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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

September 8, 2005

The Honorable John M. Knotts, Jr.
Senator, District No. 23
500 West Dunbar Road
West Columbia, SouthCarolina 29169

Dear Senator Knotts:

By letter, you have requested an opinion regarding the applicability of the Lexington County 1% Sales Tax Option for Schools to businesses located outside the county limits. Attached, you provided a letter from a local business owner located in Richland County who claims to be adversely affected by the Lexington County sales and use tax. The business owner explains that, according to South Carolina Revenue Ruling 91-17 [ruling supported by Op. S.C. Atty. Gen. July 30, 1991 (point of sale is the point of delivery)], he is required to collect and account for the tax on goods shipped or delivered to Lexington County. The business owner explains that the Department of Revenue's ruling is applicable to every county that imposes sale and use taxes. Furthermore, he notes, the more counties imposing these taxes, the more difficult it will be for business owners to account for the various county taxes. The result, he argues, is an "administrative nightmare" for businesses. Based upon the current interpretation, it is contended that businesses are required to account for the tax over the various counties and at their various rates. Finally, he explains, that if the point of sale were redefined as the seller's address, this would successfully alleviate the "administrative nightmare." Following our review, we advise that the Department's interpretation of the relevant statutes is reasonable and that a court would likely defer to such interpretation by DOR – the administrative agency charged with enforcement. Accordingly, we suggest legislative amendment as the best available recourse.

Law/Analysis

Pursuant to S.C. Code Ann. Section 4-10-350, the General Assembly has established that a sales and use tax levied by a county must be "administered and collected by the Department of Revenue in the same manner that other sales and use taxes are collected." In collecting such taxes, the Department of Revenue is authorized to make rules and regulations as are necessary. Section 12-4-320 (1) provides that the Department may ...

(1) make rules and promulgate regulations not inconsistent with law, to aid in the performance of its duties. The department may prescribe the extent, if any, to which these rules and regulations must be applied without retroactive effect;

Pursuant to South Carolina Revenue Ruling # 91-17, the Department of Revenue clarified the requirements placed upon businesses in the collection of sales and use taxes. Prior to DOR's ruling, it was unclear as to whether retailers doing business across county lines were subject to those counties' various sales and use taxes. The Department found that if certain criteria are met, a retailer making deliveries of tangible personal property is required to collect a use tax if the county of delivery was subject to a sales and use tax. According to the Ruling, if the retailer is using its own vehicles to deliver goods to an outside county, the retailer is required to collect the outside county's use tax when any of the following criteria are met:

(a) [t]he retailer maintains, temporarily or permanently, directly or by subsidiary, an office, warehouse, distribution house, sales house, other place of business, or property in the county.
(b) The retailer or a subsidiary has, temporarily or permanently, an agent, salesman, or employee operating with in the county.
(c) The retailer advertises, on an regular basis, via advertising media located in the county (e.g. newspapers, television, radio).
(d) The retailer advertises, on a regular basis, via advertising media located outside the county but which has extensive coverage within the county. SC Revenue Ruling #91-17 p.5

Furthermore, if the retailer is using vehicles other than his own to deliver goods to an outside county, the retailer was required to collect the outside county's use tax when any of the following were met:

(a) [t]he retailer maintains, temporarily or permanently, directly or by subsidiary, an office, warehouse, distribution house, sales house, other place of business, or property in the county.
(b) The retailer or a subsidiary has, temporarily or permanently, an agent, salesman, or employee operating within the county. Id.

In other words, the business is required to collect a local option use tax imposed by an "outside" county where delivery is made if a sufficient "nexus" is found between the business and that county, as demonstrated by the specified criteria set forth in the Revenue Ruling.

In its Ruling, the Department of Revenue noted that it had relied upon a July 30, 1991 Attorney General's opinion as its authority. The opinion defined "sale" as "the completion of sale by delivery of the property within the geographical area of the county which levies the tax." Id.

Essentially, for tax purposes, a sale takes place in the county where the good or goods are delivered. Based upon this analysis, the opinion concluded that the retail sale of tangible personal property is not subject to the local option sale tax when the county which imposes the tax is required to deliver the property to a purchaser outside the county. The Department specifically relied upon footnote 1 of the Opinion, which commented as to the situation where the "outside" county also imposed a local option sales and use tax. Footnote 1 stated:

> [t]his 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 within the county. Such a sale, however, would be subject to the local option use tax in the county wherein the sale was consummated by delivery. Id. (emphasis added).

Based upon these authorities, and following passage of the Local 1% School District Tax for Lexington County, DOR issued a memo employing the same standards established in # 91-17 with respect to business owners located outside Lexington County. In that Memo, the Department explained that "all sales made in or to Lexington County would be subject to a 6% sales and use tax." See, South Carolina Department of Revenue Memo, Effective March 1, 2005. (emphasis added). Specifically, effective March 1, businesses making sales in or to Lexington County would be required to collect and account for the 5% state imposed sales tax and the 1% county imposed use tax. As has been the case since the inception of this standard, businesses have been required, when shipping goods across county lines, to account for the various sales and use taxes imposed if any of the criteria specified in # 91-17 are met.

We note that it has been our longstanding policy in the issuance of opinions to defer to the administrative agency charged with the enforcement of a particular area of law. Op. S.C. Atty. Gen., October 27, 1999. Where an administrative decision has been made by the agency responsible for enforcement, and there exists an administrative appeal procedure available to challenge such a policy, we will defer to the administrative authority or discretion of the officer, agency, or public body provided such appeal is made in a timely manner. Griggs v. Hodge, 229 S.C. 245, 92 S.E.2d 654 (1956); Op. S.C. Atty. Gen., March 30, 1988 (deference given to agency's construction and interpretation); Op. S.C. Atty. Gen. January 15, 2004. Additionally, our courts afford considerable leeway with respect to an agency's interpretation of its own regulations and generally do not "second guess" such interpretation unless clearly erroneous. U.S.C. v. Batson, 271 S.C. 242, 246 S.E.2d 882 (1978). Thus, in our opinions, we do not second-guess an agency's policy decisions and interpretations of its own enabling statutes; we generally will leave such review to the courts. Op. S.C. Atty. Gen. Sept. 12, 1985.

In addition, we have long recognized that we will not overrule our prior opinions unless clearly erroneous or unless applicable law has changed. Op S.C. Atty. Gen. October 3, 1986. Moreover, it is well established "that the absence of any legislative amendment following the issuance of an opinion of the Attorney General strongly suggests that the views suppressed therein

were consistent with the legislative intent." Scheff v. Township of Maple Shade, 149 N.J. Super. 448, 374 A.2d 43 (1977).

In this instance, the Department of Revenue has acted pursuant to its statutory authority by clarifying that in certain instances retailers are required to account for a county imposed sales and use tax even if they are located outside the county. A court will defer to the Department's interpretation so long as that construction is reasonable. Such interpretation will not be overturned without "cogent reasons." Logan v. Leatherman, 290 S.C. 400, 403, 351 S.E. 2d 146, 148 (1986). Even if the agency's interpretation is not the one which the court would have adopted in the first instance, the court will nevertheless defer to any reasonable construction. Op. S.C. Atty. Gen., Oct. 1, 2004. Section 36-2-401 (2)(b) explains that "if the contract requires delivery at the destination, title passes on tender there." See, Op. S.C. Atty. Gen. July 30, 1991. Furthermore, Section 4-10-20 states that taxes will be levied on the gross proceeds of sales "within the county area." Id. Accordingly, nothing on the face of Revenue Ruling # 91-17 appears to be inconsistent with the governing statutes.

In addition, the referenced footnote in the 1991 Opinion possesses substantial support in case law. See, Yelverton's, Inc. v. Jefferson Co., 742 So.2d 1216 (Ala.Civ. App. 1997); Shell Oil. Co. Director of Revenue, 732 S.W.2d 178 (Mo. 1987); Matter of Gunther's Sons v. McGoldrick, 255 N.Y.S.2d 303 (1938), affd., 18 N.E.2d 12 (1938). In Shell Oil, the Missouri Supreme Court en banc held that Shell was required to collect St. Louis' county sales tax on aviation fuel, which Shell sold to airlines and which was delivered from Texas via a third party into tanks in St. Louis. There, the Court concluded that "[t]hese sales are entirely consummated in St. Louis County where, Shell, through its agents, delivers the aviation fuel, and passes title to the purchasers and ultimate users, the airlines with whom it has contracted." 732 S.N.2d at 181-182. And, in International Harvester Co. v. Wasson, 281 S.C. 458, 316 S.E.2d 378 (1984), our Supreme Court emphasized that the sales tax could be levied on the sale by South Carolina because "delivery occurred in South Carolina." 281 S.C. at 461

Yelverton's, Inc. v. Jefferson County, 742 So. 2d 1216 (1977), a case involving whether a business must collect an out of county use tax, is particularly instructive. There, the Court noted that, just as a nexus would be necessary for an out-of-state seller to be required to collect use taxes imposed by Alabama, the "out-of-county seller would also need to have sufficient nexus with the taxing county to be required to collect that county's use tax." 742 So.2d at 1220. The Court reviewed decisions of the United States Supreme Court, such as Miller Brothers v. Maryland, 347 U.S. 340 (1954) and Scripto, Inc. v. Carson, 362 U.S. 207 (1960), as well as Alabama case law, concluding that "'there must be a [connection] sufficient to provide a business nexus with Alabama – by agent or salesmen, or at a very minimum, by an independent contractor within the State of Alabama' to require an out-of-state seller to collect Alabama use tax." 742 So.2d at 1220.

In Yelverton's, the applicable Alabama Department of Revenue regulation provided that "[i]f the seller whose place of business is located outside of the [county] has salesman soliciting orders within the county, the seller is required to collect and remit the seller's use tax on retail sales of

tangible personal property in the same manner as an out-of-state seller who has salesmen soliciting order in Alabama .... It does not matter how delivery is made." Id. at 1221. The Court, finding such interpretation by the Department to be reasonable, deferred to that construction, stating as follows:

> [t]he Department has the power to promulgate regulations necessary for the enforcement of the sales and use taxes. Ala. Code 1975, § 40-23-31. The Department's interpretation of the regulations and statutes it is charged with enforcing should be given great weight and deference by this court unless that interpretation is contrary to the plain wording of the statute or regulation. Farmer v. Hypo Holdings, Inc., 675 So.2d 387, 390 (Ala.1996). In light of our review of the sales and use tax statutes and of the Department's regulations, we cannot say that the Department's interpretation of those statutes and regulations is contrary to their plain wording. Therefore, we agree with the Department that Yelverton's is not required to collect Jefferson County use tax in this situation under the state use tax statutes and the Department's regulations.

Id. at 1221-1222.

Here, the South Carolina DOR has employed a somewhat similar analysis to that used by the Alabama Department of Revenue in Yelverton's. One of the criteria utilized by S.C. DOR is that the retailer has an agent or salesman operating in the county. Other criteria are also employed, any one of which would give the retailer or business a sufficient "nexus" with the county in question. The point here is that a court would, as the Yelverton's Court did, likely defer to the interpretation of the agency charged with enforcement. We note also that the Revenue Ruling No. 91-17 has remained in place since 1991, apparently without legislative change. Such is further support for the fact that the Revenue Ruling is deemed by the General Assembly to be in accordance with the law. See, Calhoun Life Ins. Co. v. Gambrell, 245 S.C. 406, 414, 140 S.E.2d 774 (1965) ["... a fact of particular importance is that the legislative has not seen fit to take any action subsequent to the opinion of the Attorney General and the report of the Commissioner ...."].

We recognize and are sensitive to the fact that businesses may experience hardship as a result of the DOR interpretation. However, we also note also that the General Assembly has created the South Carolina Revenue Procedures Act (RPA) to provide a "straight forward procedure to determine any dispute with the Department of Revenue." Section 12-60-20. The RPA specifies that "there is not other remedy other than those provided in this chapter in any case involving the illegal or wrongful collection of taxes, or attempt to collect taxes." Section 12-60-80 (A).

It would appear, however, that the principal remedy for businesses would be legislative amendment. The fact that the Revenue Ruling has remained in effect for so long without change, would likely make it that the General Assembly would need to revise the pertinent statutes in order to provide relief. Of course, such a legislative change would be a policy matter for the General Assembly.

Conclusion

In our opinion, DOR's Revenue Ruling No. 91-17 would likely be upheld by a court as reasonable. Absent a finding that the Ruling is arbitrary, which is unlikely, a court would most probably defer to DOR's administrative interpretation. It is not unreasonable for the agency to conclude, in reliance upon our 1991 opinion, that depending upon the "seller's activity in the county," a sale may be considered to occur for purposes of the local option sale and use tax "... in the county wherein the sale was consummated by delivery." Op. S.C. Atty. Gen., July 30, 1991, Id.

Moreover, the Revenue Ruling's criteria for determining whether a business must collect the tax outside the county where it is located is reasonably designed to determine that there is a sufficient nexus between the business and that outside county. Such criteria are supported by existing case law.

For the same reasons, we see no reason to alter or modify our July 30, 1991 opinion. Furthermore, it is important to note that the 1991 opinion has not been modified by the General Assembly, a strong indication that the Legislature deems the opinion to be a correct statement of the law.

Accordingly, a legislative remedy is, in our view, the one most appropriate for those businesses who find the Revenue Ruling to work a hardship upon them. Of course, any statutory change is a policy matter for the General Assembly.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General