



301 Gervais Street, P.O. Box 125, Columbia, South Carolina 29214

SC PRIVATE LETTER RULING #94-9 (TAX)

TO: ABC

SUBJECT: Withholding on Performers
(Income Tax)

DATE: October 10, 1994

REFERENCE: S.C. Code Section 12-9-310(A)(3) (As Amended by Act 497, Section 49)

AUTHORITY: S.C. Code Ann. Section 12-4-320
SC Revenue Procedure #94-1

SCOPE: A Private Letter Ruling is an official advisory opinion issued by the Department of Revenue to a specific person.

NOTE: A Private Letter Ruling may only be relied upon by the person to whom it is issued and only for the transaction or transactions to which it relates. A Private Letter Ruling has no precedential value.

Question:

Does the "Facility License Agreement" as discussed in the Facts and provided to the Department of Revenue by ABC require ABC to withhold income taxes under S.C. Code Section 12-9-310(A)(3)?

Conclusion:

The Facility License Agreement as discussed in the Facts and provided to the Department of Revenue by ABC requires withholding of income taxes under Code Section 12-9-310(A)(3).

Facts:

ABC contracts with persons or entities ("Licensee") for the use of its facilities for various performances and other entertainment events.

The Facilities License Agreement between the ABC and the Licensee provides, in part:

7. TICKET SALES.

7.2. . . . All ticket revenues shall be the sole property of the ABC until final settlement.

7.4. The ABC shall at all times maintain control and direction of the ticket office, ticket personnel and ticket sales revenue, until final settlement.

18. SETTLEMENT.

18.1. All box office receipts after taxes shall be held by the ABC and applied in payment of all sums of money which shall become due from the Licensee to the ABC hereunder . . . The ABC will remit, out of the box office receipts, to applicable Governmental authorities, on the Licensee's behalf, all sales, admissions, entertainment, and other taxes. Any surplus remaining shall first be applied by the ABC in satisfaction of any remaining obligation or liability of the Licensee to the ABC under this Agreement or otherwise . . .

18.2. . . . Within fifteen (15) days after the Event, the ABC shall furnish to the Licensee a statement showing all box office receipts relating to the Licensee's use of the ABC facilities hereunder and the application of the same, and the ABC shall pay to the Licensee such amounts as shall be due to the Licensee.

Discussion:

SC Code Section 12-9-310(A)(3) states that every person or entity located or doing business within this state:

hiring or contracting or having a contract with a nonresident taxpayer conducting a business or performing services of a temporary nature within this State, where the payment under the contract exceeds ten thousand dollars or reasonably could be expected to exceed ten thousand dollars during any one calendar year, must withhold two percent of each payment made to these nonresidents. This item does not apply to a nonresident which has registered with the Secretary of State or the Department of Revenue and Taxation and by that registration has agreed to be subject to the jurisdiction of the department and the courts of this State to determine its South Carolina tax liability, including withholding and estimated taxes, together with any related interest and penalties, if any. Registering with the Secretary of State or the department is not an admission of tax liability nor must this act of registering be construed to require the filing of an income tax or franchise (license) tax return. If the person hiring, contracting, or having a contract with a nonresident obtains an affidavit from the nonresident stating that the nonresident is registered with the department or with the Secretary of State, the person is not responsible for the withholding.

Thus, this section requires anyone who has a contract with a nonresident for the conducting of business or the performing of services in South Carolina to withhold 2% of each payment made to the nonresident unless such nonresident provides an affidavit stating that he is registered with the Department of Revenue or the Secretary of State. Thus, the issue which must be addressed is whether the agreement described above constitutes a contract subject to withholding.

In order to determine if withholding is required, we must look to the language of the contract. Section 7.2 of the contract provides that the ticket revenues are the sole property of the ABC. Section 7.4 states that the ABC shall maintain control of the ticket sales revenue until final settlement. Section 18.2 provides that within 15 days after the Event, the ABC shall pay to the Licensee amounts due to the Licensee.

Since the contract indicates that "all ticket revenues are the sole property of the ABC" and that "the ABC shall pay to the Licensee such amounts as shall be due to the Licensee", a payment from the ABC to the Licensee is made.

Hence, if the Licensee is a nonresident who is not conducting business of a permanent nature in South Carolina and the payment under the contract exceeds or is reasonably expected to exceed \$10,000, the ABC is required to withhold on this contract. However, if the nonresident Licensee registers with the Department of Revenue or the Secretary of State as described in Section 12-9-310(A)(3) and provides an affidavit stating this to the ABC, the ABC would not be required to withhold.

NOTE: This ruling is premised on the entire contract provided to the Department from the ABC. This contract is incorporated as part of this document but is not distributed to maintain confidentiality.

For questions concerning withholding on contracts, contact John McCormack at (803) 737-4438.