



STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE

300A Outlet Pointe Blvd., Columbia, South Carolina 29210
P.O. Box 125, Columbia, South Carolina 29214-0575

SC REVENUE PROCEDURE #20-2

SUBJECT: Voluntary Disclosure of Nexus
(Income, Sales, Corporate License Fee)

DATE: Applies to all periods open under the statute.

SUPERSEDES: SC Revenue Procedure #09-2 and all previous documents and any oral directives in conflict herewith.

AUTHORITY: SC Code Ann. Section 12-4-320 (2014)
SC Revenue Procedure #09-3

SCOPE: The purpose of a Revenue Procedure is to provide procedural guidance to the public and Department personnel. It is an advisory opinion issued to assist in the administration of laws and regulations by providing guidance that may be followed in order to comply with the law. It is effective until superseded or modified by a change in statute, regulation, court decision, or another Departmental advisory opinion.

PURPOSE OF UPDATE

The purpose of this advisory opinion is to update SC Revenue Procedure #09-2 concerning the Department's Voluntary Disclosure Program to reflect recent changes in nexus standards.¹

OVERVIEW OF VOLUNTARY DISCLOSURE PROGRAM

The Department's Voluntary Disclosure Program is for taxpayers who may have nexus with South Carolina but are not registered with the Department to collect or remit South Carolina taxes and is designed to:

1. Encourage unregistered taxpayers to come forward voluntarily in an informal process, and begin paying taxes plus interest for the agreed look back period (generally three tax years or corresponding monthly/quarterly periods as discussed below) without incurring penalties for late filing and late payment of taxes.

¹ See SC Revenue Ruling #18-14, "Retailers Without a Physical Presence (Remote Sellers) – Economic Nexus."

2. Allow the Department to maximize compliance with its available resources.

In order to be considered for the Voluntary Disclosure Program, the taxpayer or the taxpayer's representative must initiate contact with the Department and meet the conditions specified in this advisory opinion. The request may be made by a taxpayer or the taxpayer's representative on a named or unnamed basis.

The Voluntary Disclosure Program is not available to a taxpayer that:

1. Has been contacted by the Department to schedule an audit or notified that an examination is pending prior to the time its name is disclosed to the Department in connection with participation in the voluntary filing program.
2. Is involved in an audit or litigation with the Department.
3. Requests an advisory opinion regarding matters relating to the existence of nexus.
4. Is requesting voluntary disclosure participation for non-business individual income taxes.
5. Does not respond timely and completely to a nexus questionnaire (if requested by the Department).
6. Does not provide adequate facts for the Department's Nexus/Discovery Section to determine the existence of nexus.
7. Failed to file a return as the result of fraud or gross negligence.

Taxes may be determined and assessed for any period open under statute if the taxpayer does not qualify as a voluntary filer.² Accordingly, taxes, interest, and penalties may be assessed for all years that nexus existed³ in South Carolina.

² SC Code Section 12-54-85. Subsection (C) generally provides that taxes must be determined and assessed within 36 months of the date a return was filed or due to be filed; however, this time limitation does not apply to certain situations, including failure to file returns.

³ SC Revenue Ruling #18-14 provides guidance for remote sellers (sellers without physical presence in South Carolina), who have, or establish, economic nexus with South Carolina for sales and use tax purposes. In accordance with this advisory opinion, remote sellers having economic nexus with South Carolina in calendar year 2017, or from January 1, 2018 through September 30, 2018, are responsible for remitting the sales and use tax for all taxable sales made into South Carolina on and after November 1, 2018. Remote sellers who establish economic nexus with South Carolina on or after October 1, 2018, are responsible for remitting the sales and use tax for all taxable sales made into South Carolina beginning the first day of the second calendar month after economic nexus commences.

DEPARTMENT RESPONSIBILITIES

Each request for voluntary disclosure is reviewed by the Department's Nexus/Discovery Section and is based on the specific facts of each taxpayer. Based on the information received, consideration of the request for voluntary disclosure is at the sole discretion of the Department and will be:

1. Given conditional approval for unnamed taxpayers;
2. Approved for named taxpayers; or
3. Rejected.

Conditional Approval. The Department may grant an unnamed taxpayer approval in the Voluntary Disclosure Program only on a conditional basis. During the conditional approval, the taxpayer is not protected by any time limitations on assessments if it is scheduled for audit, involved in an audit, or involved in litigation prior to the time its name is disclosed. The conditional approval is no longer conditional once the taxpayer's name is provided in writing by letter or email to the Department's Nexus/Discovery Section or the taxpayer's name is provided to the Nexus/Discovery Section by registering and/or filing all tax returns agreed upon and the taxpayer agrees to the conditions set forth in this advisory opinion.

Approval. The Department may grant approval to participate in the Voluntary Disclosure Program only to a named taxpayer who agrees to the conditions set forth in this advisory opinion.

Upon approval of the taxpayer's request to participate in the program, the Department will abide by the following guidelines:

1. Accept the filing of tax returns required to be filed pursuant to South Carolina law and payment of all required taxes for the applicable look back period (see discussion below).
2. Apply interest in accordance with the South Carolina Code.
3. Waive penalties resulting from the return being filed late and payment being made late, such as failure to file and failure to pay penalties.
4. Reserve the right to audit a taxpayer's books and records, subject to statutory time limits. If the Department audits the taxpayer, it will assess any tax determined to be due that was not discharged under the Voluntary Disclosure Program. All applicable penalties and interest will apply to additional taxes discovered to be due that have not been paid. If any of the factual representations made are found to have been materially misrepresented or a material fact is found to have been omitted by the taxpayer, the Department may consider the approval of the voluntary filer participation void and proceed as though the approval never occurred.

TAXPAYER RESPONSIBILITIES

A taxpayer who has nexus with South Carolina must agree to these Voluntary Disclosure Program conditions:

1. Register, as applicable, to collect or remit taxes within the time period agreed upon with the Department's Nexus/Discovery Section.
2. File all returns and pay all taxes and interest for the look back period (see discussion below) in a manner consistent with South Carolina statutes, regulations, court decisions, and Department advisory opinions within the time period agreed upon with the Department's Nexus/Discovery Section.
3. Continue to file and pay any taxes, interest, and penalties due for periods that end after the look back period.⁴
4. Waive all rights to file a claim for refund or returns for the tax periods prior to the look back period.
5. Waive all rights to request a refund based on lack of nexus for the returns filed for the look back period. The taxpayer also agrees to waive all rights to request a refund based on lack of nexus for returns filed after the look back period unless the activity by the taxpayer has changed substantially and nexus no longer exists with South Carolina, or there has been a change in court decisions, South Carolina statutes, regulations, or Department advisory opinions which dictates a lack of nexus.
6. Make books and records available to the Department for audit upon request.

LOOK BACK PERIOD

Except as otherwise provided, the look back period is as follows.

A. Nexus Existed for Three or More Years

Annual Filing. The look back period is the three immediately preceding ended tax years that nexus existed with South Carolina from the time a taxpayer or its representative initially contacts the Department regarding participation in the Voluntary Disclosure Program.

⁴ The taxpayer filing requirements may change if the activity by the taxpayer has changed substantially and nexus no longer exist with South Carolina, or there has been a change in court decisions, South Carolina statutes, regulations, or Department advisory opinions which dictate a different result. If a taxpayer ceases to file and pay, the taxpayer shall, as applicable, file final returns and close accounts for all registered tax types with the Department. A taxpayer may also need to file applicable forms with the Secretary of State. Questions concerning laws and forms administered by the Secretary of State should be directed to the Secretary of State's Office.

Monthly/Quarterly Filing. The look back period is the 36 immediately preceding ended months, or 12 immediately preceding ended quarters, that nexus existed with South Carolina from the time a taxpayer or its representative initially contacts the Department regarding participation in the Voluntary Disclosure Program.

B. Nexus Existed for Less Than Three Years

Annual Filing. The look back period is the number of immediately preceding ended tax years that nexus existed with South Carolina from the time a taxpayer or its representative initially contacts the Department regarding participation in the Voluntary Disclosure Program.

Monthly/Quarterly Filing. The look back period is the number of immediately preceding ended months, or immediately preceding ended quarters, that nexus existed⁵ with South Carolina from the time a taxpayer or its representative initially contacts the Department regarding participation in the Voluntary Disclosure Program.

- C. Extended Look Back Period. In situations where voluntary disclosure is approved by the Department after the date a tax return is due subsequent to the look back period described above, the look back period and voluntary disclosure conditions set forth in this advisory opinion may be extended to include those subsequent returns. (See Example C.)
- D. Shorter Look Back Period. In circumstances where the Department agrees that nexus is uncertain (*i.e.*, it is uncertain whether a court would determine the existence of nexus), the Department may enter into an agreement for a shorter look back period.

Note: For corporations subject to the corporate license fee⁶, all corporate license fees due are computed separately on the income tax returns required to be filed for the look back period. (See Examples A and B.)

EXAMPLES

The following examples assist in explaining the look back period.

Example A – Named Taxpayer – Corporate Tax and License Fee Nexus.⁷ Assume a calendar year corporate taxpayer discovers income tax nexus existed with South Carolina for five years (2019, 2018, 2017, 2016, and 2015). In January 2020, the taxpayer contacts the Department and is approved to participate in the Voluntary Disclosure Program in February 2020.

⁵ See footnote 3.

⁶ A corporate license fee is a franchise tax paid a year in advance of the taxpayer's income tax year for the privilege of doing business as a corporation in South Carolina pursuant to Chapter 20 of Title 12.

⁷ The nexus rules for business income taxes and corporate license fees are the same.

Income Tax Returns. The Department requires the taxpayer to file South Carolina corporate income tax returns for the tax years ended 2019, 2018, and 2017 - the three immediately preceding ended tax years from the time the taxpayer initially contacted the Department regarding participation in the Voluntary Disclosure Program.

Note: Although the 2019 return is not due until April 15, 2020, the 2019 corporate return is included in the look back period.

Corporate License Fee. Since South Carolina's income tax and corporate license fee are computed on the same tax return, but the license fee is paid a year in advance of the income tax, the look back period for the corporate license fees is 2020, 2019, 2018 (the fees that would be paid on the income tax returns for the years ended 2019, 2018, and 2017).

Example B – Unnamed Taxpayer – Corporate Tax and License Fee Nexus. Assume a calendar year corporate taxpayer discovers income tax nexus existed with South Carolina for the last two calendar years (2018 and 2017) and comes forward anonymously in December 2019. The taxpayer is granted approval to participate in the Voluntary Disclosure Program in January 2020.

Income Tax Returns. The Department requires the taxpayer to file South Carolina corporate income tax returns for the years ended 2018 and 2017 - the number of immediately preceding ended tax years from the time the taxpayer initially contacted the Department regarding participation in the Voluntary Disclosure Program.

Note: The 2019 return is not due before approval is granted by the Department to participate in the Voluntary Filing Program; this return does not fall within the "extended" look back period.

Corporate License Fee. Since South Carolina's income tax and corporate license fee are computed on the same tax return, but the license fee is paid a year in advance of the income tax, the look back period for the corporate license fees is 2019 and 2018 (the fees that would be paid on the income tax returns for the years ended 2018 and 2017).

Example C – Named Taxpayer – Sales and Use Tax Nexus – Extended Look Back Period Illustrated. Assume a sole proprietorship discovers sales and use tax nexus existed with South Carolina for the last forty-seven calendar months (2019, 2018, 2017, and 2016) and comes forward anonymously in November 2019. The taxpayer is approved to participate in the Voluntary Disclosure Program at the end of January 2020.

Generally, the look back period for sales and use tax returns is the number of immediately preceding ended monthly periods that nexus existed from the time the taxpayer initially contacted the Department regarding participation in the Voluntary Disclosure Program not to exceed the immediately preceding 36 months ended. In this example, sales and use tax nexus existed with South Carolina since January 2016, therefore, the Department will require the taxpayer to file sales tax returns for the monthly periods October 2019 back to November 2016 – the 36 immediately preceding ended monthly periods from initial contact with the Department.

Note: The November and December 2019 sales and use tax returns are due before the approval is granted by the Department to participate in the Voluntary Disclosure Program; these two months of returns for November and December 2019 are subsequent to the original look back period of 36 months, but fall within the “extended” look back period and voluntary disclosure conditions set forth in this advisory opinion (a total look back period of 38 months).

SUBMISSION OF REQUESTS OR ADDITIONAL INFORMATION

Requests for participation in the Voluntary Disclosure Program should be mailed to:

South Carolina Department of Revenue
Attn: Nexus/Discovery Section
PO Box 125
Columbia, South Carolina 29214-0970

Additional information concerning the existence of nexus with South Carolina or the voluntary filing procedure should be directed to the Nexus/Discovery Section.

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/W. Hartley Powell

W. Hartley Powell, Director

February 21 _____, 2020
Columbia, South Carolina