

# Chapter 13

## Nexus

### A. General Information

Nexus is a sufficient connection between a person and a state, and a sufficient connection between an activity, property, or transaction and a state, that allows the state to subject the person, and the activity, property, or transaction to its taxing jurisdiction. The Due Process and Commerce Clauses of the United States Constitution and other federal statutes provide limitations on a state's powers to tax out-of-state corporations.

Over the years, the courts have provided limitations and guidelines in determining whether certain activities create nexus in a taxing state. For example, see *Quill Corp. v. North Dakota* 502 U.S. 808, 112 S. Ct. 1904, 119 L. Ed. 2d 27 (1992); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 326 (1977); *Miller Brothers v. Maryland*, 347 U.S. 340, 347, 74 S. Ct. 535, 98 L. Ed. 744 (1954); *Scripto, Inc. v. Carson*, 362 U.S. 207, 80 S. Ct. 52, 4 L. Ed. 2d 54 (1960); *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967); *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984); and *National Geographic Society v. California Board of Equization*, 430 U.S. 551, 97 S. Ct. 1386, 51 L. Ed. 2d 631 (1977).

The purpose of this chapter is to provide written guidance from the Department concerning sales and use tax nexus creating activities. Initially, this project began as an informal response to two surveys from national publications as to whether or not certain types of business activities, by themselves, create sales and use tax nexus.

Because of the importance of this issue to taxpayers, the complexity of nexus issues and the changes taking place in this area, the Department issued its responses to the issues raised in these surveys as an advisory opinion, SC Revenue Ruling #07-3. The provisions of SC Revenue Ruling #07-3 are incorporated into this chapter.

**This opinion reflects the Department's official position regarding sales and use tax nexus at this time. Since developments in this area are constantly taking place, any response is subject to change due to a future statute, regulation, court decision, or advisory opinion.**

**Any change in South Carolina's position as set forth in this document that is not the result of a court case or change in statute or regulation will be prospective. Any change that is the result of a court case will apply to all periods open under the statute unless the court states otherwise and any change in statute or regulation will be applicable as of the effective date established by the General Assembly.**

Questions concerning the existence of nexus with South Carolina should be directed to the Department's Nexus/Discovery Section at 803-898-5671 or 803-898-5886.

## B. Qualifications to Survey Responses

Each response is based upon the specific facts described in the survey question and the following assumptions:

- The business is selling tangible personal property<sup>1</sup> at retail to residents or others in South Carolina;
- Each specific survey question by itself was the only possible nexus creating activity or relationship a business has in South Carolina;<sup>2</sup> and,
- The activities described are not “de minimis” unless the question or answer specifically states otherwise.

A “yes” response indicates the activity or relationship will, by itself, create nexus with South Carolina. A “no” response indicates the activity or relationship will, by itself, not create nexus with South Carolina. However, it is important to note that a combination of several different activities or relationships, even if each by itself does not create nexus, may create nexus with South Carolina. In addition, any variance from the facts stated in a survey question, or any additional facts not stated in a survey question, may change the answer set forth in this document.

Each response refers only to sales and use tax nexus. Activities that create nexus for sales and use tax purposes differ from those that create nexus for other tax purposes.

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<sup>1</sup> See Code Section 12-36-60 for the definition of “tangible personal property” and the various imposition provisions of Chapter 36 of Title 12 (sales and use tax provisions) for information as to services and intangibles that are “tangible personal property” by definition.

<sup>2</sup> Even though some survey questions specifically state that the activity represents the corporation’s “sole activity” in South Carolina, all other survey questions represent the corporation’s sole activity in South Carolina whether or not such is specifically stated. The difference in wording only represents how each national publication worded its questions.

**C. Survey Answers**

**A. General Activities**

- |   | YES                      | NO                                  |
|---|--------------------------|-------------------------------------|
| 1. The corporation holds a certificate of authority to conduct business in South Carolina, or is otherwise registered with the Secretary of State or any other regulatory agency in South Carolina. | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| 2. The corporation issues credit cards to customers who reside in South Carolina.   | <input type="checkbox"/> | <input type="checkbox"/>            |

Note: The answer depends on the facts and circumstances.

**B. Property in South Carolina**

- |   | YES                                 | NO                                  |
|---|-------------------------------------|-------------------------------------|
| 1. The corporation's sole activity in South Carolina is maintaining or using a place of business for selling tangible personalty.   | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| 2. The corporation's sole activity in South Carolina is maintaining or using a place of business for storing <sup>3</sup> tangible personalty.  | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| 3. The corporation's sole activity in South Carolina is maintaining or using a distribution facility that: <sup>4</sup><br>(a) meets the definition of a "distribution facility" <sup>5</sup> as found in Code Section 12-6-3360(M)(8). | <input type="checkbox"/>            | <input checked="" type="checkbox"/> |

<sup>3</sup> For purposes of this scenario, the storage facility does not meet the definition of a "distribution facility" as defined in Code Section 12-6-3360(M)(8) and discussed in Question B.3. See also footnote #5.

<sup>4</sup> This question was not a part of the surveys from national publications, as discussed in the Introduction, but was added to ensure persons reviewing this opinion would be aware of South Carolina's special rules concerning a "distribution facility" provided for in Code Section 12-36-2690. See footnote #5.

<sup>5</sup> Code Section 12-36-2690 states that "owning or utilizing a distribution facility [as defined in Code Section 12-6-3360] within South Carolina is not considered in determining whether the person has a physical presence in South Carolina sufficient to establish nexus with South Carolina for sales and use tax purposes." Code Section 12-6-3360(M)(8) defines a "distribution facility" as "an establishment where shipments of tangible personal property are processed for delivery to customers. The term does not include an establishment where retail sales of tangible personal property are made to retail customers on more than twelve days a year except for a facility which processes customer sales orders by mail, telephone, or electronic means, if the facility also processes shipments of tangible personal property to customers and if at least seventy-five percent of the dollar amount of goods sold through the facility are sold to customers outside of South Carolina." Code Section 12-36-2690 is schedule to be repealed for tax years after June 9, 2010; therefore, the answer will change if Code Section 12-36-2690 is repealed.

- |   | YES                                 | NO                       |
|---|-------------------------------------|--------------------------|
| (b) does not meet the definition of a “distribution facility” as found in Code Section 12-6-3360(M)(8).                     | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| 4. The corporation’s sole activity in South Carolina is maintaining tangible personalty for lease through a representative. | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| 5. The corporation’s sole activity in South Carolina is the presence in South Carolina of an affiliated entity.             | <input type="checkbox"/>            | <input type="checkbox"/> |

Note: The answer depends on the facts and circumstances.

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|--|-------------------------------------|--------------------------|
| 6. The corporation’s sole activity in South Carolina is the existence of unrelated in-state office ( <i>e.g.</i> advertising). | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| 7. The corporation’s sole activity in South Carolina is licensing software for use in South Carolina.                          | <input type="checkbox"/>            | <input type="checkbox"/> |

Note: See SC Revenue Ruling #05-13 for information as to the taxation of software. As set forth in the revenue ruling, if software is delivered in tangible form or if the purchaser is charged to access an Application Service Provider (“ASP”) website to use software, the transaction would be taxable. If the software is delivered electronically, the transaction would not be subject to the tax.

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| 8. The corporation’s sole activity in South Carolina is that of a mail-order catalog seller with property or solicitors in South Carolina.               | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| 9. The corporation’s sole activity in South Carolina is the drop shipment of catalogs in South Carolina, for mailing to residents within South Carolina. | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| 10. The corporation’s sole activity in South Carolina is renting customer mailing lists to other vendors in South Carolina.                              | <input type="checkbox"/>            | <input type="checkbox"/> |

Note: The answer depends on the facts and circumstances.

**C. Activities of an Employee or Third Party (e.g., Sales Representative, Independent Contractor or Affiliated Company)**

- |   | YES                                 | NO                       |
|---|-------------------------------------|--------------------------|
| 1. The corporation’s sole activity in South Carolina is the presence of a representative selling in South Carolina. | <input checked="" type="checkbox"/> | <input type="checkbox"/> |

- |  | YES                                 | NO                       |
|--|-------------------------------------|--------------------------|
| 2. The corporation authorizes an employee or third party ( <i>e.g.</i> , independent contractor, affiliated company or other representative) to install, deliver, service, or repair merchandise in South Carolina or hires independent contractor to perform warranty or repair services on tangible personal property in South Carolina. (The repairs may be under warranty for which there is no separate charge or may be under warranty for which there was a separate charge.) | <input checked="" type="checkbox"/> | <input type="checkbox"/> |

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|--|-------------------------------------|--------------------------|
| 3. The corporation uses an employee or third party ( <i>e.g.</i> , independent contractor, affiliated company, or other representative) to investigate, handle or resolve customer issues, provide training or technical assistance, or otherwise provide customer service to customers in South Carolina. | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
|--|-------------------------------------|--------------------------|

Note: This answer assumes that the employee or third party is physically present in South Carolina.

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|--|-------------------------------------|--------------------------|
| 4. The corporation's sole activity in South Carolina is an employee/representative providing training to South Carolina customers.         | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| 5. The corporation's sole activity in South Carolina is an employee/representative providing trouble-shooting to South Carolina customers. | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| 6. The corporation's sole activity in South Carolina is purchasing agents entering South Carolina to acquire tangible personal property.   | <input type="checkbox"/>            | <input type="checkbox"/> |

Note: See *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). The answer depends on the facts and circumstances.

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|--|--------------------------|--------------------------|
| 7. The corporation's sole activity in South Carolina is attendance by a sales representative at a two or three day trade show. | <input type="checkbox"/> | <input type="checkbox"/> |
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Note: The answer depends on the facts and circumstances, including but not limited to, what the representative does at the trade show, the business' intent with respect to returning to the state, etc.

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|---|--------------------------|--------------------------|
| 8. The corporation sells tangible personal property while temporarily located in South Carolina for up to three days. | <input type="checkbox"/> | <input type="checkbox"/> |
|---|--------------------------|--------------------------|

Note: The answer depends on whether or not the corporation's presence or sales are de minimis, the business' intent with respect to returning to the state, the value of the sales, and other facts and circumstances. However, even if nexus is not established, the seller must be licensed and remit the tax on all sales made by the employee during the trade sho

- |  | YES                                 | NO                                  |
|--|-------------------------------------|-------------------------------------|
| 9. The corporation sells tangible personal property to residents in South Carolina from outside the state ( <i>e.g.</i> , by telephone, over the Internet, via catalog/direct mail, or otherwise) and has an employee visit South Carolina four or more times during the year. | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| 10. The corporation's sole activity in South Carolina is telemarketing activity into South Carolina (telemarketer not located in South Carolina).  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> |
| 11. The corporation's sole activity in South Carolina is the use of a telemarketing firm with a South Carolina office.   | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| 12. The corporation hires an unrelated call center or fulfillment center located in South Carolina to process telephone or electronic orders that primarily derive from out-of-state customers.  | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| 13. The corporation's sole activity in South Carolina is using an in-state photographer, if the vendor's products are shipped to South Carolina during the photographic sessions.  | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| 14. The corporation collects delinquent accounts using a collection agency in South Carolina or hires attorneys or other third parties to file collection suits in South Carolina.   | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| 15. The corporation is affiliated with an entity that sells tangible personal property or services to customers in South Carolina, and   |                                     |                                     |
| (a) the South Carolina affiliate sells similar merchandise and uses common trade names, trademarks or logos.   | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| (b) uses the South Carolina affiliate to accept returns, take orders, perform customer service or distribute advertising materials on its behalf.  | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| (c) sells tangible personal property over the Internet or by catalog and has an affiliated company that operates a retail store in South Carolina.   | <input type="checkbox"/>            | <input type="checkbox"/>            |
| Note: The answer depends on the facts and circumstances.   |                                     |                                     |
| 16. The corporation sells tangible personal property to residents in South Carolina from outside the state and authorizes an employee or third party ( <i>e.g.</i> , sales representative, independent contractor, or affiliated company) to solicit sales in South Carolina.  | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| 17. The corporation has employees or representatives occasionally enter South Carolina to meet with South Carolina suppliers of goods or services.   | <input type="checkbox"/>            | <input type="checkbox"/>            |

Note: See *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). The answer depends on the facts and circumstances.

- |   | YES                                 | NO                       |
|---|-------------------------------------|--------------------------|
| 18. The corporation's sole activity in South Carolina is soliciting through independent agents.   | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| 19. The corporation's sole activity in South Carolina is using a broker to arrange rentals of customer mailing lists to vendors in South Carolina and other states. | <input type="checkbox"/>            | <input type="checkbox"/> |

Note: See SC Revenue Ruling #05-13 for analogous information as to the taxation of software. As such, if the mailing list is delivered in tangible form, the transaction would be taxable. If the software is delivered electronically, the transaction would not be subject to the tax.

#### **D. Delivery**

- |   | YES                                 | NO                                  |
|---|-------------------------------------|-------------------------------------|
| 1. The corporation's sole activity in South Carolina is in-state delivery via company-owned vehicles.   | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| 2. The corporation's sole activity in South Carolina is the presence of a representative to deliver merchandise in South Carolina. <sup>6</sup> | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| 3. The corporation delivers merchandise in South Carolina by means other than common carrier or the U.S. Postal Service.                        | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| 4. The corporation uses a company in South Carolina to drop-ship merchandise to customers.  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> |

Note: See SC Revenue Ruling #98-8.

#### **E. Transactions with South Carolina Printers**

- |   | YES                      | NO                                  |
|---|--------------------------|-------------------------------------|
| 1. The corporation's sole activity in South Carolina is using a South Carolina printing company to print catalogs or advertisements, if the vendor's personnel enter the state occasionally (1-3 times per year) during the printing process. | <input type="checkbox"/> | <input checked="" type="checkbox"/> |

Note: See Code Section 12-36-75.<sup>7</sup>

<sup>6</sup> This answer assumes the representative is not operating out of a facility that meets the definition of a "distribution facility" in Code Section 12-6-3360(M)(8). See also footnotes #3 and #5.

<sup>7</sup> Code Section 12-36-75 states:

“(A) Notwithstanding any other provision of this chapter, tangible or intangible property that is: (1) owned or leased by a person that has contracted with a commercial printer for printing and used in connection with a printing contract; and  
(2) located at the premises of the commercial printer;

- |   | YES                      | NO                                  |
|---|--------------------------|-------------------------------------|
| 2. The corporation's sole activity in South Carolina is using a South Carolina printing company to print catalogs or advertisements, if the vendor's personnel do not enter South Carolina during the printing process. | <input type="checkbox"/> | <input checked="" type="checkbox"/> |

Note: See Code Section 12-36-75.<sup>8</sup>

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|--|--------------------------|-------------------------------------|
| 3. The corporation's sole activity in South Carolina is using a South Carolina printing company where the taxpayer's printing materials or printed goods are stored. | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
|--|--------------------------|-------------------------------------|

Note: See Code Section 12-36-75.<sup>9</sup>

#### **F. Advertising**

- |   | YES                      | NO                       |
|---|--------------------------|--------------------------|
| 1. The corporation's sole activity in South Carolina is advertising on local media (e.g., newspapers, radio, TV). | <input type="checkbox"/> | <input type="checkbox"/> |

Note: The answer depends on the facts and circumstances (*e.g.*, nexus may exist if the advertising consists of a personal endorsement by a local personality)

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|---|--------------------------|--------------------------|
| 2. The corporation's sole activity in South Carolina is advertising on national media, which may be circulated in South Carolina ( <i>e.g.</i> , national magazines or TV). | <input type="checkbox"/> | <input type="checkbox"/> |
|---|--------------------------|--------------------------|

Note: The answer depends on the facts and circumstances (*e.g.*, nexus may exist if the advertising consists of a personal endorsement by a local personality)

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shall not be considered to be, or to create, an office, a place of distribution, a sales location, a sample location, a warehouse, a storage place, or other place of business maintained, occupied, or used in any way by the person. A commercial printer with which a person has contracted for printing by reason of any printing contract which may include storing and shipping the items printed shall not be considered to be in any way a representative, an agent, a salesman, a canvasser, or a solicitor for the person.

(B) Notwithstanding any other provision of this chapter, the following shall not cause a person that has contracted with a commercial printer for printing to have a duty to register as a retailer or to collect or remit the sales or use tax imposed by this chapter:

- (1) the ownership or leasing by that person of tangible or intangible property located at the South Carolina premises of the commercial printer and used in connection with printing contracts;
- (2) the sale by that person of property printed or imprinted at and shipped or distributed from the South Carolina premises of the commercial printer by the commercial printer;
- (3) the activities performed pursuant or incident to a printing contract by or on behalf of that person at the South Carolina premises of the commercial printer by the commercial printer; or
- (4) the activities performed pursuant or incident to a printing contract by the commercial printer in South Carolina for or on behalf of that person."

<sup>8</sup> See footnote #7.

<sup>9</sup> See footnote #7.

YES NO

3. The corporation's sole activity in South Carolina is advertising on satellite TV.

Note: The answer depends on the facts and circumstances (*e.g.*, nexus may exist if the advertising consists of a personal endorsement by a local personality)

4. The corporation's sole activity in South Carolina is spillover advertising from neighboring states.

Note: This answer assumes that the advertiser and retailer have no physical presence in South Carolina.

5. The corporation's sole activity in South Carolina is that of a mail-order catalog seller with only mail communication in the state.

Note: This answer assumes that the retailer has no physical presence in South Carolina and that the catalogs are not mailed from within South Carolina.

6. The corporation's sole activity in South Carolina is mailing catalogs to South Carolina consumers.

Note: This answer assumes that the retailer has no physical presence in South Carolina and that the catalogs are not mailed from within South Carolina.

**Note: As stated in the "Introduction," the above answers are based on the assumption that the business is selling tangible personal property at retail to residents or others in South Carolina and that each specific survey question by itself was the only possible nexus creating activity or relationship a business has in South Carolina. However, it is important to note that a combination of several different activities or relationships, even if each by itself does not create nexus, may create nexus with South Carolina. In addition, any variance from the facts stated in a survey question, or any additional facts not stated in a survey question, may change the answer set forth in this chapter.**