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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

April 6, 1998

The Honorable Herbert Kirsh
Member, House of Representatives
532-A Blatt Building
Columbia, S. C. 29211

Re: Informal Opinion

Dear Representative Kirsh:

You have enclosed a copy of a letter you received from Mr. Otis Rawl, Jr., Tax Manager for the South Carolina Department of Revenue. You indicate that "[T]he Food Lion Stores in South Carolina are charging a sales tax on the bonus discount that they give when you give them the little card." By way of example, you note that "... on a $.99 item [you]... had the bonus card and bought it for $.79; [you were]... charged 5¢ sales tax when it should have been 4¢." In addition, you state that you called one of the lawyers in Salisbury, North Carolina about this, and he told you that he was sending an opinion request from his office regarding this matter. However, no record of any opinion request to us from Food Lion was located. Therefore, you now seek an opinion regarding Food Lion's charge of sales tax on the full amount of an item prior to any bonus discount.

LAW/ANALYSIS

S.C. Code Ann. Sec. 12-36-910 provides that "[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." The term "gross proceeds of sales" means the value proceeding or accruing from the sale, lease, or rental of tangible personal property." Section 12-36-90. Pursuant to § 12-36-90(2)(a), however, the term does not include "a cash discount allowed and taken on sales." Thus, the issue

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Request Letter

is how the term "cash discount allowed and taken on sales" is to be interpreted in the context which you have posited.

Mr. Rawl's letter to you of January 28, 1998 interprets this Section (although not by specific reference) as follows:

> [i]f a grocery store discounts product prices as a result of coupons which will be reimbursed by the manufacturer, the grocery store is required to collect the sales tax on the amount of sales as if the coupons had not been presented. In the case of a grocery store which uses a bonus card and reduces the cost of the goods purchased by a percentage, but is not reimbursed for the reduction, the sales tax applies to the reduced amount.

This interpretation is consistent with that given this office in Op. Atty. Gen., Op. No. 82-30 (May 5, 1982) with respect to the question of whether or not a manufacturer's rebate to the retail customer effects the gross proceeds of sale or the sales price for purposes of sales or use taxes. Thus, we construed the virtually identical predecessor statutes to §§ 12-36-910 and 12-36-90(2)(a) [§§ 12-35-510 and 12-35-30] by statement of the following:

> [s]ection 12-35-510 imposes the tax upon the 'selling at retail' with the tax measured by the seller's 'gross proceeds'. Thus, where the gross proceeds are not reduced the full amount thereof is subject to the tax. However, § 12-35-30 except from the gross proceeds 'cash discounts allowed and taken [on] sales'. Arguably, where a discount is allowed the purchaser by the seller, the amount of the discount is not subject to the tax since it is never received by the seller. Here, though, the rebate is paid by a third party, an automobile manufacturer. There is nothing in the sales tax statutes or regulations permitting a seller to deduct from his gross proceeds an amount paid by a third party to or for the benefit of the purchaser, even though the purpose of the payment is to reimburse the purchaser for a part of the purchase price. The gross proceeds accruing to the seller remain the same whether or not a rebate is paid by a third party. See Keystone Chevrolet Company v. Kirk (1978), 69 Ill. 2d 483, 372 N.E.2d 651.

It is well recognized that construction of a statute by the agency charged with executing it is entitled to the most respectful consideration [by the courts] and should not be

overruled absent cogent reasons. Logan v. Leatherman, 290 S.C. 400, 351 S.E.2d 146, 148 (1986); Welch v. Public Service Commission, 297 S.C. 378, 377 S.E.2d 133 (S.C. App. 1989). Moreover, deference to the agency's interpretation is highlighted in these situations where the administrative interpretation is longstanding and has been consistently followed. Marchant v. Hamilton, 279 S.C. 497, 309 S.E.2d 781 (S.C. App. 1983).

The interpretation rendered to you by Mr. Rawl is apparently one which has been given by the Revenue Department for some time. That interpretation is reasonable and appears to be the one in accord with the language of the statute. Mr. Rawl uses the criteria of whether the grocer (retailer) "will be reimbursed by the manufacturer" as being crucial to determining whether the retailer "is required to collect the sales tax on the amount of sales as if coupons had not been presented." If there is such reimbursement by a third party to the retailer, the tax must be collected on that amount; if the retailer "is not reimbursed for the reduction, the sales tax applies to the reduced amount." In short, if there is a true bonus discount, without reimbursement to the retailer by a third party, then the sales tax lawfully to be collected is only upon the reduced price amount. I concur with Mr. Rawl's reasoning in this regard.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/kkf