

PUBLIC DRAFT

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Comments Due by: **July 29, 2015**

SC REVENUE RULING #15-X (DRAFT – 7/08/15)

SUBJECT: Photographers - Photographs Sold in Tangible or Electronic Form
(Sales & Use Tax)

EFFECTIVE DATE: Applies to all periods open under the statute.

SUPERSEDES: All previous advisory opinions and any oral directives in conflict herewith.

REFERENCES: S.C. Code Section 12-36-910(A) (2014)
S.C. Code Section 12-36-1310(A) (2014)
S.C. Code Section 12-36-60 (2014)
S.C. Code Section 12-36-2120(36) (2014)
S.C. Regulation 117-309.2

AUTHORITY: S. C. Code Ann. Section 12-4-320 (2014)
S. C. Code Ann. Section 1-23-10(4) (2005)
SC Revenue Procedure #09-3

SCOPE: The purpose of a Revenue Ruling is to provide guidance to the public. It is an advisory opinion issued to apply principles of tax law to a set of facts or general category of taxpayers. It is the Department's position until superseded or modified by a change in statute, regulation, court decision, or another Departmental advisory opinion.

QUESTIONS

1. Are sales at retail of photographs in traditional printed form subject to sales and use tax?
2. Are sales at retail of photographs in non-printed tangible form, such as by videotape, CD, DVD or flash drive, subject to sales and use tax?
3. Are sales at retail of photographs delivered electronically as an attachment to an email or as a download from the photographer's website subject to sales and use tax?
4. Are sales at retail of photographs in which the photographer provides the customer the same photographs in tangible form (traditional printed form, videotape, CD, DVD or flash drive) and electronically as an attachment to an email or as a download from the photographer's website subject to sales and use tax?
5. Are sales at retail of photographs where the photographer is obligated to deliver the photographs outside of South Carolina subject to sales and use tax?

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6. What is the measure of the sales and use tax when the transaction is subject to tax?

CONCLUSIONS

1. Sales at retail of photographs in traditional printed form are subject to South Carolina sales and use tax, unless otherwise exempt.¹
2. Sales at retail of photographs delivered in non-printed tangible form, such as by videotape, CD, DVD or flash drive, are sales of tangible personal property under Code Section 12-36-60 and are subject to South Carolina sales and use tax, unless otherwise exempt.

Note: The sale of the photographs is subject to the tax regardless whether the photographer or customer provides the videotape, CD, DVD or flash drive upon which the photographs are transferred to the customer.

3. Sales at retail of photographs delivered electronically as an attachment to an email or as a download from the photographer's website are not sales of tangible personal property under Code Section 12-36-60 and, therefore, are not subject to South Carolina sales and use tax.
4. Sales at retail of photographs in which the photographer provides the customer the same photographs in tangible form (traditional printed form, videotape, CD, DVD or flash drive) and electronically as an attachment to an email or as a download from the photographer's website are subject to South Carolina sales and use tax, unless otherwise exempt. The measure of the tax is the entire gross proceeds of sale. **(See Note in Question 2.)**
5. Sales at retail of photographs to a customer in another state as an attachment to an email or as a download from the photographer's website are not subject to South Carolina sales and use tax.

Sales at retail of photographs in tangible form (traditional printed form, videotape, CD, DVD or flash drive) where the photographer is obligated to deliver (using his own truck, the mail, or a common carrier) the photographs outside of South Carolina are exempt from South Carolina sales and use tax. See Code Section 12-36-2120(36).

6. The calculation of the South Carolina sales and use tax imposed on sales of photographs is based upon the entire gross proceeds of the sale or sales price. This includes charges for consultation fees, sitting fees, travel, or other expenses incurred in providing the photograph, as well as the cost of the photographer's labor.

FACTS

¹ For example, sales of photographs to the federal government are not subject to sales and use tax. See Code Section 12-36-2120(2).

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Professional photographers are engaged to take portraits of families, weddings, children, pets, landscapes and more at a studio or at an off-site location. Today, photographs are provided to the customer in a variety of forms, including (1) traditional print form, (2) alternative tangible means, such as by videotape, CD, DVD or flash drive **provided by the photographer or customer**, (3) electronic methods, such as email or customer download through the photographer's website, or (4) a combination of printed or non-printed tangible photographs and electronic photographs. In addition to selling photographs, some photographers may also provide services that are sold in conjunction with photographs. Often, the photographer charges a flat fee for the photographs or may charge separately for a consultation fee, sitting fee, set up fee, travel fee, and other expenses incurred in providing the photograph.

The purpose of this advisory opinion is to address the application of the sales and use tax to sales of photographs sold at retail by a photographer to a customer in tangible and electronic form and to provide guidance in determining the amount of the charges used to compute the South Carolina sales and use tax.²

DISCUSSION

Sales of Photographs Subject to Tax

Code Sections 12-36-910(A) and 12-36-1310(A) impose the South Carolina sales tax and use tax, respectively. South Carolina imposes a sales tax on the gross proceeds of sales of every person engaged in the business of selling tangible personal property at retail. The sales tax applies when the person is engaged in the business of selling, the person is selling tangible personal property in South Carolina, and the sales in South Carolina are at retail. The retailer is liable for the sales tax.

South Carolina imposes a use tax on the sales price of tangible personal property purchased at retail for use in South Carolina. It mostly applies to purchases of tangible personal property for use in South Carolina from out of state retailers and includes purchases from retailers made through the Internet or when visiting another state. The purchaser is liable for the use tax. If the purchaser has a receipt from a seller showing the seller has collected the South Carolina tax from the purchaser, the purchaser is relieved of the use tax liability.³ South Carolina allows a credit against the use tax due in South Carolina for the state and local sales or use tax due and paid in another state on purchases of tangible personal property.

Code Section 12-36-60 defines the term "tangible personal property", in part, as "personal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses. It also includes services and intangibles ... the sale or use of which is subject to tax under this chapter"

² For purposes of this advisory opinion, it is assumed that no charges are incurred for merely viewing or accessing the photographer's website. See SC Revenue Ruling #06-8 concerning taxable communications charges for accessing a website.

³ Code Section 12-36-1330(B).

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South Carolina Regulation 117-309.2 specifically provides that photographers operating photographic studios for the purpose of taking photographs and portraits are primarily engaged in the business of selling tangible personal property at retail to their customers and such sales are taxable.⁴

Based on the above, sales at retail of photographs to a customer in tangible form (*e.g.*, print, videotape, CD, DVD, flash drive, etc.) are sales of tangible personal property and are subject to tax, unless otherwise exempt.⁵ For example, Code Section 12-36-2120(36) provides an exemption from the tax for sales of tangible personal property where the seller is obligated to deliver (using his own truck, the mail, or a common carrier) the tangible personal property to the buyer in another state.⁶

Now it must be determined whether sales of photographs solely by electronic forms are taxable. For electronic delivery (*e.g.*, by email or a website download from the photographer's site) of photographs to be subject to sales and use tax, it must be determined that there is a sale of tangible personal property. It is the longstanding position of the Department that photographs that are sold and transferred electronically as an attachment to an email or as a download from the photographer's website do not meet the definition of tangible personal property in Code Section 12-36-60. Accordingly, sales of photographs at retail electronically as an attachment to an email or as a download from the photographer's website are not subject to South Carolina sales and use tax.

Note: Sales at retail of photographs in which the photographer provides the customer the same photographs in tangible form (traditional printed form, videotape, CD, DVD or flash drive) and electronically as an attachment to an email or as a download from the photographer's website are subject to South Carolina sales and use tax, unless otherwise exempt. The measure of the tax is the entire gross proceeds of sale.

Charges Subject to Sales or Use Tax

Having established that the sale of photographs by tangible means is subject to South Carolina sales or use tax, it must be determined what charges associated with the purchase are taxable. The sales tax is calculated on the retailer's "gross proceeds of sales." Code Section 12-36-90 provides that gross proceeds is the value proceeding or accruing from the sale of tangible personal property. It includes the proceeds from the sale of tangible personal property without

⁴ This regulation also addresses sales by photo finishers and photo copiers and provides examples of specific transactions not subject to tax by them because they are the result of a service. These provisions are not applicable to this advisory opinion and are not discussed.

⁵ See *Citizens and Southern Systems, Inc. v. South Carolina Tax Commission*, 280 S.C. 138, 311 S.E.2d 717 (Ct. App. 1984) and SC Revenue Ruling #03-5, concluding the same regarding the delivery of computer software by magnetic tape and other tangible forms.

⁶ Code Section 12-36-2120(36) specifically exempts from the tax the gross proceeds or sales price of "tangible personal property where the seller, by contract of sale, is obligated to deliver to the buyer, or to an agent or donee of the buyer, at a point outside this State or to deliver it to a carrier or to the mails for transportation to the buyer, or to an agent or donee of the buyer, at a point outside this State".

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any deduction for (1) the cost of goods sold, (2) cost of materials, labor, or service, (3) transportation costs, or (4) any other expenses.

Similarly, the use tax is calculated on the “sales price” of tangible personal property. Code Section 12-36-130 provides that sales price is the total amount for which tangible personal property is sold, without any deduction for the cost of the property sold, the cost of the materials used, labor or service cost, any services or transportation costs that are a part of the sale, or any other expenses.

Based upon the above, the total amount charged in conjunction with the sale of tangible personal property is included in the tax base. This includes charges for consultation fees, sitting fees, travel, or other fees or expenses incurred in providing the photograph, as well as the cost of the photographer’s labor.

The principle of what is includable in “gross proceeds” was established in *Meyers Arnold, Inc. v. South Carolina Tax Commission*, 285 S.C. 303, 328 S.E.2d 920 (Ct. App. 1985). In this case, the Court of Appeals reasoned:

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 and subject to the sales tax.

This principle was followed in Commission Decision S-D-175 (1986), where the Department concluded that services provided by a commercial photography studio in producing original transparencies for a customer are part of the sale and may not be exempted from the gross proceeds of sale.

As such, but for the sales of photographs, the photographer would not receive the consultation fees, sitting fees, and other fees incurred in providing the photographs. For these reasons, the consultation fees, sitting fees, and compensation for his labor are a part of the gross proceeds of sales or sales price and are subject to the sales and use tax, if the photographs are sold and delivered in tangible form (traditional printed form, videotape, CD, DVD or flash drive), unless otherwise exempt.

EXAMPLES

The following examples provide guidance in determining whether various transactions with a photographer in South Carolina are subject to the sales and use tax and the measure of the tax.

Sitting Fee and Purchase of Traditional Printed Photos. A photographer charges a \$25 sitting fee for a photo shoot. The customer purchases a package of traditional prints for \$50. The sales and use tax is imposed on the entire \$75.

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Sitting Fee and Purchase of Electronic Photos. A photographer charges a \$25 sitting fee for a photo shoot. The customer pays \$50 to receive the photographs as an attachment to an email or as a download from the photographer's website. Since no tangible personal property is sold, no sales and use tax is imposed.

Sitting Fee but No Photos are Purchased. A photographer charges a \$25 sitting fee for a photo shoot. The customer does not purchase any photos. Since no tangible personal property is sold, no sales and use tax is imposed.

Retainer Fee and Purchase of Photos in Tangible Format. A photographer charges a nonrefundable retainer fee of \$2,000. For \$500, the customer purchases **photographs that are placed on a CD or flash drive**. The entire \$2,500 is included in the calculation of the sales tax.

Consulting Fee and Purchase of Electronic Photos. The customer enters into a contract with a photographer to produce photographs for \$3,500 (\$500 for download of photos from the photographer's website and a \$3,000 consulting fee). Since no tangible personal property is sold, no sales and use tax is imposed.

Combination of Tangible and Electronic Photos Sold and Delivered in South Carolina. The customer enters into a contract with a photographer to produce photographs for \$3,000 (a \$1,000 consulting fee, a \$1,500 fee to download digital photos from the photographer's website, and \$500 for the purchase and delivery in South Carolina of a CD of the same photos.) The entire \$3,000 is subject to the tax.

Out of State Photo Session and Print and Electronic Photos Delivered Outside of South Carolina. A South Carolina photographer charges \$1,000 to photograph a wedding in North Carolina, \$500 to deliver printed photos through the mail to a North Carolina address, and \$1,000 for the customer to download electronic photos. None of the charges are subject to South Carolina sales and use tax since the photographer mailed the tangible photographs out of state.

Retainer Fee Paid but Photo Session Canceled. The customer pays a \$3,000 nonrefundable retainer fee to reserve the photographer's services for a wedding date planned for next summer. The wedding is canceled, and no photos are taken or purchased. Since no tangible personal property is sold, no sales and use tax is imposed.

Separate Purchase by Family and Friends. A photographer charges a couple \$3,000 to take wedding photos and mail tangible prints to their address in South Carolina. The photographer posts the photos online where family and friends can purchase printed photos for \$50 plus \$5 shipping and handling. The measure of the tax for each printed photograph sold and delivered to family and friends in South Carolina is \$55. The measure of the tax for the sale to the bride and groom is \$3,000. (Photographs sold and delivered outside of South Carolina are not subject to the sales and use tax.)

Miscellaneous Expenses Incurred in Making Tangible Photos. A photographer charters an airplane, hires models or rents props for use in making tangible photographs. These charges are

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included in the gross proceeds or sales price of the photographs and subject to the sales and use tax. See *Richland County v. South Carolina Tax Commission*, Richland County Court of Common Pleas, Case No. 82-CP-40-2143 (1983). See Regulation 117-310 for when delivery charges or transportation charges are included in gross proceeds of sales.