



REVENUE PROCEDURE #94-4

SUBJECT: Definition of Withholding Agent
(Income Tax)

EFFECTIVE DATE: Applies to all periods open under statute.

SUPERSEDES: All previous documents and any oral directives in conflict herewith.

INTRODUCTION

This procedure defines "withholding agent" and identifies who may be held personally and individually liable for the amount to be withheld or required to be withheld.

DEFINITION OF WITHHOLDING AGENT - GENERALLY

SC Code Section 12-9-310(A) requires withholding in certain situations by:

Every person, firm, corporation, association, joint-stock company, partnership, fiduciary, or the State of South Carolina, or any political subdivision of the State or any agency or any instrumentality or authority thereof, and any municipality, located within or doing business within the State, having an income within the State or having an employee earning income within this State, or in any manner whatever subject to the jurisdiction of this State, the United States or any political subdivision thereof, or any instrumentality or agency of the United States or any political subdivision thereof, or any other state or political subdivision or instrumentality or agency thereof. . .

Definition of Withholding Agent. With the exception of the application of SC Code Section 12-9-420 (discussed below), the Department will consider the withholding agent to be any individual, trust, estate, partnership, receiver, association, company, corporation, or any other entity including the United States, a state, a political subdivision or agency of the United States or any state, and a municipality located in South Carolina required to withhold income taxes under the provisions of Chapter 9 of Title 12 of the South Carolina Code of Laws.

The withholding agent, as described in the paragraph above, is primarily liable for the collection and remittance of amounts due the Department under Chapter 9 of Title 12. If the tax is not paid, the Department will attempt to collect the tax from the withholding agent. If the Department is unable to collect the tax from the withholding agent, it may seek to apply the provisions of SC Code Section 12-9-420.

DEFINITION OF WITHHOLDING AGENT - SECTION 12-9-420

If an entity described in Section 12-9-310(A) (discussed above) fails to withhold or remit payment to the Department, and efforts to collect such amounts have been unsuccessful, the Department may apply the provisions of Section 12-9-420. This section states:

Every withholding agent who fails or neglects to withhold or pay to the Department of Revenue and Taxation any sums required by this chapter to be withheld and paid is personally and individually liable therefor, and any sum or sums withheld in accordance with the provisions of Sections 12-9-310 to 12-9-370 are to be held in trust for the State. . . The term "withholding agent", as used in this section, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs. (Emphasis added.)

Hence, this section deems a withholding agent to be personally and individually liable for amounts required to be withheld and remitted to the Department. **For purposes of this section only**, a withholding agent includes individuals, such as an officer or employee of a corporation, or a partner or employee of a partnership, or a member or an employee of a limited liability company. Thus, this section allows the Department to collect from an individual amounts required to be withheld and remitted.

Section 12-9-420 will be applied in order to facilitate the collection of tax and enhance voluntary compliance. If a business or other entity has failed to collect or pay over amounts required to be withheld, the provisions of this section may be imposed against those determined to have been responsible in failing to pay over the tax. **Responsibility must be established.** The withheld taxes will be collected only once, whether from the business or entity, from one or more responsible persons, or from the business or entity and one or more responsible persons. Effort will be made to collect the amounts required to be withheld from the business or entity before attempting to collect any amount from an individual. If more than one person is a responsible person, the provisions of this section may be applied against any one or more of them in order to collect the amount due.

Responsibility is a matter of status, duty, and authority. Those performing acts without exercising independent judgment will not be deemed responsible.

In general, non-owner employees of the business entity, who act solely under the dominion and control of others, and who are not in a position to make independent decisions on behalf of the business entity, will not be subject to the the provisions of Section 12-9-420. For example, a payroll clerk who is directed by the owner of the business to not remit withheld taxes will not be held to be responsible. The owner, in this example, would be the responsible person.

In addition, this section will not be imposed on unpaid, volunteer members of any board of trustees or directors of an organization referred to in IRC Section 501 to the extent they are solely serving in an honorary capacity, do not participate in the day-to-day or financial operations of the organization, or do not have knowledge of the failure on which this section is imposed.

A person will not be held to be personally and individually liable for the tax if sufficient information is not available to demonstrate he or she was actively involved in the business or entity at the time the liability was not being paid.

Before making a final determination as to who is responsible in failing to withhold or pay sums required to be withheld and paid, the Department will consider all relevant issues. The initial determination of whether a person is a withholding agent for purposes of SC Code Section 12-9-420 must be approved by the audit or collection supervisor or manager. Once a person has been deemed to be a responsible person for purposes of Section 12-9-420, he may appeal this decision through the appeals process.

DEFINITION OF WITHHOLDING AGENT - SECTION 12-9-510

For purposes of the withholding required by Code Section 12-9-510 on the sale of real property by nonresidents, the withholding agent is the buyer. The amount of the tax, interest and any penalties for failure to file returns, provide information and remit payment will be assessed against the buyer.

NOTE: For information concerning withholding penalties, see SC Revenue Procedure #93-5.