
State of South Carolina
Department of Revenue
301 Gervais Street, P. O. Box 125, Columbia, South Carolina 29214
Website Address: <http://www.sctax.org>

SC REVENUE PROCEDURE #03-5

SUBJECT: Certificate of Compliance Exception to a Lien Placed on Assets Transferred

EFFECTIVE DATE: June 18, 2003

REFERENCES: S. C. Code Ann. Section 12-36-530 (Supp. 2002)
S. C. Code Ann. Section 12-54-124 (Enacted June 18, 2003)

AUTHORITY: S. C. Code Ann. Section 12-4-320 (Supp. 2000)
S. C. Code Ann. Section 1-23-10(4) (Supp. 2000)
SC Revenue Procedure #03-1

SCOPE: The purpose of a Revenue Procedure is to provide procedural guidance to the public and Department personnel. It is a written statement issued to assist in the administration of laws and regulations by providing guidance that may be followed in order to comply with the law. **A Revenue Procedure is an advisory opinion; it does not have the force or effect of law, and is not binding on the public.** It is, however, binding on agency personnel until superseded or modified by a change in statute, regulation, court decision, or advisory opinion.

LAW:

Effective June 18, 2003, Act No. 69 (Section 3Y) added Code Section 12-54-124 to provide rules concerning a tax lien placed on assets transferred for tax liabilities that were generated by the transferor on or before the date when a majority of the business assets are transferred, the non-issuance of a license by the Department to the transferee until all taxes have been paid, and an exception to these rules if a certificate of compliance is timely obtained from the Department. The new statute reads:

In the case of the transfer of a majority of the assets of a business, other than cash, whether through sale, gift, devise, inheritance, liquidation, distribution, merger, consolidation, corporate reorganization, lease or otherwise, any tax generated by the business which was due on or before the date of any part of the transfer constitutes a lien against the assets in the hands of a purchaser, or any other transferee, until the taxes are paid. Whether a majority of the assets have been transferred is determined by the fair market value of the assets transferred, and not by the number of assets

transferred. The department may not issue a license to continue the business to the transferee until all taxes due the State have been settled and paid and may revoke a license issued to the business in violation of this section.

This section does not apply if the purchaser receives a certificate of compliance from the department stating that all tax returns have been filed and all taxes generated by the business have been paid. The certificate of compliance is valid if it is obtained no more than thirty days before the sale or transfer.

A similar provision concerning a lien placed against the goods, furniture, and fixtures purchased for unpaid taxes of the seller and the non-issuance of a retail sales tax license by the Department to the purchaser until all taxes have been paid is contained in the sales tax statute, Code Section 12-36-530. It reads:

Retailers, after closing or selling a business, must return the retail license to the department for cancellation and remit any unpaid or accrued taxes. The department may refuse to issue a new retail license to any person who has failed to comply with the provisions of this section.

In the case of sale of any business the tax is considered to be due at the time of the sale of the fixtures and equipment incident to the business and constitutes a lien against the stock of goods and the fixtures and equipment in the hands of the purchaser, or any other third party, until the tax is paid. The department may not issue a retail license to continue or conduct the business to the purchaser until all taxes due the State have been settled and paid.

Therefore, Code Section 12-54-124 provides that in the case of the transfer of a majority of the assets of a business, (1) any tax of the transferor due before the transfer constitutes a lien against the assets in the hands of the transferee until the taxes are paid, and (2) the Department may not issue a license to continue the business to the transferee until all taxes due South Carolina have been settled and paid. This provision, however, does not apply if the transferee receives a certificate of compliance from the Department within 30 days before the transfer. Code Section 12-36-530, however, does not contain the certificate of compliance exception. Code Section 12-36-530 specifically provides that in the case of the sale of any business, (1) the tax is considered to be due at the time of the sale of the fixtures and equipment incident to the business and constitutes a lien against the stock of goods and the fixtures and equipment in the hands of the purchaser, or any other third party, until the tax is paid, and (2) the Department may not issue a retail license to continue or conduct the business to the purchaser until all taxes due South Carolina have been settled and paid.

Under the rule of statutory construction of statutes *in pari materia*, statutes are not to be considered as isolated fragments of law, but as a whole, or as parts of a great, connected, homogenous system. Such statutes are considered as if they constituted but one act, so that sections of one act may be considered as though they were parts of the other act, as far as this can reasonably be done. Indeed, as a general rule, where legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new

enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it, unless a different purpose is shown plainly. 73 Am.Jur.2D Statutes Section 188.

Accordingly, it is the Department's position that when a majority of the assets of a business are transferred or when a business is sold, (1) any tax generated by the transferor due before the transfer constitutes a lien against the assets in the hands of the transferee until the taxes are paid and (2) the Department may revoke or may not issue a license (such as a retail sales tax license, admissions tax license, tobacco license, or coin operated device license) to continue the business to the transferee until all taxes due South Carolina have been settled and paid. If, however, the transferee receives a certificate of compliance from the Department within 30 days before the transfer, then there will not be a lien placed against the assets in the hands of the transferee for the unpaid tax liabilities of the transferor, and the Department may issue a license to the transferee to continue the business.

Caution: Neither Code Section 12-54-124 nor the certificate of compliance protects the transferee from a lien placed on the assets prior to the transfer by other statutory or judicial means. For example, the transferee is not protected from a lien existing on the property due to nonpayment of real property taxes.

USE OF A CERTIFICATE OF COMPLIANCE TO RELIEVE TRANSFEREE OF TRANSFEROR'S TAX LIABILITY:

Persons that are involved in the transfer of the assets of a business, or are in the process of buying a business or receiving assets from a business that is transferring a majority of its assets, should consider asking the transferor to request a certificate of compliance to be remitted to the transferee before finalizing the transfer.

A certificate of compliance from the Department is prima facie evidence that a tax has been paid, that a return has been filed, or that information has been supplied as required. The certificate of compliance issued pursuant to Code Section 12-54-124 is valid for 30 days from the date it is issued by the Department. If the transfer takes place during this 30 day period, there will not be a lien against the assets in the hands of the transferee and the Department will not hold the transferee responsible. The Department will pursue the transferor if the transferor does not file applicable returns or pay unpaid tax liabilities. Caution: Neither Code Section 12-54-124 nor the certificate of compliance, however, protects the transferee from a lien placed on the assets prior to the transfer by other statutory or judicial means.

EXAMPLE:

An example illustrates the time period a certificate of compliance will protect the transferee. Assume a calendar year corporation is completing the transfer of a majority of its business assets in July 2003. The taxpayer has a valid 6 month extension of time to file its 2002 corporate tax return; the extended due date is September 15, 2003. The taxpayer requested a certificate of compliance in June 2003, prior to filing its 2002 corporate tax return. The Department issues a certificate of compliance, dated July 1, 2003, that covers the period through December 31, 2001

(the date the most recent corporate tax return can be verified). The transferee is protected from the liens that might otherwise arise from Code Sections 12-54-124 or 12-36-530, providing the transfer is completed during the 30 day period July 1 – July 31, 2003. The seller remains liable for its unpaid tax liabilities, including any 2002 corporate liabilities that may arise upon filing the 2002 corporate return.

PROCEDURE:

The purpose of this advisory opinion is to establish a procedure for use by taxpayers requesting a certificate of compliance from the Department pursuant to Code Section 12-54-124.

WHO MAY REQUEST A CERTIFICATE OF COMPLIANCE

A request for a certificate of compliance may be made by (1) the taxpayer or (2) a third party. Requests from a third party must be accompanied by authorization from the taxpayer to receive the information. This will generally be a power of attorney form, South Carolina or Internal Revenue Service Form 2848. The form may be obtained from the Department's website at www.sctax.org.

HOW TO REQUEST A CERTIFICATE OF COMPLIANCE

Each request for a certificate of compliance must be in writing and must include a nonrefundable \$60 Department processing fee. Certificates will not be issued in response to requests not accompanied by payment.

South Carolina Form C-268 "Certificate of Compliance Request Form" may be used to request a certificate of compliance. A written request that is not made using Form C-268 may result in substantial processing delays. Form C-268 is available on the Department's website at www.sctax.org.

A request may be mailed or hand delivered to the Department. A hand delivered request should be placed in a closed envelope addressed to the "Tax Compliance Officer." Failure to place the request in a closed envelope may result in the request not being timely delivered to the responsible section of the Department. Further, hand delivery of a request to one of the Department's regional offices may result in a delay in processing the request due to the time involved in interoffice mailing the request to the Tax Compliance Officer at the Main Office. The locations of the Department offices may be found on the Department's website at www.sctax.org.

A request should be mailed to the following address:

Tax Compliance Officer
South Carolina Department of Revenue
Columbia, South Carolina 29214-0027

PROCEDURE FOR ISSUANCE OF A RESPONSE

Once the Department's Tax Compliance Officer has received a written request from a taxpayer or third party, the following procedure will be followed:

A. REVIEW OF REQUEST

1. Generally requests are reviewed in the order received. The Tax Compliance Officer will request and obtain any additional information deemed necessary. The person making the request will be informed that if the additional information is not provided within 30 days, the request may be considered withdrawn. If the additional information is provided after the request is withdrawn, then it must be accompanied by a new request and another \$60 Department processing fee.
2. The Tax Compliance Officer will gather all necessary information and determine whether the taxpayer owes the Department any returns or taxes based on the information available. Note: The research will not include whether a taxpayer has been selected for audit, is currently under audit, is currently in appeals or litigation with the Department, or has been issued a proposed notice of assessment.
3. Once the review has been completed, the results will be sent to the taxpayer, third party, or both, as requested. Depending on the research, the results will be (1) a certificate of compliance or (2) a letter explaining why the Department cannot issue a certificate of compliance.

B. TYPES AND DESCRIPTION OF RESULTS

1. Letter of Compliance. If the review indicates that the taxpayer is in compliance, then the Tax Compliance Officer will issue a certificate of compliance. The certificate of compliance letter is valid in the hands of the transferee for 30 days from the date the letter is issued by the Department. See example above in "Use of Certificate of Compliance to Relieve Transferee of Transferor's Tax Liability."
2. Inability to Issue. If the review indicates that: (1) the taxpayer has not filed all returns and paid its taxes for the years or periods reviewed, (2) the taxpayer identified in the request cannot be located in the Department's files, (3) incorrect or insufficient information has been received from the requestor, or (4) other similar reasons exist, then a letter will be mailed to the authorized parties stating that a certificate of compliance cannot be issued at this time and the reasons therefore.

The taxpayer will be given a contact person at the Department to assist in resolving any problems. If a third party is to be notified of the noncompliance, the third party will receive results that indicate that the taxpayer is not in compliance for a specific tax type. Upon satisfaction of the noncompliance, a compliance letter can be issued, if requested.

3. The results will be sent to the taxpayer or third party as soon as possible after receipt of a properly completed request and \$60 Department processing fee. Generally, if the request is submitted on a fully completed SC Form C-268, the results are sent within 10 business days after receipt by the Tax Compliance Officer.
4. The written results are mailed unless the taxpayer or third party requests the results be faxed or picked up at the Department's Main Office. Due to the confidentiality of the information, the Department will fax or allow pick up of the results only if the taxpayer or third party gives the Department written permission.

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/Burnet R. Maybank III, Director
Burnet R. Maybank III, Director

Columbia, South Carolina

November 19 , 2003