



ALAN WILSON
ATTORNEY GENERAL

May 01, 2017

The Honorable Sandy Senn
Member
South Carolina Senate, District No. 41
P.O. Box 142
Columbia, SC 29202

Dear Senator Senn:

Attorney General Alan Wilson has referred your letter to the Opinions section regarding whether it is appropriate for the South Carolina Department of Revenue to charge sales tax for certain transactions. Your letter presents the following scenarios:

I have a constituent who provides a service as a caterer for weddings and other events. He is hired by hosts who pay him a per-head guest fee for food and/or bartending services. As part of that service, he purchases alcohol retail, pays sales tax and then carries it to the venues for distribution. He does not mark up the alcohol and does not charge by the drink. He simply is reimbursed for the costs of the alcohol by the host who would have already paid the sales taxes at the retail store where my constituent purchases the beverages. The host also pays the per-head fee for the bartending "service" and often is paid a gratuity. Clearly the per head fee for services and the gratuity he receives are taxable as income. But, are such "services" subject to a sales tax above and beyond the sales tax paid by the host?

In addition, I received a letter from a business owner from Greenwood County. She complains of a similar matter except that she provides a service of transporting portable toilets to various temporary locations. She contends that she does not "sell" the toilets but merely provides a service of delivering portable toilets. She, too, pays income tax, but is she supposed to charge sales taxes for her services?

Law/Analysis

The questions raised in your letter regarding whether the sales tax is applicable to certain business transactions present questions of fact. Boggero v. S.C. Dep't of Revenue, 414 S.C. 277, 283–84, 777 S.E.2d 842, 845 (Ct. App. 2015) ("To the extent there is a question of statutory interpretation here, it most resembles the 'mixed question of law and fact' present in Bursey. The source of contention in this appeal is whether Boggero's transactions with her customers during the audit period constitute a rental or service."); Tronco's Catering, Inc., Petitioner, 09-ALJ-17-0089-CCf, 2010 WL 5781622, at *5 (Apr. 12, 2010) ("Sales tax under § 12-36-90 is a transactional tax. A transactional tax is a tax that must be determined on a transaction-by-transaction basis."). Such a factual inquiry is beyond the authority of this Office in issuing an opinion. See Op. S.C. Atty. Gen., 2006 WL 1207271 (April 4, 2006) ("Because this Office does not have the authority of a court or other fact-finding body, we are not able to adjudicate or investigate factual questions"). Therefore, this Office is unable to state an opinion regarding whether

your constituents' transactions are subject to the sales tax. However, we will provide relevant statutes and case law as guidance which may be useful to your constituents in analyzing their potential liability.

The South Carolina Code of Laws imposes "a sales tax, equal to five percent of the gross proceeds of sales,... upon every person engaged or continuing within this State in the business of selling tangible personal property at retail." S.C. Code Ann. § 12-36-910 (A) (Supp. 2016). "Gross proceeds of sales" is statutorily defined as:

[T]he value proceeding or accruing from the sale, lease, or rental of tangible personal property.

(1) The term includes:

...

(b) the proceeds from the sale of tangible personal property without any deduction for:

(i) the cost of goods sold;

(ii) the cost of materials, labor, or service;

(iii) interest paid;

(iv) losses;

(v) transportation costs;

(vi) manufacturers or importers excise taxes imposed by the United States; or

(vii) any other expenses;

S.C. Code Ann. § 12-36-90 (Supp. 2016) (emphasis added). "Sale" is further defined to mean "any transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration including... a rental, lease, or other form of agreement." S.C. Code Ann. § 12-36-100 (Supp. 2016). In contrast to a sale of tangible property, if a transaction is found to be a service, the sales tax would not apply. See S.C. Code Ann. Regs. 117-308 ("The receipts from services, when the services are the true object of the transaction, are not subject to the sales and use tax, unless the sales and use tax is specifically imposed by statute on such services."). Therefore, whether the sales tax is applicable to your constituents' transactions will depend upon whether such transactions are found to be primarily for services rather than a sale, lease, or rental of tangible personal property.

In both Hamby Catering, Inc., Petitioner, 08-ALJ-17-0041-CC (June 12, 2009) and Tronco's Catering, Inc., Petitioner, 09-ALJ-17-0089-CCf, 2010 WL 5781622 (Apr. 12, 2010), the Administrative Law Court found the sales tax to be applicable to the labor or service fees charged by the subject catering companies. In Tronco's, the Court described why the service and labor charges were subject to the sales tax as follows:

This statute [S.C. Code Ann. § 12-36-90] plainly provides that the value proceeding or accruing from the sale is the tax base. Id. In this instance, the value of the sale of catered meals includes service, labor, and room charges. Such charges are incidental to and merely enhance the value of the sale of catered meals.... This statute makes clear that the tax base must include the entire value of the sale and cannot be reduced by demarcating discrete aspects of the sale.

The Court applied both the test set out in Meyers Arnold, Inc.v. S.C. Tax Comm'n, 285 S.C. 303, 328 S.E.2d 920 (Ct. App. 1985) and true object test to reach this holding. The Meyers Arnold test is used to determine whether a fee is part of a sale of tangible personal property by determining whether the customer would have chosen to purchase a service and pay such a fee without the sale of the tangible personal property. Id. at 307, 328 S.E.2d at 923. (“But for the lay away sales, Meyers Arnold would not receive the lay away fees. The fees are obviously charged for the service rendered in making lay away sales. For these reasons, this court holds the lay away fees are part of the gross proceeds of sales and subject to the sales tax.”). The Court found that the service charged by Tronco’s, which included butlers, bartenders, dishwashers, and overhead, would be subject to the sales tax under the Meyers Arnold test because those expenses would not have been paid by the customer “but for the sale of the catered meals.” Tronco's Catering, at *6.

The second test applied by the Court, the true object test, focuses on “whether the customer’s purpose for entering the transaction was to procure a good or service.” Boggero, 414 S.C. at 285, 777 S.E.2d at 846; Tronco's Catering, at *3 (“[The true object test] is a method for determining whether a contract is primarily for services or primarily for the sale of tangible personal property.”). The Court found that the caterer’s service fees were subject to the sales tax under the true object test as follows:

When a buyer contracts with a caterer for a catered meal, the buyer's basic purpose is to obtain food for the buyer's guests. Under this test, although special skills and knowledge may go into the preparation, service, and presentation of the catered meals, it is nonetheless true that the buyer's main purpose is to purchase food and beverages.

Id. at *4.

While the Court found that the service fees, which included bartending services, were subject to the sales tax under both tests, this Office cannot state that your constituent’s service fee would also be subject to the sales tax. As discussed above, such a determination would require a factual inquiry which examines evidence regarding the nature of your constituent’s business and its customers’ primary purpose for transacting with it. Such an inquiry is beyond the scope of an opinion of this Office.

As to your second question, the South Carolina Court of Appeals has addressed a similar case where the proprietor of a portable toilet service asserted that the business’s transactions were for services and thus not subject to the sales tax. Yet, in Boggero v. S.C. Dep't of Revenue, 414 S.C. 277, 777 S.E.2d 842 (Ct. App. 2015), the Court held that the proceeds from Boggero’s portable toilet business were subject to the sales tax under S.C. Code Ann. § 12-36-910(A). The Court affirmed the Administrative Law Court’s order which found that the true object of the transactions was “the rental or lease of ... the portable toilets and other personal property provided.” Id. at 279, 777 S.E.2d at 843. The Court noted that the terms of Boggero’s service agreement with her customers stated that the customers requested both “delivery and use of portable toilets.” Id. at 286, 777 S.E.2d at 846-847 (emphasis in original). Further, Boggero’s website stated the business was “the first portable toilet rental business in the area.” Id. (emphasis added). The Court found that there was substantial evidence to support the ALC’s finding that the true object of the Boggero’s business was rental of portable toilets rather than the service of removing and disposing of human waste. Id. at 288, 777 S.E.2d at 847. Thus, the gross proceeds of sales on these transactions were subject to sales tax under S.C. Code Ann. § 12-36-910(A) as a rental of tangible personal property.

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While the Boggero court concluded that the transactions in that case were subject to the sales tax, your constituent's portable toilet business would not necessarily be subject to such a tax. As discussed above, a court is likely to evaluate your constituent's transactions under the Meyers Arnold test and the true object test to determine whether they are subject to the sales tax under S.C. Code Ann. § 12-36-910(A). Again, such a determination is a factual inquiry on a transaction-by-transaction basis.

Conclusion

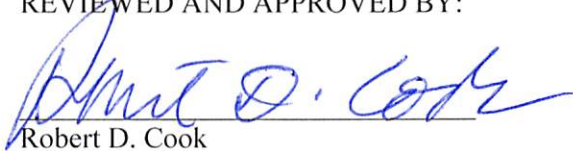
We hope that the guidance provided above will assist you and your constituents in determining which transactions are subject to the state sales tax under S.C. Code Ann. § 12-36-910 (Supp. 2016). In summary, our state courts have held that service or labor fees charged by a catering company for bartending services are subject to the sales tax. Hamby Catering, Inc., Petitioner, 08-ALJ-17-0041-CC (June 12, 2009); Tronco's Catering, Inc., Petitioner, 09-ALJ-17-0089-CCf, 2010 WL 5781622 (Apr. 12, 2010). The South Carolina Court of Appeals has also held that the proceeds from a portable toilet business are subject to the sales tax. Boggero v. S.C. Dep't of Revenue, 414 S.C. 277, 777 S.E.2d 842 (Ct. App. 2015). However, while the facts in these cases are similar to the scenarios described in your letter, this Office cannot opine on whether the sales tax is applicable to a specific transaction as that would require a factual inquiry which is beyond the scope of an opinion of this Office. If your constituents have further questions on the application of the sales tax to specific transactions, we suggest they contact the South Carolina Department of Revenue to discuss how the department would interpret their potential tax liability.

Sincerely,



Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General