1975 S.C. Op. Atty. Gen. 130 (S.C.A.G.), 1975 S.C. Op. Atty. Gen. No. 4054, 1975 WL 22351

Office of the Attorney General

State of South Carolina
Opinion No. 4054
July 23, 1975

***1 For purpose of the property factor of the income tax apportionment formula, a reduction in contract price can qualify as 'rent' under the provisions of Section 65–279.4.**

Richland County Attorney at Law

The taxpayer is a corporation engaged in a multistate business which includes substantial government contracting. Under the terms of its government contract, it is allowed to use government-owned facilities for which no formal rental charge is made. Instead of paying rent, the corporation reduces the contract price it charges the government. This is accomplished by a bid price which takes into account the fact that there will be no charge for the use of the government facilities. A corresponding government policy as announced in Section 13–101 of the Armed Services Procurement Regulation eliminates the competitive advantage of a contractor using government facilities 'by charging rental or by use of rental equivalents in evaluating bids'. This evaluation factor is 'equal to the rent allocable to the contract which would otherwise have been charged for such use'.

Section 65–279.4 of the Code contains the property factor of the income tax apportionment formula. Property specifically included in the factor is the 'value of real estate and tangible personal property as defined in this section, *used*' by the taxpayer. Property is defined in Subsections 65–274.4(b), (f) and (g) to include the value of 'rented or leased' property valued at eight times 'the annual rental rate'.

'Rent' has been defined as consideration paid for the privilege of occupying property for a given period of time. *Magruder v. Supplee*, 316 U. S. 394, 62 S. Ct. 1162. Historically, the consideration paid to the lessor has not been restricted to currency. It may consist of labor or other services. See *Kuper v. Miller*, 207 N. W. 489 (North Dakota) and *Garnes v. Hannah*, 13 N.Y.S. Ct. 262.

The reduction in the contract price was by mutual agreement and it appears under these circumstances that services were performed by the taxpayer in consideration for the use of the government facilities. A search has revealed only one case which deals even generally with the question at hand. This is the California Supreme Court case of *McDonnell Douglas Corp. v. Franchise Tax Board*, 68 Calif. 494, 446 P.2d 313 (1968). It has not been cited in any other jurisdiction. The facts of the case are similar to the facts in the situation now in question, however, the California apportionment law gave much more latitude to the taxing officials and the question was whether they had acted properly in failing to allow apportionment based on a property tax factor which included government-owned facilities. The Court held that the apportionment percentage without the use of the government-owned facilities in the property factor produced an unconstitutional result.

It is the opinion of this office, under the facts presented, that the mutual reduction in contract price is a proper measure of the consideration performed, i.e., services for the occupancy and use of the government property, and that it should be considered as 'rent' under the provisions of Section 65–279.4 of the Code.

***2** John C. von Lehe
Assistant Attorney General

1975 S.C. Op. Atty. Gen. 130 (S.C.A.G.), 1975 S.C. Op. Atty. Gen. No. 4054, 1975 WL 22351

End of Document