

SC PRIVATE LETTER RULING #91-4

TO: ABC, Inc.

SUBJECT: Nexus - Activities Exceeding Solicitation
(Income Tax)

TAX ANALYST: Steve Hallman

REFERENCES: 15 U.S.C. Section 381(a)
S.C. Code Ann. Section 12-7-230(A) (Supp. 1990)

AUTHORITY: S.C. Code Ann. Section 12-4-320 (Enacted June 1991)
SC Revenue Procedure #87-3

SCOPE: A Private Letter Ruling is a temporary document issued to a taxpayer, upon request, and it applies only to the specific facts or circumstances related in the request.

Private Letter Rulings have no precedential value and are not intended for distribution.

Question:

Do the activities of ABC, Inc. in this State create sufficient nexus to require payment of South Carolina income taxes, pursuant to S.C. Code Section 12-7-230(A)?

Facts:

ABC, Inc. is incorporated under the laws of North Carolina, where its principal place of business and corporate headquarters are located. The corporation is engaged in the business of processing cotton and synthetic fibers into finished cotton/polyester yarn. ABC does not employ salesmen in this State, but salesmen intermittently visit the State to solicit orders and maintain customer relations. All orders are approved and shipped from outside South Carolina.

In the event a South Carolina customer rejects a delivered product, a quality control technician will normally visit the customer location in this State. Under certain circumstances, if the customer complaint warrants more extensive attention, a plant manager from outside South Carolina, will personally visit the customer. The quality control technician or plant manager will

inspect the product at the customer's location to determine whether the yarn is defective. If the product is found to be defective, the technician or manager may agree to have the yarn returned or propose contractual remedies. If the yarn is not found to be defective, ABC's personnel will advise and instruct the customer how to adjust their machinery or process to be compatible with the yarn.

Discussion:

Section 12-7-230(A) of the Code of Laws of South Carolina states, in part:

...every foreign corporation transacting, conducting, doing business, or having an income within the jurisdiction of this State, whether or not the corporation is engaged in or the income derived from intrastate, interstate, or foreign commerce, shall make a return and shall pay annually an income tax equivalent to five percent of a proportion of its entire net income, to be determined as provided in this chapter. The term "transacting", "conducting", or "doing business", as used in this section, includes the engaging in or the transacting of any activity in this State for the purpose of financial profit or gain....

Public Law 86-272, as codified at 15 U.S.C. 381-385, restricts a state from imposing a tax on income derived under certain conditions. Code Section 381(a) reads, in part:

No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

- (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State;...

In summary, South Carolina imposes an income tax on foreign corporations doing business in this State, but federal statute prohibits the State from imposing a net income tax on those foreign corporations whose only activity in the State is mere solicitation. Therefore, it must be determined whether ABC's activities in the State exceed solicitation.

S.C. Revenue Ruling #91-16 establishes guidelines for determining whether certain acts carried on within this State exceed the protection afforded by 15 U.S.C. Section 381(a). Pursuant to this ruling, remedying customer complaints is an activity that, if carried on within this State, will cause otherwise protected sales to lose the immunity provided by Public Law 86-272 as it exceeds solicitation.

In Chattanooga Glass Company v. Strickland, 244 Ga. 603, 261 S.E.2d 599 (1979), the Supreme Court of Georgia held that a taxpayer who carries on an activity in a state which exceeds "solicitation" is not afforded the protection of Public Law 86-272. In that case a Delaware

company which manufactured bottles at plants scattered throughout several states, not including Georgia, solicited sales from Georgia customers. It also remedied customer complaints regarding previously purchased merchandise, purchased raw materials, and maintained containers for storage of its purchased raw materials in the State of Georgia. In reaching its decision the court reviewed relevant definitions of the term "solicitation" from other jurisdictions and concluded that:

...the instate activities of the present appellant exceeded "solicitation" both when the appellant remedied customer complaints regarding previously purchased products and when it maintained containers for the storage of its purchased raw materials....

Conclusion:

Visits made by quality control technicians and plant managers to insure quality control and to remedy customer complaints exceed "solicitation". Therefore, ABC is not protected by Public Law 86-272 and is required to file returns with and pay income taxes to South Carolina, pursuant to S.C. Code Section 12-7-230(A).

Note: In accordance with the provisions of Code Sections 12-19-20 and 12-19-70, ABC is also required to pay an annual license fee.

SOUTH CAROLINA TAX COMMISSION

s/S. Hunter Howard Jr.

S. Hunter Howard, Jr., Chairman

s/A. Crawford Clarkson Jr.

A. Crawford Clarkson, Jr., Commissioner

s/T. R. McConnell

T. R. McConnell, Commissioner

Columbia, South Carolina
October 25, 1991