



SC REVENUE PROCEDURE #90-1

- SUBJECT:** Credit for 2% Withholding Tax Assessed Under South Carolina Code of Laws Section 12-9-310(3).
- EFFECTIVE DATE:** Applies to all open periods.
- SUPERSEDES:** All previous documents and any oral directives in conflict herewith.
- REFERENCE:** S.C. Code Ann. Section 12-54-30 (Supp. 1988)
S.C. Code Ann. Section 12-9-380 (Supp. 1988)
S.C. Code Ann. Section 12-9-310(3) (Supp. 1988)
S.C. Technical Advice Memorandum #88-2
- AUTHORITY:** S.C. Code Ann. Section 12-3-130(1976)
SC Revenue Procedure #87-3
- SCOPE:** A Revenue Procedure is a statement describing agency procedures and is applicable only to employees of the South Carolina Tax Commission.
- PURPOSE:** To establish administrative procedures for allowing a credit against the 2% withholding tax under 12-9-310(3).

This procedure applies only to audits of persons hiring or contracting with any nonresident taxpayer conducting a business or performing personal service of a temporary nature within South Carolina. This procedure does not authorize any offset against the 2% withholding liability for a current period.

Facts:

A South Carolina contractor (C) hires a non-resident contractor (N) to perform various services in South Carolina. The cost of these services are expected to exceed \$10,000. Upon examination by the South Carolina Tax Commission it is determined that C failed to withhold and remit to the state two percent of the amount C paid N. N did not post a bond which would have waived the withholding requirement of Section 12-9-310(3). N did timely file returns and pay South Carolina withholding and income tax for the periods in question.

Analysis:

S.C. Code of Laws Section 12-9-310(3) provides in part:

Every person, firm, corporation, association, joint-stock company, partnership, fiduciary, or the State of South Carolina, or any political subdivision of the State or any agency or any instrumentality or authority thereof, and any municipality, located within or doing business within the State, having an income within the State or having an employee earning income within this State, or in any manner whatever subject to the jurisdiction of this State, the United States or any political subdivision thereof, or any instrumentality or agency of the United States or any political subdivision thereof, or any other state or political subdivision or instrumentality or agency thereof:

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(3) Hiring or contracting or having a contract with any nonresident taxpayer conducting a business or performing personal services of a temporary nature carried on within this State, where the contract exceeds ten thousand dollars or could reasonably be expected to exceed ten thousand dollars, must withhold two percent of each and every payment made to these nonresidents.

S.C. Code of Laws Section 12-9-380 provides in part:

Where there has been an overpayment of tax under the provisions of Section 12-9-310 to 12-9-370 refund or credit shall be made to the withholding agent only to the extent that the amount of the overpayment was not deducted and withheld by the withholding agent from the employee...

The Commission has the authority to grant a refund or credit. South Carolina Code of Laws Section 12-54-30 states in part:

If the Commission discovers on examination of a return or otherwise that the tax, penalty, or interest paid by any person is in excess of the amount legally due, the Commission may order a refund or give credit for the overpayment...

N has paid the appropriate withholding and income tax to South Carolina. As a result, any two percent withholding tax assessed as to C would create an "excess of the amount legally due" to the State of South Carolina.

The Commission under S.C. Code Sections 12-54-30 and 12-9-380 has the authority to allow a credit to C to the extent that the amount of the credit was not deducted and withheld by C from N. C has not withheld from N, therefore the Commission will allow a conditional credit to C if the following procedure is followed.

Procedure:

Following the determination that a two percent withholding tax is applicable with respect to a nonresident contractor(s), C must submit the following to the auditor:

1. Verification that N, the nonresident contractor, has filed South Carolina withholding and income tax returns for the periods in question. Evidence of filing may include but is not limited to:
 - a. Copies of the tax returns filed by the nonresident contractor.
 - b. Affidavits submitted by the nonresident contractor signed under penalties of perjury indicating that returns were filed and, if applicable, that the appropriate taxes were paid.
 - c. If applicable, the delinquent returns of the nonresident contractor and payment of tax due.
2. An executed waiver by C for any delinquent taxes due or subsequently found to be due from the nonresident contractor for the periods under consideration limited to the 2% credit. A form waiver is attached and must be used to complete this requirement.

As part of this procedure, upon receipt of the items in No. 1 the auditor will verify through Tax Commission records that the nonresident contractor's returns have been filed. Note, the Tax Commission will not provide C any information concerning N.

Where C has satisfied the above requirements a conditional credit for the 2% withholding taxes will be made. This credit will reduce the 2% withholding otherwise due; however, penalties and interest remain applicable on the tax up until the later of the due date of the nonresident contractor's return or the date the tax was paid by the nonresident.

The interest and penalties will be based on the two percent withholding tax that was not collected and remitted to the state.

Waiver of Restrictions on Assessment and Collection of Deficiency in Tax

Names and address of taxpayers (Number, street, city or town, State, ZIP code)	Social Security or employer identification number:
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Increase in Tax Penalties, and Interest

Tax Period	Nonresident Contractor	Employee ID # of Nonresident Contractor	Withholding Liability & Conditional Credit	Penalties	Interest	Total To Be Assessed Immediately
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Assessment and Collection

Under S.C. Code of Laws Section 12-54-30, the South Carolina Tax Commission agrees that the Tax Commission will not assess the two percent withholding for the taxable periods listed in this agreement as represented above except that:

- (1) The penalties and interest stated above will be assessed immediately.
- (2) The withholding liability, and additional penalties and interest will be assessed in the event of fraud, malfeasance, or misrepresentation of material fact.
- (3) The withholding liability, and additional penalties and interest will be assessed to the extent it is determined that the nonresident contractor is liable for any additional taxes, penalties or interest for the relevant tax period.

I consent to the immediate assessment and collection of any deficiency (increase in tax, interest and penalties) made before one hundred twenty (120) days after the expiration of the applicable nonresident contractor's statute of limitations for the period(s) involved. I understand that by signing this waiver, the period for assessment provided in 12-54-80 is extended and I will not be able to contest these years in a Tax Commission hearing.

Signatures:

_____ Date
 _____ Date

South Carolina Tax Commission

Director _____ Date signed