction becomes a part of the real property, such as concrete used for foundations of stand alone signs, then such tangible personal property is considered used and consumed by [REDACTED] and not sold by [REDACTED]. As such, the sales to, or purchases by, [REDACTED] of such tangible personal property are subject to the tax.

Based on the above, sales at retail of signs by [REDACTED] as described in the facts, are subject to the tax based upon "gross proceeds of sales" as follows:

- (a) Sales at retail of the signs are subject to the tax, unless otherwise exempt under the law.
- (b) All charges by [REDACTED] to customers for services provided in conjunction with, or as a part of, sales at retail of signs are includable in "gross proceeds of sales" and, therefore, subject to the tax unless the sale of the sign is otherwise exempt under the law. This would include, but is not limited to, charges by [REDACTED] to its customers for consultation, engineering and design, surveys, and permits.

However, the following charges are not subject to the tax:

- (i) Charges to install signs (whether installed by [REDACTED] or another person on its behalf), provided "such charges are separately stated from the sales price of the property on billing to customers and provided the seller's books and records of account show the reasonableness of such labor in relation to the sales price of the property;" and.

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(ii) Charges to customers for tangible personal property which becomes a part of the real property, such as concrete used for the foundation of a stand alone sign, provided such charges are separately stated from the sales price of the property on billing to customers and provided such charges are reasonable. However, sale to, or purchases by, [REDACTED] of such tangible personal property are subject to the tax.

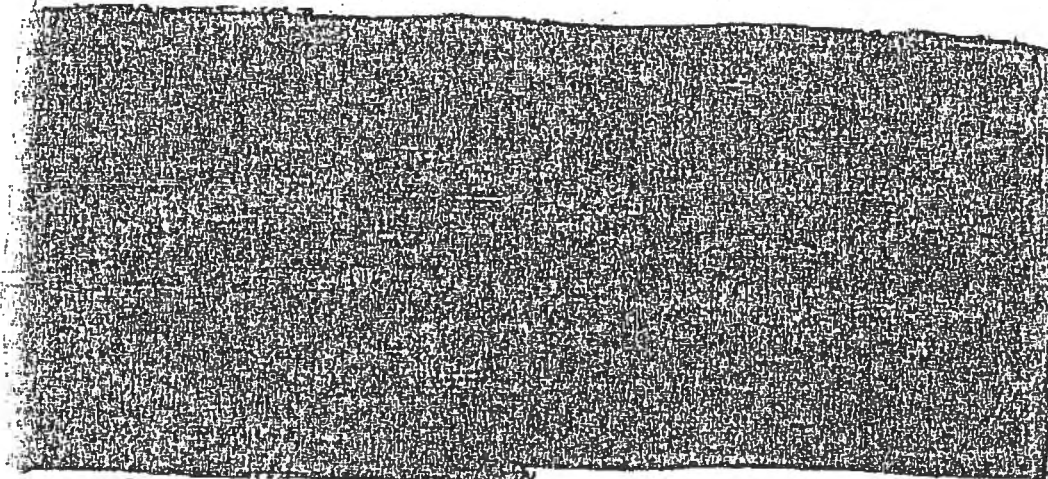
If [REDACTED] provides services that are not provided in conjunction with, or as a part of, the sale of a sign, then charges to customers for such services are not subject to the sales and use tax. For example, if [REDACTED] charges a customer to remove a sign, and this transaction is not associated with the sale of a new sign, then the charge for the sign removal service is not subject to the tax.

And finally, if [REDACTED] contracts with a manufacturer in South Carolina to manufacture a sign instead of [REDACTED], the taxation of the sale at retail of the sign is treated the same as those in which [REDACTED] is the manufacturer of the sign. In other words, [REDACTED] still the retailer liable for the tax.

Note: For information concerning the taxability of charges for freight and delivery, repairs, warranty and maintenance contracts, see SC Regulation 117-310, SC Regulation 117-306, and SC Revenue Ruling #06-9 respectively.

John McCormack

From: Susan Shumpert
Sent: Tuesday, May 16, 2007 8:03 AM
To:



Attachments: ~~XXXXXX~~ PLR - March 2007.doc; ~~XXXXXX~~ Cover.doc; Nexus Creating Activities for Sales and Use Taxes.doc; Nexus Cover.doc

Attached are two staff draft ruling for your review. They are as follows:

1. Staff Draft Revenue Ruling concerning Nexus Creating Activities for Sales and Use Taxes (Sales and Use Tax)
2. Staff Draft Private Letter Ruling concerning Signs - Sales of Tangible Personal Property or Improvements to Realty (Sales and Use Tax)

Upon reviewing these documents, please return the response/cover sheet with your comments and suggestion to John McCormack by Tuesday, May 29, 2007 either by e-mail or interoffice mail.

Thanks.

SOUTH CAROLINA DEPARTMENT OF REVENUE

MEMORANDUM

DATE: May 15, 2007

FROM: John McCormack

TELEPHONE: 898-5138

E-MAIL: mccormj@setax.org

SUBJECT: Signs - Sales of Tangible Personal Property or Improvements to Realty
(Sales and Use Tax)

RETURN DATE May 29, 2007

1. Is the advisory opinion clearly written? _____ If not, explain in the comment section.
 2. Is the advisory opinion consistent with your current practice? _____ If not, explain in the comment section. Also, explain if you know of other employees, divisions, or districts with a different current practice.
 3. Do you agree with the conclusion? _____
 4. Does the discussion support the conclusion? _____
- Do you agree with the effective date? (If applicable) _____

If you are aware of any written or unwritten administrative positions etc. related to the issue(s), or audits (pending or completed), or court cases related to the issue(s), please identify.

COMMENTS/SUGGESTIONS:

If you wish to confer with Policy prior to process continuing, please call me before the return date.

REVIEWED BY:

DOR RESP LOWE'S2584

STAFF DRAFT

State of South Carolina
Department of Revenue
301 Gervais Street, P.O. Box 125, Columbia, South Carolina 29214
Website Address: <http://www.sctax.org>

SC PRIVATE LETTER RULING #07-Draft

SUBJECT: Signs -- Sales of Tangible Personal Property or Improvements to Realty
(Sales and Use Tax)

REFERENCES: S. C. Code Ann. Section 12-2-25(B) (Supp. 2006)
S. C. Code Ann. Section 12-36-910 (2000; Supp. 2006)
S. C. Code Ann. Section 12-36-1310 (2000; 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 12-36-90 (2000; Supp. 2006)
S. C. Code Ann. Section 12-36-130 (2000; Supp. 2006)
SC Regulation 117-309.9 (Supp. 2006)
SC Regulation 117-314.2 (Supp. 2006)
SC Regulation 117-313.3 (Supp. 2006)

AUTHORITY: S. C. Code Ann. Section 12-4-320 (2000)
S. C. Code Ann. Section 1-23-10(4) (2006)
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.

Questions:

1. Is ~~XXXXXXXXXXXXXXXXXXXX~~ a retailer selling and installing signs or a contractor making improvements to real property with respect to the types of signs described in the facts?

DOR RESP LOWE'S2585

STAFF DRAFT

2. [REDACTED] is a retailer selling and installing signs, what is the basis for the tax?
3. [REDACTED] contracts with a manufacturer in South Carolina to manufacture a sign instead of [REDACTED] is the taxation of the transaction treated the same as those in which [REDACTED] the manufacturer?

Conclusions:

1. [REDACTED] is a retailer engaged in the business of selling tangible personal property at retail.

However, since [REDACTED] is a single member limited liability company that is disregarded for federal and state income tax purposes, it is disregarded for all South Carolina tax purposes and the taxpayer for sales and use tax purposes is [REDACTED]. As the taxpayer for sales and use tax purposes and the person liable for the tax, [REDACTED] must obtain the retail license in its name. In completing the application form (Form SCTC -111), [REDACTED] should be listed as the "Owner" on Line 1 of the form with [REDACTED] listed as the "Trade Name (Doing Business As)" on Line 2 of the form.

2. Sales at retail of signs by [REDACTED], as described in the facts, are subject to the tax based upon "gross proceeds of sales" as follows:

(a) Sales at retail of the signs are subject to the tax, unless otherwise exempt under the law.

(b) All charges by [REDACTED] to customers for services provided in conjunction with, or as a part of, sales at retail of signs are includable in "gross proceeds of sales" and, therefore, subject to the tax unless the sale of the sign is otherwise exempt under the law. This would include, but is not limited to, charges by [REDACTED] to its customers for consultation, engineering and design, surveys, and permits.

However, the following charges are not subject to the tax:

(i) Charges to install signs (whether installed by [REDACTED] or another person on its behalf), provided "such charges are separately stated from the sales price of the property on billing to customers and provided the seller's books and records of account show the reasonableness of such labor in relation to the sales price of the property;" and,

(ii) Charges to customers for tangible personal property which becomes a part of the real property, such as concrete used for the foundation of a stand alone sign, provided such charges are separately stated from the sales price of the property on billing to customers and provided such charges are reasonable. However, sales to,

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or purchases by, [REDACTED] of such tangible personal property are subject to the tax.

If [REDACTED] provides services that are not provided in conjunction with, or as a part of, the sale of a sign, then charges to customers for such services are not subject to the sales and use tax. For example, if [REDACTED] charges a customer to remove a sign, and this transaction is not associated with the sale of a new sign, then the charge for the sign removal service is not subject to the tax.

Note: For information concerning the taxability of charges for freight and delivery, repairs, and warranty and maintenance contracts, see SC Regulation 117-310, SC Regulation 117-306, and SC Revenue Ruling #06-9 respectively.

3. If [REDACTED] contracts with a manufacturer in South Carolina to manufacture a sign instead of [REDACTED], the taxation of the sale at retail of the sign is treated the same as those in which [REDACTED] is the manufacturer of the sign. In other words, [REDACTED] is still the retailer liable for the tax.

Facts:

[REDACTED] is a Florida S Corporation. It manufactures signs in Florida for out-of-state customers as well as Florida customers. [REDACTED] also has the signs installed at the out-of-state customer's location using a subcontractor. [REDACTED] contracts with and pays the subcontractor for installing the sign and then bills the customer for the sign and installation costs and collects sales tax on the transaction in accordance with the law of the state where the sign is delivered. This sales tax is remitted to the taxing authorities in the state where the sign is installed.

To address Florida sales and use tax issues, [REDACTED] is creating a Florida single-member limited liability company. The new LLC will be named [REDACTED]. [REDACTED] will be disregarded for federal and state income tax purposes and, therefore, treated as a division of the [REDACTED]. However, for Florida sales tax purposes, [REDACTED] and [REDACTED] will be legally distinct. [REDACTED] will purchase signs from [REDACTED] for delivery to its out-of-state customers. [REDACTED] will deliver the signs by a common carrier or pursuant to the terms of the sales contract deliver the property using [REDACTED] own mode of transportation. [REDACTED] will contract with and pay a subcontractor for installing the sign and then will bill the customer for the sign and installation costs and collect sales tax on the transaction in accordance with the law of the state where the sign is delivered.

[REDACTED] manufactures six distinct signage products: channel letters, back-lit letters, pylon signs, monument signs, and electronic display systems, and banners. In addition, [REDACTED] offers total customer packages which include an array of signage products custom tailored to meet the demands of a diverse range of businesses.

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Channel Letters are individually illuminated letters and graphics. These letters are found everywhere, from shopping malls to exterior storefront identification. There are three types of channel letters:

The most common type is **Standard Channel Letters**. These letters are made up of a U-channel base, with colored Plexiglas faces.

Reverse Channel Letters have metal faces and returns (sides of letters) and have a clear plastic backing. These letters are designed to be mounted an inch or two away from the wall. At night, these letters create a halo-lit effect.

The third type of Channel Letters have "open" faces. Though not actually open, the faces of these letters are clear plastic with the balance of the letters built just like Standard Channel Letters. This allows for the raw neon to be seen, as well as the inside of the U-channel letterform itself.

Back-Lit Letters are individual letters and graphics that are illuminated from a source that is located behind the letters. The usage of back lighting creates a halo effect around the letters.

Pylon signs are an effective way to provide advance notice of the location of a business or to feature a business name or logo. It is very common to see pylon signs on or near main streets. Manufactured of aluminum & steel, the structures are made for long term usage.

Monument signs are free-standing signs constructed on the ground with a continuous footing or foundation and a base at grade level.

Electronic display systems utilize digital media to display information. The use of electronic display systems has rapidly increased due to their ability to display information rapidly, fluidly and in a more esthetically pleasing manner. Electronic displays are often utilized by companies needing to communicate large amounts of information, such as airports, bus terminals, and stadiums. However, their use has also increased rapidly in mainstream commerce.

Banners are temporary signs until the actual sign is manufactured.

Window Graphics are vinyl signs applied inside the windows or on the doors that are used to tell store hours and emergency contact information.

[REDACTED] performs design and engineering services. The marketing design department provides clients with creative artwork concepts.

Finally, from time to time, [REDACTED] may contract with a sign manufacturer in South Carolina to manufacture a sign instead of contracting with [REDACTED] to manufacture the sign.

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Discussion:

[REDACTED] is a single member limited liability whose single member is [REDACTED] a Florida S corporation. [REDACTED] will be disregarded for federal and state income tax purposes and will, therefore, be treated as a division of [REDACTED]

Code Section 12-2-25(B) states that "[f]or South Carolina tax purposes... a single member limited liability company, which is not taxed for South Carolina income tax purposes as a corporation, is not regarded as an entity separate from its owner."

Based on the above, the taxpayer for South Carolina sales and use tax purposes is [REDACTED] since [REDACTED] "is not regarded as an entity separate from its owner."

For purposes of this advisory opinion, the taxpayer will be referred to as [REDACTED]

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

A sales tax, equal to five 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 five percent² of the sales price of the property, regardless of whether the retailer is or is not engaged in business in this State.

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

¹ At the time this document was issued, the total state sales and use tax rate was 5%. Beginning June 1, 2007, the total state sales and use tax rate will be 6%. Code Section 12-36-1110, which increases 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.

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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.

(1) The terms include:

(a) sales of building materials to construction contractors, builders, or landowners for resale or use in the form of real estate;

SC Regulation 117-309.9 concerns sign companies, and states:

A person engaged in the business of erecting, on properties owned or controlled by him, signs for the display of products of a second party for a consideration is deemed to be engaged in the business of selling a service. A tax is due measured by the purchase price of all tangible personal property used or consumed by such person as additions or improvements to realty.

A person engaged in the business of designing, fabricating and erecting signs on properties of another, for the display of that person's products, is deemed to be a retailer. The gross proceeds of the sale of such signs are subject to the tax. If the signs are leased or rented, the lease or rental proceeds are subject to the tax.

A person engaged in both of the above businesses shall pay the tax in accordance with the applicable provisions as set forth hereinabove.

A person who designs and constructs a sign as defined in the second paragraph above may, if all statutory requirements are met, be considered a manufacturer. (Emphasis added.)

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In addition, in Commission Decision #89-70 the Department held that a taxpayer engaged in the business of designing, fabricating and erecting signs was a retailer of tangible personal property.

Based on the above and the facts set forth above, [REDACTED] is selling tangible personal property at retail.

However, we must consider the application of the tax with respect to tangible personal property which becomes a part of real property. SC Regulation 117-314.2 addresses this matter and states:

Building materials when purchased by builders, contractors, or landowners for use in adding to, repairing or altering real property are subject to either the sales or use tax at the time of purchase by such builder, contractor, or landowner. "Building materials" as used in the Sales and Use Tax Law includes any material used in making repairs, alterations or additions to real property. "Builders," "contractors," and "landowners" mean and include any person, firm, association or corporation making repairs, or additions to real property. The term "building materials" includes such tangible personal property as lumber, timber, nails, screws, bolts, structural steel, elevators, reinforcing steel, cement, lime, sand, gravel, slag, stone, telephone poles, fencing, wire, electric cable, brick, tile, glass, plumbing supplies, plumbing fixtures, pipe, pipe fittings, prefabricated buildings, electrical fixtures, built-in cabinets and furniture, sheet metal, paint, roofing materials, road building materials, sprinkler systems, air conditioning systems, built-in-fans, heating systems, floorings, floor furnaces, crane ways, crossties, railroad rails, railroad track accessories, tanks, builders hardware, doors, door frames, window frames, water meters, gas meters, well pumps, and any and all other tangible personal property which becomes a part of real property.

For additional guidance in this matter, we refer to *City of North Charleston v. Claxton*, 315 S.C. 56, 431 S.E.2d 610 (1993). While that case dealt with the value of property in a condemnation proceeding, it also addressed the issue of real (fixtures) versus personal property.

Quoting from that case:

Criteria for determining whether an item remains personalty or becomes a fixture when affixed to realty includes: (1) the mode of attachment; (2) the character of the structure of the article; (3) the intent of the parties making the annexation; and, (4) the relationship of the parties. Creative Displays, 272 S.C. at 72, 248 S.E.2d at 918.

The Court, in *Claxton*, referenced *Rebel Manufacturing and Marketing Corporation*, 54 B.R. 674 (Bkrtry. D.S.C. 1985). In that case, a bank argued that the sale of a mobile

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home was subject to a mortgage on the realty because it was a fixture [real property]. The mobile home was underpinned, anchored, and connected to sewerage, water and electric lines. Also, the home had a screened porch attached and was adjacent to several large trees.

In ruling for the bank, the Court reasoned:

The various substantial structures and trees surrounding the mobile home would be severely damaged, if not destroyed, should the mobile home be removed.

* * * *

It seems clear that the debtor's positioning the mobile home among the trees, and adding the construction [the porch] warrants the inference that the intent of the debtor was for the mobile home to become a part of the realty.

Paris Mountain Water Company v. Woodside, 133 S.C. 383, 131 S.E. 37 (1925), a South Carolina State Supreme Court case, was concerned with whether water pipes placed in lands belonging to others were to be taxed as realty or personalty. The Court, in holding that the pipe was to be taxed as realty, stated:

In the requirement of an intention to make the article annexed a permanent accession to the land, the expression of permanent does not, it seems, imply that the annexation must be intended to be perpetual, but rather that the article shall appear to be intended to remain where fastened until worn out, until the purpose to which the realty is devoted has been accomplished, or until the article is superseded by another article more suitable for the purpose.

Based on the above, if a tangible personal property becomes a part of real property, such as concrete used for the foundation of a stand alone sign, then such tangible personal property is considered used and consumed by [redacted] and not sold by [redacted].

The next issue concerns the basis for the tax on sales of tangible personal property at retail.

The sales tax is imposed upon a retailer's "gross proceeds of sales" which is defined at Code Section 12-36-90, in part, as:

...the value proceeding or accruing from the sale, lease, or rental of tangible personal property... without any deduction for... the cost of materials, labor, or service... [or] any other expenses....

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The use tax is based upon the "sales price" of tangible personal property. The term "sales price" is defined at Code Section 12-36-130, in part, as:

...the total amount for which tangible personal property is sold, without any deduction for the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, losses, or any other expenses.

(1) The term includes:

- (a) any services or transportation costs that are a part of the sale, whether paid in money or otherwise; ...

In *Meyers Arnold, Inc. v. South Carolina Tax Commission*, 285 S.C. 303, 328 S.E.2d 920, 923 (1985), the Court of Appeals of South Carolina held the element of service involved in a lay away sale was subject to tax as being part of the sale of tangible personal property. The test used by the court was as follows:

...But for the lay away sales, Meyers Arnold would not receive the lay away fees. The fees are obviously charged for the service rendered in making lay away sales. For these reasons, this court holds the lay away fees are part of the gross proceeds and subject to the sales tax.

Accordingly, the total amount charged in conjunction with the sale or purchase of tangible personal property is subject to the tax.

A similar conclusion was reached in *Regency Towers Association, Inc. v. South Carolina Tax Commission*, 88-CP-26-1109 (1989), where the Horry County Court of Common Pleas held charges for maid service were not deductible from gross proceeds derived from charges for accommodations. In Commission Decision #92-37, the Commission held that charges for maid services, which were optional, were a part of the accommodations furnished to transients and therefore subject to the accommodations tax. (See Code Section 12-36-920(B) and SC Regulation 117-307 for subsequent changes in the statute concerning "additional guest charges," such as maid service, at places furnishing accommodations.)

In Commission Decision #90-38, the Commission held that charges for engraving services, even though optional, were a part of the sale of plaques and trophies by the retailer and includible in gross proceeds of sales. The decision states, in part:

...We find and conclude that here the "engraving charges" are part of the sale of tangible personal property since the customer is not seeking a professional service but is seeking an engraved trophy or plaque....

* * * *

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...The Courts have held that although the amount of materials used may be inconsequential with respect to the labor involved where the customer seeks to purchase custom made or designed tangible personal property, the artistic skill of the craftsman is a part of the sales price of the product and is inextricably linked....

In summary, charges for services that are made in conjunction with, or as part of the sale of, tangible personal property are includable in "gross proceeds of sales" or "sales price," and, therefore, subject to the tax.

However, it is important to note two additional issues with respect to the basis for the tax.

First, SC Regulation 117-313.3, concerning installation charges, states:

Not subject to the sales or use tax are charges for installation incident to the sale of tangible personal property when such charges are separately stated from the sales price of the property on billing to customers and provided the seller's books and records of account show the reasonableness of such labor in relation to the sales price of the property.

Second, since some tangible personal property used in the transaction becomes a part of the real property, such as concrete used for foundations of stand alone signs, then such tangible personal property is considered used and consumed by [REDACTED] and not sold [REDACTED]. As such, the sales to, or purchases by, [REDACTED] of such tangible personal property are subject to the tax.

Based on the above, sales at retail of signs by [REDACTED] as described in the facts, are subject to the tax based upon "gross proceeds of sales" as follows:

(a) Sales at retail of the signs are subject to the tax, unless otherwise exempt under the law.

(b) All charges by [REDACTED] to customers for services provided in conjunction with, or as a part of, sales at retail of signs are includable in "gross proceeds of sales" and, therefore, subject to the tax unless the sale of the sign is otherwise exempt under the law. This would include, but is not limited to, charges by [REDACTED] to its customers for consultation, engineering and design, surveys, and permits.

However, the following charges are not subject to the tax:

(i) Charges to install signs (whether installed by [REDACTED] or another person on its behalf), provided "such charges are separately stated from the sales price of the property on billing to customers and provided the seller's books and records of account show the reasonableness of such labor in relation to the sales price of the property;" and,

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(ii) Charges to customers for tangible personal property which becomes a part of the real property, such as concrete used for the foundation of a stand alone sign, provided such charges are separately stated from the sales price of the property on billing to customers and provided such charges are reasonable. However, sale to, or purchases by, [REDACTED] of such tangible personal property are subject to the tax.

If [REDACTED] provides services that are not provided in conjunction with, or as a part of, the sale of a sign, then charges to customers for such services are not subject to the sales and use tax. For example, if [REDACTED] charges a customer to remove a sign, and this transaction is not associated with the sale of a new sign, then the charge for the sign removal service is not subject to the tax.

And finally, if [REDACTED] contracts with a manufacturer in South Carolina to manufacture a sign instead of [REDACTED], the taxation of the sale at retail of the sign is treated the same as those in which [REDACTED] is the manufacturer of the sign. In other words, [REDACTED] still the retailer liable for the tax.

Note: For information concerning the taxability of charges for freight and delivery, repairs, warranty and maintenance contracts, see SC Regulation 117-310, SC Regulation 117-306, and SC Revenue Ruling #06-9 respectively.

regardless of whether or not they itemize charges for materials or labor, because they are not engaged in the activity of selling tangible personal property. Rule 12A-1.051(4), F.A.C.³ Real property contractors are considered the ultimate consumers of the materials and supplies they use to perform real property contracts, so they must pay tax on the costs of those materials and supplies. Rule 12A-1.051(4), F.A.C. The tax upon the fabricated cost of items manufactured, produced, compounded, processed, or fabricated for one's own use applies to real property contractors. Rule 12A-1.051(2)(a) and (b) and (10), F.A.C.

The Department has advised Taxpayer that the transactions between Taxpayer and its customers constitute improvements to real property and are therefore real property contracts for the purposes of Chapter 212, F.S. Here, out-of-state customers will contract directly with LLC. The facts and sample documents provided indicate that the transactions between LLC and its purely out-of-state customers will be identical to those between Taxpayer and its customers. The transactions between LLC and its customers should therefore also be considered real property contracts.

LLC, instead of manufacturing products for its customers, will purchase products fabricated to its specifications from Taxpayer. Taxpayer stated in the facts presented that LLC will purchase the products from Taxpayer in arm's length transactions. Thus, Taxpayer's sales to LLC will be made at fair market value, and will reflect Taxpayer's direct and indirect costs incurred in manufacturing, insuring, and delivering the products to LLC. Because LLC is a real property contractor with respect to its contracts with customers, its purchases from Taxpayer will constitute retail sales taxable under Section 212.05(1)(a) l.a., F.S., unless the conditions of an exemption are met. See Section 212.21(2), F.S.; Rule 12A-1.051(4), F.A.C.

Taxpayer's position is that sales of products by Taxpayer to LLC will constitute nontaxable sales for export pursuant to Section 212.06(5)(a)1., F.S., and Rule 12A-1.0015, F.A.C. Section 212.06(5)(a)1., F.S., and Rule 12A-1.0015(1)(a), F.A.C., provide a "safe harbor" for dealers that sell items of tangible personal property that are exported from Florida. These provisions indicate that a seller is not required to collect and remit tax to this Department when the seller is required by the terms of the sale to deliver the item:

- to a licensed exporter for exporting;
- to a common carrier or forwarding agent for shipment outside Florida;
- to the U.S. mail for mailing to a destination outside Florida; or
- using its own mode of transportation to a destination outside Florida.

The contracts provided by Taxpayer specify from the outset that the products are being fabricated for delivery outside Florida, that Taxpayer is required to deliver the products to the non-Florida site via common carrier or Taxpayer's own transportation, and contain provisions indicating that title and risk of loss pass only upon the out of state delivery.⁴ Therefore, the requirements to claim the export

³ Retail sale plus installation contracts, described in Rule 12A-1.051(3)(d), F.A.C., are treated differently. See Rule 12A-1.051(5), F.A.C. It is noted that contracts qualifying under Rule 12A-1.051(3)(d), F.A.C., are very rare.

⁴ When goods are required to be delivered at a particular destination, the general rule is that title and risk of loss pass to the buyer when the purchaser takes delivery at the specified destination absent a contrary agreement between the parties. See Sections 672.401(2)(b) and 672.509(1)(b), F.S. The contracts provided by Taxpayer are consistent with the general rule.

exemption will be met.

Taxpayer, as the selling dealer, is required to keep sufficient records to document that the item was exported outside Florida, such as the nonexhaustive list of examples provided in Rule 12A-1.0015(2)(c), F.A.C. As long as the necessary documentation is maintained, the Department will be able to confirm that Taxpayer was not required to collect and remit sales tax on the transaction pursuant to Section 212.06(5)(a)1., F.S. Such documentation should identify: (a) the item(s) sold; (b) the purchaser; and (c) the ultimate destination of the item(s). The required documentation must be maintained until the tax imposed by Chapter 212, F.S., may no longer be determined and assessed under Section 95.091(3), F.S. (currently, for three years from the later of: the date the tax is due, the date the return with respect to the tax is due, or the date such return is filed).

This response constitutes a Technical Assistance Advisement under s. 213.22, F.S., which is binding on the Department only under the facts and circumstances described in the request for this advice, as specified in s. 213.22, F.S. Our response is predicated on those facts and the specific situation summarized above. You are advised that subsequent statutory or administrative rule changes or judicial interpretations of the statutes or rules upon which this advice is based may subject similar future transactions to a different treatment than expressed in this response.

You are further advised that this response, your request and related backup documents are public records under Chapter 119, F.S., and are subject to disclosure to the public under the conditions of s. 213.22, F.S. Confidential information must be deleted before public disclosure. In an effort to protect confidentiality, we request you provide the undersigned with an edited copy of your request for Technical Assistance Advisement, the backup material and this response, deleting names, addresses and any other details which might lead to identification of the taxpayer. Your response should be received by the Department within 15 days of the date of this letter.

If you have any further questions with regard to this matter and wish to discuss them, you may contact me directly at (850) 922-4710.

Sincerely,

[REDACTED]

Control #:

[REDACTED]

January 16, 2007

VIA HAND-DELIVERY

[REDACTED]

Re: Request for Technical Assistance Advisement

Dear Sir or Madam:

We request a Technical Assistance Advisement regarding whether sales made by a taxpayer using the below described structure will qualify for exemption as export sales under Section 212.06(5)(a), F.S.

Facts

The taxpayer, [REDACTED] is a sign contractor that manufactures signs for out-of-state customers. The Taxpayer also has the signs installed at the out-of-state customer's location using a subcontractor. The Taxpayer contracts with and pays the subcontractor for installing the sign and then bills the customer for the sign and installation costs and collects sales tax on the transaction in accordance with the law of the state where the sign is delivered. This sales tax is remitted to the taxing authorities in the state where the sign is installed.

The Department has taken the position that these out-of-state sales are improvements to real property and not sales of tangible personal property and that use tax is due on the fabricated cost of the signs. The Department has stated that its fabrication use tax under Section 212.06(1)(b), Florida Statutes applies to signs even though the signs are exported and installed in other states.

The Taxpayer will restructure its operations to qualify for the export exemption rather than incur the cost of challenging the Department's position.

DOR RESP LOWE'S2598

January 16, 2007

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Law

Florida Statutes 212.06

(5)(a)1. Except as provided in subparagraph 2., it is not the intention of this chapter to levy a tax upon tangible personal property imported, produced, or manufactured in this state for export, provided that tangible personal property may not be considered as being imported, produced, or manufactured for export unless the importer, producer, or manufacturer delivers the same to a licensed exporter for exporting or to a common carrier for shipment outside the state or mails the same by United States mail to a destination outside the state;

Rule 12A-1.0015 Sales for Export; Sales to Nonresident Dealers and Foreign Diplomats.

1) SCOPE.

(a) Tangible personal property imported, produced, or manufactured in this state for export, as provided in s. 212.06(5)(a)1., F.S., is not subject to Florida sales tax when the importer, producer, or manufacturer delivers the property to a licensed exporter for export outside Florida or to a common carrier for shipment outside Florida, or mails the property by United States mail to a destination outside Florida. This rule is intended to provide tax guidelines for the sale of tangible personal property for the purposes of export from Florida.

(2) SALES OF PROPERTY IRREVOCABLY COMMITTED TO EXPORTATION.

(b) When a dealer sells tangible personal property, commits the property to the exportation process at the time of sale, and the exportation process remains continuous and unbroken until the property is exported from Florida, the dealer is not required to collect tax. The intent of the seller and the purchaser to export the property is not sufficient to establish that the property is not subject to tax in Florida. The delivery of the property to a location in Florida for subsequent export from Florida is insufficient to establish documentary evidence that the property sold was irrevocably committed to the exportation process. The following are examples of methods to

DOR RESP LOWE'S2599

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commit the property to the exportation process at the time of sale;

1. The dealer is required by the terms of the sale contract to deliver the property outside Florida using the dealer's own mode of transportation;

2. The dealer is required by the terms of the sale contract to mail the property by United States mail to a destination located outside Florida; or

3. The dealer is required by the terms of the sale contract to deliver the property to a carrier, licensed customs broker, or forwarding agent for final and certain movement of the property to a destination located outside Florida.

c) Any dealer who makes tax-exempt sales of tangible, personal property for export outside Florida is required to maintain records to document that the property is committed to the exportation process at the time of sale and that the exportation process is continuous and unbroken until the property is exported from Florida. The dealer is required to maintain records that identify the tangible personal property sold and the delivery destination of the property. The documentation must clearly establish that the property was not commingled with the mass of property within Florida. If the purchaser exercises any act of dominion or control that would constitute "use" of the property by the purchaser in Florida within the meaning of that term set forth in s. 212.02(20), F.S., the property was not irrevocably committed to the exportation process. Examples of records to document sales for export to points outside Florida are:

1. Internal delivery orders identifying the property sold and the destination and date of delivery that are supported by receipts of expenses incurred in delivering the property, such as trip tickets or truck logs signed by the person who delivers the property;

January 16, 2007

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3. Common carriers' receipts, bills of lading, or similar documentation that evidences the delivery destination;

Discussion and Analysis

The Taxpayer is creating a Florida single-member limited liability company that will fabricate signs in Florida for installation in other states. The new LLC will be named [REDACTED] LLC will be disregarded for federal and state income tax purposes and, therefore, treated as a division of the taxpayer. However, under state law, the taxpayer and [REDACTED] are legally distinct. This legal distinction applies for sales tax purposes. The Taxpayer will purchase signs from [REDACTED] for delivery to its out-of-state customers. [REDACTED] shall deliver the signs on behalf of the Taxpayer by a common carrier or pursuant to the terms of the sales contract deliver the property using [REDACTED]'s own mode of transportation.

The sale of signs by [REDACTED] to the Taxpayer for export by the Taxpayer shall be arm's length transactions for resale by the Taxpayer to out-of-state customers and should qualify for the export exemption under Section 212.06(5)(a)(1), Florida Statutes since the signs are delivered by [REDACTED] on behalf of the Taxpayer to a common carrier for shipment outside the state or by using [REDACTED]'s own mode of transportation. The Taxpayer contracts with and pays the subcontractor for installing the sign and then bills the customer for the sign and installation costs and collects sales tax on the transaction in accordance with the law of the state where the sign is delivered. This sales tax is remitted to the taxing authorities in the state where the sign is installed.

Regarding sales to out-of-state customers, the above described structure should qualify for the export exemption as exports of tangible personal property under section 212.06(5)(a)(1), Florida Statutes and Rule 12A-1.0015, Florida Administrative Code assuming they are delivered either by common carrier or [REDACTED]'s own vehicles to an out-of-state location on behalf of the Taxpayer. The Taxpayer purchases the signs for resale to the out-of-state customer and collects and remits sales and use tax to the taxing authorities in that state where the sign is installed. [REDACTED] acts as the Taxpayer's agent to deliver the signs it sells to the Taxpayer to the Taxpayer's out-of-state customer.

Regarding the Taxpayer's sales to Florida customers, these sales shall be made by the Taxpayer in accordance with method now required by the Department of Revenue as reflected in its most recent audit of the Taxpayer. That is, it shall fabricate the signs and sell them to its Florida customers and pay use tax on the fabricated cost of the signs. It will not collect and remit sales tax on the total cost of the installed sign.

Conclusion

DOR RESP LOWE'S2601

[REDACTED]

January 18, 2007

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We respectfully request a conference with appropriate Department of Revenue personnel if the Department determines that the above structure for making sales to out-of-state customers does not qualify the subject sales for the export exemption under Section 212.06(5)(a)(1), Florida Statutes.

Sincerely,

[REDACTED]

JTL/

Attachment

[REDACTED]

To: South Carolina Department of Revenue
Policy - Advisory Opinion Request
P.O. Box 12265
Columbia, SC 29211

CC:

From:

Date: January 8, 2007

Subject: Taxability Opinion Request *Signs Taxed*

General Information

The taxpayer [REDACTED] is a Florida S Corporation. [REDACTED] is a sign contractor that manufactures signs for out-of-state customers. The Taxpayer also has the signs installed at the out-of-state customer's location using a subcontractor. The Taxpayer contracts with and pays the subcontractor for installing the sign and then bills the customer for the sign and installation costs and collects sales tax on the transaction in accordance with the law of the state where the sign is delivered. This sales tax is remitted to the taxing authorities in the state where the sign is installed.

The Florida Department of Revenue has taken the position that these out-of-state sales are improvements to real property and not sales of tangible personal property and that use tax is due on the fabricated cost of the signs. The Department has stated that its fabrication use tax under Section 212.06(1)(b), Florida Statutes applies to signs even though the signs are exported and installed in other states.

The Taxpayer is creating a Florida single-member limited liability company that will fabricate signs in Florida for installation in other states. The new LLC will be named [REDACTED] and will be disregarded for federal and state income tax purposes and, therefore, treated as a division of the taxpayer. However, under state law, the taxpayer and [REDACTED] are legally distinct. This legal distinction applies for sales tax purposes. [REDACTED] will purchase signs from the Taxpayer for delivery to its out-of-state customers. The Taxpayer shall deliver the signs by a common carrier or pursuant to the terms of the sales contract deliver the property using the Taxpayer's own mode of transportation.

The sale of signs by the Taxpayer to [REDACTED] for export by the Taxpayer shall be arm's length transactions for resale by [REDACTED] to out-of-state customers and should qualify for the export exemption under Section 212.06(5)(a)(1), Florida Statutes since the signs are delivered by the Taxpayer on a common carrier for shipment outside the state or by using the Taxpayer's own mode of transportation. [REDACTED] contracts with and

pays the subcontractor for installing the sign and then bills the customer for the sign and installation costs and collects sales tax on the transaction in accordance with the law of the state where the sign is delivered. This sales tax is remitted to the taxing authorities in the state where the sign is installed.

Regarding sales to out-of-state customers, the above described structure should qualify for the export exemption as exports of tangible personal property under section 212.06(5)(a)(1), Florida Statutes and Rule 12A-1.0015, Florida Administrative Code assuming they are delivered either by a common carrier or the Taxpayer's own vehicles to an out-of-state location on behalf of [REDACTED]. The Taxpayer purchases the signs for resale to the out-of-state customer and collects and remits sales and use tax to the taxing authorities in that state where the sign is installed. The Taxpayer acts as the [REDACTED] agent to deliver the signs it sells to [REDACTED] out-of-state customers.

Regarding the Taxpayer's sales to Florida customers, these sales shall be made by the Taxpayer in accordance with method now required by the Florida Department of Revenue as reflected in its most recent audit of the Taxpayer. That is, it shall fabricate the signs and sell them to its Florida customers and pay use tax on the fabricated cost of the signs. It will not collect and remit sales tax on the total cost of the installed sign.

Products

[REDACTED] manufactures six distinct signage products: channel letters, back-lit letters, pylon signs, monument signs, and electronic display systems, and banners. In addition, [REDACTED] offers total customer packages which include an array of signage products custom tailored to meet the demands of a diverse range of businesses.

- **Channel Letters** are individually illuminated letters and graphics. These letters are found everywhere, from shopping malls to exterior storefront identification. There are three types of channel letters:
 - The most common type is Standard Channel Letters. These letters are made up of a U-channel base, with colored Plexiglas faces.
 - Reverse Channel Letters have metal faces and returns (sides of letters) and have a clear plastic backing. These letters are designed to be mounted an inch or two away from the wall. At night, these letters create a halo-lit effect.
 - The third type of Channel Letters have "open" faces. Though not actually open, the faces of these letters are clear plastic with the balance of the letters built just like Standard Channel Letters. This allows for the raw neon to be seen, as well as the inside of the U-channel letterform itself. Open Face Channel Letters are very effective for aggressively grabbing attention.
- **Back-Lit Letters** are individual letters and graphics that are illuminated from a source that is located behind the letters. The usage of back lighting creates a halo effect around the letters and adds increased visibility and attractiveness.
- **Pylon signs** are an effective way to provide advance notice of the location of a business or to feature a business name or logo. It is very common to see pylon signs on or near main streets. Manufactured of aluminum & steel, the structures are made for long term

usage. With signage, as with many other business investments, initial cost may not reflect long term value. A properly designed sign can effectively communicate for many years.

- **Monument signs** are free-standing signs constructed on the ground with a continuous footing or foundation and a base at grade level. Most communities have light restrictions on the specifications for monument signs, making it imperative to engage knowledgeable professionals in the manufacturing and installation of monument signage. [REDACTED] has the knowledge and experience necessary to ensure proper compliance for every company's monument signage needs.
- **Electronic display systems** utilize digital media to display information. The use of electronic display systems has rapidly increased due to their ability to display information rapidly, fluidly and in a more esthetically pleasing manner. Electronic displays are often utilized by companies needing to communicate large amounts of information, such as airports, bus terminals, and stadiums. However, their use has also increased rapidly in mainstream commerce. Despite a larger initial cost, electronic displays have an exceptional ROI based on their programmability and adaptability.
- **Banners** are temporary signs until the actual sign is manufactured.
- **Window Graphics** are vinyl signs applied inside the windows or on the doors vinyl that are used to tell store hours and emergency contact information.

Services

The Taxpayer performs design and engineering services. The marketing design department provides clients with creative artwork concepts. To ensure the highest quality of the products the Taxpayer completes inspections regularly during each stage of production, crating and shipping. In addition, as a product exits one phase of production and enters another, it must pass through a signoff inspection procedure. These methods greatly aid the staff in producing the finest possible sign products. As with all of the Taxpayer's other clients, the Taxpayer proactively works toward installation not in terms of store turnover or store opening, but in the context of each individual store's time schedule. The Taxpayer has established relationships with a network of more than 200 licensed sub-contractors designated to complete quality installations throughout the country. Within this subset, the Taxpayer has meticulously established a list of preferred sub-contractors designated to complete installations solely for the Taxpayer. The Company's relationships with these sub-contractors allows them to offer superior installation services to their client base while focusing management and personnel attention to our core competency of sign design and manufacturing. The Taxpayer's nationwide maintenance network can respond to most signage issues within 72 hours, ensuring that your signs are properly maintained as quickly as possible. Also, each project nationwide will be assigned a *single contract* with the Taxpayer or [REDACTED] to help eliminate any questions.

Issues

Please define the taxes imposed by your state on the activities of [REDACTED] and [REDACTED]. Please include in your analysis the taxation of the signs pre-LLC and post-LLC since the creation of the LLC will eliminate the use tax in Florida. I have attached a copy of the Florida Department of Revenue Technical Assistance Advisement.

Please include the actual state ruling in your analysis for each of the following items:

1. Define how each of the following signs [REDACTED] produces should be classified. Is it tangible personal property (TPP) or improvements to realty (IMP)? If there are further classifications, please specify.
 - Channel letters, 3 types
 - Back-lit letters
 - Pylon signs
 - Monument signs
 - Electronic display systems
 - Banners
 - Window Graphics
2. Define how the various signs are taxed. Include in the definition how lump sum and separated contracts make a difference. Also include the difference between new construction and remodeling.
3. Define how the following services and miscellaneous items on the above types of signs are taxed:
 - Engineering Sealed Drawings
 - Permits
 - Freight
 - Crate
 - Final Electrical Hookups
 - Removals, with signs to follow
 - Removals, without signs to follow
 - Repairs
 - Electrical components, ballasts, lamps with service work
 - Surveys alone
 - Surveys in conjunction with signs
 - Fascia panels
 - Trenching, boring, and conduit
4. Rarely, [REDACTED] contracts with a manufacturer in your state to manufacture the sign. In these situations, [REDACTED] is the retailer. How should the sale of these signs be taxed in your state?
5. In most cases [REDACTED] actually installs the sign. How are signs taxed that are not installed by [REDACTED] or their subcontractors?

Anything you can do to expedite this request will be greatly appreciated. Please feel free to call or email me if you have any questions or need additional information. Thanks for your help in this matter.

WKF

STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE
**POWER OF ATTORNEY AND
DECLARATION OF REPRESENTATIVE**

SC2848

(Rev. 8/31/04)
3307**Part I Power of Attorney****1 Taxpayer Information** (Note: Taxpayer(s) must sign and date this form on page 2, line 8.)

Taxpayer name(s) and address (Type or print.)

Social Security number(s)

Employer identification number

Daytime telephone number

Plan number (if applicable)

hereby appoint(s) the following representative(s) as attorney(s) - in fact.

2 Representative(s) (Type or print.)

Name and address

Telephone No.

Fax No.

Check if new:

Address ☐Telephone No. ☐

Name and address

Telephone No.

Fax No.

Check if new:

Address ☐Telephone No. ☐

Name and address

Telephone No.

Fax No.

Check if new:

Address ☐Telephone No. ☐

to represent the taxpayer(s) before the SC Department of Revenue for the following tax matters:

3 Tax Matters - A general reference to "All years," "All periods," or "All taxes" is not acceptable.

Type of Tax (Individual, Corporate, Withholding, Sales, etc.)	Tax Form Number (SC1040, WH1605, ST-3, etc.)	Year(s) or Period(s)
Sales tax		2002, 2003, 2004
Sales tax		2005, 2006, 2007

4 Acts Authorized - The representatives are authorized to receive and inspect confidential tax information and to perform any and all acts that I can perform with respect to the tax matters described in line 3, including the authority to sign any agreements, consents or other documents. The authority does not include the power to receive refund checks or the power to sign certain returns unless done pursuant to a licensed attorney/client relationship. If I want to authorize my representative to sign an income tax return, this authorization is specifically listed below.

List any specific additions to or deletions from the acts otherwise authorized in this power of attorney:

Receipt of Refund Checks - If you want to authorize a representative named in line 2 to receive, BUT NOT TO ENDORSE OR CASH refund checks, initial here _____ **and list the name of that representative below.**

Name of representative to receive refund check(s) ▶

DOR RESP LOWE'S2607

41616

6 Notices and Communications - All notices and other written communications will be sent to the first representative listed in line 2.

If you do not want any notices or communications sent to your representative, check this box ☐

Retention/Revocation of Prior Power(s) of Attorney - The filing of this power of attorney automatically revokes all earlier power(s) of attorney on file with the South Carolina Department of Revenue for the same tax matters for years or periods covered by this document.

If you do not want to revoke a prior power of attorney, check here ☐

YOU MUST ATTACH A COPY OF ANY POWER OF ATTORNEY YOU WANT TO REMAIN IN EFFECT.

8 Signature of Taxpayer(s) - If a tax matter concerns a joint return, both husband and wife must sign if joint representation is requested; otherwise, see the instructions for SC2848 concerning signature of taxpayer(s). If signed by a corporate officer, partner, guardian, tax matters partner/person, LLC members, executor, receiver, personal representative or trustee on behalf of the taxpayer, I certify that I have the authority to execute this form on behalf of the taxpayer.

> If this power of attorney is not signed, it will be returned.

1/18/07

Date

Title (if applicable)

Print Name

Signature

Date

Title (if applicable)

Print Name

Part II Declaration of Representative

I declare that:

- I am authorized to represent the taxpayer(s) identified in Part I for the tax matter(s) specified; and
- I am one of the following:
 - a Attorney - a member in good standing of the bar of the highest court of the jurisdiction shown below.
 - b Certified Public Accountant - duly qualified to practice as a certified public accountant in the jurisdiction shown below.
 - c Enrolled Agent - enrolled as an agent under the Requirements of the US Treasury Department Circular No. 230.
 - d Officer - a bona fide officer of the taxpayer organization.
 - e Full-Time Employee - a full-time employee of the taxpayer.
 - f Family Member - a member of the taxpayer's immediate family (i.e., spouse, parent, child, brother, or sister).
 - g Return Preparer.
 - h Other, please explain.

> If this power of attorney is not signed, it will be returned.

I declare that this return and all attachments are true, correct and complete to the best of my knowledge and belief. To willfully furnish a false or fraudulent statement to the Department is a crime.

Designation - Insert above letter (a-h)	Jurisdiction (state)	Signature	Date
b	FL	[Redacted Signature]	1-11-2007
b	FL	[Redacted Signature]	1-11-07
b	FL	[Redacted Signature]	

DOR RESP LOWE S2608

John McCormack

From: [REDACTED]
Sent: Tuesday, May 29, 2007 2:40 PM
To: John McCormack
Subject: [REDACTED]

John,
I agree with your draft for [REDACTED]
Thanks,
[REDACTED]

5/30/2007

DOR RESP LOWE'S2609

1618

May 14, 2007

Susan,

Please circulate the attached draft PLR within DOR only for two weeks for comments and suggestions

Thanks

John

DOR RESP LOWE'S2610

John McCormack

From: [REDACTED]
Sent: Wednesday, April 25, 2007 11:37 AM
To: John McCormack
Subject: RE: Draft PLR

John Conclusions seem OK to me. I noted a couple of possible typos.

corrected

Page 2, under conclusions, 2nd paragraph, first sentence, shouldn't the word "company" appear after "limited liability"?

Page 4, near bottom under "Window Graphics", the second line begins with "vinyl". I don't believe that word should be there.

Have a good PM.

From: John McCormack
Sent: Tuesday, April 24, 2007 12:35 PM
To: [REDACTED]
Cc: [REDACTED]
Subject: Draft PLR

Attached is a DRAFT private letter ruling concerning the sale and installation of signs. Before I send it out for general comments within the DOR, I would like your comments on the draft

Please review and send me your comments and suggestions. As part of this review, please consider Reg 117-309.9 (page 6) and let me know if you think the statement "The gross proceeds of the sale of such signs are subject to the tax" requires the imposition of the tax on charges for items that become a part of the real property, such as concrete used for foundations. The draft does not tax the concrete as part of the sale by the seller (if separately stated and reasonable), but as an item used by the seller that is taxed when purchased by the seller. However, your thoughts on this issue would be appreciated.

Please send me your comments by May 2, 2007.

Thanks.

John

John McCormack

From: [REDACTED]
Sent: Monday, April 30, 2007 3:02 PM
To: [REDACTED]
Cc: John McCormack
Subject: RE: Draft PLR

Thanks Lib.

From: [REDACTED]
Sent: Monday, April 30, 2007 3:01 PM
To: [REDACTED]
Subject: RE: Draft PLR

This looks like a well written policy document to me.
Lib

From: [REDACTED]
Sent: Tuesday, April 24, 2007 12:54 PM
To: [REDACTED]
Cc: [REDACTED]
Subject: FW: Draft PLR

From: John McCormack
Sent: Tuesday, April 24, 2007 12:35 PM
To: [REDACTED]
Cc: [REDACTED]
Subject: Draft PLR

Attached is a DRAFT private letter ruling concerning the sale and installation of signs. Before I send it out for general comments within the DOR, I would like your comments on the draft

Please review and send me your comments and suggestions. As part of this review, please consider Reg 117-309.9 (page 6) and let me know if you think the statement "The gross proceeds of the sale of such signs are subject to the tax" requires the imposition of the tax on charges for items that become a part of the real property, such as concrete used for foundations. The draft does not tax the concrete as part of the sale by the seller (if separately stated and reasonable), but as an item used by the seller that is taxed when purchased by the seller. However, your thoughts on this issue would be appreciated.

Please send me your comments by May 2, 2007.

Thanks

John

DOR RESP LOWE'S2612

John McCormack

From: [REDACTED]
Sent: Tuesday, April 24, 2007 5:12 PM
To: John McCormack
Subject: RE: Draft PLR

John,
I remember reading something a while back concerning the consultation, engineering, and designing of a telephone system. I believe that the conclusion was such charges were includable in the gross proceeds of sales. I saw a differing opinion in 2(b) of the conclusions section.

From: John McCormack
Sent: Tuesday, April 24, 2007 12:35 PM
To: [REDACTED]
Cc: [REDACTED]
Subject: Draft PLR

Attached is a DRAFT private letter ruling concerning the sale and installation of signs. Before I send it out for general comments within the DOR, I would like your comments on the draft

Please review and send me your comments and suggestions. As part of this review, please consider Reg 117-309.9 (page 6) and let me know if you think the statement "The gross proceeds of the sale of such signs are subject to the tax" requires the imposition of the tax on charges for items that become a part of the real property, such as concrete used for foundations. The draft does not tax the concrete as part of the sale by the seller (if separately stated and reasonable), but as an item used by the seller that is taxed when purchased by the seller. However, your thoughts on this issue would be appreciated.

Please send me your comments by May 2, 2007.

Thanks,

John

4-25-2007

DOR RESP LOWE'S2613 1622

John McCormack

From: [REDACTED]
Sent: Tuesday, April 24, 2007 4:23 PM
To: John McCormack
Subject: RE: Draft PLR

I agree with your draft. I too do not interpret Reg 117-309.9 to include materials used as footings or foundations permanently attached to real property to support the sign as a retail sales. These charges should be separately stated and are reasonable and not an attempt to evade tax.

From: John McCormack
Sent: Tuesday, April 24, 2007 12:35 PM
To: [REDACTED]
Cc: [REDACTED]
Subject: Draft PLR

Attached is a DRAFT private letter ruling concerning the sale and installation of signs. Before I send it out for general comments within the DOR, I would like your comments on the draft

Please review and send me your comments and suggestions. As part of this review, please consider Reg 117-309.9 (page 6) and let me know if you think the statement "The gross proceeds of the sale of such signs are subject to the tax" requires the imposition of the tax on charges for items that become a part of the real property, such as concrete used for foundations. The draft does not tax the concrete as part of the sale by the seller (if separately stated and reasonable), but as an item used by the seller that is taxed when purchased by the seller. However, your thoughts on this issue would be appreciated.

Please send me your comments by May 2, 2007.

Thanks

John

4/24/2007

DOR RESP LOWE'S2614

1623

4/24/07

Attached is a DRAFT private letter ruling concerning the sale and installation of signs. Before I send it out for general comments within the DOR, I would like your comments on the draft

Please review and send me your comments and suggestions. As part of this review, please consider Reg 117-309.9 (page 6) and let me know if you think the statement "The gross proceeds of the sale of such signs are subject to the tax" requires the imposition of the tax on charges for items that become a part of the real property, such as concrete used for foundations. The draft does not tax the concrete as part of the sale by the seller (if separately stated and reasonable), but as an item used by the seller that is taxed when purchased by the seller. However, your thoughts on this issue would be appreciated.

Please send me your comments by May 2, 2007.

Thanks.

John



Have conclusion to end of document
to allow reader to process the "why"

State of South Carolina
Department of Revenue
301 Gervais Street, P.O. Box 125, Columbia, South Carolina 29214
Website Address: <http://www.sctax.org>

February 12, 2007

[REDACTED]
[REDACTED]
[REDACTED]
Re: [REDACTED]

Private Letter Ruling Request
(Sales and Use Tax)

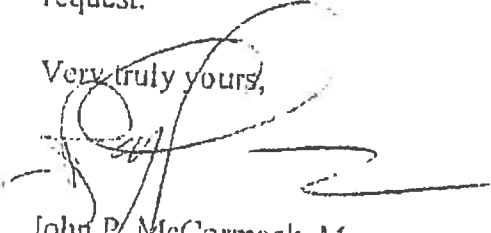
Dear [REDACTED]

This letter is to inform you that the Office of General Counsel for Policy is in receipt of your request for an advisory opinion.

It is the Department's position to work on requests in the order received, unless reasons are given to do otherwise. I will notify you once we have researched the issues and a response has been drafted.

In the meantime, please feel free to contact me concerning the status of your request.

Very truly yours,


John P. McCormack, Manager
Office of General Counsel for Policy
803-898-5138
mccormj@sctax.org

DOR RESP LOWE'S2616

Checkpoint Contents
State & Local Tax Library
State & Local Taxes
States

South Carolina

Cases

South Carolina Dept. of Rev. Commission Decisions
1989

Commission Decision 89-70, 89-70, 05/23/1989

Commission Decision 89-70

Case Information:

Docket/Court: 89-70, South Carolina Dept. of Rev. Commission Decisions

Date Issued: 05/23/1989

Tax Type(s): Sales and Use Tax

OPINION

In Re:

A Finding Concerning The Sales And Use Tax Liability Of XYZ d/b/a ABC For The Period May 1, 1984 Through December 31, 1984 And Sales And Use Tax Liability Of ABC For The Period January 1, 1985 Through February 28, 1987.

FINDINGS OF FACT

XYZ operated as a sole proprietor in the business of designing, fabricating and erecting signs. The business was incorporated on January 1, 1985, as ABC, and continued the same operation as the sole proprietorship had conducted. During the operation of the business, the taxpayers obtained a retail license and used it to purchase materials free of the sales tax. The taxpayers reported tax on the costs of the materials used to make the signs. In effect, the taxpayers reported tax as though the business was that of a contractor.

Upon examination, the Field Services Division determined the taxpayers were not contractors but instead operated as retailers. Based on such a view, the Division found additional taxes were due.

CONCLUSIONS

Our issue is determining the proper classification of the taxpayers' business. We have reviewed the evidence and testimony presented to us and conclude the taxpayers are not contractors. Rather, the taxpayers are retailers.

A sample contract was presented and it appears to us to support the retail nature of the taxpayers' business. It is clear that the purchaser of the sign may have the sign installed by the seller or installed by someone else. In fact, the contract gives different warranties to the buyer depending on whether or not the "installation is purchased from the company ..." The testimony by XYZ before us established

that the taxpayers installed approximately 95% of the signs sold with the balance being installed by the purchaser.

Further, the description given by the taxpayers of the business supports a finding of a retail operation since the taxpayers' business is that of designing, fabricating and erecting signs. ¹ The testimony before us showed that the taxpayers and the customer agree upon a design based upon a sketch prepared by the taxpayers. After approval by the customer, a contract is executed identifying the particulars of the sign. The sign is then fabricated to the specifications of the contract, and finally, arrangements are made for installation. Those activities are consistent with a retailer. ²

It is also relevant that other taxpayers have been taxed in the same fashion. Apparently, at least three other taxpayers in the area in the taxpayers' business have been taxed as retailers. To treat the taxpayers here in a different manner would be inappropriate. Based on the above we find and conclude the taxpayers are operating a retail business and are therefore subject to the tax developed by the Field Services Division upon audit. Further, no refund of taxes paid by XYZ is allowed.

Due to the nature of this matter, we believe it is inappropriate to impose any penalties. The taxpayers relied upon the advice of an accountant in reporting as a contractor and we believe such reliance is sufficient for having penalties waived. Under the authority of Section 12-54-160 such penalties are waived.

AND IT IS SO FOUND AND ORDERED.

SOUTH CAROLINA TAX COMMISSION

1

Regulation 117-174.247 holds that a person is a retailer if engaged in the business of designing, fabricating and erecting signs on properties of another for the display of that person's products.

2

The taxpayer's Articles of Incorporation set forth its business as design, manufacture and sale of advertising signs. Such is further evidence of a retail operation.

END OF DOCUMENT -

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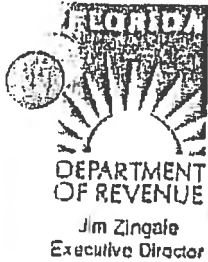
117-309.9. Sign Companies.

A person engaged in the business of erecting, on properties owned or controlled by him, signs for the display of products of a second party for a consideration is deemed to be engaged in the business of selling a service. A tax is due measured by the purchase price of all tangible personal property used or consumed by such person as additions or improvements to realty.

A person engaged in the business of designing, fabricating and erecting signs on properties of another, for the display of that person's products, is deemed to be a retailer. The gross proceeds of the sale of such signs are subject to the tax. If the signs are leased or rented, the lease or rental proceeds are subject to the tax.

A person engaged in both of the above businesses shall pay the tax in accordance with the applicable provisions as set forth hereinabove.

A person who designs and constructs a sign as defined in the second paragraph above may, if all statutory requirements are met, be considered a manufacturer.



General Tax Administration
Child Support Enforcement
Property Tax Administration
Administrative Services
Information Services

October 13, 2005

[REDACTED]

Re: Technical Assistance Advisement 05A-040
Sales and Use Tax
Improvements to Real Property; Fabrication; Sales for Export
Section 212.02, Florida Statutes (F.S.)
Section 212.05, F.S.
Section 212.054, F.S.
Section 212.06, F.S.
Section 608.471, F.S.
Rule 12A-1.0015, Florida Administrative Code (F.A.C.)
Rule 12A-1.051, F.A.C.

[REDACTED]

Dear [REDACTED]:

This is a response to your letter of March 16, 2005, requesting a Technical Assistance Advisement (TAA) regarding the above-referenced matter. This response to your request constitutes a TAA under Chapter 12-11, Florida Administrative Code (F.A.C.), and is issued to you under the authority of Section 213.22, Florida Statutes (F.S.).

Facts

Taxpayer, a Florida corporation, is a product contractor that manufactures signs ("products") for its customers. In addition, Taxpayer also arranges installation of the products. Taxpayer contracts with and pays a subcontractor to install the products, and then bills its customers for the products and installation costs. The Department has advised Taxpayer that its contracts with customers constitute improvements to real property, and that Taxpayer should not collect and remit sales tax on its Florida sales. In addition, the Department has advised Taxpayer that it must pay use tax on the fabricated cost of all products sold and installed pursuant to such contracts (regardless of whether the products are delivered in Florida or elsewhere).

Taxpayer's sales to Florida customers are not the subject of this request for advisement. Rather, Taxpayer proposes to restructure its operations with regard to out-of-state sales. To this end, Taxpayer is creating a single-member Florida limited liability company, [REDACTED], which will be disregarded for federal and state income tax purposes. LLC will purchase products from Taxpayer, in arm's length transactions, for sale and delivery to its out-of-state customers. LLC will market exclusively to non-Florida customers. The contracts between Taxpayer and LLC will be contracts for sale of products that Taxpayer will fabricate to LLC's specifications. Taxpayer will deliver the products on behalf of LLC via common carrier or utilizing Taxpayer's own transportation. LLC will contract with and pay a subcontractor to install the products. LLC will bill its customer for the product and installation and collect and remit tax according to the law of the state where the product is delivered.

Taxpayer has provided draft documents that will be used to form LLC, including Articles of Organization, Limited Liability Company Operating Agreement, and Organizational Consent of Members. In addition, sample invoices of transactions between Taxpayer and LLC and LLC and its customers have also been provided.

The sample Customer Proposal between LLC and its customer indicates that the customer is purchasing the fully installed real property improvement (not, e.g., purchasing products at retail from LLC). LLC will place a Purchase Order with Taxpayer for the required product. The Purchase Order will indicate the out-of-state site and installation subcontractor to which the Taxpayer will deliver the completed product on LLC's behalf. Taxpayer will separately invoice LLC for the products and transportation costs. LLC will separately invoice its customer for the installed products. The Purchase Order indicates that the subcontractors (designated "Contractor" in the Purchase Order) will act as LLC's agent with regard to the accepting delivery and completing the installation portion of the agreement. Materials shipped to the job site and accepted by the subcontractor remain the property of LLC. The subcontractor is charged with examining the materials for defects, and for handling and safekeeping until the work is completed and accepted by the customer. Upon completion, the subcontractor will send LLC a final invoice, which must include all applicable items required by section 12. of the Purchase Order, including: photographs of the completed work and any applicable damage; a signed certificate of completion (a copy of which is attached to the Purchase Orders); Purchase Order number and signed copy of the Purchase Order; and copies of any applicable permits.

Requested Advisement

Whether the sale of products by Taxpayer to LLC qualifies for the export exemption provided by Section 212.06(5)(a)1., F.S.

Taxpayer's Position

Taxpayer takes the position that sales of products to LLC will be nontaxable sales for export pursuant to Section 212.06(5)(a)1., F.S., and Rule 12A-1.0015, F.A.C.

Applicable Authority

The declaration of legislative intent for Chapter 212, F.S., Tax on Sales, Use, and Other

Transactions, is contained in Section 212.21(2), F.S., and provides in relevant part:

It is hereby declared to be the specific legislative intent to tax each and every sale, admission, use, storage, consumption, or rental levied and set forth in this chapter, except as to such sale, admission, use, storage, consumption, or rental as shall be specifically exempted therefrom by this chapter subject to the conditions appertaining to such exemption. . . .
(emphasis supplied)

Section 212.05, F.S., similarly declares the legislative intent to tax retail sales of tangible personal property and uses of tangible personal property. Subsection (1) of Section 212.05, F.S., provides in pertinent part:

(1) For the exercise of such privilege, a tax is levied on each taxable transaction or incident, which tax is due and payable as follows:

(a)1.a. At the rate of 6 percent of the sales price of each item or article of tangible personal property when sold at retail in this state, computed on each taxable sale for the purpose of remitting the amount of tax due the state, and including each and every retail sale.

* * *

(b) At the rate of 6 percent of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state;

* * *

Section 212.06, F.S., provides in pertinent part:

(1)(a) The aforesaid tax at the rate of 6 percent of the retail sales price as of the moment of sale, 6 percent of the cost price as of the moment of purchase, or 6 percent of the cost price as of the moment of commingling with the general mass of property in this state, as the case may be, shall be collectible from all dealers as herein defined on the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state of tangible personal property

(b) Except as otherwise provided, any person who manufactures, produces, compounds, processes, or fabricates in any manner tangible personal property for his or her own use shall pay a tax upon the cost of the product manufactured, produced, compounded, processed, or fabricated

* * *

(5)(a)1. Except as provided in subparagraph 2., it is not the intention of this chapter to levy a tax upon tangible personal property imported, produced, or manufactured in this state for export, provided that tangible personal property may not be considered as being imported, produced, or manufactured for export unless the importer,

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producer, or manufacturer delivers the same to a licensed exporter for exporting or to a common carrier for shipment outside the state or mails the same by United States mail to a destination outside the state; . . . nor is it the intention of this chapter to levy a tax on any sale which the state is prohibited from taxing under the Constitution or laws of the United States. Every retail sale made to a person physically present at the time of sale shall be presumed to have been delivered in this state.

(emphasis supplied)

* * *

Section 212.02, F.S., provides in pertinent part:

(14)(a) "Retail sale" or a "sale at retail" means a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property or services taxable under this chapter, and includes all such transactions that may be made in lieu of retail sales or sales at retail. . . .

* * *

(15) "Sale" means and includes:

(a) Any transfer of title or possession, or both, exchange, barter, license, lease, or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration.

* * *

(20) "Use" means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof, or interest therein, except that it does not include the sale at retail of that property in the regular course of business. . . .

(21) The term "use tax" referred to in this chapter includes the use, the consumption, the distribution, and the storage as herein defined.

* * *

Section 608.471(3), F.S., provides in pertinent part:

Single-member limited liability companies and other entities that are disregarded for federal income tax purposes must be treated as separate legal entities for all non-income-tax purposes. . . .

Section 12A-1.0015, F.A.C., provides in pertinent part:

* * *

(2) SALES OF PROPERTY IRREVOCABLY COMMITTED TO EXPORTATION.

* * *

(b) When a dealer sells tangible personal property, commits the property to the exportation process at the time of sale, and the exportation process remains continuous and unbroken until the property is exported from Florida, the dealer is not required to collect tax. The intent of the seller and the purchaser to export the property is not sufficient to establish that the property is not subject to tax in Florida. The delivery of the property to a location in Florida for subsequent export from Florida is insufficient to establish documentary evidence that the property sold was irrevocably committed to the exportation process. The following are examples of methods to commit the property to the exportation process at the time of sale:

1. The dealer is required by the terms of the sale contract to deliver the property outside Florida using the dealer's own mode of transportation;
2. The dealer is required by the terms of the sale contract to mail the property by United States mail to a destination located outside Florida; or
3. The dealer is required by the terms of the sale contract to deliver the property to a carrier, licensed customs broker, or forwarding agent for final and certain movement of the property to a destination located outside Florida.
 - a. The term "carrier" means a person regularly engaged in the business of transporting tangible personal property owned by other persons for compensation. The term "carrier" includes common carriers and contract carriers.

* * *

(c) Any dealer who makes tax-exempt sales of tangible personal property for export outside Florida is required to maintain records to document that the property is committed to the exportation process at the time of sale and that the exportation process is continuous and unbroken until the property is exported from Florida. The dealer is required to maintain records that identify the tangible personal property sold and the delivery destination of the property. The documentation must clearly establish that the property was not commingled with the mass of property within Florida. If the purchaser exercises any act of dominion or control that would constitute "use" of the property by the purchaser in Florida within the meaning of that term set forth in s. 212.02(20), F.S., the property was not irrevocably committed to the exportation process. Examples of records to document sales for export to points outside Florida are:

1. Internal delivery orders identifying the property sold and the destination and date of delivery that are supported by receipts of expenses incurred in delivering the property, such as trip tickets or truck logs signed by the person who delivers the property;
2. United States Postal Service parcel post receipts with supporting documentation identifying the property and the destination;
3. Common carriers' receipts, bills of lading, or similar documentation that evidences the delivery destination; . . .

* * *

Rule 12A-1.051, F.A.C., provides in pertinent part:

(1) Scope of the rule. This rule governs the taxability of the purchase, sale, or use of tangible personal property by contractors and subcontractors who purchase, acquire, or manufacture materials and supplies for use in the performance of real property contracts

(2) Definitions. For purposes of this rule, the following terms have the following meanings:

(a) "Fabricated cost" means the cost to a real property contractor of fabricated items, as defined in the following paragraph. The elements of cost included in fabricated cost are set forth in Rule 12A-1.043, F.A.C. Fabricated cost does not include the cost of transporting fabricated items from the contractor's plant to the job site or the cost of labor at the job site where the fabricated items are incorporated into the real property improvement.

(b) "Fabricated items" means items contractors manufacture, produce, process, compound, or fabricate for their own use in performing contracts for improvements to real property. The term applies only to items the contractor manufactures, produces, processes, compounds, or fabricates at a plant or shop maintained by the contractor. For this purpose, a temporary facility established at a job site that is used exclusively in connection with performing a contract for a real property improvement at that job site is not considered to be a plant or shop maintained by the contractor.

* * *

(d) "Improvement to real property" or "real property improvement" includes the activities of building, erecting, constructing, altering, improving, repairing, or maintaining real property.

* * *

(f) "Manufacture, produce, compound, process, or fabricate" means:

1. To convert or condition tangible personal property by changing the form, composition, quality, or character of the property;
2. To make, build, create, produce, or assemble components or items of tangible personal property in a new or different manner;
3. To physically apply materials and labor necessary to modify or change the characteristics of tangible personal property. The terms do not include activities that do not result in any change in the character or quality of tangible personal property. For example, a repair or restoration of property to return it to its original state and level of functionality is not included within the defined activities.

(g) "Real property" means land, improvements to land, and fixtures. It is synonymous with the terms "realty" and "real estate."

(1)l. "Real property contract" means an agreement, oral or written, whether on a lump sum, time and materials, cost plus, guaranteed price, or any other basis, to:

a. Erect, construct, alter, repair, or maintain any building, other structure, road, project, development, or other real property improvement;

* * *

2. The term "real property contract" does not include:

- a. A contract for the sale or for the sale and installation of tangible personal property such as machinery and equipment; or
- b. A contract to furnish tangible personal property that will be installed or affixed in such a way as to become a fixture or improvement to real property if the person furnishing the property has not also contracted to affix or install it.

* * *

(4) General rule of taxability of real property contractors. Contractors are the ultimate consumers of materials and supplies they use to perform real property contracts and must pay tax on their costs of those materials and supplies, unless the contractor has entered a retail sale plus installation contract. Contractors performing only contracts described in paragraphs (3)(a), (b), (c), or (e) do not resell the tangible personal property used to the real property owner but instead use the property themselves to provide the completed real property improvement. Such contractors should pay tax to their suppliers on all purchases. They should also pay tax on all materials they fabricate for their own use in performing such contracts, as discussed in subsection (10). They should charge no tax to their customers, regardless of whether they itemize charges for materials and labor in their proposals or invoices, because they are not engaged in selling tangible personal property. Such contractors should not register as dealers unless they are required to remit tax on the fabricated cost of items they fabricate to use in performing contracts.

* * *

(10) Use tax on fabrication costs. Contractors may maintain shops, plants, or similar facilities where they manufacture, produce, compound, process, or fabricate items for their own use in performing contracts. Contractors are required to pay use tax on the fabricated cost of those items. The elements that must be included in the taxable cost of such items are set forth in Rule 12A-1.043, F.A.C. In the case of real property contractors, the taxable cost of an item manufactured, produced, compounded, processed, or fabricated for use in performing a contract does not include labor that occurs at the job site where the item will be incorporated into a real property improvement or transportation from the plant where an item was fabricated to the job site. Examples of real property contractors who are subject to tax under this subsection include cabinet contractors who build custom cabinets in their shops, roofing contractors who operate tile plants, or heating/air conditioning/ventilation

contractors who maintain sheet metal shops for making ductwork. Real property contractors that are required to remit use tax on fabricated items must register as dealers for purposes of remitting such tax if they are not already registered as dual operators.

* * *

(17) Specific activities classified as real property contracts. Contractors who are engaged in the following activities are generally considered to be real property contractors, although any particular job may be determined not to involve an improvement to real property:

* * *

(hh) [Products] that are permanently attached to realty;

* * *

Discussion and Response

Section 212.05(1)(a)1.a., F.S., imposes a sales tax on the retail sale of tangible personal property.¹ A "retail sale" is defined by Section 212.02(14)(a), F.S., as a sale for any purpose other than for resale. Section 212.02(15)(a), F.S., defines "sale" broadly as "[a]ny transfer of title or possession, or both, exchange, barter, license, lease, or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration." Section 212.06(1)(b), F.S., provides that any person² who manufactures, produces, compounds, processes, or fabricates tangible personal property for their own use is required to pay tax upon the cost of manufacturing, producing, compounding, processing, or fabricating such items ("fabricated cost"). See also Rule 12A-1.043(1), F.A.C.; Rule 12A-1.051(10), F.A.C. Tax is levied upon each retail sale or the fabricated cost of manufacturing, producing, compounding, processing, or fabricating items at the rate of six percent (6%), plus any applicable local discretionary surtax. Sections 212.05(1)(a)1.a. and 212.06(1)(a), F.S.; see Section 212.054(2), F.S.

The tax levied pursuant to Chapter 212, F.S., is imposed at the level of the purchaser or ultimate consumer/user of tangible personal property. See Sections 212.02(14)(a) and 212.07(1)(a), F.S.; see also Section 212.06, F.S. Real property contractors are generally considered to be the ultimate consumers or users of the tangible personal property they purchase to perform a real property contract (i.e., they are not reselling the tangible personal property). See Rule 12A-1.051(4), F.A.C.; Kings Bay Yacht and Country Club, Inc. v. Green, 173 So. 2d 509 (Fla. 1st DCA 1965). The stated general rule for real property contractors is that they should not charge tax to their customers,

¹ "Tangible personal property" is defined in pertinent part as "personal property which may be seen, weighed, measured, or touched or is in any manner perceptible to the senses . . ." Section 212.02(19), F.S.

² For the purposes of Chapter 212, F.S., "person" is defined to include "any individual, firm, copartnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate, or other group or combination acting as a unit . . ." Section 212.02(12), F.S. For the purposes of Chapter 212, F.S., LLC is a "person" separate and distinct from Taxpayer. See Section 608.471(3), F.S.

JOINT EXHIBIT 59

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South Carolina

Rulings

South Carolina Revenue Ruling

2015

South Carolina Revenue Ruling 15-1, 02/05/2015

South Carolina Revenue Ruling No. 15-1, 02/05/2015

Date Issued: 02/05/2015

Tax Type(s): Sales and Use Tax

SUBJECT: Kayaks and Paddle Boards — Rentals and Tours (Sales and Use Tax)

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

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

REFERENCES: S. C. Code Ann. Section 12-36-910(A) (2014)

S. C. Code Ann. Section 12-36-1310 (A) (2014)

S. C. Code Ann. Section 12-36-1110 (2014)

S. C. Code Ann. Section 12-36-60 (2014)

S. C. Code Ann. Section 12-36-100 (2014)

S. C. Code Ann. Section 12-36-110 (2014)

S. C. Code Ann. Section 12-36-120 (2014)

S. C. Code Ann. Section 12-36-90 (2014)

SC Regulation 117-318.4

SC Revenue Procedure #09-3

Question:

1. A business that only rents kayaks and paddle boards and does not conduct tours.
2. A business that only conducts tours of rivers and lakes using kayaks and paddle boards and does not rent kayaks and paddle boards.
3. A business that rents kayaks and paddle boards and also conducts tours using the same kayaks and paddle boards.

Conclusion:

1. If the business only rents kayaks and paddle boards and does not conduct tours, then rentals of the kayaks and paddle boards by the business to customers are subject to the State sales and use tax, plus any applicable local sales and use tax.

The purchases by the business of the kayaks and paddle boards that it will rent to customers are wholesale purchases and are not subject to the tax. The business may purchase the kayaks and paddle boards at wholesale (not subject to the tax) by providing the seller of the kayaks and paddle boards a resale certificate.

For additional information on resale certificates, see SC Revenue Procedure #08-2.

2. If the business only conducts tours of rivers and lakes using kayaks and paddle boards and does not rent kayaks and paddle boards, then the charge for the tour is a charge for a service that is not subject to State and local sales and use taxes.

The purchases by the business of the kayaks and paddle boards that it will use in conducting the tours of rivers and lakes are purchases at retail by the business and are subject to the State sales and use tax, plus any applicable local sales and use tax.

Note: Since the business is purchasing the kayaks and paddle boards at retail, the business will either pay the tax to the supplier at the time of purchase or remit the use tax directly to the Department on its purchase of the kayaks and paddle boards.

3. If the business rents kayaks and paddle boards and also conducts tours using the same kayaks and paddle boards, then:

- a. The rentals of the kayaks and paddle boards by the business to customers are subject to the State sales and use tax, plus any applicable local sales and use tax.
- b. The use of the same kayaks and paddle boards in providing tours is a "**withdrawal for use**" subject to the State sales tax, plus any applicable local sales tax. The business may elect one of two methods to pay the tax on its **withdrawals** for use: (i) the business may purchase all its kayaks and paddle boards at retail by paying the tax to the seller at the time of purchase or remitting the use tax directly to the Department on its purchase of the kayaks and paddle boards and no further tax is due on any future withdrawal for use of the kayaks and paddle boards when used in providing a tour, or (ii) the business may purchase all its kayaks and paddle boards at wholesale (not subject to the tax) and remit the tax on the fair market rental value of a kayak or paddle board each time it is used in providing a tour.

For example, if a business rents kayaks for \$20 per hour, then all such rentals are subject to the State sales and use tax, plus any applicable local sales and use tax. When the same kayak is also used in providing a tour that costs \$100 per hour, then the sales tax is due on \$20 of each \$100 as a "withdrawal for use" of the kayak for the tour. However, if the business had elected to remit the tax to the seller or directly to the Department at the time of its purchase of the kayaks and paddle boards, then no tax would be due on the subsequent "withdrawal for use" of the kayak for each tour.

Note: If a business is selling or renting kayaks, paddle boards or any other tangible personal property (e.g., souvenirs, clothing, food, etc.), then it will need a retail license since it will be engaged in the business of selling tangible personal property at retail.

Facts:

Kayaking and paddle boarding are popular in South Carolina. Throughout the state, there are businesses that rent kayaks and paddle boards and others that conduct tours of South Carolina's scenic waterways using kayaks and paddle boards. In some cases, these businesses do both — rent kayaks and paddle boards and conduct tours using the same kayaks and paddle boards.

The purpose of this advisory opinion is to provide guidance as to the application of the sales and use tax to the kayak and paddle board rental and tour industry.

Discussion:

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

A sales tax, equal to [six]¹ 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.

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]² percent of the sales price of the property, regardless of whether the retailer is or is not engaged in business in this State.

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.

Code Section 12-36-100 defines the term "sale" to include leases and rentals of tangible personal property.

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

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.

(1) The terms include:

(c) the withdrawal, use, or consumption of tangible personal property by anyone who purchases it at wholesale, except:³

(emphasis added).

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

... 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.

Based on the above, a "retail sale" includes:

- (1) the withdrawal of tangible personal property by anyone who purchased it at wholesale;
- (2) the use of tangible personal property by anyone who purchased it at wholesale; or, 5
- (3) the consumption of tangible personal property by anyone who purchased it at wholesale.

Code Section 12-36-90 defines the term "gross proceeds of sales," which is the basis for calculating the sales tax, in part as:

... the value proceeding or accruing from the sale, lease, or rental of tangible personal property.

(1) The term includes:

(c) the fair market value of tangible personal property previously purchased at wholesale which is **withdrawn** from the business or stock and used or consumed in connection with the business or used or consumed by any person **withdrawing** it, except for:⁴

(emphasis added).

Based on the above, tangible personal property purchased at wholesale is subject to the sales tax based upon its fair market value when it is (1) **withdrawn** from the business or stock and (2) used or consumed in connection with the business or used or consumed by the person **withdrawing** it.

SC Regulation 117-318.4 specifically addresses retailers that rent tangible personal property and also **withdraw**, use or consume the same tangible personal property, and states:

Where a person customarily rents tangible personal property and customarily **withdraws** the same for his own use, storage or consumption, a tax is due by such person on each **withdrawal** for use, the tax to be measured by the amount he would customarily receive as rental had the property been leased or rented for a like period of time. In the alternative the tax may be paid on the full purchase price of the property and no further liability incurred on **withdrawals** for use. Having once elected either method of reporting on **withdrawals** for use, the taxpayer must so continue unless and until permission has been received from the department in writing to make a change. Regardless of the method selected for accounting for the tax on **withdrawals** for use, the tax is due on all amounts proceeding or accruing from the rental, lease or sale of the property.

Therefore, a business that rents kayaks and paddle boards is liable for the sales tax on all such rentals.⁶

For example, if a business rents kayaks for \$20 per hour, then all such rentals are subject to the State sales and use tax, plus any applicable local sales and use tax. When the same kayak is also used in providing a tour that costs \$100 per hour, then the State sales tax, and any applicable local sales tax, is due on \$20 of each \$100 as a "withdrawal for use" of the kayak for the tour. However, if the business had previously elected to remit the tax to the seller, or directly to the Department, at the time of its purchase of the kayaks and paddle boards, then no tax would be due on the subsequent "withdrawal for use" of the kayak when used for a tour.

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JOINT EXHIBIT 60

South Carolina Sales Tax Guide, Private Letter Ruling #95-4, South Carolina, ¶320-028, South Carolina Tax Commission, (May 23, 1995)

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¶320-028. Private Letter Ruling #95-4, South Carolina Tax Commission, May 23 1995.

South Carolina Department of Revenue and Taxation, May 23, 1995.

Food Services (Sales and Use Taxes)

Questions:

1. Is ABC Inc. liable for sales and use taxes on sales of food and food management services to a hospital, as described in transaction 1 in the facts?
2. Is ABC Inc. liable for sales and use taxes on sales of only food management services to a hospital, as described in transaction 2 in the facts?
3. Is ABC Inc. liable for sales and use taxes on sales of food management services and food in a cafeteria located at a private company, as described in transaction 3 in the facts?

Conclusions:

1. As described in transaction 1 in the facts, ABC Inc. is making a wholesale sale of tangible personal property and is *not* liable for sales and use taxes on sales of food and food management services to a hospital.
2. As described in transaction 2 in the facts, ABC Inc. is providing a service and is *not* liable for sales and use taxes when providing food management services to a hospital.
3. As described in transaction 3 in the facts, ABC Inc. is making a retail sale of tangible personal property on behalf of a private company and is liable for sales tax, as a retailer under Code Section 12-36-70, on sales of food in the cafeteria of that company.

Facts:

ABC Inc., a Delaware corporation, is engaged in the business of supplying food and/or food management service to public and private institutions, such as private businesses and hospitals, in connection with the operation of the institutions' food services program. Advice has been requested regarding the taxability of management and food services provided by ABC, Inc. Based upon the terms and conditions set forth in contracts with their clients, ABC, Inc. is seeking guidance with respect to the following transactions:

Transaction 1—

Under the terms of the contract, ABC and the hospital agree to the following provisions:

1. A consulting and management fee is charged for operating the hospital's food service,
2. The food is purchased by ABC and the hospital reimburses ABC for the food costs,
3. Management personnel are carried as part of ABC's payroll. ABC bills the hospital for salaries and a percentage of payroll charges. The hospital pays the hourly employees who prepare and serve the food,
4. All daily cash sales received from the food service operation are delivered to the hospital's business office daily,
5. Food is provided to patients and substantial sales are made at the cafeteria.

Transaction 2—

Under the terms of the contract, ABC and the hospital agree to the same provisions described in transaction 1, except that the hospital will purchase the food.

Transaction 3—

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Under the terms of the contract, ABC and the private business agree to the following provisions:

1. ABC's charges a consulting and management fee to operate a cafeteria located at a private business,
2. The business pays ABC for all food purchased by ABC,
3. Management personnel and hourly employees who prepare and serve the food are carried as a part of ABC's payroll. ABC bills the business for salaries and a percentage rate of payroll charges,
4. ABC collects the receipts from the daily cash sales and credits this amount against the business's monthly food service operation.

Discussion:

Code Section 12-36-910(A) imposes the sales tax and reads, in part:

A sales tax, equal to five 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.

Code Section 12-36-1310(A) imposes the use tax and reads, in part:

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.

According to the law, the sales and use taxes are imposed on retail sales of tangible personal property, but are not imposed on wholesale sales of tangible personal property.

Code Section 12-36-110 defines the terms "sale at retail" and "retail sale", in part, as follows:

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.

(1) The terms include:

(c) the withdrawal, use, or consumption of tangible personal property by anyone who purchases it at wholesale

...

(h) sales of prepared meals, or unprepared food products to prepare meals, to hospitals, ... educational institutions, boarding houses, and transportation companies, if furnished as part of the service rendered. These institutions and companies are deemed to be the users or consumers of the property....

Code Section 12-36-120 provides the meaning of the term "wholesale sale" and reads, in part:

Wholesale sale and sale at wholesale mean a sale of:

(1) tangible personal property to licensed retail merchants ... for resale, and do not include sales to users or consumers not for resale;

The law, therefore, provides that a retail sale includes: (1) sales of tangible personal property, (2) withdrawals of inventory purchased at wholesale, and (3) sales to hospitals of prepared meals or unprepared food products to prepare meals for patients. A retail sale does not include a wholesale sale.

Now, we will review the three transactions described in the facts above and discuss the sales and use tax consequences of each.

Transaction 1—

As described in the facts, ABC is providing food and food management services to a hospital. Employees of the hospital are preparing and serving the food. The hospital is providing food to patients as part of the medical services, and also sells a substantial amount of food to employees, visitors, and guests in its cafeteria. In other words, the hospital is the user and consumer of the food purchased from ABC based upon Code Section

12-36-110 and is a "retailer" of food purchased from ABC that is resold to guests, employees and visitors in the hospital cafeteria.

Regulation 117-174.82 addresses the imposition of the tax upon businesses making both retail sales and withdrawals for use and reads:

Operators of businesses who are both making retail sales and withdrawing for use from the same stock of goods are to purchase at wholesale all of the goods so sold or used and report both retail sales and withdrawals for use under the sales tax law.

This ruling applies only to those who actually carry on a retail business having a substantial number of retail sales and does not apply to ... others who make isolated ... sales and who have not set themselves up as being engaged in selling. Where only isolated sales are made, tax should be paid on all of the taxable property purchased with no sales tax returns being required of the seller making such isolated ... sales.

Based upon the above, ABC is not liable for sales and use taxes on food and food management services provided to the hospital. In complying with this regulation, the hospital must present ABC a properly completed South Carolina Form ST-8A—Resale Certificate in order to purchase the food tax free. The hospital is then liable for sales and use taxes on both retail sales of food in its cafeteria and the food that is withdrawn for patient meals.¹ (See SC Revenue Ruling #93-9.)

Transaction 2—

As described in the facts, ABC is providing food management services only to a hospital. The hospital is purchasing food from outside vendors. The hospital is providing food to patients as part of their medical services and also is selling food to employees, visitors, and guests in its cafeteria. In other words, the hospital is the user and consumer of the food purchased from vendors based upon Code Section 12-36-110 and is a "retailer" of food purchased from ABC that is resold to guests, employees and visitors in the hospital cafeteria.

As stated in the facts, ABC is providing a management service only. ABC is not making a sale of tangible personal property and is not liable for sales and use taxes.

Based upon the discussion in transaction 1, Regulation 117-174.82 is applicable since the hospital is making a substantial amount of retail sales and withdrawing for use from the same stock of goods. The hospital must present its vendors a properly completed South Carolina Form ST-8A—Resale Certificate in order to purchase the food tax free. The hospital is then liable for sales and use taxes on both retail sales of food in its cafeteria and the food that is withdrawn for patient meals.² (See SC Revenue Ruling #93-9.)

Transaction 3—

As described in the facts, ABC is operating a cafeteria at a private business³. ABC buys the food, employs the management personnel, and employs the hourly personnel that cook and serve the food. ABC also collects the receipts from the daily cash sales and credits this amount against the business's monthly food service operation. Since ABC is making sales on behalf of the private business, ABC is treated as a retailer, and liable for the sales tax, pursuant to the last paragraph of Code Section 12-36-70. ABC may present a properly completed Form ST-8A—Resale Certificate in order to purchase the food tax free. ABC is then liable for sales tax on the gross proceeds from the food sales in the cafeteria of the private business.

Footnotes

- 1 The hospital will report retail sales based on gross proceeds of sales of food in its cafeteria and withdrawals for use to patients based upon the property's fair market value (i.e. the amount paid by the hospital to ABC for food costs reimbursed under the terms of the contract).
- 2 The hospital will report retail sales based on gross proceeds of sales of food in its cafeteria and withdrawals for use to patients based upon the property's fair market value (i.e. the amount paid by the hospital to outside vendors for food costs).

- 3 The business is not a hospital, infirmary, sanitarium, nursing home, similar institution, educational institution, boarding house, or transportation company deemed to be a user or consumer as provided in Code Section 12-36-110(1)(h).

JOINT EXHIBIT 61

**South Carolina State Tax Reporter, Decision No. 94-4-- Property--
Basis of assessment-- Residence located in floodway, South
Carolina, ¶400-111, South Carolina Tax Commission, (Jan. 12, 1994)**

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¶400-111. Decision No. 94-4, South Carolina Tax Commission, January 12, 1994.

Property: Basis of assessment: Residence located in floodway.— The assessor's valuation of a residence that was located in the floodway of a creek was reduced to account for the nominal value of the land. Although the assessor had properly discounted the value of the taxpayer's residence to account for the structural problems caused by the floodway, the land was improperly valued in excess of its actual nominal value. Thus, the property value was reduced to the fair market value of the residence, without attribution of any value to the land. See ¶20-660

FINDINGS OF FACT

The matter before us concerns the 1992 property tax value of property in Columbia owned by Jane and John Doe and further identified as TMS Number R00000-00-00. The subject property is located in the floodway of Gill Creek. The Does purchased the property in 1961. Since that time, flooding has become an increasing problem in connection with the property. Due to the flooding, the land is continually eroding and the foundation of the house has been substantially damaged.

The assessor valued the property for \$119,400 which includes a land value of \$20,000 and a building value of \$99,400. The taxpayers claim the property is worth \$80,000. The Richland County Board of Assessment Appeals affirmed the value established by the assessor.

CONCLUSION

The assessor presented three comparable sales and four equity comparisons to support his value. Two of these comparables in each instance are not in the floodway, but are rather, in the floodplain. Although we recognize that these properties were the best information available to the assessor, we find that properties in the floodplain are not comparable with properties in the floodway.

There was one comparable sale in the floodway in 1991. We hesitate to rely exclusively on the this sale to establish value in this case. Even though the sale may have been between a willing-buyer and willing-seller, we have substantial doubts that the seller would have been able to find another willing purchaser for the property at the price for which it was purchased. The price paid is very similar to the price for property located in the floodplain.

The assessor has admitted that this is very difficult property to value. In an attempt to fairly value the property, the assessor made adjustments to the subject property's value so that it is valued at approximately \$14 less per square foot than the average of the comparable sales and approximately \$10 less per square foot than the average of the equity comparisons.¹ These adjustments resulted in the land value of \$20,000 and the house value of \$99,400. The taxpayers assert that the house should be valued at \$80,000 and the land should be valued at zero.

We agree with the assessor that the property is difficult to value. Generally, we do not review the separate assessment values of the property to the house. Rather, we review the entire value of the property to determine if the property is valued in excess of its fair market value. In this unusual case, we believe it is appropriate to separately consider the land value and the house value. As previously discussed, the land is located in the floodway. At the time this house was built, the flooding problems were not known. It is highly doubtful that anyone would purchase this land to build a new house. Someone would be willing to purchase the property for a residence only because the house is already located on the property. Were it not for this house, the land could

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only be used for recreational purposes and would therefore have very little value. We, therefore, find that the \$20,000 value for the land is excessive. We do not believe that a willing buyer fully informed of the flooding and the problems associated with the flooding would pay \$20,000 for this land. The only values found in the record for the land are the \$20,000 amount advocated by the assessor and a zero value advocated by the taxpayer. Although we recognize that this land has some value, we believe the value is substantially less than \$20,000. Based on the evidence presented in the record, we find that the taxpayers' value of zero is closer to the correct value than the \$20,000 value of the assessor. We, therefore, find that the value of the land is minimal.

Information in the record indicates that the assessor has taken into account the structural problems of the house in his valuation. We, therefore, find that the assessor's value of \$99,400 is proper for the house and reduce the overall assessment of the property to \$99,400.

AND IT IS SO FOUND AND ORDER.

Footnotes

- 1 Although the equity comparisons allow us to determine if the property has been equitable assessed, equity comparisons are not a basis for establishing fair market value. *Wasson v. Mayes*, 252 S.C. 497, 167 S.E.2d 304 (1969).

JOINT EXHIBIT 62

South Carolina State Tax Reporter, Private Letter Ruling #97-4, South Carolina, ¶320-038, South Carolina Tax Commission, (Sep. 18, 1997)

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¶320-038. Private Letter Ruling #97-4, South Carolina Tax Commission, September 18 1997.

South Carolina Department of Revenue, September 18, 1997.

SC Private Letter Ruling #97-4

Security System (Sales and Use Tax)

Questions:

1. Are the periodic fees for the standard security package paid by a customer to ABC, Inc. ("ABC") for electronically monitoring a customer's home for the purpose of burglary and fire protection subject to the sales and use taxes?
2. Are charges by ABC to supply and install the add-on equipment subject to the sales and use taxes?
3. Are charges by ABC to repair the add-on equipment subject to the sales and use taxes?

Conclusions:

1. MONITORING AND EQUIPMENT FOR THE STANDARD SECURITY PACKAGE

The periodic charges by ABC are not for the access to, or use of, a communication system and are therefore *not* subject to the tax under Code Sections 12-36-910(B)(3) and 12-36-1310(B)(3). In addition, the periodic charges by ABC are not leases or rentals of the equipment in standard security packages; therefore, such charges are not subject to the sales or use tax under Code Sections 12-36-910(A) or 12-36-1310(A).

As such, ABC is using and consuming the equipment in providing a nontaxable monitoring service. ABC's purchase or use of the equipment used in the standard security package is subject to the sales or use tax at the time such equipment is sold to or purchased by ABC.

2. SALE AND INSTALLATION OF ADD-ON EQUIPMENT

Transfers of title and possession of add-on equipment to customers are sales of tangible personal property by ABC and are subject to the sales and use tax.

Charges by ABC to install the add-on equipment are subject to the sales and use taxes since such charges are not separately stated from the sales price of the add-on equipment on the bills to customers.

3. CHARGES TO REPAIR ADD-ON EQUIPMENT

Repair charges are addressed in Regulation 117-174.192. Based on this regulation, the following outlines the application of the tax to repairs made by ABC to add-on equipment:

1. If ABC charges customers for repair materials that pass to the customer, that do not lose their identity, and that are a substantial part of the repair job, then these charges are subject to the tax. However, installation charges by ABC with respect to these repair materials are not subject to the tax provided these charges are separately stated from the sales price of the property on billing to the customer and are reasonable.
2. If ABC never charges customers for repair materials that pass to the customer, that do not lose their identity, and that are a substantial part of the repair job, then the tax is due at the time these materials are sold to or purchased by ABC.
3. If ABC charges some customers for repair materials that pass to the customer, that do not lose their identity, and that are a substantial part of the repair job and does not charge other customers, then ABC may purchase all such material at wholesale and remit the tax at the time it charges the customer for the repair material or at the time it withdraws such material from inventory for the "no charge" repair. However, tax is not due on the withdrawal of the material for the "no charge" repair if ABC is replacing a defective part under a written warranty.

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contract provided the warranty contract was (at the time of the original purchase of the defective property) given without charge, the tax was paid on the sale of the defective part or on the sale of the property of which the defective part was a component, and the warrantee is not charged for any labor or materials (See Code Section 12-36-110.).

4. If ABC uses repair materials that (a) do not pass to the customer or (b) that pass to the customer but lose their identity or are only incidental to the repair job, then the tax is due at the time these materials are sold to or purchased by ABC.

Facts:

ABC provides security services and monitoring services to residential customers. The security system generally consists of a standard package or a standard wireless package, both of which remain the property of ABC.

The standard package includes an electronic telephone dialer, door/window contacts, and a motion sensor. In addition to the above, the standard wireless package includes a receiver board and a key chain remote.

Monitoring services are provided from a communications center located outside of South Carolina. When a protected premises goes into a state of alarm, the system dials the communications center and transmits a digital message to the communications center. The operator in the communications center processes the message and takes appropriate action to resolve the situation. Additionally, patrol car services consisting of a ABC employee periodically patrolling the protected premises may be available sometime in the future.

ABC will provide residential customers with a security alarm system and monitoring services for a stated fee. The system (standard package) will be provided for a specified period of time (service contract). Under the terms of the service contract, title to the security system remains with ABC. Service contracts are anticipated to be for twenty-four months and the customer will have the option of renewing indefinitely. Customers will only obtain the right to use the system for the period during which the monitoring services are being provided. Service contract customers will be responsible to remit a lump sum payment (monthly, quarterly, semi-annually, or annually) for use of the system and monitoring service.

In addition, customers may request additional protection over and above the standard package. The items providing this additional protection are known as "add-on protection items." Add-on protection items will be sold to the customers (*title will pass to the customers*). Add-on pricing includes a lump sum charge for product, material, and labor. Charges for patrol car services, if instituted, will be separately stated.

ABC employees will assemble and install the equipment and perform service and training at the customer's residence.

The question has arisen as to whether the fees charged by ABC are subject to the State sales and use taxes.

Discussion:

MONITORING AND EQUIPMENT FOR THE STANDARD SECURITY PACKAGE

With respect to the standard security package, ABC charges the customer one monthly fee. Separate charges are not assessed for use of the equipment and for monitoring.

The first question to arise is whether the monthly fee is subject to the tax as the sale or use of a communication service.

The sale or use of communications is subject to tax under Chapter 36 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; ...

In reviewing various communication issues in the past, the Department has concluded that charges for the ways or means of communication must be charges for access to, or use of, a communication system, whether this charge is based on a fee per a specific time period or per transmission.

Since the periodic charges by ABC are not for the access to, or use of, a communication system, such charges are *not* subject to the tax under Code Sections 12-36-910(B)(3) and 12-36-1310(B)(3)

Now it must be determined if such charges are subject to the sales and use tax as a "sale" of tangible personal property when ABC retains title to the equipment.

Code Section 12-36-910(A) imposes a sales tax and reads:

A sales tax, equal to five 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) imposes a use tax and 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 five 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.

Therefore, for the 5% sales or use taxes to apply, there must be a retail sale or purchase of tangible personal property.

Code Section 12-36-110 defines the terms "sale at retail" and "retail sale", in part, as follows:

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.

(1) The terms include:

(c) the withdrawal, use, or consumption of tangible personal property by anyone who purchases it at wholesale,....

In addressing withdrawals for use, SC Regulation 117-174.82 states that "[o]perators of businesses who are making both retail sales and withdrawing for use from the same stock of goods are to purchase at wholesale all of the goods so sold or used and report both retail sales and withdrawals for use under the sales tax law." In order for this regulation to apply, the business must have a substantial number of retail sales.

Therefore, a retailer is liable for the sales tax on sales made to the user or consumer and on withdrawals for use of items originally purchased at wholesale for resale but used or consumed by the retailer. In addition, a retailer is liable for the use tax on purchases of tangible personal property for the retailer's own use or consumption.

Now we must determine whether ABC is using and consuming its equipment in providing a nontaxable monitoring service or whether the transaction constitutes a sale under the law whereby the monthly monitoring fee is subject to the tax.

While it could be argued that the transaction constitutes a "sale" since it has transferred possession of its equipment for a consideration, one other factor first needs to be considered.

The so-called "true object" test is generally used to delineate sales of services from sales of tangible personal property. Applying this test to the matter at hand, it must be determined whether the monthly fee is consideration paid for the sale of a monitoring service or the sale of tangible personal property (the equipment installed in the customer's home or business).

The "true object" test is best described in 9 *Vanderbilt Law Review* 231 (1956), wherein it is stated:

The true test then is one basic purpose of the buyer. When the product of the service is not of value to anyone other than the purchaser, either because of the confidential character of the product, or because it is prepared to fit the purchaser's special needs - a contract or will prepared by a lawyer, or the accident investigation report prepared for an insurance company - this fact is evidence tending to show that the service is the real purpose of the contract. When the purpose of a contract is to produce an article which is the true object of the agreement, the final transfer of the product should be a sale, regardless of the fact that special skills and knowledge go into its production. Under this analysis, printing work, done on special order, and of significant value only to the particular customer, is still a sale. The purchaser is interested in the product of the services of the printer, not in the services per se. Similarly, it would seem that contracts for custom-produced articles, be they intrinsically valuable or not, should be classified as sales when the product of the contract is transferred.

The Vanderbilt Law Review article, in quoting *Snite v. Department of Revenue*, 398 Ill. 41, 74 N.E. 2d. 877 (1947), also establishes the following general rule:

If the article sold has no value to the purchaser except as a result of services rendered by the vendor, and the transfer of the article to the purchaser is an actual and necessary part of the services rendered, then the vendor is engaged in the business of rendering service, and not in the business of selling at retail. If the article sold is the substance of the transaction and the service rendered is merely incidental to and inseparable part of the transfer to the purchaser of the article sold, then the vendor is engaged in the business of selling at retail ... If the service rendered in connection with an article does not enhance its value and there is a fixed or ascertainable relation between the value of the article and the value of the service rendered in connection therewith, then the vendor is engaged in the business of selling at retail, and also engaged in the business of furnishing service, and is subject to tax as to the one business and tax exempt as to the other.

While the above quotes do not establish rigid rules, they do provide general guidance in determining the purpose of a transaction, and are particularly helpful in addressing the issues at hand.

As such, ABC is using and consuming the equipment in providing a nontaxable monitoring service. ABC's purchase or use of the equipment used in the standard package are subject to the sales or use tax at the time sold to or purchased by ABC. The periodic charges by ABC are not the lease or rental of the equipment in a standard security package; therefore, such charges are not subject to the sales or use tax under Code Sections 12-36-910(A) or 12-36-1310(A).

SALE AND INSTALLATION OF ADD-ON EQUIPMENT

With respect to the transfer of title or possession of the add-on equipment, Code Section 12-36-910(A) is applicable and reads:

A sales tax, equal to five 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) imposes a use tax and 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 five 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, for the 5% sales or use taxes to apply, there must be a retail sale or purchase of tangible personal property.

Code Section 12-36-110 defines the terms "sale at retail" and "retail sale," in part, as follows:

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.

Therefore, transfers of title and possession of add-on equipment to customers by ABC are sales subject to the sales and use tax.

Regulation 117-174.204 addresses the issue of installation charges for add-on equipment. The regulation states:

Not subject to the sales or use tax are charges for installation incident to the sale of tangible personal property when such charges are separately stated from the sales price of the property on billing to customers and provided the seller's books and records of account show the reasonableness of such labor in relation to the sales price of the property.

Based on the above, an installation charge by ABC for add-on equipment is subject to the tax with respect to add-on equipment sold (see Code Section 12-36-100) since the charge is not separately stated from the sales price of the property on the billing to the customer.

CHARGES TO REPAIR ADD-ON EQUIPMENT

Repair charges are addressed in Regulation 117-174.192 which reads:

Materials used in repairing, for tax purposes, fall into the following classes:

(a) Materials which pass to the repairman's customers and which do not lose their identity when used by the repairman and which are a substantial part of their repair job (such as auto repair parts, radio tubes, and condensers) are sold at retail by the repairman. He must report sales tax on such sales, including tax on the service incidental thereto. He may, however, if making separate agreements to sell the repair parts and to perform labor and service required, remit tax only upon the price of the parts if his records and his invoices clearly show a separation of the amounts received from sales of parts and from the rendering of services.

(b) Materials which pass to the repairman's customers but which lose their identity when used by the repairman or which are inconsequential in amount; such as paint, solder, and tack; are considered to have been used or consumed by the repairman and are taxable at the time of sale to him.

(c) Materials which are used or consumed by the repairman and which do not pass on to his customers are supplies and taxable when sold to the repairman.

(d) Materials which fall in class (b) or (c) are purchased at wholesale for use by a repairman who, in addition to using such materials as a repairman, sells the same kind of materials for use by others. These materials become subject to the sales tax upon their withdrawals for use by the repairman. Note, however, that a repairman is not considered a vendor unless he carries a stock of goods and sells outright therefrom a substantial amount. If the repairman makes only isolated sales or "accommodation" sales, he is not to be licensed as a seller under the sales tax law, in which case his supplier is liable for the tax.

In all instances materials are taxable when sold to repairmen for use in making repairs where such materials lose their identity as a result of such use. For instance, solder used in welding, paint used in automobile refinishing, thread used in mending clothes, cloth used in reupholstering. In all instances where the shape or composition of the repair material is materially changed, such altered or changed material is considered to have been used or consumed by the repairman, and, for that reason, subject to tax when sold to him. No tax on this material is to be collected by the repairman from his customer.

In instances where repair materials and repair parts are passed to the repairman's customers without change, except necessary and customary minor adjustments, such parts or materials may be purchased at wholesale by the repairman licensed under the Sales Tax Law. The repairman is then liable for sales tax on such sales of materials and parts to his customers.

Based on this regulation, the application of the tax to repairs made by ABC to add-on equipment it has sold to the customer is as follows:

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1. If ABC charges customers for repair materials that pass to the customer, that do not lose their identity, and that are a substantial part of the repair job, then these charges are subject to the tax. However, installation charges by ABC with respect to these repair materials are not subject to the tax provided these charges are separately stated from the sales price of the property on billing to the customer and are reasonable.
2. If ABC does not charge customers for repair materials that pass to the customer, that do not lose their identity, and that are a substantial part of the repair job, then the tax is due at the time these materials are sold to or purchased by ABC.
3. If ABC charges some customers for repair materials that pass to the customer, that do not lose their identity, and that are a substantial part of the repair job and does not charge other customers, then ABC may purchase all such material at wholesale and remit the tax at the time it charges the customer for the repair material or at the time it withdraws such material from inventory for the "no charge" repair. However, tax is not due on the withdrawal of the material for the "no charge" repair if ABC is replacing a defective part under a written warranty contract provided the warranty contract was (at the time of the original purchase of the defective property) given without charge, the tax was paid on the sale of the defective part or on the sale of the property of which the defective part was a component, and the warrantee is not charged for any labor or materials.
4. If ABC uses repair materials that (a) do not pass to the customer or (b) that pass to the customer but lose their identity or are only incidental to the repair job, then the tax is due at the time these materials are sold to or purchased by ABC.