

March 20, 2007

The Honorable C. David Umphlett
Member, House of Representatives
306-A Blatt Building
Columbia, South Carolina 29211

Dear Representative Umphlett:

We received your letter requesting an opinion on behalf of a constituent who is in the business of selling items to restaurant owners. Specifically, you ask whether items such as napkins, forks, spoons, and straws are subject to sales tax when purchased from a wholesaler by a restaurant owner? You state:

As I understand it, items such as napkins, forks, spoons, and straws are not taxed separately for the owner to pay if served with a meal but are taxed if they are provided for the customer to pick up as in a fast-food establishment. This appears to be duplication of taxes in some circumstances.

Law/Analysis

Section 12-36-910(A) of the South Carolina Code (2000) imposes a five percent sales tax “upon every person engaged or continuing within this State in the business of selling tangible personal property at retail.” Furthermore, section 12-36-1310(A) of the South Carolina Code (2000) imposes a use tax “on the storage, use, or 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.” Section 12-36-110 of the South Carolina Code (2000) defines when a sale is a sale at retail. “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.” S.C. Code Ann. § 12-36-110. Section 12-36-120 of the South Carolina Code clarifies a wholesale sale or a sale at wholesale by listing five instances that constitute wholesale sales. These instances include:

(1) 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;

The Honorable C. David Umphlett
Page 2
March 20, 2007

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(4) materials, containers, cores, labels, sacks, or bags used incident to the sale and delivery of tangible personal property, or used by manufacturers, processors, and compounders in shipping tangible personal property.

S.C. Code Ann. § 12-36-120.

In order to address your inquiry, we must first consider when items such as napkins, forks, spoons, and straws are purchased by restaurant owners, whether this transaction constitutes a wholesale sale or a retail sale. From our reading of the above statutes, the answer to this question depends upon whether such items are purchased for resale or whether the restaurant owner is the ultimate user or consumer of such items. Without further information, we assume restaurant owners do not sell the items mentioned in your letter to their customers. If the items are not being sold to restaurant customers, the restaurants themselves must be the final consumers of these items. Thus, we are inclined to opine that the sale of these items by wholesalers to restaurant owners is a retail sale and therefore, is taxable at the time of the sale.

However, section 12-36-120(4), as cited above, proclaims the sale of materials “used incident to the sale and delivery of tangible personal property” constitutes a wholesale sale and therefore, are not taxable at the time of transfer. Furthermore, section 12-36-2120 of the South Carolina Code (2000 & Supp. 2005), specifying numerous exemptions from sales tax, exempts “wrapping paper, wrapping twine, paper bags, and containers, used incident to the sale and delivery of tangible personal property” from sales taxation. S.C. Code Ann. § 12-36-2120(14) (2000).

Certainly, one may argue that providing napkins, forks, spoons, and straws to restaurant customers constitutes the sale of materials incident to the sale and delivery of food and therefore, is not only a wholesale sale not subject to tax, but is exempt per section 12-36-2120. However, Regulation 117-312.1 of the South Carolina Code of Regulations (Supp. 2005), promulgated by the South Carolina Department of Revenue (the “Department”) offers the following explanation with regard to section 12-36-2120(14):

Licensed retailers purchase free of sales or use taxes wrapping paper, wrapping twine, paper bags and containers for use incident to the delivery of tangible personal property sold by them. They also purchase tax-free materials used in packaging personal property sold by them.

The list below, while illustrative of items falling within the exemption or exclusion, is not exhaustive:

Souffle cups, butter chips, paper cups, paper plates, boxes and crates and glazed tissue used to package articles of food.

It will be seen that items such as straws, napkins, wooden or paper spoons and forks do not meet the requirements outlined above and, hence, must bear the tax. Such items are rather in the nature of supplies used or consumed by the retailer in the operation of his or its business.

(emphasis added).

According to this regulation, the Department is of the opinion that napkins, forks, spoons, and straws purchased by restaurant owners do not fall within the items described in section 12-36-2120(14) as items incident to the sale and delivery of tangible personal property. We would further assume because the Department does not believe these items are materials incident to the sale and delivery of tangible personal property for purposes of section 12-36-2120(14), it would also conclude they do not meet the requirements of a wholesale sale under section 12-36-120(4) and therefore, are subject to tax as a retail sale of tangible personal property.

Included with your request, you provided us with a copy of a Revenue Ruling issued by the Department in 1995, which discusses the tax treatment of tangible personal property purchased by restaurant owners. S.C. Rev. Rul. 95-6. In that revenue ruling, the Department considered the statutes cited above and regulation 117-174.79 of the South Carolina Code of Regulations, which has since been reenacted as regulation 117-312.1 cited above. Based on these authorities, the Department determined “[p]urchases of straws, napkins, and utensils are made at retail and are, therefore, subject to tax.” Id.

This Office, like the courts of this State, “generally gives deference to an administrative agency’s interpretation of an applicable statute or its own regulation.” Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003). A court will reject an agency’s interpretation only when the plain language of the regulation is contrary to the agency’s interpretation. Brown v. South Carolina Dep’t of Health and Env’tl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 415 (2002). We believe the Department’s determination that items such as napkins, forks, spoons, and straws are consumed by restaurants, rather than used incident to the sale and delivery of a restaurant’s food, is in accord with the statutes cited above. Therefore, we believe a court would find these items subject to taxation when sold by the wholesaler to the restaurant owner.

In your letter, you indicate these items are being treated differently according to whether they are served with a meal or are provided to a customer picking up food from a restaurant. However, in our review of the provisions contained in chapter 36 of title 12, as well as the regulations promulgated by the Department, we find no reason that these items should be taxed differently based on how the restaurant owner provides them to their customers. We do not believe these items

The Honorable C. David Umphlett
Page 4
March 20, 2007

become items purchased for resale or items used incident to the sale and delivery of the food because they are furnished in the restaurant rather than given to the customer to take with them. In accordance with the Department's regulation, these items are in the nature of supplies used or consumed by the restaurant regardless of whether they are used on the restaurant's premises. Thus, we believe the tax treatment of these items is the same regardless of whether they are used in the restaurant or provided to customers taking food elsewhere.

Conclusion

Based upon our analysis above, giving great deference to the Department's interpretation of the sales and use tax statutes, we believe that items such as napkins, forks, spoons, and straws sold to restaurant owners by wholesalers are subject to taxation at the time of the sale. Furthermore, we do not find a distinction based upon whether these items are furnished for use in the restaurant or for use elsewhere.

Very truly yours,

Henry McMaster
Attorney General

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Assistant Attorney General

REVIEWED AND APPROVED BY:

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