

**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.**

## **Work Papers**

Worksheet 1	Contact Information
Worksheet 2	Information Guide on Requesting a PLR (Not included in this draft. Available through the Department's website, <a href="http://www.sctax.org">www.sctax.org</a> .)
Worksheet 3	Income Tax Credits - Summary Chart
Worksheet 4	Nexus Questionnaire (Not included in this draft. Available through the Department's website, <a href="http://www.sctax.org">www.sctax.org</a> .)
Worksheet 5	SC Taxation of LLCs
Worksheet 6	Notes on Other US and SC Constitutional Limitations
Worksheet 7	Form 1120 (Not included in this draft. Available through the Department's website, <a href="http://www.sctax.org">www.sctax.org</a> .)
Worksheet 8	Form 1120S (Not included in this draft. Available through the Department's website, <a href="http://www.sctax.org">www.sctax.org</a> .)
Worksheet 9	CL-1 (Not included in this draft. Available through the Department's website, <a href="http://www.sctax.org">www.sctax.org</a> .)
Worksheet 10	SCTC 111 (Not included in this draft. Available through the Department's website, <a href="http://www.sctax.org">www.sctax.org</a> .)
Worksheet 11	<i>Geoffrey</i> (Not included in this draft.)
Worksheet 12	Public Law 86-272
Worksheet 13	C-268 (Certificate of Compliance) (Not included in this draft. Available through the Department's website, <a href="http://www.sctax.org">www.sctax.org</a> .)
Worksheet 14	SC Rev. Proc. #95-4 – Fairness (Not included in this draft. Available through the Department's website, <a href="http://www.sctax.org">www.sctax.org</a> .)
Worksheet 15	SC Rev. Proc. Bull. #02-4 - Economic Development (Not included in this draft. Available through the Department's website, <a href="http://www.sctax.org">www.sctax.org</a> .)
Worksheet 16	SC Rev. Proc. Bull. #02-5 - Penalty Waiver (Not included in this draft. Available through the Department's website, <a href="http://www.sctax.org">www.sctax.org</a> .)
Worksheet 17	SC Rev. Rul. #99-5 - Job Tax Credit and SC Rev. Rul. #05-5 – Job Tax Credit Meaning of “Expansion” (Not included in this draft. Available through the Department's website, <a href="http://www.sctax.org">www.sctax.org</a> .)
Worksheet 18	Information Guide on Appeals (Not included in this draft. Available through the Department's website, <a href="http://www.sctax.org">www.sctax.org</a> .)
Worksheet 19	Representation of Taxpayers
Worksheet 20	Administrative Law Court Rules (Not included in this draft. Available through the Administrative Law Court website, <a href="http://www.scalc.net">www.scalc.net</a> .)

# Worksheet 1

## Contact Information

### Department of Revenue Contact Information

Appeals and Audit Review	803-898-5616
Corporate Tax Section	803-898-5705
Electronic Funds Transfer Help Desk	1-800-476-0311 or 803-898-5740
Forms	803-898-5320
General Information	803-898-5000
Problems Resolution	803-898-5873
Registration	803-898-5872
Taxpayer Rights Advocate	803-898-5444
Voluntary Filer/Nexus Questions	803-898-5664
Withholding Section	803-898-5752
Other Phone Numbers	<a href="http://www.sctax.org">www.sctax.org</a>

### Other State Agencies

SC Government.

[www.myscgov.com](http://www.myscgov.com)

**Note:** This website includes links to all South Carolina state and local government websites, including legislative and judicial sites.

Administrative Law Court

PO Box 11667

Columbia, SC 29211

803-734-0550

[www.scalc.net](http://www.scalc.net)

Coordinating Council for Economic Development

(at the Department of Commerce)

PO Box 927

Columbia, SC 29202

803-737-0095

[www.sccommerce.com](http://www.sccommerce.com)

Department of Archives and History  
8301 Parklane Road  
Columbia, SC 29223  
803-896-6174  
[www.state.sc.us/scdah](http://www.state.sc.us/scdah)

Department of Commerce  
PO Box 927  
Columbia, SC 29202  
803-737-0400  
[www.sccommerce.com](http://www.sccommerce.com)

Department of Insurance  
PO Box 100105  
Columbia, SC 29202-3105  
803-737-6160 (general questions) or 803-737-6088 (moratorium questions)  
[www.doi.state.sc.us](http://www.doi.state.sc.us)

Department of Social Services  
PO Box 1520  
Columbia, SC 29202-1520  
803-898-7601  
[www.state.sc.us/dss](http://www.state.sc.us/dss)

Employment Security Commission  
PO Box 995  
Columbia, SC 29202  
803-737-2400  
[www.sces.org](http://www.sces.org)

Secretary of State  
PO Box 11350  
Columbia, SC 29211  
803-734-2170  
[www.scsos.com](http://www.scsos.com)

Small and Minority Business Assistance Office  
1205 Pendleton Street, Suite 329  
Columbia, SC 29201  
803-734-0657  
[www.govoep.state.sc.us/osmba](http://www.govoep.state.sc.us/osmba)

**WORKSHEET 3**

**SUMMARY OF SOUTH CAROLINA BUSINESS TAX CREDITS IN CHAPTERS 6, 10, AND 14 OF TITLE 12 AND TITLES 6 AND 11**

**(CAUTION: This is a summary written in general terms. It may not be relied on as a substitute for researching original sources of authority. Revised April 2005.)**

\*“Entities Qualifying for the Credit” refer to those entities which generate the particular tax credit. Each credit has detailed requirements that should be reviewed which may limit the use of a credit passed through to certain entities subject to tax under a specific code section.

CREDIT	CREDIT AVAILABLE AGAINST				ENTITIES QUALIFYING FOR THE CREDIT*				
	Individual Income Tax (12-6-510)	Corporate Income Tax (12-6-530)	License Tax (12-20-50)	Other Taxes Administered by DOR	C Corporation	S Corporation	Partnership	Limited Liability Company	Sole Proprietor
<p><b>Job Tax Credit</b> SC Code §12-6-3360 Forms TC-4 and 616</p> <ul style="list-style-type: none"> <li>•Credit of \$1,500 to \$8,000 per qualifying job for 5 years based on county ranking of distressed (\$8,000), least developed (\$4,500), under developed (\$3,500), moderately developed (\$2,500), or developed (\$1,500).</li> <li>•Additional \$1,000 credit per qualifying job if in multicounty park.</li> <li>•Additional \$1,000 credit per qualifying job if taxpayer meets requirements of Brownfields Voluntary Cleanup Program.</li> <li>•Must be manufacturing, processing, tourism, warehousing, distribution, research &amp; development, corporate office facility, qualifying service related facility, or technology intensive facility.</li> <li>•Create and maintain monthly average of 10 jobs generally; hotel/motel requires 20 jobs; qualified service related facility requires 30, 75, 125 or 250 jobs based on compensation, however, a health service facility in any county, or a retail facility or service related industry in a “distressed” or “least developed” county, requires 10 jobs</li> <li>•Limited to 50% of income tax liability</li> <li>•15 year carryforward</li> </ul>	X	X			X	X	X	X	X
<p><b>Job Development Credit</b> SC Code §§12-10-50(A), 12-10-80 and 12-10-81 Forms WH 1605 and 1606/EAZ/RDA</p> <ul style="list-style-type: none"> <li>•Credit of 55% to 100% depending on location of project based on 2% to 5% of gross wages paid to new employees</li> <li>•Discretionary incentive approved by the Coordinating Council for Economic Development at the Department of Commerce</li> <li>•Refundable from employee withholding to use for, or reimburse the cost of, qualifying expenditures</li> <li>•Business of type eligible for job tax credit</li> <li>•Provide health care</li> <li>•Revitalization Agreement with Coordinating Council of Department of Commerce</li> <li>•10 - 15 year maximum benefit</li> </ul>				X  Wage Withholding	X	X	X	X	X

CREDIT	CREDIT AVAILABLE AGAINST				ENTITIES QUALIFYING FOR THE CREDIT*				
	Individual Income Tax (12-6-510)	Corporate Income Tax (12-6-530)	License Tax (12-20-50)	Other Taxes Administered by DOR	C Corporation	S Corporation	Partnership	Limited Liability Company	Sole Proprietor
<p><b>Job Retraining Credit</b> SC Code §§12-10-50(B) and 12-10-95 Forms WH 1605 and 1606/EAZ/RDA</p> <ul style="list-style-type: none"> <li>•Credit up to \$500 a year for each employee being retrained in production, technology, export, or for each employee in an apprenticeship program; \$2,000 maximum credit per employee over 5 years</li> <li>•Discretionary incentive approved by the Coordinating Council for Economic Development at the Department of Commerce</li> <li>•Refundable from employee withholding to use for, or reimburse the cost of, qualifying retraining or apprenticeship programs</li> <li>•Must be manufacturing, processing, or technology intensive facility</li> <li>•Provide health care</li> <li>•Retraining Agreement with Coordinating Council of Department of Commerce</li> <li>•Retraining approved by a technical college</li> <li>•Employer must match amount claimed as credit</li> </ul>				X  Wage Withholding	X	X	X	X	X
<p><b>Research and Development Credit</b> SC Code §12-6-3415 Form TC-18</p> <ul style="list-style-type: none"> <li>•Credit of 5% of qualified SC research expenses</li> <li>•Must claim tax credit under Internal Revenue Code §41</li> <li>•Limited to 50% of corporate income tax or license fee liability remaining after all other credits</li> <li>•Unused credit must be used before a tax year beginning 10 years from the qualified expenditure date</li> </ul>		X	X		X	X, only at corporate level		X, only if LLC is taxed as a corporation	

CREDIT	CREDIT AVAILABLE AGAINST				ENTITIES QUALIFYING FOR THE CREDIT*				
	Individual Income Tax (12-6-510)	Corporate Income Tax (12-6-530)	License Tax (12-20-50)	Other Taxes Administered by DOR	C Corporation	S Corporation	Partnership	Limited Liability Company	Sole Proprietor
<b>Economic Impact Zone Investment Tax Credit</b> SC Code §12-14-60 Forms TC-11 and TC-11R  <ul style="list-style-type: none"> <li>•Credit of 1% to 5% of cost of property based on property recovery period under Internal Revenue Code §168(e)</li> <li>•Qualified manufacturing and productive equipment must be placed in service in a South Carolina economic impact zone</li> <li>•Limited to \$5 million for taxpayers subject to §12-20-100, such as utilities</li> <li>•10 year carryforward</li> <li>•Basis reduction for amount of credit</li> <li>•Recapture if disposed or removed from zone during applicable recovery period</li> </ul>	X	X			X	X	X	X	X
<b>Corporate Headquarters Credit</b> SC Code §12-6-3410 Form TC-8  <ul style="list-style-type: none"> <li>•Part I - Credit of 20% of qualifying real property costs if incur at least \$50,000 of real property costs &amp; create at least 40 new jobs with required functions</li> <li>•Part II - Additional 20% credit for personal property if 75 new jobs are created having headquarters functions and certain wages</li> <li>•10 year carryforward; 15 year carryforward if additional job requirements are met</li> <li>•Basis reduction for amount of credit</li> </ul>		X	X		X	X, only at corporate level		X, only if LLC is taxed as a corporation	

CREDIT	CREDIT AVAILABLE AGAINST				ENTITIES QUALIFYING FOR THE CREDIT*				
	Individual Income Tax (12-6-510)	Corporate Income Tax (12-6-530)	License Tax (12-20-50)	Other Taxes Administered by DOR	C Corporation	S Corporation	Partnership	Limited Liability Company	Sole Proprietor
<p><b>Infrastructure Construction or Improvement Credit</b> SC Code §12-6-3420 Form TC-6</p> <ul style="list-style-type: none"> <li>•Credit of 50% of certain expenses or contributions for water lines, sewer lines, or roads</li> <li>•Project must be dedicated to public use and not exclusively benefit taxpayer</li> <li>•Credit lost to extent expenditures benefit taxpayer</li> <li>•\$10,000 annual limit per project</li> <li>•3 year carryforward up to \$30,000</li> <li>•Recapture if road removed from public use</li> </ul>		X			X	X, only at corporate level		X, only if LLC is taxed as a corporation	
<p><b>Credit for Hiring Family Independence Recipient</b> SC Code §12-6-3470 Forms TC-12 and TC12-A</p> <ul style="list-style-type: none"> <li>•“Basic credit” of 20% of wages paid to employee for each full month during first 12 months of employment, 15% of wages during second 12 months, and 10% of wages during third 12 months</li> <li>•“Additional credit” of \$175 per full month during first 36 months of employment (up to \$2,100 each qualifying year) if full time job is located in a county ranked as “distressed” or “least developed.”</li> <li>•Make health insurance available to recipient on same basis as all employees</li> <li>•Apply to Department of Social Services for certification of eligibility by 15th day after tax year end</li> <li>•Maximum \$5,500 “basic credit” per employee combined with job tax credit; maximum does not apply to a taxpayer in a “distressed” county.</li> <li>•15 year carryforward</li> </ul>	X	X			X	X	X	X	X

CREDIT	CREDIT AVAILABLE AGAINST				ENTITIES QUALIFYING FOR THE CREDIT*				
	Individual Income Tax (12-6-510)	Corporate Income Tax (12-6-530)	License Tax (12-20-50)	Other Taxes Administered by DOR	C Corporation	S Corporation	Partnership	Limited Liability Company	Sole Proprietor
<b>Credit for Hiring Displaced Worker</b> SC Code §12-6-3450 Form TC-10  <ul style="list-style-type: none"> <li>•Credit of 10% of qualified wages paid for the tax year</li> <li>•Employee's job in a South Carolina economic impact region was terminated due to closing of military or other federal facility</li> <li>•Terminated employee certified by SC Employment Security Commission</li> <li>•10 year carryforward</li> <li>•Reduce deduction for wages by amount of credit</li> </ul>	X	X			X	X	X	X	X
<b>Minority Business Credit</b> SC Code §12-6-3350 Form TC-2  <ul style="list-style-type: none"> <li>•Credit of 4% of payments to subcontractor</li> <li>•State contractor subcontracting with certified minority firm</li> <li>•Limited to one consecutive 6 tax year credit period</li> <li>•Maximum \$25,000 per year</li> <li>•No carryforward</li> </ul>	X	X			X	X	X	X	X

CREDIT	CREDIT AVAILABLE AGAINST				ENTITIES QUALIFYING FOR THE CREDIT*				
	Individual Income Tax (12-6-510)	Corporate Income Tax (12-6-530)	License Tax (12-20-50)	Other Taxes Administered by DOR	C Corporation	S Corporation	Partnership	Limited Liability Company	Sole Proprietor
<b>Community Development Corporation Investment Credit</b> SC Code §12-6-3530 Form TC-14  <ul style="list-style-type: none"> <li>•Credit of 33% of qualifying investment or of a pro rata amount if total credits for all taxpayers exceeds \$5 million</li> <li>•\$1 million maximum credit for all taxpayers in one calendar year</li> <li>•\$5 million maximum credit for all calendar years</li> <li>•10 year carry forward</li> <li>•Certification from SC Department of Commerce</li> <li>•Effective for tax years beginning after 2000</li> <li>•Credit terminates on June 30, 2010</li> </ul>	X	X		X Bank Tax	X	X	X	X	X
<b>Child Care Program Credit</b> SC Code §12-6-3440 Form TC-9  <ul style="list-style-type: none"> <li>•Credit of 50% of capital expenditures, up to \$100,000</li> <li>•Credit of 50% of child care payments, not to exceed \$3,000 per participating employee per year</li> <li>•Total credit limited to 50% of tax liability</li> <li>•10 year carryforward</li> </ul>	X	X		X Bank Tax	X	X	X	X	X

CREDIT	CREDIT AVAILABLE AGAINST				ENTITIES QUALIFYING FOR THE CREDIT*				
	Individual Income Tax (12-6-510)	Corporate Income Tax (12-6-530)	License Tax (12-20-50)	Other Taxes Administered by DOR	C Corporation	S Corporation	Partnership	Limited Liability Company	Sole Proprietor
<b>Conservation Credit</b> SC Code §12-6-3515 Form TC-19  <ul style="list-style-type: none"> <li>•Credit of 25% of federal charitable deduction for a gift of land for conservation or for a qualified conservation contribution on a SC real property interest, not to exceed \$250 per acre</li> <li>•Maximum \$52,500 per year per original transferor</li> <li>•Unlimited carryforward</li> <li>•Unused credit may be transferred upon approval by Department</li> </ul>	X	X			X	X	X	X	X
<b>Energy Conservation &amp; Renewable Energy Credit</b> SC Code §12-6-3340 Form TC-1  <ul style="list-style-type: none"> <li>•Credit of 25% of expenditures for the purchase and installation of conservation tillage equipment, certain drip/trickle irrigation systems, and dual purpose combination truck and crane equipment</li> <li>•One time \$2,500 maximum credit for all years for each type of conservation or energy measure</li> <li>•5 year carryforward</li> </ul>	X	X			X	X	X	X	X

CREDIT	CREDIT AVAILABLE AGAINST				ENTITIES QUALIFYING FOR THE CREDIT*				
	Individual Income Tax (12-6-510)	Corporate Income Tax (12-6-530)	License Tax (12-20-50)	Other Taxes Administered by DOR	C Corporation	S Corporation	Partnership	Limited Liability Company	Sole Proprietor
<b>Water Impoundment Credit</b> SC Code §12-6-3370 Form TC-3  <ul style="list-style-type: none"> <li>•Credit of 25% of expenditures for construction, installation, or restoration of ponds, lakes, other water impoundments and water control structures designed for water storage</li> <li>•Construction permit issued by Department of Health and Environmental Control or proof of exemption from DHEC, Natural Resources Conservation District, or local Soil and Water Conservation District</li> <li>•Maximum \$2,500 credit per year</li> <li>•5 year carryforward</li> </ul>	X	X			X	X	X	X	X
<b>Textile Revitalization Credit</b> SC Code §6-32-40(A)(2) Form TC-23  <ul style="list-style-type: none"> <li>•Credit of 25% of rehabilitation expenses for the renovation, improvement, and redevelopment of SC abandoned textile mills</li> <li>•For eligible sites placed in service after July 1, 2004</li> <li>•Credit claimed in equal amounts for 5 years beginning in year property is placed in service</li> <li>•5 year carryforward</li> <li>•Credit is in addition to the rehabilitation credit allowed in SC Code §12-6-3535</li> <li>•Special rules for allocation of credit by partnerships</li> <li>•May elect a property tax credit under SC Code §6-32-40(A)(1) in lieu of this income tax credit</li> <li>•Credit repealed July 1, 2014</li> </ul>	X	X			X	X	X	X	X
<b>Credit for Rehabilitation of Certified Historic Structure</b> SC Code §12-6-3535(A) Form TC-21  <ul style="list-style-type: none"> <li>•Credit of 10% of qualified rehabilitation expenditures for SC certified historic structure that qualify the federal credit under Internal Revenue Code §47.</li> <li>•Must claim credit under Internal Revenue Code §47</li> <li>•Credit claimed in equal amounts for 5 years beginning in year property is placed in service</li> <li>•Additional work done for 5 years while credit is being claimed must be consistent with Standards for Rehabilitation, otherwise unused credit is forfeited</li> <li>•Application and certification with SC Department of Archives and History</li> <li>•5 year carryforward of any credit installment</li> </ul>	X	X			X	X	X	X	X

CREDIT	CREDIT AVAILABLE AGAINST				ENTITIES QUALIFYING FOR THE CREDIT*				
	Individual Income Tax (12-6-510)	Corporate Income Tax (12-6-530)	License Tax (12-20-50)	Other Taxes Administered by DOR	C Corporation	S Corporation	Partnership	Limited Liability Company	Sole Proprietor
<b>Habitat Management Credit</b> SC Code §12-6-3520  <ul style="list-style-type: none"> <li>•Credit of 50% of qualifying costs for habitat management or construction and maintenance of improvements to designated land</li> <li>•Meet requirements of Department of Natural Resources regulations</li> <li>•Land must be certified or determined in need</li> <li>•Limited to 50% of tax liability</li> <li>•10 year carryforward</li> <li>•Recapture if voluntarily leave agreement</li> <li>•Effective only if sufficient funding is available</li> </ul>	X	X			X	X	X	X	X
<b>Palmetto Seed Credit</b> SC Code §12-6-3430 Form TC-7  <ul style="list-style-type: none"> <li>•Credit equal to lesser of: (1) all qualified investments during tax year times 30% or (2) 50% of qualified investments during all years times 30%</li> <li>•Investment in Palmetto Seed Capital Corporation or Limited Partnership</li> <li>•Limited to tax liability after use of all other credits</li> <li>•\$5 million maximum credit for all taxpayers</li> <li>•10 year carryforward</li> <li>•Chapter 44, Title 41, containing the Palmetto Seed Capital Fund Limited Partnership, is repealed once the President of the Palmetto Capital Corporation certifies the investments have been liquidated.</li> </ul>	X	X		X Bank Tax	X	X	X	X	X
<b>Venture Capital Investment Credit</b> SC Code Title 11, Chapter 45 Form SC 1101B  <ul style="list-style-type: none"> <li>•Tax credit certificate issued by SC Venture Capital Fund if Fund is unable to repay debt to lender</li> <li>•Bank must lend money to SC Venture Capital Fund</li> <li>•Maximum \$50 million in tax credits issued at one time</li> <li>•Maximum \$20 million in tax credit used in one year</li> <li>•Unlimited carryforward</li> <li>•Unused credit may be transferred among bank and insurance company lenders</li> </ul>				X Bank Tax					

CREDIT	CREDIT AVAILABLE AGAINST				ENTITIES QUALIFYING FOR THE CREDIT*				
	Individual Income Tax (12-6-510)	Corporate Income Tax (12-6-530)	License Tax (12-20-50)	Other Taxes Administered by DOR	C Corporation	S Corporation	Partnership	Limited Liability Company	Sole Proprietor
<p><b>Motion Picture Project Credit</b> SC Code §12-6-3570(A) Forms TC-25</p> <ul style="list-style-type: none"> <li>•Credit of 20% of qualifying cash investment</li> <li>•Minimum \$250,000 SC project costs &amp; minimum SC filming days</li> <li>•Project certified by SC Film Commission at Department of Commerce</li> <li>•\$100,000 maximum credit per taxpayer per project</li> <li>•Limited to 50% of tax liability when combined with any other income tax credit</li> <li>•15 year carryforward</li> <li>•Credit recapture if project does not timely meet statutory requirements</li> </ul> <p>Note: See Sections .06 B. 21. and .05 C. 3. of this portfolio for a discussion of the term “taxpayer” for purposes of credit eligibility.</p>	X	X				X (see note)	X (see note)	X, only if LLC is not taxed as a corporation (see note)	
<p><b>Motion Picture Production/Post Production Facility Credit</b> SC Code §12-6-3570(B) Forms TC-25</p> <ul style="list-style-type: none"> <li>•Credit of 20% of value of qualifying investment</li> <li>•Minimum \$1-2 million facility investment</li> <li>•Facility certified by SC Film Commission at Department of Commerce</li> <li>•\$5 million maximum credit for all taxpayers per project</li> <li>•Limited to 50% of tax liability when combined with any other income tax credit</li> <li>•15 year carryforward</li> <li>•Credit recapture if facility does not timely meet statutory requirements</li> </ul>	X	X			X	X	X	X	X
<p><b>Commercial Production Credit</b> SC Code §12-6-3560 Form TC-24</p> <ul style="list-style-type: none"> <li>•Credit of 10% of SC investment in certified commercial production</li> <li>•Must be producing an advertisement, composed of moving images and words, that is recorded on film, videotape, or digital medium in SC for multi-market distribution via television, cable, satellite, or motion picture theater</li> <li>•Production certified by SC Film Commission at the Department of Commerce</li> <li>•Total investment in State certified production must be \$500,000 in calendar year</li> <li>•\$1 million maximum credit for all taxpayers in one year</li> </ul>	X	X			X	X	X	X	X

CREDIT	CREDIT AVAILABLE AGAINST				ENTITIES QUALIFYING FOR THE CREDIT*				
	Individual Income Tax (12-6-510)	Corporate Income Tax (12-6-530)	License Tax (12-20-50)	Other Taxes Administered by DOR	C Corporation	S Corporation	Partnership	Limited Liability Company	Sole Proprietor
<p><b>Qualified Recycling Facility Credit</b>  SC Code '12-6-3460  Form TC-17</p> <p>\$Credit of 30% of investment</p> <p>\$\$\$300 million minimum investment required  \$Must operate or construct a facility certified as a qualified recycling facility  \$Unlimited carryforward  \$Recapture if minimum investment is not met by end of year 5 following construction or operation</p>		X	X	X Sales or Use Tax	X	X	X	X	X
<p><b>Voluntary Environmental Clean Up Credit</b>  SC Code §12-6-3550  Form TC-20</p> <ul style="list-style-type: none"> <li>•“Basic credit” of 50% of expenses for industrial and commercial environmental contamination site cleanup</li> <li>•“Additional credit” of 10% of expenses, up to \$50,000, in final year of cleanup with certificate of completion</li> <li>•Maximum \$50,000 “basic credit” per year</li> <li>•5 year carryforward up to \$100,000</li> <li>•Must enter into a nonresponsible party voluntary cleanup contract with SC Department of Health and Environmental Control</li> <li>•Must obtain tax certificate from SC Department of Health and Environmental Control</li> </ul>		X			X	X, only at corporate level		X, only if LLC is taxed as a corporation	

NOTE: Some credits may apply to the insurance premium tax administered by the Department of Insurance. Questions concerning the insurance premium tax should be directed to the Department of Insurance.

All credits are nonrefundable unless otherwise provided.

## Worksheet 5

### South Carolina Taxation of Limited Liability Companies (LLCs)

#### A. South Carolina Income Taxes

If an LLC is treated as a corporation for federal income tax purposes, it is treated as a corporation for South Carolina income tax purposes. Likewise, if an LLC is treated as a partnership for federal income tax purposes, it is treated as a partnership for South Carolina income tax purposes. Moreover, if a single member LLC is disregarded as an entity separate from its owner for federal income tax purposes, it is similarly disregarded for South Carolina income tax purposes.

South Carolina has adopted the partnership and corporate provisions (subchapters K, C and S) of the Internal Revenue Code and Internal Revenue Code §7701 which defines “partnership” and “corporation.”

Treasury regulations govern how an organization is classified for federal tax purposes. There are US Department of the Treasury regulations for determining the classification of an unincorporated business organization as either a partnership or a corporation for federal income tax purposes. Under these regulations an unincorporated entity can choose to be taxed as a corporation, or be taxed as a partnership (or disregarded as an entity separate from its owner if it is a single member LLC). This classification process is referred to as “check the box.” The Department follows the “check the box” regulations.<sup>1</sup>

#### B. South Carolina Definitions

Definitions in SC Code §12-2-25 provide the following:

As used in SC Code Title 12, *Taxation*, and unless otherwise required by the context:

1. “Partnership” includes a limited liability company taxed for South Carolina income tax purposes as a partnership.
2. “Partner” includes any member of a limited liability company taxed for South Carolina income tax purposes as a partnership.
3. “Corporation” includes a limited liability company or professional or other association taxed for South Carolina income tax purposes as a corporation.
4. “Shareholder” includes any member of a limited liability company taxed for South Carolina income tax purposes as a corporation.

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<sup>1</sup>See SC Info. Ltr. #96-25.

Therefore, an LLC classified as a partnership for South Carolina income tax purposes will be deemed a partnership for all other tax purposes in South Carolina. Likewise, an LLC classified as a corporation for South Carolina income tax purposes will be deemed a corporation for all other tax purposes in South Carolina.

SC Code §12-2-25 also provides that a single member LLC which is not taxed as a corporation is not regarded as an entity separate from its owners for all South Carolina tax purposes. This provision makes it clear that a single member LLC which did not elect to be treated as a corporation is treated as part of its owner; *e.g.*, a sole proprietorship if it is owned by an individual, a division of a corporation if it is owned by a corporation, or a division of a partnership if it is owned by a partnership.

### **C. Issues Related to Single Member LLCs Disregarded as an Entity Separate from Their Owners**

#### **1. Nexus**

Nexus is a sufficient connection between a state and a taxpayer which allows the state to subject the taxpayer to its taxing jurisdiction. Nexus with a single member LLC which is disregarded as an entity separate from its owner may result in nexus with the owner.

**Comment:** Assume that Corporation A does not have nexus with South Carolina. A creates a single member LLC, B, to do business in South Carolina. If A does not elect to have B treated as a corporation, it will be disregarded as an entity separate from A. Since B is a part of A and doing business in South Carolina, the authors believe that the Department will take the position that A has nexus in South Carolina. Even if it were determined that A did not have nexus with South Carolina, assuming A and B carried on a unitary business, the Department will likely take the position that B's income tax return must include A's income and apportionment factors.

#### **2. A Member's Liability for a Single Member LLC's Taxes**

It is unclear whether a member of a single member LLC which is disregarded as an entity separate from its owner can be held liable for the LLC's taxes. The question arises from the conflict between:

1. An LLC being disregarded for tax purposes, which arguably includes tax collection purposes, and
2. An LLC generally being considered a separate entity for liability and other state law purposes.

In South Carolina relevant statutory authorities are:

1. SC Code §12-2-25 provides that a single member LLC which is not taxed as a corporation will be ignored for all South Carolina tax purposes.

2. SC Code §33-44-201 provides that “[e]xcept as provided in Section 12-2-25 for single-member limited liability companies, a limited liability company is a legal entity distinct from its members.”<sup>2</sup>
3. SC Code §33-44-1001 provides that “[e]xcept as provided in Section 12-2-25 for single-member limited liability companies, the laws of the State or other jurisdiction under which a foreign limited liability company is organized govern its organization and internal affairs and the liability of its managers, members, and their transferees,”<sup>3</sup>
4. SC Code §33-44-303, however, provides that “... the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager.”

## **D. Other South Carolina Taxes**

### **1. Corporate License Fees**

Corporate license fees are imposed on corporations required to file an annual report. Code Section 12-20-20 provides that, with very few exceptions, every domestic corporation, every foreign corporation qualified to do business in South Carolina, and any other corporation required by SC Code §12-6-530 to file income tax returns, must make a report annually to the Department of Revenue.

SC Code §12-2-25 provides that for purposes of Title 12, “corporation” includes a limited liability company, or professional or other association, taxed for South Carolina income tax purposes as a corporation. Whether an LLC will be taxed as a corporation for South Carolina income tax purposes depends upon whether it is taxed as a corporation for federal income tax purposes.

Therefore, LLCs which are classified as corporations for federal income tax purposes must pay South Carolina corporate license fees.

If a corporation owns a single member LLC that is disregarded for South Carolina tax purposes, the LLC does not owe a separate corporate license fee. The LLC is treated as part of the corporation which owns it and that corporation pays a license fee which includes the LLC. If the single member LLC has elected to be taxed as a corporation, then it is treated as a 100% owned subsidiary and is subject to a separate corporate license fee.

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<sup>2</sup>Emphasis added.

<sup>3</sup>Emphasis added.

## **2. Deed Recording Fees**

SC Code Title 12, Chapter 24, imposes a fee for the privilege of recording a deed transferring realty to another person. The clerks of court and registers of mesne conveyances collect the fee at the time of filing.

### **a. Imposition and Determination of Value**

The fee is \$1.85 for each five hundred dollars, or fractional part thereof, of the realty's "value."<sup>4</sup> In arm's length real property transactions, this value is the sales price paid or to be paid in money or money's worth. A deduction, however, is allowed for the amount of any lien or encumbrance existing on the realty before the transfer and remaining on the realty after the transfer.<sup>5</sup>

### **b. Affidavit of Value**

An affidavit must accompany every deed presented for recording and must set forth the value of the realty. The county may require any other information deemed necessary or may, at the discretion of the clerk or register of mesne conveyances, not require the affidavit.

If the deed is exempt from the deed recording fee, an affidavit is not required to state the value, but it must (1) state that the deed is exempt, (2) state the reason or reasons why the deed qualifies for an exemption, and (3) be signed by a responsible person connected with the transaction and state that connection.<sup>6</sup>

### **c. Liability**

The fee is the liability of the grantor or the joint or several liability of the grantors. The grantee is secondarily liable for the fee. However, in the case of a master-in-equity deed, a deed from the federal government, a state or any of a state's political subdivisions, or a qualified retirement plan, the liability falls upon the grantee or grantees.<sup>7</sup>

### **d. Exemptions**

Among the exemptions from the fee affecting LLCs are deeds:

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<sup>4</sup> SC Code §12-24-10.

<sup>5</sup> SC Code §12-24-30. See SC Rev. Rul. #04-6.

<sup>6</sup> See SC Code §12-24-70.

<sup>7</sup> SC Code §12-24-20.

1. Transferring realty from a person to an LLC if the person is a member of the LLC or is in the process of becoming a member, if no consideration is paid for the transfer other than the interest in the LLC or the increase in value of the interest held by the grantor. However, except as provided in 2. below, the transfer of realty from an LLC to a member of the LLC is subject to the fee even if it is transferred to a member which is not an individual.<sup>8</sup>
2. Transferring realty from a “family LLC” (an LLC taxed as a partnership whose members all belong to the same family or are charitable entities)<sup>9</sup> to a member of the LLC as long as no consideration is paid for the transfer other than a reduction in the grantee’s interest in the LLC. “Family” means the grantor, the grantor’s spouse, parents, grandparents, sisters, brothers, children, stepchildren, grandchildren, and the spouses and lineal descendants of any of them, and the grantor’s and grantor’s spouse’s heirs under the statute of descent and distribution.
3. Transferring realty in a statutory merger or consolidation from a constituent LLC to the continuing or new LLC, as long as all LLCs involved are taxed as corporations, or all are taxed as partnerships.<sup>10</sup>
4. Transferring realty from the owner of a single member LLC (which has not elected to be taxed as a corporation) to the LLC, and transferring realty from the single member LLC (which has not elected to be taxed as a corporation) to its owner. There is no exemption in the statute for these transfers, but the imposition of the recording fee is on the privilege of recording a deed, with respect to any deed whereby any realty is transferred to another person. Since single member LLCs which do not elect to be treated as a corporation are treated as part of their owner, there is no transfer to “another person.”<sup>11</sup>

### 3. Withholding on Income of Nonresident Partners and S Corporation Shareholders

SC Code §12-8-590 requires partnerships and S corporations to withhold income tax at the rate of 5% on nonresident partners’ and nonresident S corporation shareholders’ shares of South Carolina taxable income, whether or not distributed.

Exceptions. There are three exceptions to the withholding requirements:

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<sup>8</sup>See SC Code §12-24-40(8).

<sup>9</sup>See SC Code §12-24-40(9).

<sup>10</sup>See SC Code §12-24-40(10) and (11).

<sup>11</sup>See SC Code §§12-24-10 and 12-2-25. Also, see SC Rev. Rul. #04-6.

1. A partnership or S corporation is not required to withhold income taxes with respect to any partner or shareholder who submits an affidavit stating the nonresident partner or shareholder is subject to the personal jurisdiction of South Carolina for the purpose of determining and collecting South Carolina taxes.<sup>12</sup>
2. A partnership or S corporation is not required to withhold income taxes with respect to any partner or shareholder for which the partnership or S corporation reports the nonresident partner's or shareholder's income on a composite tax return.<sup>13</sup>
3. A partnership or S corporation is not required to withhold income taxes on income attributable to the sale of real property which is subject to withholding under SC Code §12-8-580, "withholding by buyer of real property or associated tangible personal property from nonresident seller."

Therefore, except as provided above, an LLC which is treated as a partnership or S corporation for income tax purposes must withhold income tax at the rate of 5% on nonresident members' shares of South Carolina taxable income, whether or not distributed.

#### **4. Agricultural Use Property Tax Valuation**

Agricultural real property which is actually used for agricultural purposes is taxed on an assessment equal to:

1. Four percent of its fair market value for agricultural purposes for owners or lessees who are individuals or partnerships, and corporations which do not:
  - a. Have more than ten shareholders,
  - b. Have as a shareholder a person (other than an estate) who is not an individual,
  - c. Have a nonresident alien as a shareholder, or
  - d. Have more than one class of stock.
2. Six percent of its fair market value for such agricultural purposes for owners or lessees who are corporations, except for certain corporations specified in 1. above.<sup>14</sup>

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<sup>12</sup>See SC Rev. Proc. #92-5 regarding the affidavit.

<sup>13</sup>See SC Code §12-6-5030 and SC Rev. Proc. #92-5 regarding composite returns.

<sup>14</sup>SC Code §12-43-220(d)(1). See also SC Reg. §117-124.7.

Whether an LLC has a 4 or 6 percent assessment ratio depends on whether it is classified as a partnership, corporation, or sole proprietorship (single member LLC owned by an individual which did not elect corporate treatment). If it is taxed as a corporation, the assessment ratio further depends on whether it meets the requirements above.

## **E. Conversions of One Type of Entity to Another Involving LLCs**

### **1. Tax Consequences of the Conversion of a Partnership to an LLC<sup>15</sup>**

#### **a. Definitions and Assumptions**

For this discussion, “organization” means the partnership before the conversion, and the LLC after the conversion; and “owner” means a partner before the conversion and a member after the conversion.

This discussion assumes that (i) the conversion from a partnership to an LLC does not involve the addition or removal of any owner or affect the amount of the organization owned by any owner, (ii) the LLC will continue the same business conducted by the partnership, and (iii) both the partnership and the LLC are organized under the laws of a state of the United States or the District of Columbia.

#### **b. Income Tax**

Since South Carolina has adopted subchapter K of the Internal Revenue Code, the Department will follow the federal income tax guidelines set forth in IRS Rev. Rul. 95-37 concerning the conversion of a partnership to an LLC.

Therefore, the conversion is treated as follows:

1. The conversion is treated as a partnership-to-partnership conversion. This treatment applies whether the resulting LLC is formed in the same state or in a different state than the converting domestic partnership. Therefore,
  - a. The partnership will not terminate under Internal Revenue Code §708;
  - b. If the owners’ shares of organization liabilities do not change, there will be no change in the adjusted basis of any owner’s interest in the organization;
  - c. If the owners’ shares of organization liabilities change and cause a deemed contribution of money to the organization by an owner, then the adjusted basis of that owner’s interest in the organization will be increased by the amount of the deemed contribution;

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<sup>15</sup> See SC Rev. Rul. #95-9.

- d. If the owners' shares of organization liabilities change and cause a deemed distribution of money by the organization to an owner, then the adjusted basis of that owner's interest in the organization will be reduced (but not below zero) by the amount of the deemed distribution, and gain will be recognized by the owner to the extent the deemed distribution exceeds the adjusted basis of the owner's interest in the organization; and
  - e. There will be no change in the holding period of any owner's total interest in the organization.
2. The taxable year of the converting partnership will not close with respect to all the owners or with respect to any owner.
  3. The resulting LLC will not need to obtain a new taxpayer identification number.

The tax results of the owners' shares of organizational liabilities changing (see items 1. c. and d. above) should not create too much cause for concern because SC Code §33-44-902(g) provides that a general partner who becomes a member of an LLC as a result of a conversion remains liable as a partner for an obligation incurred by the partnership before the conversion. Moreover, SC Code §33-44-902(h) states that a general partner's liability for obligations of the LLC incurred after the conversion is that of a member of the LLC; a limited partner who becomes a member as a result of a conversion remains liable only to the extent the limited partner was liable for an obligation incurred before the conversion.

### c. Sales Tax

Every person engaged in the business of selling tangible personal property at retail must obtain a retail license. Since it has been determined that the conversion of a partnership to an LLC taxed as a partnership is treated as a partnership-to-partnership conversion, and the organization is still considered to be the same entity for South Carolina tax purposes, it is not required to obtain a new retail license.<sup>16</sup>

**Note:** The Department advises the new LLC to obtain a new retail license for each retail location. If a retail license remains in the name of the partnership, the Department will assume that the general partner or partners are personally liable for any sales or use taxes the LLC fails to pay.

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<sup>16</sup> See also SC Code §33-44-903 which confirms that a partnership that has been converted into an LLC is the same entity that existed before conversion and all property owned by the converting partnership vests in the LLC.

Because a new retail license is not required, the Department will waive the \$50 application fee for a retail license. Apply for a new license on Form SCTC 111 — Business Tax Application,<sup>17</sup> and write “Partnership Conversion to LLC” on the top of the form.

#### **d. Deed Recording Fees**

When a partnership converts to an LLC, it is the mere reorganization of a partnership, and for South Carolina tax purposes the property is still vested in the same partnership. No realty has been “transferred to another person.” Therefore, if a partnership converting to an LLC conveys real property to the LLC, no deed recording fee is due.<sup>18</sup>

## **2. Income Tax Consequences of Other Conversions**

### **a. Tax Consequences of the Conversion of a Corporation to a Limited Liability Company**

There are no tax-free reorganizations from corporations to partnerships and, therefore, no tax-free reorganizations from corporations (either C or S) to LLCs taxed as a partnership. A conversion from a corporation to an LLC taxed as a partnership will be viewed as:

1. A distribution of assets to the shareholders followed by their contribution to the LLC;
2. A contribution of the assets from the corporation to the LLC in exchange for interests in the LLC and then distribution by the corporation to the shareholders of the LLC interests; or
3. A contribution of stock in the corporation to the LLC followed by a liquidation of the corporation.

South Carolina follows the federal treatment. In several private letter rulings the Internal Revenue Service has adopted the second characterization.<sup>19</sup>

Under Internal Revenue Code §336, the corporation recognizes gain on the distribution of the property as if the corporation had sold the property and the shareholders must recognize gain to the extent the fair market value of the assets they receive exceed the basis in their stock. Therefore, the conversion of a corporation into an LLC will be taxable at both the corporate and the shareholders levels.

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<sup>17</sup> See Worksheet 10.

<sup>18</sup> See SC Code §12-24-10.

<sup>19</sup> See IRS PLRs 9404021 and 9409016.

The result would be the same if an LLC taxed as a corporation, elects pursuant to the “check the box” regulations, to be taxed as a partnership in the future.

South Carolina is expected follow the federal tax treatment for an LLC which is taxed as a corporation and is converted to a corporation. If the conversion qualifies as an F reorganization under Internal Revenue Code §368(a)(1)(F), South Carolina will also treat it as an F reorganization.<sup>20</sup>

**b. The Sale of Interests in an LLC Taxed as a Partnership Where a Single Member LLC results**

South Carolina follows the federal tax treatment where one person purchases all of the ownership interest in a domestic LLC that is taxed as a partnership. Therefore, the LLC is deemed to make a liquidating distribution to the members of the partnership prior to the sale. The purchaser is deemed to purchase the assets from the members (other than herself if she was a member).

The purchaser has a cost basis and a new holding period in the assets she is deemed to have purchased. If she was a member of the original LLC she receives a basis in the assets she is deemed to receive in the LLC’s liquidation determined by Internal Revenue Code §732(b), and she will report gain or loss, if any, to the extent required by Internal Revenue Code §731(a). She will also include the partnership’s holding period in determining her holding period for the assets she is deemed to receive in the liquidating distribution.<sup>21</sup>

**c. A Single Member LLC Which is Disregarded as an Entity Separate from Its Owner Becomes an LLC with More than One Owner Taxed as a Partnership**

South Carolina follows the federal tax treatment where a single member LLC which is disregarded as an entity separate from its owner becomes an LLC with more than one owner taxed as a partnership.

For example, if A owns a single member LLC which is disregarded, and B purchases 50% of A’s ownership interest, B’s purchase is treated as the purchase of a 50% interest in each of the LLC’s assets, which are treated as held directly by A. Immediately thereafter, A and B are treated as contributing their respective interests in those assets to a partnership in exchange for ownership interests in the partnership.

If A owns a single member LLC which is disregarded, and B contributes cash to the LLC for an interest in the LLC, B’s contribution is treated as a contribution to a partnership in exchange for an ownership interest in the partnership. A is treated as contributing all of the assets of the LLC to the partnership in exchange for a partnership interest.<sup>22</sup>

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<sup>20</sup> See IRS PLR 9636007.

<sup>21</sup> See IRS Rev. Rul. 99-6.

<sup>22</sup> See IRS Rev. Rul. 99-5.

## Worksheet 6

### Notes on Other US and SC Constitutional Limitations

#### A. Introduction

Although the cases discussed in this Worksheet are not corporate income tax or corporate license fee cases, they concern South Carolina's handling of constitutional limitations, which may, in turn be of use in understanding issues of interest to corporations doing business in South Carolina.

#### B. United States Constitution — Notes on other South Carolina Cases

##### 1. Privileges and Immunities<sup>1</sup> — *Toomer v. Witsell*

Although hardly surprising today, in *Toomer v. Witsell*<sup>2</sup> the United States Supreme Court invalidated a South Carolina license fee on shrimp fishing boats for violating the Privileges and Immunities Clause. South Carolina imposed a license fee on shrimp fishing boats in its coastal waters at the rate of \$25 for each resident-owned boat and \$2,500 for each boat owned by a nonresident. The Court concluded that the purpose and effect of the fee were not to conserve shrimp but to exclude nonresidents and thereby create a commercial shrimp monopoly for South Carolina residents.

“The primary purpose for this [Privileges and Immunities] clause, ... was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. ...

... one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.”<sup>3</sup>

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<sup>1</sup> Article IV, Section 2, the “interstate privileges clause,” provides:

“The Citizens of each State shall be entitled to all Privileges and Immunities of the Citizens in the several States.”

<sup>2</sup> 334 U.S. 385, 68 S. Ct. 1156 (1948).

<sup>3</sup> 334 U.S. at 395-396; 68 S.Ct. at 1162.

## 2. The First Amendment<sup>4</sup> — *Thayer v. SC Tax Commission*<sup>5</sup>

Thayer was assessed a use tax on printed advertising materials (real estate advertising pamphlets) that she purchased out-of-state for distribution within the state. She argued that the state could not tax her materials while exempting newspapers and religious publications from tax. The South Carolina Supreme Court upheld the exemption for newspapers, struck down the exemption for religious publications, and upheld the tax on Ms. Thayer.

The court relied on *Leathers v. Medlock*<sup>6</sup> to uphold the exemption for newspapers. It held that differential taxation of speakers, even members of the press, does not violate the First Amendment unless the tax is directed at, or presents the danger of, suppressing particular ideas; *i.e.*, the tax cannot be dependent upon the content of the publication.

The Court relied on *Texas Monthly, Inc. v. Bullock*<sup>7</sup> in deciding that the religious publications exemption violated the Establishment Clause of the First Amendment. The court held that the constitutionality of the exemption for religious publications could be considered separately from the constitutionality of sales and use taxes as a whole, so the exemption, not the taxes, was invalid.

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<sup>4</sup>“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; ...”

<sup>5</sup>301 SC 6, 413 S.E.2d 810 (1991).

<sup>6</sup>111 S.Ct. 1438 (1991). In *Leathers v. Medlock* a cable television subscriber and a trade organization of cable operators brought an action challenging the imposition of sales taxes on cable television services. No sales taxes were charged on the sale of print media. The Court held that Arkansas’ extension of its generally applicable sales tax to cable television services alone, or to cable and satellite services, while exempting print media, does not violate the First Amendment. The Court reasoned that the tax is a tax of general applicability that does not single out the press and thereby threaten to hinder it. There was no evidence that Arkansas targeted cable television in a purposeful attempt to interfere with its First Amendment activities. Neither did Arkansas select a small group of speakers to bear the burden of the tax. Finally, the tax was not content based.

<sup>7</sup>109 S.Ct. 890 (1989). In *Texas Monthly, Inc. v. Bullock* a Texas statute exempted from sales taxes periodicals published or distributed by a religious faith consisting wholly of writings promulgating the teachings of the faith and books consisting wholly of writing sacred to a religious faith.

Three judges held that the exemption lacked sufficient breadth to pass scrutiny under the Establishment Clause of the First Amendment. The tax would have been constitutional if it incidentally benefitted religious groups, as long as the exemption was conferred on a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end. One justice concurred based on *Arkansas Writers’ Project, Inc. v. Ragland*, 107 S Ct 1722 (1987), which proscribed scrutiny of a publication’s content as the basis for imposing a tax, and two justices concurred because the exemption violated the Establishment Clause of the First Amendment.

**Comment:** This case is important beyond its holding because it is a warning that reading South Carolina statutes is not enough to understand the law. The SC Code still contains §12-36-2120(8) which states that “newsprint paper, newspapers, and religious publications, including the *Holy Bible* and the SC Department of Agriculture’s *The Market Bulletin*” are exempt. Religious publications, including the *Holy Bible* are no longer exempt, but no law has been introduced to delete the exemption from the SC Code.

### 3. Fifth Amendment (Double Jeopardy)<sup>8</sup> — *McMullin v. DOR*<sup>9</sup>

This case considered whether application of the South Carolina Marijuana and Controlled Substance Tax Act,<sup>10</sup> violated plaintiff’s constitutional right not to be put in jeopardy twice for the same offense.

The taxpayer relied on the United States Supreme Court’s decision in *Department of Revenue of Montana v. Kurth Ranch*.<sup>11</sup> *Kurth Ranch* held that the high rate and deterrent purpose of the tax, in and of themselves, did not necessarily render the tax punitive, but other unusual features set it apart from most taxes. The United States Supreme Court concluded that, “[t]aken as a whole, [the tax imposed under Montana’s Dangerous Drug Tax Act] is a concoction of anomalies, too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of Double Jeopardy analysis.”<sup>12</sup>

The South Carolina Supreme Court upheld South Carolina’s tax by distinguishing *Kurth Ranch*. It stated that a review of the South Carolina Act clearly indicates it does not contain the “unusual features” cited by the *Kurth Ranch* majority. Under the provisions of the South Carolina Act, the tax is imposed whether or not the taxpayer has been arrested for possession of the controlled substance. In other words, the class of taxpayers is not defined by the actions of law enforcement personnel. Further, under the South Carolina Act, the tax is based on actual possession. The Court did not emphasize that the South Carolina tax only applied to illegal possession.

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<sup>8</sup>“... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; ...

<sup>9</sup>321 S.C. 475 (1996).

<sup>10</sup>SC Code §§12-21-5010 to 12-21-6050.

<sup>11</sup>511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994).

<sup>12</sup>511 U.S. at 783; 114 S.Ct. at 1948.

#### 4. Retroactivity of Decisions — *Bass v. South Carolina*

In *Bass v. South Carolina*,<sup>13</sup> South Carolina federal government retirees sued the state and the Tax Commission for refunds for taxes paid on their retirement income. The action was brought because of a United States Supreme Court decision, *Davis v. Michigan Dept. of Treasury*,<sup>14</sup> in which it was held that state taxation of income of persons retired from employment or service with the federal government at a greater rate than the taxation of income of persons retired from state service, violated the doctrine of intergovernmental tax immunity and federal law<sup>15</sup> and was thus prohibited. This case was settled and refunds paid.

**Comment:** The interesting issue remaining is whether the South Carolina Supreme Court will apply the doctrine of *Chevron Oil Co. v. Huson*<sup>16</sup> in the future to determine if judicial decisions in purely state law and state constitutional cases should be applied prospectively or retroactively. The South Carolina Supreme Court applied *Chevron v. Huson* in the *Bass* case. *Chevron v. Huson* was a non-tax case which held that the result in a civil case would not be retroactive if the case:

1. Announced a new principle of law;
2. Prospectivity would avoid injustice or hardship, and
3. Prospectivity would not unduly undermine the “purpose and effect” of the new rule.

The United States Supreme Court in *Harper v. Virginia*<sup>17</sup> held that when the United States Supreme Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether an event predates or postdates the announcement of the rule. This rule extended the ban against selective application of new rules in criminal cases to civil cases. The court held that when it does not reserve the question whether its holding should be applied to the parties before it, the opinion is properly understood to have followed the normal rule of retroactive application.

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<sup>13</sup> 302 S.C. 250, 395 S.E.2d 171, vacated and remanded 501 U.S. 1246, 111 S.Ct. 2881, 115 L.Ed.2d 1047 (1991), 307 S.C. 113, 414 S.E.2d 110 (1992).

<sup>14</sup> 489 U.S. 803, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989).

<sup>15</sup> 4 USC §111. This section authorizes states to tax pay or compensation for personal services as a federal employee, if the taxation does not discriminate against the employee because of the source of the pay or compensation.

<sup>16</sup> 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971).

<sup>17</sup> 509 U.S. 83, 113 S.Ct. 2510 (1993).

## C. Overview of the South Carolina Constitution

Article X of the SC Constitution is entitled “Finance, Taxation and Bonded Debt.” Most of the tax sections concern property taxes, including a uniformity requirement, assessment ratios, classification of property, and exemptions.<sup>18</sup>

**Comment:** The requirement in SC Constitution Article X, §1, that the assessment of all property be equal and uniform within the classifications established by the Constitution has been eroded by the General Assembly’s power in SC Constitution Article X, §3, to enact exemptions. For example:

1. With certain exceptions, SC Code §12-37-223A authorizes the governing body of a county, by ordinance, to exempt an amount of fair market value of real property located in the county sufficient to limit to 15% any valuation increase attributable to a countywide reassessment program. Countywide reassessment programs are required to be conducted every five years. SC Code §12-43-217;
2. SC Constitution Article X, §3, and SC Code 12-37-220(A) (1) provide that all property of a political subdivision is exempt if the property is used exclusively for public purposes. In *Charleston County Aviation Authority v. Wasson*, 289 S.E.2d 416 (SC 1982), a challenge was raised to the exemption of property owned by the Aviation Authority (a political subdivision) which was leased to a private business. The Court held:
  - a. The fact that property is used by a private business entity does not preclude its use from being public;
  - b. The lease of the airport authority’s property to airlines, car rental companies, a parking lot operator, a limousine and taxi service, an air cargo company and to the operator of a restaurant, snack bar, lounge and gift shop providing various services to meet the needs of passengers were incidental to the public use and such property was exempt under SC Constitution Article X, Section 3, and SC Code §12-37-220(A)(1).

In *Quirk v. Campbell*, 394 S.E.2d 320 (SC 1990), a taxpayer challenged the constitutionality of one of South Carolina’s “fee in lieu” statutes. SC Code §4-29-67 allows a negotiated “fee in lieu of [property] taxes,” with no millage increases or increases in the property’s value for at least 20 years.

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<sup>18</sup> South Carolina Constitution, Article X, §§1–4 and 6.

To qualify for this “fee in lieu,” the property was required to be transferred to the county, which then leased it back to the private party making the investment. The lease was a 20 year financing lease that gave the investor the right of repurchasing the property at the end of the lease for \$1. The Court in *Quirk*, citing *Charleston County Aviation Authority v. Wasson*, held that:

- a. The “fee in lieu” statute was constitutional because the property qualified for the exemption provided for by SC Constitution Article X, Section 3, and SC Code 12-37-220(A)(1) which provides that all property of a political subdivision is exempt if the property is used exclusively for public purposes; and
- b. The public purpose was “promoting industrial development.”

Since 1990, two other fee in lieu of property tax statutes have been enacted which in some cases allow the fee for 30 years and allow the county and company to agree that the fee payments will be used for infrastructure the company needs.<sup>19</sup>

Section 5 of SC Constitution Article X is applicable to all South Carolina taxes. It provides that no tax may be levied without the consent of the people or their representatives, and that any tax levied “shall distinctly state the public purpose to which the proceeds of the tax shall be applied.”

In *Weaver and Richland County Council v. Recreation District*<sup>20</sup> the South Carolina Supreme Court held an act<sup>21</sup> that authorized the Recreation Commission, an appointed body, to levy a property tax to meet the cost of operating and maintaining recreational facilities was unconstitutional. The Court reasoned that the power to tax may not be conferred on a purely appointive body but must be under the supervisory control of elected bodies.

## **D. Other Local Tax Issues**

### **1. Local taxes**

Local governments are generally supported by property taxes, business license taxes based upon gross receipts, local sales and use taxes, and fees. The specifics of property taxes and local sales and use taxes are mandated by state law, as are some of the provisions of business license taxes.<sup>22</sup> No South Carolina local government imposes an income tax.

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<sup>19</sup> See SC Code Title 4, Chapter 12 and Chapter 44.

<sup>20</sup> 328 S.C. 83, 492 SE2d 79 (1997).

<sup>21</sup> Act No. 317, 1969 Acts 382.

<sup>22</sup> See generally Title 12, Chapters 37, 39, and 43 for property taxes; and Title 4, Chapter 10, and Title 6, Chapter 1, for local sales and use taxes.

Although South Carolina municipalities and counties have “home rule,”<sup>23</sup> the South Carolina Constitution essentially left it up to the General Assembly to decide local government powers.<sup>24</sup> Acting under this authority, the General Assembly enacted various statutes restricting the tax and revenue raising powers of counties and municipalities. For example, SC Code §6-1-310 provides that a local government may not impose a new tax unless specifically authorized by the General Assembly.

In addition, SC Code §6-1-330 provides that a local government may only impose a new service or user fee if it is approved by a “positive majority.” A service or user fee is a charge required to be paid in return for a particular government service or program made available to the payer that benefits the payer in some manner different from the members of the general public not paying the fee.<sup>25</sup> A “positive majority” is a vote for adoption by the majority of the members of the entire governing body, whether present or not.<sup>26</sup>

**Comment:** There is a state Revenue Procedures Act and Taxpayers’ Bill of Rights.<sup>27</sup> There are no local government equivalents. In one case, BellSouth was able to obtain a temporary restraining order<sup>28</sup> from the federal district court in South Carolina against Seneca, South Carolina, preventing the city from enforcing a new city gross receipts tax on telecommunications. BellSouth argued that the federal Tax Injunction Act<sup>29</sup> was

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<sup>23</sup> Article VIII of the SC Constitution. See also *Hospitality Association of South Carolina, Inc., v. The County of Charleston, The Town of Hilton Head Island, South Carolina, and The City of Charleston*, 320 S.C. 219, 464 S.E.2d 113 (1995).

<sup>24</sup> Article VIII SC Constitution; *Hospitality Association of South Carolina, Inc., v. The County of Charleston, The Town of Hilton Head Island, South Carolina, and The City of Charleston*, 320 S.C. 219, 464 S.E.2d 113 (1995); and *Town of Hilton Head, Kiawah Island, City of Charleston, County of Georgetown v. Morris (Comptroller General)*, 324 S. C. 30, 484 S.E.2d 104 (1997).

<sup>25</sup> SC Code §6-1-300(6).

<sup>26</sup> SC Code §6-1-300(5).

<sup>27</sup> SC Code Title 12, Chapters 60 and 58, respectively. See Sections .11 B. and G. of this portfolio for a discussion of the Revenue Procedures Act and the Taxpayers’ Bill of Rights.

<sup>28</sup> Prof. William J. Quirk, BellSouth Gets Order Against South Carolina Municipal Telecom Tax, 98 *State Tax Notes* 230-17 (December 1, 1998). The order was obtained November 23, 1998. See also *BellSouth Telecommunications, Inc., v. City of Seneca* C/A No.: 8:98-3451-13 (U.S. Dist. SC April 28, 1999), denying the city’s motion to dismiss.

<sup>29</sup> 28 USC §1341.

inapplicable because there was no predeprivation or postdeprivation remedy for this tax provided by law; *i.e.*, the law did not permit a taxpayer to withhold payment while litigating the tax, and if the tax was paid the law did not provide for a refund.<sup>30</sup>

## **2. Equal Protection, Due Process, and Intrastate Jurisdiction to Tax — *Eli Witt Co. v. City of West Columbia***

The South Carolina Constitution has its own Due Process and Equal Protection Clauses, although taxpayers tend to rely on their federal counterparts. *Eli Witt Co. v. City of West Columbia*<sup>31</sup> surprised many South Carolina tax practitioners.

Eli Witt is a wholesale distributor which sells various items to convenience and grocery stores in South Carolina. It owned a warehouse in West Columbia, South Carolina. Eli Witt's gross income in South Carolina was approximately \$22 million of which only \$1.8 million was derived from sales within the City of West Columbia. West Columbia has a business license tax ordinance which imposes a tax on a business's gross income earned within the state, minus gross income taxed by another city. Eli Witt was not subject to tax in any other city so West Columbia taxed the entire \$22 million.

Eli Witt claimed that the ordinance violated the Equal Protection Clause of the constitution because it was treated differently than a business which is taxed by another municipality. Eli Witt also argued that the ordinance violated the Due Process Clause of the constitution because the measure of the tax was not limited to the income earned within the City. The court upheld the tax on Eli Witt's entire state gross income.

It held that the ordinance does not violate the Equal Protection Clause because it is rationally related to the legislative purpose, members of a class are treated alike, and classification rests on a reasonable basis.

With regard to the Due Process Clause issue, the Court quoted *Triplett v. City of Chester*<sup>32</sup> which stated that it was "not contemplated that the various phases of a business should be segregated and only that part taxed which was actually carried on within the corporate limits. The tax was imposed for the privilege of maintaining or conducting a place of business within that municipality and it was intended that the business should be considered as a whole."<sup>33</sup>

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<sup>30</sup> Bell South relied on *McKesson Corp. v. Division of Alcoholic Beverages*, 496 US 18 (1996); *Reich v. Collins*, 513 US 106 (1994); and *Newsweek Inc. v. Florida Dept. of Rev.*, 522 U.S. 442, 118 S.Ct. 904 (1998).

<sup>31</sup> 425 S.E.2d 16 (S.C. 1992).

<sup>32</sup> 40 S.E.2d 239 (1972).

<sup>33</sup> 425 S.E.2d at 18.

The South Carolina Supreme Court distinguished and limited *Southern Bell Tel. & Tel. Co v. City of Spartanburg*<sup>34</sup> to its facts. In *Southern Bell*, the Supreme Court held that cities could not tax revenues from intrastate long distance calls or services to customers outside of the city limits with its local business license tax base. The Court stated that the “city lacked power to tax revenues from services the company rendered to customers residing outside the city limits.”<sup>35</sup>

### **3. Local Taxation of Insurance Companies — *Charleston v. Government Employees Insurance Company***

In *Charleston v. Government Employees Insurance Company*,<sup>36</sup> the South Carolina Supreme Court upheld a local business license tax on gross premiums collected on insurance policies written on property or risks located within the city. The insurance companies argued that the ordinance violated the Commerce Clause of the U.S. Constitution. The Court pointed out that the U.S. Supreme Court in *U.S. v. South-Eastern Underwriters Ass’n*.<sup>37</sup> held that insurance was commerce within the meaning of the Commerce Clause, but the next year Congress enacted the McCarran-Ferguson Act<sup>38</sup> restoring regulatory and taxing authority to the states. Charleston contended, and the Court agreed, that South Carolina law<sup>39</sup> permitting municipalities to collect a business license fee or tax based upon insurance premiums delegated the State’s McCarran-Ferguson Act immunity to municipalities.

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<sup>34</sup> 285 S.C. 495, 331 S.E.2d 333 (1985).

<sup>35</sup> 331 S.E.2d 333 at 334.

<sup>36</sup> *Charleston v. Government Employees Insurance Company*, 334 S.C. 67, 512 S.E.2d 504 (1999).

<sup>37</sup> 322 U.S. 533, 64 S.Ct. 1162 (1944).

<sup>38</sup> 15 U.S.C. §§1011 through 1025 (1977).

<sup>39</sup> SC Code §38-7-160.

## Worksheet 12

### Public Law 86-272 (15 USC §381)

Public Law 86-272 places certain limits on the power of a state to impose a tax on the income derived from within its borders. It reads, in pertinent part:

- (a) No State, or political subdivision thereof, shall have power to impose... a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:
  - (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
  - (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).
- (b) The provisions of subsection (a) of this section shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to
  - (1) any corporation which is incorporated under the laws of such State; or
  - (2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State.
- (c) For purposes of subsection (a) of this section, a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance, of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, of tangible personal property.

(d) For purposes of this section

- (1) the term “independent contractor” means a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities; and
- (2) the term “representative” does not include an independent contractor.

## **Worksheet 19**

### **A. Administrative Law Court Rule on Representation of Taxpayers**

#### **Rule 9.A. Parties and Their Representatives**

Parties in a contested case have the right to participate or to be represented in all hearings or pre-hearing conferences related to their case. A partnership, corporation or association may be represented by any member, officer, director or duly authorized employee. An agency may be represented by the director, an official, or duly authorized employee of the agency. Any party may be represented by an attorney admitted to practice, either permanently or pro hac vice, or as otherwise authorized by law. In tax related cases, any party may be represented by a certified public accountant. No one shall be permitted to represent a party where such representation would constitute the unauthorized practice of law. A party proceeding without legal representation shall remain fully responsible for compliance with these Rules and the Administrative Procedures Act. This Rule shall not be construed to permit law student practice except to the extent authorized by Rule 401 of the South Carolina Appellate Court Rules.

**B. The Supreme Court of South Carolina Rule on Unauthorized Practice of Law Rules Proposed by the South Carolina Bar.**

***THE SUPREME COURT OF SOUTH CAROLINA***

In re: Unauthorized Practice of Law Rules Proposed  
by the South Carolina Bar

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O R D E R

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In June 1991 the South Carolina Bar through a special subcommittee of the Unauthorized Practice of Law Committee (Committee) submitted to the Supreme Court a set of proposed rules governing the unauthorized practice of law (Proposed Rules). This comprehensive set of Proposed Rules represents the Committee's collective wisdom accumulated during its thirteen years of existence, as well as the efforts of the special subcommittee which spent over a year drafting these rules. The Proposed Rules attempt to define and delineate the practice of law, and to establish clear guidelines so that professionals other than attorneys can ensure they do not inadvertently engage in the practice of law.

It is impossible for anyone not familiar with the scope of the issues embraced by the Proposed Rules to truly appreciate the enormity of the task undertaken by the special subcommittee. After careful review of the Proposed rules, the documentation in support of these rules, and the tremendous amount of memoranda in opposition to their adoption, we conclude that the Proposed Rules should not be adopted. We commend the subcommittee for its Herculean efforts to define the practice of law. We are convinced, however, that it is neither practicable nor wise to attempt a comprehensive definition by way of a set of rules.

Instead, we are convinced that the better course is to decide what is and what is not the unauthorized practice of law in the context of an actual case or controversy.

The Constitution commits to this Court the duty to regulate the practice of law in South Carolina. S. C. Const. art. V, § 4; see also S. C. Code Ann. § 40-5-10 (1986). We take this opportunity to clarify certain practices which we hold do not constitute the unauthorized practice of law.

First, we recognize the validity of the principle found in S.C. Code Ann. § 40-5-80 (1986): any individual may represent another individual before any tribunal, if (1) the tribunal approves of the representation and (2) the representative is not compensated for his services. We have refused, however, to allow an individual to represent a business entity under the statute. See State ex rel. Daniel v. Wells, 191 S.C. 468, 5 S.E.2d 181 (1939). We modify Wells today to allow a business to be represented by a non-lawyer officer, agent or employee, including attorneys licensed in other jurisdictions and those possessing Limited Certificates of Admission pursuant to Rule 405, SCACR, in civil magistrate's court proceedings. Such representation may be compensated and shall be undertaken at the business's option, and with the understanding that the business assumes the risk of any problems incurred as the result of such representation. The magistrate shall require a written authorization from the entity's president, chairperson, general partner, owner or chief executive officer, or in the case of a person possessing a Limited Certificate, a copy of that Certificate, before permitting such representation.

Second, we hold that State agencies may, by regulation<sup>1</sup>, authorize persons not licensed to practice law in South Carolina, including laypersons, Certified Public Accountants (CPAs), attorneys licensed in other jurisdictions and persons possessing Limited Certificates of Admission, to appear and represent clients before the agency. These regulations are presumptively valid and acts done in compliance with the regulations are presumptively not the unauthorized practice of law. We recognize, however, that such an agency practice could be abused, and reserve the authority to declare unenforceable any regulation which results in injury to the public.

Third, our respect for the rigorous professional training, certification and licensing procedures, continuing education requirements, and ethical code required of Certified Public Accountants (CPAs) convinces us that they are entitled to recognition of their unique status. We hold that CPAs do not engage in the unauthorized practice of law when they render professional assistance, including compensated representation before agencies and the Probate Court, that is within their professional expertise and qualifications. We are confident that allowing CPAs to practice in their areas of expertise, subject to their own professional regulation, will best serve to both protect and promote the public interest.

We also take this opportunity to reaffirm the rule that police officers may prosecute traffic offences in magistrate's court and in municipal court. Only the arresting officer may prosecute the case, although if the officer is new or inexperienced, he may be assisted at trial by one of his supervisors. State v. Sossamon, 298 S. C. 72, 378 S.E.2d 259

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<sup>1</sup> A copy of the proposed regulation shall be filed with the Supreme Court Clerk at the same time it is filed with the Legislative Council.

(1989); see also State ex rel. McLeod v. Seaborn, 270 S. C. 696, 244 S. E.2d 317 (1978).

Finally, we recognize that other situations will arise which will require this Court to determine whether the conduct at issue involves the unauthorized practice of law. We urge any interested individual who becomes aware of such conduct to bring a declaratory judgement action in this Court's original jurisdiction to determine the validity of the conduct. We hope by this provision to strike a proper balance between the legal profession and other professionals which will ensure the public's protection from the harms caused by the unauthorized practice of law.

Let this order be published with the Administrative Orders of this Court.

IT IS SO ORDERED.

Columbia, South Carolina  
September 21, 1992