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THE STATE OF SOUTH CAROLINA
OFFICE OF THE ATTORNEY GENERAL
COLUMBIA

OPINION NO. _____

March 24, 1989

SUBJECT: Taxation & Revenue - Proposed amendments to
Sales and Use Taxes.

SYLLABUS: The amendments being considered by the
South Carolina Tax Study Commission to
Chapter 35 of Title 12 of the South Carolina
Code of Laws more nearly fall within the
definition of an excise rather than a
property tax. Because of the fact that the
amendments to the present statute are
substantive, that the case law
applicable thereto would no longer control,
doubt that does exist and the magnitude of
the revenue involved, we recommend that a
judicial declaration be obtained to
conclusively define the character of the
proposed tax.

TO: Honorable Hugh K. Leatherman
South Carolina Tax Study Commission
And Senator, District 31

FROM: Joe L. Allen, Jr. *JLA*
Chief Deputy Attorney General

QUESTION: The South Carolina Tax Study Commission is
considering amendments to the sales and use tax statutes set
forth in Chapter 35 of Title 12. The questions are whether
the amendments constitute a property or an excise tax and if
property, whether the same meet constitutional requirements.

DISCUSSION:

Of primary concern regarding the questions presented are the
imposition provisions of the proposed amendments to Chapter
35 of Title 12. A five percent (5%) tax is imposed by
Section 12-SU-XXI:

". . .on the sales price of taxable sales."

"Taxable sales" are defined by Section 12-35-XX4 to mean:

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". . . the retail sale of taxable property by
retailers."

The terms "retail sales" and "sale at retail" are defined in
Section 12-20-110 to mean:

"All sales of taxable property except
wholesale sales . . ."

Section 12-SU-XX1A imposes:

"A five percent tax . . . on the sales price
of taxable purchases."

A taxable purchase is defined by Section 12-35-XX5 to mean:

". . . taxable property purchased at retail
for storage, use or other consumption in this
State . . ."

Your inquiry is whether the above constitutes a property or
an excise tax and if a property tax, whether it is
constitutionally suspect.

First, it should be stated that case law can arguably be
found to support either position and hence we couch our
response by saying that only a judicial decision could
resolve the issue.¹

It is understood that under the present sales and use tax
statutes approximately one and a quarter billion dollars was
paid into the state treasury during the fiscal year ending
June 30, 1988. The proposal makes fundamental changes in
the present laws in that the imposition of the tax is
changed from the levy upon the privilege of selling tangible
personal property at retail to the sale or purchase price of
tangible personal property.

¹The amendments constitute substantive and material
changes in the present sales taxing statutes. Because of
such, the decision in State v. Byrnes, 219 S.C. 485, 66
S.E.2d 33 (1951), that construed the present law and upheld
its constitutionality would no longer be controlling.

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Nonetheless and upon these reservations, we advise that a court would probably conclude the proposed tax to be an excise tax and not a property tax.

The difficulty in stating a conclusive opinion is illustrated by the following language:

"The distinction between property taxes and excises, . . . raised by defining a property tax as a tax assessed directly on all property or on all property of a certain class within the jurisdiction of the taxing power and usually imposed in proportion to value, and excise taxes as charges imposed by public authority upon the performance of an act, the enjoyment of a privilege, or the engaging in an occupation, while helpful, is not easy of application when applied to particular taxes and resort is had to incidents rather than definitions." 103 A.L.R. 18.

It could be argued that the proposed tax is on property because it is the sale or purchase of the property that is taxed. Generally, there would be no ownership or rights in the property in the absence of the sale or purchase.

"To levy a tax by reason of ownership of property is to tax the property. . . . It cannot be made an occupation or license tax by calling it so. . . ." Dawson, Atty. Gen. v. Kentucky Distilleries & Warehouse Co., 255 U.S. 288, 41 S.Ct. 272. See also 71 Am.Jur.2d, State and Local Taxation, Section 24, page 358.

In our view, the most probable construction of the proposal, however, is that it is an excise tax upon the act or the privilege of purchasing the property. It more closely falls within that classification.

"Excises, in their original sense, were something cut off from the price paid on a sale of goods as a contribution to the support of government. In its modern sense an excise tax is any tax which does not fall within the classification of a poll tax or a

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property tax, and which embraces every form of burden not laid directly upon persons or property. The obligation to pay an excise is based upon the voluntary action of the person taxed in performing the act, enjoying the privilege, or engaging in the occupation which is the subject of the excise, and the element of absolute and unavoidable demand is lacking. . . . " 71 Am.Jur.2d, State and Local Taxation, Section 28, pages 360-361.

Here the tax is imposed upon the sale price or purchase price. It is collected at the time of sale. There is no assessment or any other action required of the government to trigger the tax liability.

Such a tax has the indicia of an excise tax.

"An excise and a property tax, when the two approach each other, ordinarily may be distinguished by the respective methods adopted of laying them and fixing their amounts. If a tax is imposed directly by the legislature without assessment, and its sum is measured by the amount of business done or the extent to which the conferred privileges have been enjoyed or exercised by the taxpayer, irrespective of the nature or value of the taxpayer's assets, it is regarded as an excise." 71 Am.Jur.2d, State and Local Taxation, Section 29, page 361.

The proposed tax levy better fits the description of an excise rather than a property tax. A tax as here considered has usually been held to be an excise tax and generally denominated a sales tax. 68 Am.Jur.2d, Sales and Use Taxes, Sections 3, 4 and 5, pages 12-18. Because of the fact that the amendments to the present statute are substantive, that the case law applicable thereto would no longer control, doubt that does exist and the magnitude of the revenue involved, we recommend that a judicial declaration be obtained to conclusively define the character of the proposed tax.²

²Should the levy be a property tax, it would fail to meet the requirements of Article X. Personal property must be taxed upon an assessment equal to ten and one-half percent of value. Intangible property cannot be taxed.

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CONCLUSION:

The amendments being considered by the South Carolina Tax Study Commission to Chapter 35 of Title 12 of the South Carolina Code of Laws more nearly fall within the definition of an excise rather than a property tax. Because of the fact that the amendments to the present statute are substantive, that the case law applicable thereto would no longer control, doubt that does exist and the magnitude of the revenue involved, we recommend that a judicial declaration be obtained to conclusively define the character of the proposed tax.

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