

SC REVENUE PROCEDURE #09-2

SUBJECT: Voluntary Disclosure of Nexus

EFFECTIVE DATE: Initial Contacts Made on or After May 1, 2009.

SUPERSEDES: SC Revenue Procedure #07-1 and all previous documents and any oral directives in conflict herewith.

AUTHORITY: S. C. Code Ann. Section 12-4-320 (2000)
SC Revenue Procedure #05-2

SCOPE: The purpose of a Revenue Procedure is to provide procedural guidance to the public and Department personnel. It is an advisory opinion issued to assist in the administration of laws and regulations by providing guidance that may be followed in order to comply with the law. It is effective until superseded or modified by a change in statute, regulation, court decision, or another Departmental advisory opinion.

OVERVIEW OF VOLUNTARY DISCLOSURE PROGRAM:

The Department has developed a voluntary compliance procedure for taxpayers who may have nexus with South Carolina but are not registered with the Department to collect or remit South Carolina taxes. This procedure is designed to:

1. Encourage unregistered taxpayers to come forward voluntarily in an informal process, and begin paying taxes plus interest for the agreed look back period (generally three tax years or corresponding monthly/quarterly periods as discussed below) without incurring penalties for late filing and late payment of taxes.
2. Allow the Department to maximize compliance within its available resources.

In order to be considered for the voluntary disclosure program, the taxpayer (or the taxpayer's representative) must initiate contact with the Department and meet the conditions specified in this advisory opinion. The request may be made by a taxpayer or the taxpayer's representative on a named or unnamed basis.

The voluntary disclosure program is not available to a taxpayer that:

1. Has been contacted by the Department to schedule an audit or notified that an examination is pending prior to the time its name is disclosed to the Department in connection with participation in the voluntary filing program.
2. Is involved in an audit or litigation with the Department.
3. Requests an advisory opinion regarding the existence of nexus.
4. Does not respond timely and completely to a nexus questionnaire (if requested by the Department).
5. Does not provide adequate facts for the Department's Nexus/Discovery Section to determine the existence of nexus.
6. Failed to file a return as the result of fraud or gross negligence.
7. Is requesting voluntary disclosure participation for non-business individual income taxes.

A taxpayer who does not qualify as a voluntary filer is not protected by any time limitations on assessments.¹ Accordingly, taxes will be assessed for all years that nexus existed in South Carolina. Also, interest and penalties will be added in accordance with the South Carolina Code.

DEPARTMENT RESPONSIBILITIES:

Each request for voluntary disclosure is reviewed separately by the Department's Nexus/Discovery Section based on the specific facts of each taxpayer. Based on the information received, consideration of the request for voluntary disclosure is at the sole discretion of the Department and will be:

1. Given conditional approval for unnamed taxpayers;
2. Approved for named taxpayers; or
3. Rejected.

¹ SC Code §12-54-85(C). At one time there was a statute that presumed that any tax due for more than 10 years had been paid. That statute was repealed effective August 1, 1995. Now there are no limitations on assessment of taxes where no return was filed and none on fraudulent returns. The Department has consistently taken the position that the former 10 year statute would continue to apply to taxes due before August 1, 1995; therefore it does not seek to make assessments for periods before August 1, 1985 (10 years prior to the August 1, 1995, effective date).

Conditional Approval. The Department may grant an unnamed taxpayer approval in the voluntary disclosure program only on a conditional basis. During the conditional approval, the taxpayer is not protected by any time limitations on assessments if it is scheduled for audit, involved in an audit, or involved in litigation prior to the time its name is disclosed. The conditional approval is no longer conditional once the taxpayer's name is provided in writing by letter or e-mail to the Department's Nexus/Discovery Section or the taxpayer's name is provided to the Nexus/Discovery Section by registering and/or filing all tax returns agreed upon and the taxpayer agrees to the conditions set forth in this advisory opinion.

Approval. The Department may grant approval to participate in the voluntary disclosure program only to a named taxpayer who agrees to the conditions set forth in this advisory opinion.

Upon approval of the taxpayer's request to participate in the program, the Department will abide by the following guidelines:

1. Accept the filing of tax returns required to be filed pursuant to South Carolina law and payment of all required taxes for the applicable look back period (see discussion below.)
2. Apply interest in accordance with the South Carolina Code.
3. Waive penalties resulting from the return being filed late and payment being made late, such as failure to file and failure to pay penalties.
4. Reserve the right to audit a taxpayer's books and records, subject to statutory time limits. If the Department audits the taxpayer, it will assess any tax determined to be due that was not discharged under the Voluntary Disclosure Program. All applicable penalties and interest will apply to additional taxes discovered to be due that have not been paid. If any of the factual representations made are found to have been materially misrepresented or a material fact is found to have been omitted by the taxpayer, the Department may consider the approval of the voluntary filer participation void and proceed as though the approval never occurred.

TAXPAYER RESPONSIBILITIES:

A taxpayer who has nexus with South Carolina must agree to certain voluntary disclosure program conditions. These conditions include the taxpayer agreeing to:

1. Register, as applicable, to collect or remit taxes within the time period agreed upon with the Department's Nexus/Discovery Section.
2. File all returns and pay all taxes and interest for the look back period (see discussion below) in a manner consistent with South Carolina statutes, regulations, court decisions, and Department advisory opinions within the time period agreed upon with the Department's Nexus/Discovery Section.

3. Continue to file and pay for periods that ended subsequent to the look back period, unless the activity by the taxpayer has changed substantially and nexus no longer exists with South Carolina, or there has been a change in court decisions, South Carolina statutes, regulations, or Department advisory opinions which dictates a different result. If the taxpayer ceases to file and pay, the taxpayer shall file SC Form C-278, "Account Closing Form," for all applicable registered tax types. The Form C-278 does not close an income tax account; a final income tax return must be filed to close the corporate account.²
4. Waive all rights to file a claim for refund or returns for the tax periods prior to the look back period.
5. Waive all rights to request a refund based on lack of nexus for the returns filed for the look back period. The taxpayer also agrees to waive all rights to request a refund based on lack of nexus for returns filed after the look back period unless the activity by the taxpayer has changed substantially and nexus no longer exists with South Carolina, or there has been a change in court decisions, South Carolina statutes, regulations, or Department advisory opinions which dictates a lack of nexus.
6. Make books and records available to the Department for audit upon request.

LOOK BACK PERIOD:

Except as otherwise provided, the look back period is as follows.

- A. 1. Annual Filing – Nexus Existed for 3 or More Years. The look back period is the three immediately preceding ended tax years that nexus existed with South Carolina from the time a taxpayer or its representative initially contacts the Department regarding participation in the voluntary disclosure program;
 2. Annual Filing – Nexus Existed for Less Than 3 Years. The look back period is the number of immediately preceding ended tax years that nexus existed with South Carolina from the time a taxpayer or its representative initially contacts the Department regarding participation in the voluntary disclosure program; or
 3. Monthly/Quarterly Filing. The look back period is the number of immediately preceding ended corresponding 36 monthly or 12 quarterly periods applicable to a taxpayer referred to in item (1) or (2) above.
- B. Extended Look Back Period. In situations where voluntary disclosure is approved by the Department after the date a tax return is due subsequent to the look back period described above, the look back period and voluntary disclosure conditions set forth in this advisory opinion may be extended to include those subsequent returns. (See Example C.)

² A taxpayer may also need to file applicable forms with the Secretary of State. Questions concerning laws and forms administered by the Secretary of State should be directed to the Secretary of State's Office.

C. Shorter Look Back Period. In circumstances where the Department agrees that nexus is uncertain (*i.e.*, it is uncertain whether a court would determine the existence of nexus), the Department may enter into an agreement for a shorter look back period.

Note for corporations subject to the corporate license fee (*i.e.*, a franchise tax paid a year in advance of the taxpayer's income tax year for the privilege of doing business as a corporation in South Carolina,) all corporate license fees due are computed separately on the income tax returns required to be filed for the look back period. (See Examples A and B.)

The following examples assist in explaining the look back period.

Example A – Named Taxpayer – Corporate Tax and License Fee Nexus. Assume that a calendar year corporate taxpayer discovers that income tax nexus existed with South Carolina for five years (2005, 2006, 2007, 2008, and 2009). In January 2010, the taxpayer contacts the Department and is approved to participate in the voluntary disclosure program in February 2010.

Income Tax Returns. The Department requires the taxpayer to file South Carolina corporate income tax returns for the tax years ended 2009, 2008, and 2007 - the three immediately preceding ended tax years from the time the taxpayer initially contacted the Department regarding participation in the voluntary disclosure program. Note: Although the 2009 return is not due until March 15, 2010, the 2009 corporate return is included in the look back period.

Corporate License Fee. Since South Carolina's income tax and corporate license fee are computed on the same tax return, but the license fee is paid a year in advance of the income tax, the look back period for the corporate license fees is 2010, 2009, 2008 (the fees that would be paid on the income tax returns for the years ended 2009, 2008, and 2007.)

Example B – Unnamed Taxpayer – Corporate Tax and License Fee Nexus. Assume that a calendar year corporate taxpayer discovers that income tax nexus existed with South Carolina for the last two calendar years (2008 and 2009) and comes forward anonymously in December 2010. The taxpayer is approved to participate in the voluntary disclosure program in January 2011.

Income Tax Returns. The Department requires the taxpayer to file South Carolina corporate income tax returns for the years ended 2009 and 2008 - the number of immediately preceding ended tax years from the time the taxpayer initially contacted the Department regarding participation in the voluntary disclosure program. Note that the 2010 return is not due before approval is granted by the Department to participate in the voluntary filing program; this return does not fall within the "extended" look back period.

Corporate License Fee. Since South Carolina's income tax and corporate license fee are computed on the same tax return, but the license fee is paid a year in advance of the income tax, the look back period for the corporate license fees is 2010 and 2009 (the fees that would be paid on the income tax returns for the years ended 2009 and 2008.)

Example C – Unnamed Taxpayer – Sales Tax Nexus – Extended Look Back Period Illustrated.

Assume that a corporate taxpayer discovers that sales tax nexus existed with South Carolina for the last four calendar years (2006, 2007, 2008, and 2009) and comes forward anonymously in November 2009. The taxpayer is approved to participate in the voluntary disclosure program in January 2010.

Generally, the look back period for sales tax returns is the number of immediately preceding ended monthly periods that nexus existed from the time the taxpayer initially contacted the Department regarding participation in the voluntary disclosure program not to exceed the immediately preceding 36 months ended. In this example, sales tax nexus existed with South Carolina since January 2006, therefore, the Department will require the taxpayer to file sales tax returns for the monthly periods October 2009 back to November 2006 – the 36 immediately preceding ended monthly periods from initial contact with the Department. Note that the November and December 2009 sales tax returns are due before the approval is granted by the Department to participate in the voluntary disclosure program; these 2 months of returns for November and December 2009 are subsequent to the original look back period of 36 months, but fall within the “extended” look back period and voluntary disclosure conditions set forth in this advisory opinion (a total look back period of 38 months.)

ADDITIONAL INFORMATION OR SUBMISSION OF REQUESTS:

All questions concerning the existence of nexus with South Carolina or the voluntary filing procedure in this advisory opinion should be directed to the Department’s Nexus/Discovery Section at 803-898-5619 or 803-898-5905.

Requests for participation in the program should be mailed to:

South Carolina Department of Revenue
Attn: Nexus/Discovery Section
PO Box 125
Columbia, South Carolina 29214

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/Ray N. Stevens

Ray N. Stevens, Director

March 6 _____, 2009
Columbia, South Carolina