

1981 WL 157965 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

September 16, 1981

***1 SUBJECT: Taxation—Procedure When Segregation Of Sales And Use Taxes Is Impracticable.**

The procedure set forth in Section 12-35-1240 merely postpones the payment of tax and does not change the character or nature of a sales or use tax.

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QUESTION:

Does the procedure set forth in Section 12-35-1240 and used when the segregation of sales and use taxes is impracticable change the character and nature of the tax or does it merely postpone the payment of such tax?

APPLICABLE LAW:

[Section 12-35-1240, South Carolina Code](#) of Laws, 1976, as amended.

DISCUSSION:

[Section 12-35-1240](#) reads as follows:

‘Notwithstanding other provisions of this chapter, when in the opinion of the Commission the nature of a taxpayer's business renders it impracticable or inequitable for the taxpayer to account for the taxes imposed by Articles 5 and 7 of this chapter separately, the Commission may issue its certificate to such taxpayer authorizing the sale at wholesale and such taxpayer shall thereupon be accountable for the tax levied by said articles with respect to the gross proceeds of sale of the property withdrawn, used or consumed by such taxpayer for use, consumption or application within this State.’

Article 5 referred to in the above quoted Section refers to the imposition of sales taxes and Article 7 refers to the imposition of use taxes.

‘It is impossible to lay down any positive rule by means of which the character of any given tax may be ascertained. In each case the character of the tax must be ascertained by its incidents and from the natural and legal effect of the language employed in the statute.’ 68 Am. Jur., 2d, [Sales and Use Taxes](#), § 172.

Pursuant to the statutory scheme, this State's sales tax is imposed upon the seller for the privilege of selling tangible personal property at retail. Section 12-35-510; [Southeastern Steel Co., Ins. v. Burton Block and Concrete Co., Inc.](#), 273 S. C. 634, 258 S. E. 2d 888. The sales tax is also imposed on purchases of tangible personal property at wholesale and later withdrawn for use or consumption by the purchaser. Sections 12-35-30 and 12-35-110. The use tax is imposed upon a user or consumer, usually the purchaser, of any tangible personal property purchased at retail and brought into this State for storage, use or other consumption. Section 12-35-810; [Colonial Stores, Inc. v. South Carolina Tax Commission](#), 253 S. C. 14, 168 S. E. 2d 774.

‘Though the sales tax and the use tax in many instances bring about the same result and may secure the same revenues and serve complementary purposes, they are different in conception, are assessments upon different transactions, and may have to justify themselves on different constitutional grounds.’ 68 Am. Jur. 2d, Sales and Use Taxes, § 173.

In Colonial Stores, Inc. v. South Carolina Tax Commission, supra, our Supreme Court, after citing § 12-35-1240, indicated that the Section did not alter the nature or character of the tax by use of the following language:

*2 ‘That both parties regarded the premium merchandise as being acquired for use by Colonial rather than for resale and, hence, subject to a use tax is further evidenced by the fact that the tax was paid and collected on the basis of the cost of the premium merchandise to Colonial in accordance with Sec. 65-1421 [§ 12-35-810] of the Code, rather than its reasonable market value. A different rule of valuation applies where goods are purchased for resale but later withdrawn from stock and used by the taxpayer. In such case, the withdrawal is, in effect, treated as a sale at retail and the basis of valuation for tax purposes is ‘the reasonable and fair market value’, of the tangible property withdrawn. See Code § 65-1353 [§ 12-35-30].’ 168 S. E. 2d at 776.

This reasoning would be consistent with the language found in the statute itself which states that the taxpayer shall be held accountable for ‘the tax levied by said articles’. If the tax arises under Article 5 it is a sales tax and will remain so. Conversely, if the tax arises under Article 7, it is a use tax and will remain so.

CONCLUSION:

It is therefore the opinion of this office that the procedure set forth in Section 12-35-1240 merely postpones the payment of tax and does not change the character or nature of a sales or use tax.

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