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.10 Tax Procedure and Taxpayer Remedies

A. Records

1. Duty to Keep Records and Department's Authority to Examine

A corporation is required to keep all records that are necessary to a determination of the correct tax liability under the laws administered by the Department, and to comply with regulations the Department prescribes.¹

In order to determine the correctness of any return, including information returns, or to make a determination of tax liability, the Department may examine the books, and other records and equipment bearing upon the matters required to be included on any return. The Department may also examine or investigate the place of business, tangible personal property, facilities, computers, computer programs, electronic data, vouchers, and other documents of the taxpayer or other person that bear upon the matters required to be included on a return.²

Note: Upon request, a taxpayer may delay the examination for up to 30 days.³ The delay will not be granted if there is reasonable evidence that the taxpayer is about to destroy or remove the books, papers, records, or memoranda from the State or otherwise make them unavailable for examination.⁴ In criminal investigations where the Department believes that evidence may be destroyed or hidden, it may obtain a search warrant.

The Department may summon witnesses to appear and give testimony and to produce records, books, papers, and documents relating to any matters which the Department has authority to investigate or determine.⁵ The Department may also take depositions of witnesses, whether or not in South Carolina, by giving notice to the interested party, in the manner that depositions of witnesses are taken in civil actions pending in the circuit court.⁶

¹SC Code §12-54-210 (A) and SC Reg. §117-200.2(C)(1).

²SC Code § 12-54-100 and SC Reg. §117-200.2(C)(1).

³SC Code §12-54-100.

⁴SC Code § 12-54-100.

⁵SC Code §12-4-330(A) and 12-54-110.

⁶SC Code §12-4-330(B).

2. Record Keeping Media

a. Microfilm, Microfiche, or Other Storage-only Imaging Systems

Taxpayers may convert hard-copy documents received or produced in the normal course of business to microfilm, microfiche, or other storage-only imaging systems and may discard the original hardcopy documents provided that certain conditions are met. Documents that may be stored on these media include, but are not limited to, general books of account, journals, voucher registers, general and subsidiary ledgers, and supporting records of details such as sales invoices, purchase invoices, exemption certificates, and credit memoranda.⁷

In addition, microfilm, microfiche, and other storage-only imaging systems must meet the following requirements:

1. Documentation establishing the procedures for converting the hardcopy documents to microfilm, microfiche, or other storage-only imaging systems must be maintained and made available on request.
2. Procedures must be established for the effective identification, processing, storage, and preservation of the stored documents and for making them available for the period they are required to be retained.
3. Upon request by the Department, a taxpayer must provide facilities and equipment for reading, locating, and reproducing any documents maintained on microfilm, microfiche, or other storage-only imaging systems.
4. When displayed on equipment or reproduced on paper, the documents must exhibit a high degree of legibility and readability.
5. All data stored on microfilm, microfiche, or other storage-only imaging systems must be maintained and arranged in a manner that permits the location of any particular record.
6. There is no substantial evidence that the microfilm, microfiche, or other storage-only imaging system lacks authenticity or integrity.⁸

b. Electronic Records

If a taxpayer retains records in both electronic and hardcopy formats, the taxpayer is required to make the records available to the Department in electronic format upon request of the Department. This requirement does not prohibit a taxpayer from demonstrating tax compliance with traditional hardcopy documents.⁹

⁷SC Reg. §117-200.2(K).

⁸SC Code §12-54-210 (B) and SC Reg. §117-200.2(K).

Electronic records used to establish tax compliance must contain sufficient transaction-level detail information so that the details underlying the electronic records can be identified and made available to the Department upon request. At the time of an examination, the retained records must be capable of being retrieved and converted to a standard record format. Taxpayers are not required to construct electronic records other than those created in the ordinary course of business.¹⁰

Where a taxpayer uses electronic data interchange (EDI)¹¹ processes and technology, the level of record detail, in combination with other records related to the transactions, must be equivalent to that contained in an acceptable paper record. For example, the retained records should contain such information as vendor name, invoice date, product description, quantity purchased, price, amount of tax, indication of tax status, shipping detail, etc. Codes may be used to identify some or all of the data elements, provided that the taxpayer provides a method which allows the Department to interpret the coded information.¹²

Upon the request of the Department, the taxpayer must provide a description of the business process that created the retained records. Such description must include the relationship between the records and the tax documents prepared by the taxpayer and the measures employed to ensure the integrity of the records.

The taxpayer must be capable of demonstrating:

1. The functions being performed as they relate to the flow of data through the system;
2. The internal controls used to ensure accurate and reliable processing; and,
3. The internal controls used to prevent unauthorized addition, alteration, or deletion of retained records.

The following specific documentation is required for electronic records retained:

1. Record formats or layouts;
2. Field definitions (including the meaning of all codes used to represent information);

⁹SC Reg. §117-200.2(C). SC Reg. §117-200.2 was based upon the Model Recordkeeping and Retention Regulation adopted by the MultiState Tax Commission on January 15, 1998.

¹⁰SC Reg. §117-200.2(D).

¹¹“Electronic data interchange” means the computer-to-computer exchange of business transactions in a standardized structured electronic format.

¹²SC Reg. §117-200.2(E).

3. File descriptions (*e.g.*, data set name); and
4. Detailed charts of accounts and account descriptions.¹³

The taxpayer must provide the Department with access to electronic records in one or more of the following ways:

1. The taxpayer may arrange to provide the Department with the hardware, software, and personnel resources to access the electronic records;
2. The taxpayer may convert the electronic records, including copies of files, to a standard record format specified by the Department on a magnetic medium that is agreed to by the Department; or
3. The taxpayer and the Department may agree on other means of providing access to the electronic records.¹⁴

Except as otherwise provided, taxpayers are not relieved of the responsibility to retain hardcopy records that are created or received in the ordinary course of business as required by existing law and regulations. Hardcopy records may be retained on microfilm, microfiche, and other storage-only imaging systems as provided above. If hardcopy records are not produced or received in the ordinary course of transacting business (*e.g.*, when the taxpayer uses electronic data interchange technology), hardcopy records need not be created.¹⁵

Note: The Department may allow a taxpayer to use other methods of maintaining and providing records that are received, created, maintained, or generated through various computer, electronic, and imaging processes and systems.¹⁶

3. Penalties

A person liable for a tax, license, fee, or surcharge administered by the Department or for the filing of a return, including information returns, must keep books, papers, memoranda, records, render statements, make returns, and comply with regulations as the Department prescribes. Persons failing to keep required records or refusing to comply with regulations must be penalized in an amount not exceeding \$500 for the period covered by the return in addition to other penalties provided by law.¹⁷

¹³SC Reg. §117-200.2(G).

¹⁴SC Reg. §117-200.2(I).

¹⁵SC Reg. §117-200.2(L).

¹⁶SC Reg. §117-200.2(M).

¹⁷SC Code §12-54-210.

If a person neglects or refuses to obey a summons from the Department, the Department may apply to any circuit judge to hold the person in contempt. Any judge may hear the application and, if satisfactory proof is made, will direct the sheriff of the county in which the person resides to arrest the person. Upon the person being brought before him, the judge will hear the case.¹⁸

It is a misdemeanor for a person to wilfully fail to keep records or supply information, at the time or times required by law or regulation. Upon conviction, the person must be fined not more than \$10,000, or imprisoned not more than one year, or both, together with the costs of prosecution.¹⁹

4. Confidentiality of Records

Except in accordance with proper judicial order or as otherwise provided by law, it is unlawful for a person to divulge or make known in any manner any particulars set forth or disclosed in any report or return required by the income tax, withholding, bank tax, building and loan income tax, or corporate license fee chapters of the South Carolina Code.²⁰ A person convicted of violating this prohibition is guilty of a misdemeanor and, upon conviction, must be fined not more than \$1,000, or imprisoned for not more than one year, or both. If the offender is an officer or an employee of South Carolina, he must be dismissed from office and is disqualified from holding any public office in South Carolina for a period of 5 years. If the offender is an officer or employee of a company retained by South Carolina on an independent contract basis for certain specified purposes, the contract is immediately terminated and the company is not eligible to contract with South Carolina for this purpose for a period of 5 years thereafter.²¹

Exceptions to this prohibition include sharing certain information with local governments and furnishing information to the Internal Revenue Service and other states.²²

¹⁸SC Code §12-54-110(D).

¹⁹SC Code §12-54-44(B)(3).

²⁰Chapters 6, 8, 11, 13, and 20 of Title 12, respectively.

²¹SC Code §12-54-240.

²²SC Code §§ 12-54-220 and 12-54-240.

B. Tax Procedure

1. Overview

The South Carolina Revenue Procedures Act (Act)²³ was enacted to provide a straightforward method of resolving any dispute with the Department. Some points to remember about the Act are:

1. Taxpayers are always given at least 30 days to respond to any tax authority at any stage in the dispute.
2. Taxpayers receive a hearing from an independent body, the Administrative Law Court,²⁴ before they have to pay any tax (except for real property taxes where they may have to pay 80% of the protested property tax assessed).
3. The Act provides that there is no remedy, other than those provided in the Act, in any case involving the illegal or wrongful collection of taxes or attempts to collect taxes.²⁵
4. Taxpayers may elect “small claims treatment” for disputes involving less than \$10,000. If the taxpayer elects small claims treatment neither the taxpayer nor the Department will be able to appeal the decision of the Administrative Law Judge. The decision does not set precedent for other cases.
5. For the purposes of this Act, “tax or taxes” means taxes, licenses, permits, fees, or other amounts, including interest and penalties, imposed by SC Code Title 12, or subject to assessment or collection by the Department.

Note: The Act also contains specific provisions on appealing license denials, license revocation and suspensions, and jeopardy assessments.²⁶

²³SC Code Chapter 60 of Title 12. It should be noted that the Revenue Procedures Act applies to local sales taxes administered by the Department and to property taxes which are administered jointly by the Department and local governments. It does not, however, apply to purely local government taxes, such as local business license fees.

²⁴Prior to April 26, 2004, the SC Administrative Law Court was known as the SC Administrative Law Judge Division. SC Code §1-23-500.

²⁵SC Code §12-60-80(A). See the Note in Section .10 B. 5. of this portfolio for an exception where the issue is the constitutionality of the statute.

²⁶See SC Code Subarticles 5 and 9 of Article 5 of Chapter 60.

2. Representation of Taxpayers before the Department and Contingent Fees in State Tax Matters

a. Authorized Taxpayer Representatives

The Act determines who may represent a taxpayer during the administrative tax process. It does not address the representation of taxpayers in hearings held by the Administrative Law Court or any other court. In general, the rules allow a return preparer to explain the return, and allow representation before the Department by attorneys, certified public accountants, and agents enrolled to practice before the Internal Revenue Service. Employees of companies may represent their employer in matters before the Department. Real estate appraisers who are registered, licensed, or certified in South Carolina may represent a party if the only matter in issue is the value of real estate. The Department has never objected to a taxpayer representative who is an attorney or certified public accountant licensed in a state other than South Carolina.²⁷

b. Contingent Fees in State Tax Matters

The Act looks to US Treasury Department Circular 230 and to professional rules of conduct in determining whether practitioners may charge contingent fees for representing taxpayers in the administrative tax process.²⁸ Circular 230 §10.27 and SC Rev. Rul. #04-3 discuss contingent fees and explain when a contingent fee will be allowed in connection with a tax matter. If otherwise allowed, a practitioner may charge a contingent fee for the preparation of, or advice rendered for, an amended tax return or claim for refund (other than a claim for refund on an original tax return) only if the practitioner reasonably anticipates that the amended return or the refund claim will receive substantive review by the Department. Note that all claims for refund that exceed \$5 million must be reviewed by the Budget and Control Board before a refund may be issued.²⁹

3. Assessment and Administrative Appeals³⁰

If the taxpayer and auditor do not agree on the result of an audit or other dispute with the Department, the appeals process begins when a proposed assessment or division decision is issued by a division of the Department.³¹ A “proposed assessment” is the first written notice sent or given to a taxpayer stating that a division within the Department has concluded that a tax

²⁷SC Code §12-60-90. See also Rule 9A of the Administrative Law Court Rules for who can practice before the Administrative Law Court, and the September 21, 1992, order of the South Carolina Supreme Court regarding the unauthorized practice of law, both reproduced in Worksheet 19.

²⁸SC Code §12-60-90(E).

²⁹SC Rev. Rul. #04-3.

³⁰See an Information Guide on Appeals, Worksheet 18.

³¹SC Code §12-60-420.

is due. However, the term does not include the auditor's work papers, draft audit reports, or any document specifically stating that it is not a proposed assessment.³² A "division decision" is a decision by a division of the Department that affects the rights or obligations of a person for which no specific appeals rights are provided by this Act; it includes the refusal to expunge or satisfy a lien.³³ The proposed assessment or division decision must be mailed or delivered to the taxpayer and must contain information as to the division's reasons for issuing the proposed assessment or division decision as well as information as to how the taxpayer may contest the proposed assessment or division decision.³⁴

After sending the proposed assessment or division decision, the Department must wait 90 days before issuing a final assessment. If a taxpayer protests the proposed assessment or division decision as described below, the Department may not issue a final assessment until the taxpayer's appeal is resolved. Certain exceptions apply to the restrictions on the time for assessments.³⁵

A taxpayer may appeal a proposed assessment or division decision by filing a protest with the Department within 90 days of the date of the proposed assessment. The written protest must contain information which identifies the taxpayer and gives reasons why the taxpayer believes the proposed assessment or division decision is incorrect.³⁶ A taxpayer may make its protest using Form C-245, Application for Appeal. If the taxpayer fails to file a timely written protest, the Department will assess the tax or take other appropriate action. Note, that the filing of a protest extends the time the Department has for issuing a final assessment.³⁷

After the protest has been filed, the taxpayer may be offered a conference.³⁸ The taxpayer may participate or refuse to participate in this conference.

Comment: In the authors' experiences many cases are settled in conference within the Audit Services section of the Department. If the case is not settled, factual issues may be resolved. The authors believe that taxpayers are generally served well by participating in settlement conferences, unless the taxpayer wants to litigate the issue as soon as possible, or the only issue is the constitutionality of a statute.

³²SC Code §12-60-30(23).

³³SC Code §12-60-30(13).

³⁴SC Code §12-60-420.

³⁵SC Code §12-60-440.

³⁶For a complete listing of what must be provided in the protest see SC Code §12-60-450(B).

³⁷SC Code §§ 12-60-450(C) and 12-54-85(G).

³⁸See SC Rev. Proc. #04-1 describing the Department's internal administrative appeal and settlement process.

If the taxpayer does not participate in a conference, or such conference has not disposed of the case, the Department will assign a Department representative to handle the appeal. If the taxpayer and the Department representative cannot settle the matter, they will attempt to stipulate the facts and issues involved in the appeal.

If the Department issues a determination adverse to the taxpayer, it will be in writing and mailed or delivered to the taxpayer. This determination is referred to as the “Department determination.” The Department determination must explain the basis for the Department’s decision and inform the taxpayer that he has the right to request a contested case hearing before the Administrative Law Court. The Department determination must also state that the tax will be assessed in 30 days unless the taxpayer requests a contested case hearing.³⁹ If the Department does not issue a Department determination within 9 months from the date the taxpayer files the written protest, then the taxpayer may request a contested case hearing before the Administrative Law Court for a determination.⁴⁰

Requests for a contested case hearing before the Administrative Law Court must be made in accordance with the Administrative Law Court rules. These rules require the taxpayer to file the request with the Department.

In certain instances, the Department is not bound to follow the procedures described above. For example, if a taxpayer fails or refuses to make any report or to file a return as required, the Department is allowed to make an estimate of tax liability and issue a proposed assessment using the best information available.⁴¹ Additionally, if the taxpayer fails to respond or participate in the settlement and stipulation process, the Department representative may view the appeal as abandoned and make a Department determination using any information available.

4. Claims for Refunds⁴²

A taxpayer may seek a refund of any state tax by filing a written claim for refund with the Department explaining why the refund should be granted. The appropriate division of the Department will decide if a refund is due and give the taxpayer a written decision as soon as practicable after the claim is filed. If the claim is denied, the taxpayer may appeal the division’s decision by filing a written protest within 90 days of denial of the refund and following the procedures for protesting an assessment of tax.

³⁹SC Code §§ 12-60-450(E)(1) and (2).

⁴⁰SC Code §12-60-450(E)(3).

⁴¹SC Code §12-60-430.

⁴²SC Code §12-60-470. A claim for refund must be filed within the period of limitations for claims for refund in SC Code §12-54-85(F). Generally a claim must be filed within 3 years from the date the return was filed or 2 years from the date of payment, whichever is later. The Department may extend these time limitations. SC Code §12-60-40. See Rev. Proc. Bull. #00-3 for a discussion of when claims from refunds can be accepted beyond the normal period of limitations. See Section .10 C. 4. of this portfolio.

A taxpayer may seek a contested case hearing before the Administrative Law Court after the final denial of the taxpayer's request for refund in a Department determination. The taxpayer has 30 days from the date of the Department determination to request a contested case hearing. This request must be filed with the Department.

A claim for refund can be amended prior to, but not after, the expiration of time for filing the claim for refund under SC Code §12-54-85(F). The claim, as amended, will be treated as if it was first filed when the amendment was filed, and the procedures and time periods involved will begin again.⁴³

If a taxpayer ultimately prevails on the merits in a lawsuit seeking a refund or abatement of a license fee or any tax based upon the allegation that the tax or fee has been imposed wrongfully as a matter of law, the Department will issue a refund to all similarly situated taxpayers who timely and properly applied for a refund.⁴⁴

If a taxpayer is due a refund, it must first be applied against any amount of that same tax that is currently assessed and due and outstanding from the taxpayer. The remaining refund, if any, must then be applied against any other state taxes that have been assessed against the taxpayer and that are currently due. If any excess remains, the taxpayer will be refunded that amount plus interest or such amount may be credited to the taxpayer's future tax liabilities.⁴⁵

5. Requirement to Exhaust Prehearing Remedies

For both a proposed assessed tax and a claim for refund, a taxpayer must exhaust his prehearing remedies before seeking a contested case hearing before the Administrative Law Court. Exhaustion requires that the taxpayer file a written protest and provide the facts, the law, and any other authority supporting the taxpayer's position to the Department employee handling the appeal.⁴⁶

If a taxpayer requests a contested case hearing prior to exhausting the prehearing remedy by failing to file a protest, the Administrative Law Judge will dismiss the matter without prejudice.⁴⁷

⁴³SC Code §12-60-470(H).

⁴⁴SC Code §12-60-480.

⁴⁵SC Code §12-60-490.

⁴⁶SC Code §12-60-30(15).

⁴⁷SC Code §12-60-3390.

If a taxpayer has failed to provide the Department with all the facts or law necessary for the Department to reach its conclusion, the Administrative Law Judge will remand the case to the Department for reconsideration unless the Department chooses to forego the remand. The time limitation for assessment remains suspended by SC Code §12-54-85(G) during the remand process.⁴⁸

Note: Exception regarding the constitutionality of a statute. When the sole issue is whether a statute is constitutional on its face, a declaratory judgement action may be brought in circuit court. This exception does not apply to a statute that is unconstitutional as applied to a person or a limited class of persons.⁴⁹

6. Small Claims Cases

A taxpayer who requests a contested case hearing may elect to designate the action as a small claims case if no more than \$10,000 of tax and penalties (but not including interest) are in controversy at the time of filing the request for a contested case hearing. The request that a matter be designated a small claims case must be made at the time of the request for a contested case hearing. The decision of the Administrative Law Judge in an action designated as a small claims case is final and conclusive and may not be reviewed by any court and has no precedential value for the purpose of other taxpayers' appeals. An appeal that raises a constitutional issue may not be designated a small claims case.⁵⁰

7. Class Action Suits

A claim or action for the refund of taxes may not be brought as a class action in the Administrative Law Court or any other court in South Carolina, and the Department, political subdivisions, or their instrumentalities may not be named as a defendant in any other class action brought in South Carolina.⁵¹

⁴⁸SC Code §12-60-510.

⁴⁹SC Code §12-60-80(B). In *Evans v. State of South Carolina*, 344 S.C. 60, 543 S.E. 2d 547 (2001), the SC Supreme Court held that where the plaintiff is only challenging an act as it applies to a limited class of persons, and not its constitutionality as a whole, the Department and the Administrative Law Court have the authority to rule on the plaintiff's constitutional claims.

⁵⁰SC Code §12-60-520.

⁵¹SC Code §12-60-80(C).

8. General Procedures in Revenue Cases Held Before the Administrative Court or Any Other Court

Requests for contested case hearings must be made in accordance with the rules of the Administrative Law Court.⁵² All parties to a contested case hearing must do their best to stipulate facts and issues involved in the hearing.⁵³

Contested case hearings are to be held without a jury and in accordance with the procedures set forth in the Administrative Procedures Act⁵⁴ and the Rules of Procedure for the Administrative Law Court.⁵⁵ No costs may be charged or allowed to either party, with limited exceptions.⁵⁶

The Administrative Law Court is required to make copies of their decisions (subject to rules of confidentiality) available to the public.⁵⁷

Except as otherwise provided, a party may appeal a decision of the Administrative Law Court to the circuit court of Richland County, South Carolina, except that a resident of this State may elect to bring the action in the circuit court for the county of his residence.⁵⁸ If the taxpayer or Department prematurely brings an action in circuit court, the judge will dismiss the case without prejudice.⁵⁹ Before appealing a matter to the circuit court, the taxpayer must pay the tax or post a bond.⁶⁰

⁵²SC Code §12-60-3310. The Administrative Law Court's rules and decisions are available on their website. See Section 11 Worksheet 1 for contact information. Their website is also available through a link on the Department's website, www.sctax.org.

⁵³SC Code §12-60-3320.

⁵⁴SC Code Chapter 23, Title 1.

⁵⁵SC Code §12-60-3340.

⁵⁶SC Code §12-60-3350.

⁵⁷SC Code §12-60-3360. The Administrative Law Court's rules and decisions are available on their website. See Section 11 Worksheet 1 for contact information. Their website is also available through a link on the Department's website, www.sctax.org.

⁵⁸SC Code §12-60-3380.

⁵⁹SC Code §12-60-3390.

⁶⁰SC Code §12-60-3370.

C. Time Limitations

1. Assessment of Tax

SC Code §12-54-85 specifically addresses time limitations for assessing a tax deficiency. As a general rule, the amount of taxes or fees due under laws administered by the Department must be determined and assessed within 36 months from the date the return or document was filed or due to be filed, whichever is later. If the tax or fee is not required to be remitted with a return or document, for instance in the case of the deed recording fee,⁶¹ the amount of taxes or fees due must be determined and assessed within 36 months after the later of the date the tax was due or the first date on which any part of the tax or fee was paid.

In certain instances, the Department may determine and assess taxes and fees after the 36 month limitation. For example, if a person signs a waiver allowing an extension of the 36 month period for issuing an assessment, the Department will be allowed additional time to assess the tax. Additionally, if the taxpayer failed to file a return or document as required by law, or there was a fraudulent intent to evade taxes or fees when filing the return or other document, the Department does not have to abide by the 36 month limitation on assessments.⁶² In addition, the statute for assessments is 72 months where there is a substantial understatement of total tax required to be shown on the return of 20% or more.⁶³

Moreover, in certain situations, the running of the period of limitations may be suspended. The assessment limitation period will be suspended: (1) for 90 days after the date the taxpayer gives notice of termination of a waiver or extension of the assessment period, (2) for 90 days after the date of a proposed assessment, (3) from the date of a proposed assessment until 90 days after a decision becomes final, if a taxpayer protests the proposed assessment, (4) from the date when an action is stayed by injunction, order of a court, or statutory prohibition, until 90 days after the injunction or prohibition is lifted, and, (5) during the pendency of a stay ordered by the Taxpayers' Rights Advocate.⁶⁴ A decision does not become final until the decision cannot be considered, heard, or reheard by request, appeal, or petition by the Administrative Court, or any other court.⁶⁵

⁶¹SC Code Chapter 24 of Title 12.

⁶²SC Code §12-54-85(C). At one time there was a statute that presumed that any tax due for more than 10 years had been paid. That statute was repealed effective August 1, 1995. Now there are no limitations on assessment of taxes where no return was filed and none on fraudulent returns. The Department has consistently taken the position that the former 10 year statute would continue to apply to taxes due before August 1, 1995; therefore it does not seek to make assessments for periods before August 1, 1985 (10 years prior to the August 1, 1995, effective date).

⁶³SC Code §12-54-85(C)(3).

⁶⁴See section .01 D. of this portfolio for a discussion of the Taxpayers' Bill of Rights and the Taxpayers' Rights Advocate.

⁶⁵SC Code §12-54-85(G).

Further, no tax may be collected by levy, warrant for distraint, or proceedings in court unless such actions were begun within 10 years of assessment of the tax, the taxpayer has agreed to extend this period, or the running of the period has been suspended.⁶⁶

2. Claims for Refunds

Generally, claims for refunds must be filed within 3 years of the time the return was filed or 2 years from the date of payment, whichever is later. If no return was filed, a claim for refund must be filed within 2 years from the date of payment. Refunds are limited to the amount paid immediately preceding the filing of the claim equal to 3 years plus the period of any extension of time for filing the return, or two years if the claim is not filed within the 3 year period.⁶⁷

3. Special Rules for Assessments and Claims for Refunds Due to Federal Income Tax Adjustments

Income taxes due to an understatement of taxes resulting from Internal Revenue Service adjustments may be determined after the 36 month limitation if they are assessed before 180 days after the Department receives notice from the taxpayer of the Internal Revenue Service's final determination.⁶⁸

A person, including a pass through entity, who conducts a trade or business (other than that of being an employee) must notify the Department in writing within 180 days after a final determination of tax adjustment (*i.e.*, the federal assessment date) is made by the Internal Revenue Service.⁶⁹

Notwithstanding the time limitation on filing a claim for refund in SC Code §12-54-85(F), a person may file a claim for refund within 180 days after the date that a final determination of a tax adjustment is made by the Internal Revenue Service. After the normal limitations period, this refund is limited to the overpayment of taxes resulting from adjustments made by the Internal Revenue Service.⁷⁰

⁶⁶SC Code §12-54-85(E).

⁶⁷SC Code §12-54-85(F).

⁶⁸SC Code §12-54-85(D).

⁶⁹SC Code §12-54-85(D)(2).

⁷⁰SC Code §12-54-85(D)(3).

4. Interpretation and Mitigation of the Time Limitations

Consistent with its longstanding administrative position, the Department interprets time limitations consistent with the following rules:⁷¹

1. If the taxpayer agrees to the Department's request that a waiver of the time limitations on assessments be extended, then the time the Department may mail a notice of assessment pursuant to SC Code §12-54-85 will be extended. In so doing, the Department will also consider the time within which a taxpayer may file a claim for refund to be extended until the agreed upon date. However, if the Department's extension is limited in any way, such as to a particular issue, then the extension for a refund by a taxpayer will be limited in the same way. This position only applies to effective extensions agreed to in writing with the Department.
2. A taxpayer must file a claim for refund within the time limitations and state the reasons for that request. SC Code §12-60-470(B)(5) requires a claim for refund to state the amount claimed, but, if after filing a timely claim for refund, the taxpayer discovers that a refund greater than the amount originally requested is due, the Department will consider such claims, but only if the adjustment is based upon issues raised in the timely filed claim for refund. No additional refund is allowed for new issues raised after the time limitations have expired.
3. The Department will apply the doctrines of setoff, equitable recoupment, and the mitigation provisions of Internal Revenue Code §§1311 - 1314.

D. Interest

If any tax is not paid when due, interest is due on the unpaid portion from the time the tax was due until the time the tax is paid in its entirety.⁷² A tax is due on the last day for its payment, without regard to any extension of time to pay or any jeopardy assessment. Any tax for which no payment date is provided is due on the date the liability arises.

Any tax refunded or credited must include interest on the amount of the credit or refund from the later of the date the tax was paid, or the original due date of the return, to the date the refund was sent or delivered to the taxpayer or the credit made. If any overpayment of tax is refunded within 75 days after the last day for filing the tax return, determined without regard to any extension of time for filing the return, or in the case of a return filed after the last date, is refunded within 75 days of the date the return was filed, no interest is due on the overpayment. If the taxpayer files a claim for credit or refund of tax, and the refund is paid within 75 days after the claim is filed, no interest is allowed on the overpayment from the date the claim is filed until the refund is paid.⁷³

⁷¹See SC Rev. Proc. Bull. #00-3.

⁷²SC Code §12-54-25.

⁷³SC Code §12-54-25(C).

The rate of interest on underpayments and overpayments is established by the Department in the same manner and at the same time as the underpayment rate provided in Internal Revenue Code Sections 6621(a)(2) and 6622.⁷⁴

E. Penalties

Civil and criminal tax penalties⁷⁵ are generally found in Chapter 54 of Title 12 of the SC Code. The following less common provisions should be noted:

1. The Department, in its discretion, may revoke one or more licenses held by the taxpayer for failure to comply with any law or regulation administered by the Department.⁷⁶
2. The Department may require any person to post a cash or surety bond if the person fails to file a timely return or pay any tax for as many as 2 tax filing periods in a 12 month period. The amount of the bond may not be greater than three times the estimated average liability each filing period. When the person required to post a bond complies with all requirements of law and regulations for a period of 24 consecutive months, the Department will return the bond and cancel the bonding requirements.⁷⁷
3. The substantial understatement of tax penalty of 25% of the underpayment attributable to the understatement is triggered if the understatement for the taxable period exceeds the greater of 10% of the tax required to be shown on the return for the taxable period or \$5,000. In the case of a corporation, other than an S corporation or a personal holding company (as defined in Internal Revenue Code §542), \$10,000 is substituted for \$5,000.⁷⁸

Other civil penalties include:

1. Failure to File. The penalty for failure to file a return by the date required, determined with regard to any extension of time for filing, is 5% of the amount of the tax if the failure is for not more than one month, with an additional 5% for each additional month or fraction of the month during which the failure continues, not to exceed 25%.⁷⁹

⁷⁴SC Code §12-54-25(D). The Department issues an Info. Ltr. quarterly listing the interest rate.

⁷⁵Most of the criminal tax provisions are in SC Code §12-54-44 and are not discussed in this portfolio.

⁷⁶SC Code §12-54-90.

⁷⁷SC Code §12-54-200.

⁷⁸SC Code §12-54-155.

⁷⁹SC Code §12-54-43(C).

2. Failure to Pay Amount Shown on Return. The penalty for failure to pay the amount shown as tax on any return by the date required, determined with regard to any extension of time for paying, is 0.5% of the amount of the tax if the failure is for not more than one month, with an additional 0.5% for each additional month or fraction of the month, during which the failure continues, not to exceed 25%.⁸⁰
3. Failure to Pay Amount Not Shown on Return. The penalty for failure to pay any amount of any tax required to be shown on a return which is not shown, including an assessment within ten days of the date of the notice and demand for payment, is 0.5% of the amount of the tax if the failure is for not more than one month, with an additional 0.5% for each additional month or fraction of a month during which the failure continues, not to exceed 25%.⁸¹
4. Negligence. The penalty for an underpayment of tax or part of a claim for refund of tax paid due to negligence or disregard of regulations is equal to the sum of 5% of the underpayment or claimed refund and 50% of the interest payable under SC Code §12-54-25. “Negligence” includes a failure to make a reasonable attempt to comply with the provisions of SC Code Title 12, and “disregard” includes careless, reckless, or intentional disregard.⁸²
5. Fraud. The penalty for an underpayment of tax required to be shown on a return due to fraud is the sum of 75% of the portion of the underpayment which is attributable to fraud and 50% of the interest payable under SC Code §12-54-25 with respect to that portion for the period beginning on the last day prescribed by law for payment of the underpayment, determined without regard to any extension, and ending on the date of the assessment of the tax or, if earlier, the date of the payment of the tax. If a portion of an underpayment is attributable to fraud, the entire underpayment must be treated as attributable to fraud, except that portion of the underpayment which the taxpayer establishes is not attributable to fraud.⁸³
6. Failure to Obtain License. The penalty for failure of a person who must obtain a license for identification purposes, and who fails to obtain or display the license properly, or to comply with statutory provisions, is not less than \$50 nor more than \$500 for each failure.⁸⁴

⁸⁰SC Code §12-54-43(D).

⁸¹SC Code §12-54-43(E).

⁸²SC Code §12-54-43(F).

⁸³SC Code §12-54-43(G).

⁸⁴SC Code §12-54-43(H).

7. Intentional Delay or Frivolous position. If a person:
 - a. Files what purports to be a return of the tax imposed by a law administered by the Department but which:
 - (i) Does not contain information on which the substantial correctness of the tax liability may be judged; or
 - (ii) Contains information that on its face indicates the liability is substantially incorrect; and
 - b. Whose conduct is due to:
 - (i) A position which is frivolous; or
 - (ii) A desire, which appears on the purported return, to delay or impede the administration of state tax laws;

He is liable for a penalty of \$500. This penalty is in addition to all other penalties provided by law.⁸⁵

8. Intentional Delay or Frivolous Position. Whenever it appears to an Administrative Law Judge that proceedings before him have been instituted or maintained by the taxpayer primarily for delay or that the taxpayer's position in the proceedings is frivolous or groundless, damages in an amount not to exceed \$5,000 must be awarded to the State.⁸⁶
9. Failure to Keep Records or Comply with Regulations. The penalty for failing to keep books, papers, memoranda, records, render statements, make returns, and comply with regulations as the Department prescribes is an amount not to exceed \$500 for the period covered by the return in addition to other penalties provided by law.⁸⁷

Note: The Department imposes this penalty for failure to file the report required by the job development and retraining credits itemizing the sources and uses of funds.⁸⁸

⁸⁵SC Code §12-54-43(I).

⁸⁶SC Code §12-54-43(J).

⁸⁷SC Code §12-54-210.

⁸⁸See SC Code §§12-10-80, 12-10-81 and 12-10-95. See Section .06 B. 3. of this portfolio for a discussion of the job development and retraining credits.

10. Failure to Deposit or Pay Withholding. The penalty for failing to deposit or pay taxes deducted and withheld pursuant to SC Code Title 12, Chapter 8, Article 5⁸⁹ is not less than \$10 nor more than \$1,000. This penalty also applies to withholding agents that are required to pay by electronic funds transfer and fail to do so.⁹⁰
 11. Failure to Give Withholding Statement to Employee. The penalty for failing to comply with the provisions requiring the furnishing of a withholding statement to employees is not less than \$100 nor more than \$1,000 for each violation. Each withholding statement required to be provided to each employee is considered a separate violation.⁹¹
 12. Failure to File Withholding Statement. The penalty for failing to file withholding statements with the Department is not less than \$100 nor more than \$2,000 for each violation. Each withholding statement required to be provided to the Department is considered a separate violation.⁹²
 13. Underpayment of Estimated Tax. The penalty for an underpayment of declaration of estimated tax by a corporate taxpayer, instead of all other penalties provided by law, is an amount determined in the same manner as prescribed by the provisions of Internal Revenue Code §6655 and applicable regulations, except that:
 - a. The small amount provisions are \$100⁹³ and
 - b. For the annualized installment method, income for the first installment is annualized using the first 3 months of the taxable year.⁹⁴
- Note:** Corporate estimated tax payments are deemed to first apply to income taxes and then to license fees.⁹⁵
14. Bad Check Charge. The penalty for a bank refusing payment of a check or electronic payment on account of insufficient funds is \$15, in addition to all other penalties.⁹⁶

⁸⁹See Section .09 of this portfolio.

⁹⁰SC Code §12-54-43 (K). See SC Code §12-54-250(A) and Section .09 B.3.a. above regarding the electronic funds transfer requirement.

⁹¹SC Code §12-54-42.

⁹²SC Code §12-54-42.

⁹³SC Code §12-54-55. See Internal Revenue Code §6655(f).

⁹⁴SC Code §12-6-3910(A).

⁹⁵SC Code §12-6-3910(D).

⁹⁶SC Code §12-54-50.

F. Other Charges

The Department imposes a 20% collection assistance fee on tax debts⁹⁷ that are at least 120 days old. The fee is imposed on the overdue tax;⁹⁸ it is not imposed if the taxpayer enters into a timely instalment agreement and makes all payments required. The Department may waive the fee to the same extent as if it was a penalty.⁹⁹ See Section .10 F. of this portfolio for a discussion of penalty waivers.

G. Appeals of Penalties and Interest

Penalties and interest are treated as taxes and can be appealed like taxes even if there is no tax in dispute.¹⁰⁰

The Department is authorized to waive, dismiss, or reduce penalties.¹⁰¹ SC Rev. Proc. Bull. #02-5 describes the reasons for which the Department will waive or reduce penalties and the procedures a taxpayer should follow to request waiver, *i.e.*, complete or partial adjustment of a penalty. In general, the appropriate treatment of a penalty is a question of fact to be considered on a case by case basis. A complete penalty waiver is appropriate when the taxpayer's failure is due to reasonable cause. The general standard for determining whether reasonable cause exists is whether the taxpayer exercised ordinary business care and prudence. A partial penalty waiver (*i.e.*, one that does not waive the entire penalty) may be appropriate when reasonable cause required by the taxpayer does not exist, but significant mitigating factors are present. The general standard for determining whether significant mitigating factors are present is based upon the Department's review of the taxpayer's filing and payment history, and the complexity, amount, frequency, and materiality of the error or understatement.¹⁰² Note: If reasonable cause or significant mitigating factors do not exist, the originally proposed or assessed penalty should be imposed. If financial hardship is an issue, penalty waiver is not the remedy. A taxpayer who is unable to pay the entire amount owed should review the applicability of the Department's Offer in Compromise program.¹⁰³

⁹⁷See Act No. 248, Part IB, Section 64, Proviso 64.8 (2004). A "tax debt" means the total amount of tax, fees, penalties, interest, and costs for which notice has been issued by the Department to a taxpayer. "Notice" means a notice of proposed assessment or notice of assessment issued by the Department to the taxpayer.

⁹⁸See Act No. 248, Part IB, Section 64, Proviso 64.8 (2004). An "overdue tax debt" is any part of a tax debt that remains unpaid 120 days or more after first notice.

⁹⁹The collection assistance fee is effective for all tax debts incurred before December 1, 2002, which remain outstanding on December 1, 2002, and all tax debts incurred after December 1, 2002. See Act No. 248, Part IB, Section 64, Proviso 64.8 (2004).

¹⁰⁰SC Code §12-60-30(26) and (27).

¹⁰¹SC Code §12-54-160.

¹⁰²See SC Rev. Proc. Bull. #02-5 for examples.

¹⁰³SC Rev. Proc. Bull. #02-5.

Comment: If a proposed assessment contains a penalty, the taxpayer should always consult SC Rev. Proc. Bull. #02-5 and consider requesting a waiver or reduction.

There is no specific authority granting the Department the right to waive or reduce interest¹⁰⁴, but on rare occasions interest has been deemed to be in the nature of a penalty and waived. Interest has been deemed to be in the nature of a penalty and waived when the Department has agreed with the taxpayer that an item was not taxable, that agreement was not binding upon the Department, and it was later determined that the item was taxable.¹⁰⁵

H. Administrative Dissolution for Failure to Pay Taxes

The Department must notify the Secretary of State if a corporation, including an LLC taxed as a corporation, fails to file the appropriate income tax return and annual report, or pay any taxes, fees or penalties.¹⁰⁶ When the Secretary of State's Office receives the notice, it will administratively dissolve a domestic corporation, or revoke a foreign corporation's authority to transact business in South Carolina. A corporation which has been administratively dissolved may apply to the Secretary of State for reinstatement. If granted, the reinstatement relates back to and takes effect as of the effective date of the administrative dissolution. Then the corporation resumes carrying on its business as if the administrative dissolution had never occurred.¹⁰⁷

Note: After cancellation of a corporate charter as a result of non-payment of taxes or fees, SC Reg. §117-870.1 provides that when the business continues operating, the shareholders are required to file a partnership income tax return, and each shareholder/partner is liable for income tax on his share of the income. This regulation was promulgated before South Carolina law provided that a reinstatement relates back to the effective date of the dissolution. It appears that partnership returns are due after the dissolution, but if the corporation is reinstated, those returns would retroactively not be required; corporate returns would be due. If partnership returns were filed and the "partners" paid income tax on this income, any refund due after the corporate returns are filed depends upon whether a claim for refund is filed within the time limitations.

¹⁰⁴SC Code §12-4-320(3). The Department has the authority to compromise taxes, interest, and penalties. This authority is often used to settle appeals based upon the hazards of litigation; compromising the tax also reduces the interest.

¹⁰⁵See *Colonial Life & Accident Insurance Company v. South Carolina Tax Commission*, 248 S.C. 334 (1966), and *Texaco, Inc., v. Robert C. Wasson*, 269 S.C. 255 (1977).

¹⁰⁶SC Code§12-6-5520. See also SC Code §§33-14-200, 33-44-809, 33-15-300, and 33-44-1006.

¹⁰⁷SC Code §33-14-220.