
State of South Carolina
Department of Revenue
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SC REVENUE RULING #04-2

SUBJECT: “Transferor Affidavit” Exception to Code Section 12-54-124 Upon the Transfer of Certain Assets

EFFECTIVE DATE: June 18, 2003

REFERENCES: 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 Ruling is to provide guidance to the public and to Department personnel. It is a written statement issued to apply principles of tax law to a specific set of facts or a general category of taxpayers. **A Revenue Ruling is an advisory opinion; it does not have the force or effect of law and is not binding on the public.** It is, however, the Department’s position and is binding on agency personnel until superseded or modified by a change in statute, regulation, court decision, or advisory opinion.

Effective June 18, 2003, Act No. 69 (Section 3Y) added Code Section 12-54-124 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 by the transferee 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.

The purpose of this advisory opinion is to answer some common questions that have arisen in the application of this new law and to explain a method by which a transferee who is not receiving business assets, or where the transferor is not transferring a majority of the assets of a business in this and other related or planned transfers, may have assurance that the Department will not assert that Code Section 12-54-124 placed a lien against the assets in the hands of the transferee, and if applicable, the Department will not refuse to issue a license and will not revoke a license based upon Code Section 12-54-124.

The statute provides that the law does not apply if a transferee receives a timely certificate of compliance. This advisory opinion sets forth a mechanism whereby the law will also not apply in certain situations even if a transferee does not obtain a certificate of compliance. In the Department's opinion, it was not the legislative intent of this statute to impede the sale of assets or expect the transferee to always know whether business assets or a majority of the assets of a business are being transferred. Accordingly, the Department has determined in the situations described below that it will not assert that Code Section 12-54-124 applies if a valid "Transferor Affidavit" is obtained. In such situations, the Department will not place a lien against the assets in the hands of the transferee, and the Department will not refuse to issue and will not revoke a license based upon Code Section 12-54-124. The Department, however, will pursue the transferor if the transferor does not file all applicable returns and pay its tax liabilities. Note: Neither Code Section 12-54-124, a "Certificate of Compliance," nor the "Transferor Affidavit" protect 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.

Question 1 – Transferor Affidavit

- Q. If the transferor asserts that the assets transferred are not business assets or do not constitute a majority of its business assets, then how may a transferee be protected from the provisions of Code Section 12-54-124?
- A. The transferee can obtain from the transferor a "Transferor Affidavit." The purpose of this affidavit is to protect the transferee who is not receiving business assets or where the transferor is not transferring a majority of the assets of a business in this and other related or planned transfers from a tax lien that may be placed on the assets transferred pursuant to Code Section 12-54-124 if the transferor does not file all applicable returns or pay all of its South Carolina tax liabilities. The "Transferor Affidavit" is valid for 30 days from the date signed by the transferor. In other words, if the transferee obtains a valid "Transferor Affidavit" and the transfer takes place during this 30 day period, then the Department will not assert that Code Section 12-54-124 placed a lien placed against the assets in the hands of the transferee, and if applicable, the Department will not refuse to issue a license and will not revoke a license based upon Code Section 12-54-124. Note: Neither Code Section 12-54-

124, a “Certificate of Compliance,” nor the “Transferor Affidavit” protect 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.

A form “Transferor Affidavit” is attached to this advisory opinion. This affidavit may be used or a substitute affidavit is acceptable in lieu of this affidavit provided all information is reflected on the substitute affidavit.

Question 2 – Certificate of Compliance

Q. What is the difference between a “Transferor Affidavit” and a “Certificate of Compliance?”

A. The purpose of a timely certificate of compliance is to protect the transferee from a tax lien that may be placed on the business assets transferred pursuant to Code Sections 12-54-124 and/or 12-36-530 **when a majority of the assets of a business are being transferred or when a business is sold**, even if the transferor did not file all applicable returns and pay all of its South Carolina tax liabilities. Note: Neither Code Section 12-54-124, a “Certificate of Compliance” nor the “Transferor Affidavit” 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.

A certificate of compliance issued prior to the transfer is valid for 30 days from the date it is issued by the Department. If the transfer takes place during this 30 day period, then the Department will not assert that Code Section 12-54-124 placed a lien against the assets in the hands of the transferee, and if applicable, the Department will not refuse to issue a license and will not revoke a license based upon Code Section 12-54-124. See SC Revenue Procedure #03-5, “Certificate of Compliance Exception to a Lien Placed on Assets Transferred,” for additional information on the procedure to use if requesting a certificate of compliance from the Department, and the applicability of the certificate of compliance to liens placed against the sale of any business pursuant to Code Section 12-36-530. Note: The transferor still remains liable for filing all applicable returns and paying all of its South Carolina tax liabilities even if a certificate of compliance is provided to the transferee.

Question 3 – Definition of “Business”

Q. What is a business?

A. Since Code Section 12-54-124 does not contain a definition of “business,” it is the Department’s opinion that relying on the common meaning of “business” for income tax purposes is reasonable when interpreting the provisions of Code Section 12-54-124. In South Carolina’s Income Tax Act, Code Section 12-6-30(10) defines “business” to include trade,

profession, occupation, or employment. Further, South Carolina has adopted many of the provisions of the Internal Revenue Code, such as Internal Revenue Code Sections 162¹ and 280A.²

In determining whether a transferor is engaged in a “business,” and subject to the provisions of Code Section 12-54-124 upon the transfer of a majority of the business assets in this and other related or planned transfers, the Department will apply income tax principles in Chapter 6 of Title 12 and Internal Revenue Code principles that have been adopted, such as Code Sections 162 and 280A.

For example, in determining if the transferor of a vacation home that has both personal use and rental use is a “business” subject to the provisions of Code Section 12-54-124, the Department will look to the federal income tax concepts in Internal Revenue Code Section 280A. ³ In general, if Section 280A limits the deduction of the vacation home rental expenses, then it is the Department’s opinion that there is not a transfer of “business” assets subject to the provisions of Code Section 12-54-124. The transferor may furnish the transferee a “Transferor Affidavit” stating that the vacation home transferred is not a business asset; a certificate of compliance is not necessary.

Alternatively, if Section 280A does not limit the deduction of the vacation home rental expenses, including depreciation, then it is the Department’s opinion that there is a transfer of “business” assets. Since this is the only vacation home owned by the transferor in this example, the transfer would be a transfer of a “majority of the business assets” and would be subject to the provisions of Code Section 12-54-124. A certificate of compliance is necessary to protect the transferee from the lien provisions of Code Section 12-54-124.

Note: Even if the transferee receives a “Transferor Affidavit” or certificate of compliance, the transferee should note that if he is purchasing real property from a nonresident seller that he may be required to withhold income taxes from the nonresident seller. See Code Section 12-8-580 and SC Revenue Advisory Bulletin #02-6 for more information.

¹ Internal Revenue Code Section 162, “Trade or Business Expenses,” allows a deduction for ordinary and necessary expenses paid or incurred during the taxable year that are directly connected with or pertaining to the taxpayer’s business.

² Internal Revenue Code Section 280A, “Disallowance of Certain Expenses in Connection with Business Use of Home, Rental of Vacation Homes, etc.” provides limitations on the amount of deductions that may be taken in connection with the rental of a residence or vacation home that is also used as a residence of the taxpayer.

³ Note: Any person who makes short term rentals of real estate will be liable for accommodations tax on his rentals whether or not the rentals constitute a business as defined by this advisory opinion. See Code 12-36-910 and 12-36-510.

Question 4 – Definition of “Majority of the Assets of a Business”

- Q. What is the transfer of a majority of the assets of a business?
- A. Code Section 12-54-124 provides that the fair market value of the assets is used to determine whether a majority of the assets have been transferred. The number of assets transferred is not used to make this determination.

Generally, a legal entity is one business, but it is possible for a legal entity, i.e., corporation, limited liability company, etc., to contain more than one discrete business enterprise. For example, a company owns six grocery stores having equal fair market value. If the company transfers the business assets of two of the grocery stores, then it is the Department’s opinion that the provisions of Code Section 12-54-124 would not apply since a majority of the business assets are not being transferred. The transferor may furnish the transferee a “Transferor Affidavit” stating that a majority of the business assets, based on fair market value, are not being transferred in this transfer and other related or planned transfers. See SC Revenue Advisory Bulletin #01-1 for guidance in determining when a legal entity contains one or more discrete businesses.

Question 5 – Definition of “Transfer”

- Q. Does the statute apply even if the planned or related transfers occur over a period of time or involve more than one transferee?
- A. Yes, neither the period of time to complete the transfer nor the number of transferees involved affects the application of the law. For example, a company liquidating its retail business may transfer all the assets of the business over a period of time to several different persons, or the business may use an auctioneer to sell all of the business assets in one day. In either case, the provisions of Code Section 12-54-124 apply. The transferee can request the transferor provide a timely certificate of compliance. See SC Revenue Procedure #03-5, “Certificate of Compliance Exception to a Lien Placed on Assets Transferred.” Unrelated transfers will not be aggregated.

Question 6 - Applicability to Foreclosures

- Q. Is this provision applicable to foreclosures?
- A. A foreclosure is a forced sale by a court. If: (1) the Judge finds that Code Section 12-54-124 is inapplicable, (2) the party whose assets are being foreclosed completes a “Transferor Affidavit,” or (3) the transferee obtains a timely certificate of compliance, then the Department will not assert that Code Section 12-54-124 placed a lien against the assets in the hands of the transferee, and if applicable, the Department will not refuse to issue a license and will not revoke a license based upon Code Section 12-54-124.

SOUTH CAROLINA DEPARTMENT OF REVENUE

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

Columbia, South Carolina
March 2, 2004

**Transferor Affidavit
Tax Lien Inapplicable
SC Code Section 12-54-124**

The undersigned transferor hereby certifies as follows:

1. This affidavit is being given in connection with a transfer of property to assure the transferee that the Department will not assert that Code Section 12-54-124 placed a lien against the assets in the hands of the transferee, and if applicable, the Department will not refuse to issue a license and will not revoke a license based upon Code Section 12-54-124. This affidavit issued for purposes of Code Section 12-54-124 is valid for 30 days from the date signed.

It is understood that this affidavit does not protect the transferee from a lien placed on the assets prior to the transfer by other statutory or judicial means, or relieve the transferor of his liabilities to pay all of its taxes or file all applicable returns, and that it does not protect the transferee from the Department refusing to issue a license, or revoking a license, for any other reason. For example, the transferee is not protected from a lien existing on the property due to nonpayment of real property taxes.

2. The undersigned is the transferor of the assets described in the attached description.

3. The Transferor's name is _____

4. The Transferor's address is _____

5. The Transferor's taxpayer identification number is _____

6. Date of Transfer _____

7. The Transferee's name is _____

8. The Transferee's address is _____

I hereby certify the following concerning the transfer (check appropriate box):

- The assets transferred are not business assets.
- Less than a majority of the business assets, based on fair market value, are being transferred in this and other related or planned transfers.

The undersigned authorizes the delivery and disclosure of this affidavit to the South Carolina Department of Revenue and acknowledges that any false statement contained herein is punishable by fine, imprisonment, or both. Recognizing that I am subject to the criminal penalties under Code Section 12-54-44(B)(6)(a)(i), I declare that I have examined this affidavit and to the best of my knowledge and belief it is true, correct, and complete.

Signature

Date

Name – Please Print

Instructions
Transferor Affidavit - SC Code Section 12-54-124

Purpose of Transferor Affidavit

The purpose of this affidavit is to provide assurance to the transferee who is not receiving business assets or where the transferor is not transferring a majority of the assets of a business in this and other related or planned transfers that the Department will not assert that Code Section 12-54-124 placed a lien on the assets in the hands of the transferee, and if applicable, the Department will not refuse to issue a license and will not revoke a license based upon Code Section 12-54-124. Caution: This affidavit does not protect the transferee from a lien placed on the assets prior to the transfer by other statutory or judicial means, or relieve the transferor of his liabilities to pay all of its taxes or file all applicable returns.

Who May Execute this Affidavit

Any transferor who is not transferring business assets or not transferring a majority of the assets of a business based on the fair market value in this and other related or planned transfers may give this affidavit to each transferee to provide assurance that the Department will not assert that Code Section 12-54-124 placed a lien on the assets in the hands of the transferee if the transferor has South Carolina tax liabilities or has not filed all applicable returns. The Department will pursue the transferor if the transferor did not file all applicable returns or pay all of its tax liabilities.

Note: A transferor who is transferring a majority of the assets of a business may provide each transferee with a timely certificate of compliance before finalizing the transfer to provide assurance that the Department will not assert that Code Section 12-54-124 placed a lien on the assets transferred. See SC Revenue Procedure #03-5, "Certificate of Compliance Exception to a Lien Placed on Assets Transferred," for additional information.

Reliance on Transferor Affidavit

The "Transferor Affidavit" is valid for 30 days from the date signed by the transferor. Accordingly, if the qualifying transfer takes place during this 30 day period, then the Department will not assert that Code Section 12-54-124 placed a lien on the assets in the hands of the transferee, and if applicable, the Department will not refuse to issue a license and will not revoke a license based upon Code Section 12-54-124. The transferee may rely on the "Transferor Affidavit" if the transferee does not know the affidavit is false.

When and Where to Execute this Affidavit

The transferor should fully complete this affidavit and submit it directly to each transferee. Each transferee should retain the affidavit and provide it if requested during audit. This affidavit should not be remitted to the Department until it is requested by the Department.