

The opinions expressed in this paper are the authors' opinions and should not be attributed to the South Carolina Department of Revenue. This paper is revised through June 10, 2005, but does not reflect legislation passed in the 2005 South Carolina legislative session.

.01 Overview and Certain Provisions for Taxpayer Assistance

A. Introduction

This portfolio is designed to be a practical guide. It will answer questions regarding South Carolina state corporate income taxes, withholding, and corporate license fees. It will reference specific authority, including relevant case law and formal and informal interpretations of the South Carolina Department of Revenue (Department).¹ It will also point out areas for which there is no authority. It is not, however, a complete legal compendium and cannot take the place of reading primary authorities and obtaining advice from experienced tax practitioners.

A wealth of primary and secondary source material is available at or through the Department's website, *www.sctax.org*, including:

- South Carolina Constitution
- South Carolina Code
- South Carolina Regulations
- Proposed Tax Regulations
- Attorney General Opinions
- Advisory Opinions issued by the Department²
- Recent court decisions and decisions of the Administrative Law Court³
- Tax Forms and Instructions
- Nexus/Filing Requirements
- Voluntary Disclosure Program
- Frequently Asked Questions
- Department Publications

B. Overview

The South Carolina corporate income tax, withholding, and license fees are administered by the Department. It should be noted that most, if not all, municipalities and some counties in South Carolina have enacted local business license fees.⁴

¹The Department of Revenue is a cabinet agency. Its Director is appointed by the Governor and may be removed by the Governor at any time. SC Code §§1-30-10 and 1-3-240(B). Prior to February 1, 1995, the Department was known as the South Carolina Tax Commission (Tax Commission). For simplicity, the Department will generally be referred to in this portfolio as the Department, even when the reference refers to a time when it was the Tax Commission.

²See Section .01 C. 3. of this portfolio for a discussion of Advisory Opinions.

³In 1995 administrative hearings on tax disputes were removed from the Tax Commission and placed with the Administrative Law Court. Administrative Law Judges are elected by the General Assembly. Prior to April 26, 2004, the SC Administrative Law Court was known as the SC Administrative Law Judge Division. SC Code §1-23-500.

South Carolina's income tax applies to transacting, conducting, or doing business within South Carolina or having income within South Carolina.

South Carolina income tax laws conform substantially to the federal income tax laws. This conformity simplifies the filing of returns by adopting federal taxable income as a starting point for South Carolina income tax purposes.⁵ SC Code §12-6-50⁶ lists the Internal Revenue Code provisions which do not apply.

Federal concepts of realization, recognition, and basis, as well as federal principles of accounting, are generally used for South Carolina income tax purposes. A taxpayer's taxable year is the same as it is for federal income tax purposes, and if it is changed for federal income

⁴These local fees are not covered in this portfolio. See Worksheet 6 regarding limitations on local taxes.

⁵See SC Code §§12-6-40 and 12-6-1110. This conformity is generally provided for in SC Code SC Code §12-6-40; however, in the 2004 legislative session, the annual conformity was provided for in a temporary proviso. Accordingly, South Carolina's income tax laws conform to the Internal Revenue Code of 1986, as amended through December 31, 2003, for calendar year 2004 income tax returns, subject to the exceptions listed in SC Code §12-6-50. In addition, the proviso provides that the increase in IRC §179 expensing amounts in the Jobs and Growth Relief Reconciliation Act of 2003, P.L. 108-27 (May 28, 2003) are only effective for taxable years beginning January 1, 2004. See SC Rev. Rul. #05-2 for more information on federal income tax conformity and exceptions. Note: As of April 1, 2005, South Carolina has not adopted the Working Families Tax Relief Act of 2004, P.L. 108-311 (October 4, 2004) or the American Jobs Creation Act of 2004, P.L. 108-357 (October 22, 2004).

⁶SC Code §12-6-50 provides that, except as otherwise specifically provided, the following Internal Revenue Code sections are specifically not adopted:

1. Sections 1(a) through 1(e), 3, 11, and 1201 relating to federal tax rates;
2. Sections 22 through 53, 515, 853, 901 through 908, and 960 relating to tax credits;
3. Sections 55 through 59 relating to minimum taxes;
4. Sections 78, 86, 87, 196, and 280C;
5. Sections 72(m)(5)(B), 72(f), 72(o), 72(q), and 72(t), relating to penalty taxes on certain retirement plan distributions;
6. Section 168(k) relating to bonus depreciation. (See SC Rev. Rul. #05-2 and SC Info. Ltr. #03-17 for information on bonus depreciation for SC income and property tax purposes.)
7. Section 172(b)(1) relating to net operating loss carrybacks;
8. Sections 531 through 564 relating to certain special taxes on corporations;
9. Sections 581, 582, and 585 through 596 relating to the taxation of banking institutions;
10. Sections 665 through 668 relating to taxation of certain accumulation distributions from trusts;
11. Sections 801 through 845 relating to taxation of insurance companies;
12. Sections 861 through 908, 912, 931 through 940, and 944 through 989 relating to the taxation of foreign income;
13. Sections 1401 through 1494;
14. Sections 1501 through 1505 relating to consolidated tax returns; and
15. Sections 2001 through 7655, 7801 through 7871, and 8001 through 9602, except for Section 6015, and except for Sections 6654 and 6655 which are adopted as provided in Section 12-6-3910.

tax purposes, then it is changed for South Carolina income tax purposes.⁷ Elections made for federal income tax purposes in connection with Internal Revenue Code Sections adopted by the State automatically apply for South Carolina income tax purposes.⁸

In addition to differences arising from South Carolina not adopting every Internal Revenue Code section, differences in a taxpayer's federal and South Carolina returns may result from South Carolina modifications,⁹ allocation, and apportionment.¹⁰

A taxpayer whose entire business is transacted or conducted in South Carolina is subject to income tax based on the entire taxable income of the business for the taxable year.¹¹ A taxpayer transacting or conducting business partly within and partly outside of South Carolina is subject to income tax based on the portion of its business carried on in South Carolina. This portion is determined by allocation and apportionment of income. The sum of these amounts is South Carolina taxable income.

Certain classes of income, less related expenses, are allocated to a specific state. Items directly allocated include dividends, nonbusiness interest, nonbusiness rents and royalties from the lease or rental of real estate or tangible personal property, certain gains and losses from the sale of real property, and nonbusiness gains and losses from sales of intangible property.¹²

The income remaining after allocation is apportioned.¹³

Modifications, allocation, and apportionment are done on a separate entity basis. South Carolina has not adopted the federal consolidated return rules and does not treat multiple entities as a single business. South Carolina generally treats related corporations as if they are unrelated.¹⁴

⁷ SC Code §12-6-4410. The taxpayer must provide the Department with a copy of any permission it receives from the Internal Revenue Service to change its year.

⁸ See Section .04, Income Tax Calculation, of this portfolio for a more complete discussion, and Section .04 B. for a grandfather provision that excepts some S corporations.

⁹ See Sections .04 B. and C. of this portfolio for a discussion of provisions modifying federal gross and taxable income.

¹⁰ See Section .05 in this portfolio for a discussion of allocation and apportionment.

¹¹ SC Code §12-6-2210.

¹² See Section .05 B. of this portfolio for a discussion of allocation.

¹³ See Section .05 E. of this portfolio for a discussion of apportionment.

¹⁴ Qualified subchapter S subsidiaries and certain single member limited liability companies are exceptions; see Section 03.C.2 and 03.C.3.a. of this portfolio, respectively. See Section .05 F. of this

South Carolina also has tax credits, deferrals, a tax moratorium, return requirements, procedural statutes, and taxpayer remedies which differ from federal law.¹⁵

C. Advice from the Department¹⁶

Taxpayers and their representatives can call,¹⁷ write,¹⁸ e-mail¹⁹ or visit the Department²⁰ to request advice. Below is a discussion of the effect of relying on such advice.

1. Oral Advice

Oral advice does not represent the opinion of the Department, and is not binding on the Department, any Department employee, or the person who asked for the advice. If a taxpayer reasonably relies on oral advice from a Department employee and because of that advice fails to pay an amount due or make a required filing, the taxpayer will still owe the amount or have to make the filing, but generally penalties will be waived.²¹ In order to obtain this penalty waiver,

portfolio for a discussion of the unitary business doctrine in South Carolina, and Section .07 B. 1. for a discussion of South Carolina's limited "consolidated" return.

¹⁵ These issues are discussed in Sections .01, .06, .07, .08, .09, and .10 of this portfolio.

¹⁶ While two of the authors are employees of the South Carolina Department of Revenue, the opinions expressed in this portfolio are those individuals' personal opinions and should not be attributed to the South Carolina Department of Revenue.

¹⁷ See Contact Information, Worksheet 1, for telephone listings.

¹⁸ Taxpayer Assistance

South Carolina Department of Revenue
301 Gervais Street
PO Box 125
Columbia, SC 29214

¹⁹ From the Department's web site, *www.sctax.org*, click on "Contact Information," and follow the instructions to submit an e-mail question to the appropriate section of the Department.

²⁰ South Carolina Department of Revenue
301 Gervais Street
PO Box 125
Columbia, SC 29214

See the Department's website, *www.sctax.org*, for the addresses of the Department's taxpayer service centers.

²¹ See SC Rev. Proc. Bull. #02-5 which summarizes when the Department will waive or reduce penalties. It is reproduced as Worksheet 16.

the Department employee who gave the advice must verify that she was made aware of all of the relevant facts and she, in fact, gave the erroneous advice. Reliance is not considered reasonable if there was a change in statutory or case law or regulations after the advice was given and before it was relied upon, or if someone in the Department contacted the taxpayer to correct the advice before it was relied upon. Reliance is also not considered reasonable if the taxpayer talks with more than one employee and obtains conflicting advice and does not inform those employees of the conflict so they can resolve it.

2. Informal Written Advice

Informal written advice does not represent the opinion of the Department, and is not binding on the Department, any Department employee, or the person who asked for the advice. Requests for informal written advice should be in writing. If the Department finds that a person's failure to make a timely return or payment is due to the person's reasonable reliance on written advice from the Department, then the person is relieved of any penalty or interest.²² Only the person making the request may rely on the advice. A person's failure to make a timely return or payment is considered to be due to reasonable reliance only if the Department finds that all of the following conditions are satisfied:

1. The person requested in writing that the Department advise him whether a particular activity or transaction is subject to tax, and the specific facts and circumstances of the activity or transaction were fully described in the request.
2. The Department responded in writing to the person regarding the written request for advice, stating whether or not the described activity or transaction is subject to tax, or stating the conditions under which the activity or transaction is subject to tax.
3. In reasonable reliance on the Department's written advice, the person did not remit the tax due.
4. The liability for taxes applied to a particular activity or transaction that occurred before either of the following:
 - a. The Department rescinded or modified the advice given by sending written notice to the person of the rescinded or modified advice; or
 - b. A change in statutory or constitutional law, a change in the Department's regulations, or a final decision of a court, which rendered the Department's earlier written advice no longer valid.

A person seeking relief must give the Department:

1. A copy of the written request to the Department and a copy of the Department's written advice;

²² SC Code §12-58-100.

2. A statement signed under penalty of perjury, setting forth the facts on which the claim is based; and
3. Any other information the Department requests.

Note: Although the statute does not waive interest and penalties for all errors based upon erroneous written advice and the rules for relief are strict, many practitioners and some Department employees appear to believe that if a taxpayer reasonably relies on erroneous written advice from the Department, the taxpayer is relieved of paying interest and penalties. Therefore, although a taxpayer should not necessarily expect better treatment than a strict reading of the statute allows, she should always ask for it.²³

3. Formal Written Advice (Advisory Opinion)

Formal advice responding to taxpayer requests is issued in the form of a Private Letter Ruling.²⁴ The Department also announces general statements of position for guidance through other advisory opinions which are not regulations and do not have the force of law. The Department's formal advisory opinions are currently called Revenue Rulings, Revenue Procedures, Private Letter Rulings, and Information Letters.²⁵

Note: South Carolina advisory opinions are available on the Department's website, www.sctax.org where they are indexed by tax type and by calendar year. To automatically receive draft, temporary, and final advisory opinions via e-mail, send an e-mail message to: request@listserv.sctax.org and include the phrase **SUBSCRIBE POLICY** on the first line of the message (not on the subject line).

Advisory opinions are not regulations, do not have the force or effect of law, and are not binding on the public.²⁶ They are, however, the Department's position, and they are binding on agency personnel until superseded or modified by a change in statute, regulation, court decision, or another advisory opinion. A Private Letter Ruling may only be relied upon by the person to whom it is issued for the transaction to which it relates.

²³ See Section .10 E. of this portfolio for a discussion of waiver of penalties and interest in the nature of a penalty.

²⁴ See Worksheet 2 for the Information Guide on requesting a Private Letter Ruling.

²⁵ SC Rev. Proc. Bull. #02-3 describes the advisory opinion process and discusses their purposes and when they will or will not be issued. From January 1, 2000 through December 31, 2002, the Department issued advisory opinions under different names; they were referred to as Revenue Advisory Bulletins, Revenue Procedural Bulletins, Private Revenue Opinions, and Revenue Informational Bulletins.

²⁶ See Code §§1-23-10(4) and 12-4-320.

Comment: The advantage of a Private Letter Ruling is that it is binding on Department personnel, providing the representations made in the request are complete and accurate and the transaction is carried out as proposed. Private Letter Rulings are no longer binding on Department personnel if superseded or modified by a change in statute, regulation, court decision, or another advisory opinion. The disadvantage is that they are drafted by a few Department employees who have other duties, so they cannot be issued quickly. There is no charge for a Private Letter Ruling.

D. Taxpayers' Bill of Rights

The South Carolina Taxpayers' Bill of Rights²⁷ establishes a Taxpayers' Rights Advocate.²⁸ The advocate is responsible for facilitating resolution of taxpayer complaints and problems, including any taxpayer complaints regarding unsatisfactory treatment of taxpayers by Department employees, and staying actions where taxpayers have suffered or will suffer irreparable loss as the result of those actions. Applicable time limitations are suspended during the pendency of a stay.²⁹

In addition, the Taxpayers' Bill of Rights includes the following provisions:

1. The amount of revenue collected may not be used to evaluate any Department employee's performance, and the Department must evaluate each employee's performance with respect to his contact with taxpayers;³⁰
2. If the Department finds that a person's failure to make a timely return or payment is due to the person's reasonable reliance on written advice from the Department, the person may be relieved of any penalty or interest;³¹
3. Under certain circumstances, the Taxpayers' Bill of Rights also requires the release of levies and liens and the reimbursement of bank charges due to erroneous levies;³² and

²⁷ SC Code Chapter 58 of Title 12.

²⁸ See Worksheet 1 for information about contacting the Taxpayers' Rights Advocate.

²⁹ SC Code §12-58-30.

³⁰ SC Code §12-58-80.

³¹ SC Code §12-58-100. See Section .01 C. of this portfolio concerning how much a taxpayer can rely on advice from Department employees.

³² SC Code §§12-58-120, 12-58-130, and 12-58-160.

4. The Department must develop and implement a taxpayer education and information program and publish brief but comprehensive statements in simple and nontechnical language which explain procedures, remedies, and the rights and obligations of the Department and taxpayers.³³

Taxpayers may also bring a civil action against the State for violation of Department published procedures. It provides that if any employee of the Department wilfully, recklessly, and intentionally disregards Department published procedures, a taxpayer aggrieved by that action may bring an action for actual and direct monetary damages against the State of South Carolina in Circuit Court but not against any state employee.³⁴

E. Relief for Voluntary Filers

Recognizing that nexus³⁵ is a complex concept with substantial uncertainty, the Department has exercised its authority to compromise taxes,³⁶ to provide a procedure granting relief from some liability for companies with nexus with South Carolina that voluntarily file with the State. This procedure³⁷ is designed to: (1) encourage nonfilers to come forward voluntarily and pay taxes without incurring penalties; and (2) allow the Department to maximize compliance with its limited audit resources. This relief is only available to “voluntary filers.”

1. Who Is a Voluntary Filer?

A taxpayer who has nexus with South Carolina but is not registered with the State to collect or remit taxes is deemed a voluntary filer provided:

1. The taxpayer either:
 - a. Registers to collect or remit taxes without having been contacted previously by the Department, or
 - b. Responds to the Department's nexus questionnaire³⁸ timely and completely upon receipt, and,

³³ SC Code §§12-58-40 and 12-58-50.

³⁴ SC Code §12-58-170.

³⁵ See Section .02 of this portfolio for a discussion of nexus.

³⁶ SC Code §12-4-320(3).

³⁷ SC Rev. Proc. #01-5.

³⁸ The Department's nexus questionnaire is available through the Department's website, www.sctax.org.

- (i) Immediately registers with the Department;
 - (ii) Requests to be registered upon timely return of the questionnaire to the Department; or
 - (iii) Agrees to register if upon review of the nexus questionnaire by an Audit Services Section employee, the employee determines that nexus exists; and,
2. The taxpayer does not appeal the determination in 1.b.(iii) above or file a claim for refund for the tax periods prior to the time of voluntary filing.

2. Voluntary Filer Relief

If a taxpayer qualifies as a voluntary filer the Department will:

1. Accept the filing of tax returns and payment of all required taxes for the three immediately preceding tax years, or the number of preceding tax years that nexus existed, if less than three years (or corresponding periods for purposes of taxes filed more frequently than annually, such as sales and use taxes);
2. Apply interest in accordance with the South Carolina Code; and,
3. Waive all penalties, except in the case of material misrepresentation of facts or fraud.

Example: A calendar year taxpayer discovers that nexus existed with South Carolina for the last 5 years and comes forward as a voluntary filer in February 2005. The Department will require the taxpayer to file South Carolina income tax returns for the tax years ended 2004, 2003, and 2002 - the three immediately preceding tax years. The Department will apply only interest on the tax liability for these years.

Comment: If the person has collected the tax from a third party, but not remitted it to the Department; *e.g.*, a retailer collecting use tax from the purchasers, the tax remains due and penalty waiver is not automatic.

3. Registration Procedure for Voluntary Filers

A corporation that qualifies as a voluntary filer must register to remit South Carolina income taxes by completing and filing Form CL-1, "Initial Annual Report of Corporations,"³⁹ and, if applicable, register to collect or remit South Carolina sales, use, or withholding taxes by completing Form SCTC-111, "Business Tax Application."⁴⁰

³⁹ See Section .08 A. of this portfolio for a discussion of the annual report.

⁴⁰ South Carolina tax forms are available on the Department's website, www.sctax.org, or they will be faxed to you if you call (803) 898-5320.

Note: South Carolina is a member of the Multistate Tax Commission's Multistate Voluntary Disclosure Program. This program assists businesses doing business in multiple states to voluntarily come into compliance with state sales, use, and income tax requirements. Program staff members act as coordinators through which businesses may approach up to 40 participating states and seek resolution of past state tax liabilities. MTC's initial settlement proposal to participating states is anonymous, however, the name of the company must be provided prior to the Department entering into a voluntary disclosure agreement. For further information, contact MTC's National Nexus Program at (202) 508-3800 or www.mtc.gov/txpyrsvs/disclose.htm.

4. Procedure for Nonvoluntary Filers

If the Audit Services Section of the Department determines that a taxpayer does not qualify as a voluntary filer or has contacted the taxpayer for audit, or initiated other contact with the taxpayer, then the Department will not allow voluntary filer relief. If the Department has to go beyond the response to a nexus questionnaire and conduct an audit or investigation of the facts to determine nexus, then the taxpayer is not entitled to voluntary filer relief. A taxpayer who does not qualify as a voluntary filer is not subject to any time limitation.⁴¹ Accordingly, taxes will be assessed for all years that nexus existed in South Carolina. Also, interest and penalties will be added in accordance with the SC Code.⁴²

5. Procedure When Nexus Is Unclear

The Department may compromise any tax, interest, or penalty imposed by Title 12 of the SC Code.⁴³ If a taxpayer agrees to become a voluntary filer and completes a nexus questionnaire which shows nexus is unclear (it is uncertain whether a court would determine the existence of nexus), the Department and the taxpayer may agree to compromise the three prior years of taxes that would otherwise be due. The determination as to whether to accept a compromise of taxes rests with the Department's Director.

⁴¹ See SC Code §12-54-85(C)(3) providing an unlimited statute of limitations for assessment where the taxpayer fails to file a return required by law. Effective August 1, 1995, a statute which presumed taxes were paid after 10 years was repealed. Therefore, as a practical matter, unlimited means back to August 1, 1985. See Section .10 C. 1. of this portfolio.

⁴² See SC Code §§12-54-25 and 12-54-43.

⁴³ SC Code §12-4-320(3).