
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 PRIVATE LETTER RULING #03-1

SUBJECT: Allocation and Apportionment of ABC Licensee Income
(Income Tax)

REFERENCES: S. C. Code Ann. Section 12-6-2220 (Supp. 2000)
S. C. Code Ann. Section 12-6-2230 (Supp. 2000)
S. C. Code Ann. Section 12-6-2290 (Supp. 2000)

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: A Private Letter Ruling is a written statement issued to a specific taxpayer by the Department to apply principles of law to a specific set of facts or a particular tax situation. A Private Letter Ruling is an advisory opinion; it does not have the force and effect of law and is not binding on the person who requested it or the public. It is, however, the Department's opinion limited to the specific facts set forth, and is binding on agency personnel only with respect to the person to whom it was issued and only until superseded or modified by a change in statute, regulation, court decision, or advisory opinion, providing the representations made in the request reflect an accurate statement of the material facts and the transaction was carried out as proposed.

Questions:

1. What South Carolina apportionment method should ABC Licensee, a newly formed corporation domiciled in South Carolina that is a subsidiary of ABC Company, use and where is its income related to the licensing of FCC licenses apportioned?
2. Does ABC Company's ownership in W-TV, a single member limited liability company operating solely in South Carolina and treated as a division of ABC Company, affect ABC Licensee's South Carolina apportionment factor?

Conclusions:

1. ABC Licensee's income related to the licensing of intangibles is apportioned using the single factor gross receipts apportionment method under Code Section 12-6-2290. ABC Licensee's income related to the licensing of the FCC licenses is apportioned outside of South Carolina since the use of the X-TV and NewsChannel * FCC licenses do not generate royalties from South Carolina, but generate royalties from H, I, and J.

2. ABC Company's (*i.e.*, the parent corporation's) ownership in W-TV, a single member limited liability company operating solely in South Carolina and treated as a division of ABC Company, does not affect ABC Licensee's (*i.e.*, a corporate subsidiary's) South Carolina apportionment factor.

Facts:

ABC Company is a Delaware corporation that is headquartered in H. ABC Company owns and operates network television broadcast properties. ABC Company operates in H, I, and J via X-TV (a commercial television station that serves the H market) and, upon approval by the FCC, via NewsChannel * (a 24 hour news and information service that provides content to H area cable operators for distribution to cable broadcast facilities.)

ABC Company holds FCC licenses related to its X-TV operations and NewsChannel *'s fleet of electronic and satellite news gathering vehicles. ABC Company is the single member in three limited liability companies: W, LLC, operating solely in South Carolina; Y, LLC, operating solely in K; and Z, LLC, operating solely in L. These three limited liability companies are disregarded for federal income tax purposes and are treated as divisions of ABC Company. Each LLC holds and will continue to hold a separate FCC license for broadcast operations conducted in its respective state.

ABC Company recently formed ABC Licensee, a wholly owned C corporation subsidiary, for a legitimate non-tax business purpose. ABC Licensee is an operating corporation, not a sham corporation, incorporated in Delaware and having its principal place of business in South Carolina. Effective October 1, 2002, ABC transferred its FCC licenses related to X and NewsChannel * to ABC Licensee. ABC Licensee will charge ABC Company an arm's length royalty for the use of these FCC licenses; its only business in South Carolina will be the licensing of intangibles and the receipt of royalty income from those intangibles.

Discussion:

Code Section 12-6-530 imposes a corporate income tax on the South Carolina taxable income of every corporation, other than those otherwise described in Code Sections 12-6-540 and 12-6-550, transacting, conducting, or doing business within South Carolina or having income within South Carolina, regardless of whether these activities are carried on in intrastate, interstate, or foreign commerce. The terms "transacting," "conducting," or "doing business" include transacting or engaging in any activity for the purpose of financial profit or gain.

In *Geoffrey v South Carolina Tax Comm.*, 437 S.E. 2d 13 (S.C. 1993), cert. denied, 114 S.Ct.550 (1993), the South Carolina Supreme Court concluded that in order for a corporation to be taxed in South Carolina the corporation must be "transacting, conducting, doing business, or having an income within this state." The court construed this language as extending South Carolina's authority to tax foreign corporations to the limits of the Constitution. In *Geoffrey*, the South Carolina Supreme Court determined that the licensing of trademarks and trade names to a South Carolina retailer and the maintaining of accounts receivable in South Carolina by a nonresident taxpayer create nexus for South Carolina income tax purposes even though the taxpayer lacked physical presence in South Carolina.

The Court determined that Geoffrey purposely directed its activities toward South Carolina, and that Geoffrey owned and used business intangible property in South Carolina. Each of these activities was held to be sufficient to satisfy the nexus requirements of the Due Process Clause and the Commerce Clause.

Based upon the facts presented above, ABC Licensee is conducting business in South Carolina and, therefore, is subject to South Carolina income tax.

Next, it must be determined how ABC Licensee will allocate and apportion its income for South Carolina tax purposes. Code Section 12-6-2210 provides for the determination of taxable income of a corporation. Code Section 12-6-2210(B) provides that if a taxpayer is transacting or conducting business partly within and partly outside of South Carolina, then South Carolina income tax is imposed upon a base which reasonably represents the proportion of the trade or business carried on within this State. South Carolina taxable income for a multistate taxpayer is determined by combining income allocated to South Carolina with income apportioned to South Carolina. After allocation, South Carolina apportions remaining business income. Based upon the facts, ABC Licensee is conducting business partly within and partly outside South Carolina; it would be subject to a net income tax in other taxing jurisdictions if South Carolina's net income tax laws were in effect in such jurisdictions. Accordingly, ABC Licensee may apportion its income. See Code Section 12-6-2210(B).

Code Sections 12-6-2220 and 12-6-2230 provide that certain classes of income less related expenses are allocated. Items directly allocated include dividends, nonbusiness interest, and nonbusiness gains and losses from sales of intangible property. Based upon the facts, ABC Licensee income from the licensing of intangibles is not allocable; it is apportionable.

In accordance with Code Section 12-6-2240, South Carolina generally requires the use of one of the following apportionment methods:

1. A "three factor" apportionment method (based on property, payroll, and double weighted sales) for taxpayers whose principal business in South Carolina is dealing in tangible personal property. Code Section 12-6-2250.
2. A "gross receipts" apportionment method for taxpayers not dealing in tangible personal property, such as financial and service businesses. Code Section 12-6-2290.
3. A "special" apportionment factor provided in Code Section 12-6-2310 for certain companies, such as railroad or telephone companies.

Based upon the facts presented, ABC Licensee will apportion income using a single factor formula based upon "gross receipts" since they are not dealing in tangible personal property and they are not one of the particular types of industries required to use a special formula. The gross receipts formula in Code Section 12-6-2290 provides that the taxpayer apportion its income using a fraction in which the numerator is gross receipts from within South Carolina during the taxable year and the denominator is total gross receipts from everywhere during the taxable year.

In *Geoffrey*, the taxpayer earned its income by licensing trademarks and trade names for a percentage of sales made by its retail licensees. The South Carolina Supreme Court determined that it was proper for South Carolina to tax its apportioned share of the royalty income. The court held that intangibles and their income could be taxed at their business situs and that the real source of Geoffrey's income was South Carolina's customers. Geoffrey's South Carolina apportioned income was determined under the single factor, gross receipts, apportionment formula; *i.e.*, gross receipts from royalty payments from South Carolina sales divided by gross receipts from everywhere.

Based upon the above discussion and *Geoffrey*, ABC Licensee's income related to the licensing of the FCC licenses is apportioned outside of South Carolina since the use of the X-TV and NewsChannel * FCC licenses do not generate royalties from South Carolina, but generate royalties from H, I, and J. Note: ABC Company's (*i.e.*, the parent corporation) ownership in W-TV, a single member limited liability company operating solely in South Carolina and treated as a division of ABC Company, does not affect ABC Licensee's (*i.e.*, a corporate subsidiary's) South Carolina apportionment factor.

CAVEAT: This advisory opinion is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances, as stated, are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting the advisory opinion may not rely on it. If the taxpayer relies on this advisory opinion, and the Department discovers, upon examination, that the facts and circumstances are different in any material respect from the facts and circumstances given in this advisory opinion, then the advisory opinion will not afford the taxpayer any protection. It should be noted that subsequent to the publication of this advisory opinion, changes in a statute, a regulation, or case law could void the advisory opinion.

SOUTH CAROLINA DEPARTMENT OF REVENUE

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

March 10, 2003
Columbia, South Carolina