

SC REVENUE RULING #05-16

SUBJECT: Local Sales and Use Taxes
Remittance of the Tax by Retailers
(Sales and Use Tax)

EFFECTIVE DATE: January 1, 2006

MODIFIES: SC Revenue Ruling #91-17, SC Revenue Ruling #96-9, and all previous advisory opinions and any oral directives in conflict herewith.

REFERENCES: Title 12, Chapter 36 of SC Code of Laws (2000; Supp. 2004)
Title 4, Chapter 10 of SC Code of Laws (2000; Supp. 2004)
Title 4, Chapter 37 of SC Code of Laws (2000; Supp. 2004)
School District and Other Local Sales and Use Tax Laws¹

AUTHORITY: S. C. Code Ann. Section 12-4-320 (2000)
S. C. Code Ann. Section 1-23-10(4) (Supp. 2004)
SC Revenue Procedure #03-1

SCOPE: The purpose of a Revenue Ruling is to provide guidance to the public and to Department personnel. It is a written statement issued to apply principles of tax law to a specific set of facts or a general category of taxpayers. A Revenue Ruling is an advisory opinion; it does not have the force or effect of law and is not binding on the public. It is, however, the Department's position and is binding on agency personnel until superseded or modified by a change in statute, regulation, court decision, or advisory opinion.

INTRODUCTION:

The South Carolina Code of Laws allows the imposition of various types of local sales and use taxes. As such, the citizens of a county, depending upon the needs within the county, may impose one or several local sales and use taxes.

The Department periodically publishes a chart with the various types of local sales and use taxes collected by the Department and the exemptions allowed under each tax. This chart can be found on the Department's website (www.sctax.org) under "Law and Policy" (See "Dept. Advisory Opinions").

¹ Many school district and other local sales and use tax laws have not been codified. For information as to the act number assigned to, and the year of enactment of, such local sales and use tax laws, see SC Information Letter #05-15. SC Information Letter #05-15 contains the most recently published information; updated information will be published on the Department's website (under "Law and Policy" – "Dept. Advisory Opinions") as warranted.

Note: This advisory opinion only addresses the general local sales and use taxes collected by the Department of Revenue on behalf of the counties and school districts. It does not address the local taxes on sales of accommodations or on sales of prepared meals that are collected directly by municipalities and counties.

PURPOSE:

The purpose of this advisory opinion is to modify previous Department advisory opinions with respect to the criteria that must be met to require a retailer to remit a county's sales and use tax when delivering the product to a purchaser located in another county.

With respect to deliveries by retailers into other counties, an opinion issued by South Carolina Attorney General issued on July 30, 1991 concerning the Local Option Sales and Use Tax provides guidance.

The opinion holds that a "retail sale of tangible personal property is not subject to the local option sales tax when the seller located within a county that imposes the tax is required to deliver the property to the purchaser outside of that county." The opinion stated in a footnote that:

This opinion does not treat the question of whether the seller is required to collect the use tax when the property is delivered into another county that also imposes the local option sales and use tax. Such is dependent upon the controlling facts and the extent of the seller's activity with that county. Such a sale, however, would be subject to the local option use tax in the county wherein the sale was consummated by delivery. (Emphasis added.)

Essentially, the determination as to when a retailer who is delivering a product into another county must remit that county's tax "is dependent upon the controlling facts and the extent of the seller's activity with that county" and has been modeled after the criteria established for determining when a retailer in another state must remit the state tax. Since the issuance of the SC Revenue Ruling #91-17 and SC Revenue Ruling #96-9, the case law in this area has evolved.

LAW:

The issue in question is a retailer's responsibility for remitting a county's tax when a retailer is delivering a product into another county.

The local sales and use taxes collected by the Department of behalf of local jurisdictions are authorized by state law. There is support for the position that once a retailer has established Due Process Clause and Commerce Clause nexus with South Carolina the retailer has Due Process Clause and Commerce Clause nexus with every county in the state and must remit local taxes for any county into which deliveries are made by, or on behalf of, the retailer. As a result of the previously cited 1991 Opinion of the Attorney General, the Department has not enforced this position, but could or may take this position in the future. Because of the Department's reliance on the 1991 opinion, the Department will not take this position without notice and any such change would only be implemented on a prospective basis.

Therefore, in reviewing this issue in light of the Department’s reliance on the 1991 Opinion of the Attorney General and subsequent case law, it must be first noted that before a retailer can be required to remit a county’s tax, the retailer must have Due Process Clause and Commerce Clause sales and use tax nexus.

Commerce Clause nexus for sales and use tax purposes requires a physical presence. Examples of physical presence giving rise to Commerce Clause nexus for sales and use tax purposes include, but are not limited to, maintaining (temporarily or permanently) an office, warehouse, distribution house, sales house, other place of business, or property of any kind in the state or having (temporarily or permanently) an agent, representative (including delivery personnel and independent contractors acting on behalf of the retailer), salesman, or employee operating within the state.

Once the retailer has established Commerce Clause nexus with South Carolina, the next issue with respect to the remittance of a county’s tax is whether the retailer has Due Process nexus with the county of delivery. (Commerce Clause nexus involves interstate commerce and is not applicable with respect to the county tax once Commerce Clause nexus with the state is established.)

In *Quill Corp. v. North Dakota*, 504 US 298, 112 S.Ct. 1904, 119 L. Ed 2d. 91 (1992), the Court stated:

The Due Process Clause “requires some definite link, some minimum connection, between state and the person, property or transaction it seeks to tax,” *Miller Bros. Co. v. Maryland* 347 U.S. 340, 344-345 (1954), and that the “income attributed to the State for tax purposes must be rationally related to ‘values connected with the taxing State.’” *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978) (citation omitted). ...

* * * *

Our due process jurisprudence has evolved substantially in the 25 years since *Bellas Hess*, particularly in the area of judicial jurisdiction. Building on the seminal case of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) , we have framed the relevant inquiry as whether a defendant had minimum contacts with the jurisdiction “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *Id.*, at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). In that spirit, we have abandoned more formalistic tests that focused on a defendant’s “presence” within a State in favor of a more flexible inquiry into whether a defendant’s contacts with the forum made it reasonable, in the context of our federal system of government, to require it to defend the suit in that State. In *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977) , the Court extended the flexible approach that *International Shoe* had prescribed for purposes of *in personam* jurisdiction to *in rem* jurisdiction, concluding that “all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.”

Applying these principles, we have held that if a foreign corporation purposefully avails itself of the benefits of an economic market in the forum State, it may subject itself to the State's *in personam* jurisdiction even if it has no physical presence in the State. As we explained in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985):

“Jurisdiction in these circumstances may not be avoided merely because the defendant did not *physically* enter the forum State. Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there. *Id.*, at 476 (emphasis in original).

Comparable reasoning justifies the imposition of the collection duty on a mail-order house that is engaged in continuous and widespread solicitation of business within a State. Such a corporation clearly has “fair warning that its activity may subject it to the jurisdiction of a foreign sovereign.” *Shaffer v. Heitner*, 433 U.S., at 218 (STEVENS, J., concurring in judgment). In “modern commercial life” it matters little that such solicitation is accomplished by a deluge of catalogs rather than a phalanx of drummers: the requirements of due process are met irrespective of a corporation's lack of physical presence in the taxing State. Thus, to the extent that our decisions have indicated that the Due Process Clause requires physical presence in a State for the imposition of duty to collect a use tax, we overrule those holdings as superseded by developments in the law of due process.

Based on the above, if a retailer that has established Commerce Clause nexus with South Carolina purposefully avails itself of the benefits of the economic market a county or it has purposefully directed its efforts toward the residents of a county, it is subject to that county's jurisdiction even if it has no physical presence in the county.

CONCLUSION:

The following gives examples of criteria that if met will require a retailer that has a physical presence in South Carolina to remit a county's tax² and therefore modifies SC Revenue Ruling #91-17, SC Revenue Ruling #96-9, and all previous advisory opinions and any oral directives in conflict with it.³

² Presently, all local taxes administered and collected by the Department of Revenue on behalf of local jurisdictions are administered and collected on a county-wide basis. These criteria, unless otherwise indicated in legislation enacted by the General Assembly, will also apply to any future sales or use taxes administered and collected by the Department of Revenue on behalf of a jurisdiction on a county-wide or other basis.

³ This advisory opinion specifically modifies Question #3 in both SC Revenue Ruling #91-17 and SC Revenue Ruling #96-9.

Whether or not a retailer can be required to remit a county's tax is dependent upon the controlling facts and the extent of the seller's activities with the county into which tangible personal property is delivered.

In summary, if a retailer that has established Commerce Clause nexus with South Carolina purposefully avails itself of the benefits of the economic market of a county or it has purposefully directed its efforts toward the residents of a county, it has a minimal connection with that county sufficient to subject it to that county's jurisdiction and therefore require it to remit the county's tax on its deliveries into that county, even if it has no physical presence in that particular county.

Examples of when a retailer that has established Commerce Clause nexus with South Carolina must remit a county's sales and use tax include, but are not limited to:

Retailers Using Their Own Vehicles: A retailer is required to remit a county's tax if the retailer is shipping property into the county using his own vehicles (whether owned or leased).

Retailers Using a Contract Carrier: A retailer is required to remit a county's tax if the retailer is shipping property into the county using a contract carrier (an independent or related company working specifically for or otherwise representing the retailer with respect to the delivery.)

Retailers Using a Common Carrier: A retailer is required to remit a county's tax if the retailer is shipping property into the county using a common carrier (e.g. UPS, the mail), and the retailer is subject to the county of delivery's jurisdiction (Due Process nexus has been established with the county of delivery).

Examples of when a retailer is subject to the county of delivery's jurisdiction include, but are not limited to, the following:

- (a) The retailer maintains, temporarily or permanently, directly or by subsidiary, an office, warehouse, distribution house, sales house, other place of business, or property of any kind in the county of delivery.
- (b) The retailer or a subsidiary has, temporarily or permanently, an agent, representative (including delivery personnel and independent contractors acting on behalf of the retailer), salesman, or employee operating within the county of delivery.
- (c) The retailer advertises via advertising media located in the county of delivery (e.g. newspapers, television, cable systems, and radio).
- (d) The retailer advertises via advertising media located outside the county but which has coverage within the county of delivery (e.g. newspapers, television, cable systems, and radio).

Please note that these statements are only examples and that there are other circumstances in which a retailer must remit a county's tax with respect to deliveries into that county. Retailers must be aware that as the courts address this issue, the requirements for remitting a county's tax may evolve and the retailer will be liable for the tax if the retailer fails to remit the tax when it has a connection with that county sufficient to require it to remit that county's tax. If upon being audited, it is found a retailer has a sufficient connection with a particular county so as to require remittance of that county's tax, but the retailer has failed to do so, the Department will assess the retailer for that county's tax.

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/Burnet R. Maybank III

Burnet R. Maybank III, Director

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Columbia, South Carolina