



SC TECHNICAL ADVICE MEMORANDUM #88-2

TO: Mr. William R. Geddings, Jr., Director
Office Services Division

FROM: John Swearingen, Manager
Tax Policy and Procedures Department

DATE: January 19, 1988

SUBJECT: Bond Requirements of Nonresident Taxpayers

REFERENCE: S.C. Code Ann. Section 12-9-310(3) (Supp. 1986)
S.C. Code Ann. Section 12-7-20(19) (Supp. 1986)
S.C. Code Ann. Section 12-7-1110 (1976)

AUTHORITY: S.C. Code Ann. Section 12-3-170 (1976)

SCOPE: A Technical Advice Memorandum is a temporary document issued to an individual within the Commission, upon request, and it applies only to the specific facts or circumstances related in the request. Technical Advice Memoranda have no precedential value and are not intended for general distribution.

Question:

Can an individual who is a legal resident of another state or a corporation which is chartered under the laws of another state qualify for exemption from the 2% withholding provision of Section 12-9-310 of the S.C. Code of Laws?

Facts:

Currently the South Carolina Tax Commission allows certain nonresident taxpayers to perform contracts in South Carolina without posting bonds as required under Section 12-9-310(3). The bonding requirement has not been required in those cases where a corporation has requested exemption from the requirement provided that the corporation has substantial assets located in South Carolina and has an established record of meeting all payments and are here on a continued basis. Pursuant to Attorney General Opinion S-OAG-54 dated 3-25-76, a question has arisen as to whether or not corporations that have previously been granted a waiver were ever intended to come within this statute.

Discussion:

S.C. Code Ann. Section 12-9-310(3) requires that:

"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."

The plain wording of this statute seems to indicate that the taxpayer must be a nonresident and the nature of his business in the state must be temporary before the withholding requirement should be invoked. Chapter 9 of S.C. Code of Laws, Title 12 provides a definition for the term "non-resident".

"Nonresident means any individual domiciled outside South Carolina and any other entity whose principal place of business is outside South Carolina."

Chapter 7, specifically Section 12-7-20(19), also gives some guidance. This section defines a resident corporation as follows:

"Resident corporation means a corporation whose principal place of business, as defined in Section 12-7-1110, is located within this state. Nonresident corporation means any corporation other than a resident corporation."

S.C. Code Ann. Section 12-7-1110 defines principal place of business as:

"...the domicile of a corporation, except when none of the business of the corporation is conducted in the state of domicile, in which circumstances, the Commission shall determine in light of the available evidence the principal place of business of the corporation."

South Carolina statutory law does not define temporary. In the absence of statutory authority, a general definition of "temporary" is provided by Black's Law Dictionary.

"That which is to last for a limited time only, as distinguished from that which is perpetual, or indefinite, in its duration."

Thus, in the circumstances at hand, a corporation whose principal place of business is located in another state but who conducts perpetual business in South Carolina as evidenced by substantial assets being located in the state, would not fall within the provisions of S.C. Code of Laws 12-9-310(3) since the element of temporariness is not met. This interpretation is consistent with the Opinion of the Attorney General dated 3/25/76.

Conclusion:

A taxpayer must be a nonresident and conduct business of a temporary nature in order to fall within the provisions of 12-9-310(3). A nonresident taxpayer whose business in South Carolina is not temporary (i.e. perpetual as evidenced by substantial assets and/or a business establishment in South Carolina) would not fall under the provisions of 12-9-310(3). However, a nonresident taxpayer whose business is temporary within this state must be withheld upon at 2% or post a withholding bond.