



STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE

300A Outlet Pointe Blvd., Columbia, South Carolina 29210
P.O. Box 12265, Columbia, South Carolina 29211

SC TEMPORARY REVENUE PROCEDURE #17- 2

SUBJECT: Withholding on South Carolina Income of Nonresident Shareholders and Partners

EFFECTIVE DATE: Applies to all periods open under the statute.

SUPERSEDES: SC Revenue Procedure #92-5 and all previous advisory opinions and any oral directives in conflict herewith.

REFERENCE: S.C. Code Ann. Section 12-8-590 (2014; Supp. 2016)
S.C. Code Ann. Section 12-6-5030 (2014)

AUTHORITY: S.C. Code Ann. Section 12-4-320 (2014)
SC Revenue Procedure #87-3

SCOPE: The purpose of a Temporary Revenue Procedure is to provide immediate procedural guidance to the public. 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 It is temporary, and is effective until superseded or modified by a change in the statute or regulation, court decision, or another Departmental advisory opinion.

INTRODUCTION

Code Section 12-8-590 requires S-corporations and partnerships to withhold income tax at the rate of 5% on nonresident S-corporation shareholders' and nonresident partners' share of South Carolina taxable income. Code Section 12-6-5030 provides for the filing of a composite individual income tax return on behalf of certain nonresident shareholders or partners by the S-corporation or partnership.

The purpose of this advisory opinion is to provide updated guidance to assist taxpayers in complying with Code Sections 12-8-590 and 12-6-5030. It is divided into the following parts:

- Part I – General Withholding Requirements, Procedure and Exceptions (Q 1 – 10)
- Part II – Specific Questions Concerning the Affidavit (SC I-309) (Q 11 – 17)
- Part III – Specific Questions Concerning a Composite Return and SC I-338 (Q 18 – 25)

PART I - GENERAL WITHHOLDING REQUIREMENTS, PROCEDURE AND EXCEPTIONS

1. WHO IS SUBJECT TO WITHHOLDING?

S-corporations. S-corporations are required to withhold and remit taxes on each nonresident shareholder's share of South Carolina taxable income of the S-corporation, whether distributed or undistributed.

Partnerships. Partnerships are required to withhold and remit taxes on each nonresident partner's share of South Carolina taxable income of the partnership, whether distributed or undistributed.

A limited liability company taxed either as an S-corporation or a partnership is subject to the withholding and reporting requirements discussed in this advisory opinion.¹

2. WHAT ARE THE EXCEPTIONS TO THE WITHHOLDING REQUIREMENTS?

The exceptions to the withholding requirements pursuant to Code Section 12-8-590 are described below.

- (a) Nonresident Affidavit Submitted (Form I-309). An S-corporation or partnership is not required to withhold income taxes with respect to any shareholder or partner who submits an affidavit stating the nonresident shareholder or partner is subject to the personal jurisdiction of South Carolina (see questions #11-17 of this document regarding the affidavit);
- (b) Participant in Composite Return. An S-corporation or partnership is not required to withhold income taxes with respect to any shareholder or partner for which the S-corporation or partnership reports the nonresident shareholder's or partner's income on a composite tax return (see questions #18-25 of this document regarding composite returns);
- (c) Exempt Organization Under Internal Revenue Code Section 501(a). An S-corporation or partnership is not required to withhold income taxes with respect to any shareholder or partner who provides a statement that the shareholder or partner is an organization exempt from income taxes under Internal Revenue Code Section 501(a). The statement must contain the shareholder's or partner's name, federal identification number, Internal Revenue Code section exemption number, and a copy of the Internal Revenue Service exemption letter;
- (d) Withholding Under Code Section 12-8-580. An S-corporation or partnership is not required to withhold income taxes under Code Section 12-8-590 on income attributable to the sale of real property which is subject to withholding under Code Section 12-8-580, "Withholding by Buyer of Real Property or Associated Tangible Personal Property from Nonresident Seller;" and

¹See Code Section 12-2-25. For simplicity, this advisory opinion refers to a limited liability company taxed as an S-corporation or taxed as a partnership as an S-corporation or a partnership.

- (e) Publicly Traded Partnership. A partnership that is a publicly traded partnership as defined in Internal Revenue Code Section 7704(b) that is treated as a partnership for federal income tax purposes who agrees and provides the Department a list of the names, addresses, and taxpayer identification numbers of each of its nonresident unitholders whose share of South Carolina partnership taxable income is more than \$500. This information should be provided to the Department with the partnership return.

3. WHAT IS THE WITHHOLDING RATE?

S-corporations and partnerships must withhold income taxes at the rate of 5% of the nonresident's share of South Carolina taxable income.

4. HOW IS THE WITHHOLDING COMPUTED?

S-corporations. S-corporations should use form SC1120S-WH, "Withholding Tax on Income of Nonresident Shareholders," to compute the amount of South Carolina income allocated to nonresident shareholders.

A form SC1120S-WH is not required if the S-corporation (1) has no South Carolina source income allocable or apportionable to any shareholder, (2) has previously filed an affidavit with the Department on behalf of all of its nonresident shareholders, (3) reports the income of all of its nonresident shareholders on a composite return, or (4) has previously filed an affidavit on behalf of some of its nonresident shareholders and reports the income of the remainder of its nonresident shareholders on a composite return. (See question #15 for guidance on submitting additional affidavits in future years.)

Partnerships. Partnerships should use Schedule W-H on form SC1065, "Partnership Return," to compute the withholding tax.

See question #6 for guidance on computing and remitting the withholding tax if the S-corporation or partnership return is extended.

5. WHEN IS THE WITHHOLDING TAX DUE?²

S-corporations. S-corporations should remit the withheld funds on or before the fifteenth day of the third month following the close of its tax year. An extension of time to file the S-corporation tax return does not extend the time to pay the withholding tax.

Partnerships. Partnerships should remit the withheld funds on or before the fifteenth day of the third month following the close of its tax year.³ An extension of time to file the partnership tax return does not extend the time to pay the withholding tax.

²See Code Section 12-60-50 for the date tax payments and returns are due if the end of the period falls on a Saturday, Sunday or a legal holiday. Although the Department honors the federal filing date for Emancipation Day in Washington, DC when filing a return, this day is not a legal holiday as defined in Code Section 12-60-50.

³This due date is effective for tax years beginning after 2015. Prior to this date, the withholding on partners was due on or before the fifteenth day of the fourth month following the tax year.

6. HOW IS THE WITHHOLDING TAX COMPUTED AND REMITTED IF THE S-CORPORATION OR PARTNERSHIP TAX RETURN IS EXTENDED?

S-corporations. S-corporations that extend the time to file their form SC1120S, “S-Corporation Income Tax Return,” must estimate the nonresident shareholders’ share of South Carolina taxable income and pay the withholding tax on this estimated amount. The estimated amount of South Carolina income to be allocated to nonresident shareholders and the amount of tax due should be computed on the appropriate lines of form SC1120S-WH.

Partnerships. Partnerships that extend the time to file their form SC1065, “Partnership Return,” must estimate the nonresident partners’ share of South Carolina taxable income and pay the withholding tax on this estimated amount. The estimated amount of South Carolina income to be allocated to nonresident partners and the amount of tax due should be computed on a schedule prepared and retained by the partnership. The withholding tax due should be remitted when the partnership files its form SC8736, “Request for Extension of Time to File South Carolina Tax Return for Fiduciary and Partnership.”

7. WHAT INFORMATION MUST BE PROVIDED TO THE SHAREHOLDER OR PARTNER BY THE S-CORPORATION OR PARTNERSHIP?

The S-corporation or partnership must provide each nonresident shareholder or partner for whom tax was withheld a federal form 1099-MISC. This form 1099-MISC is to be used for South Carolina purposes only. The information reported on form 1099-MISC should include the respective shareholder’s or partner’s name, address, social security or federal identification number and amount of income tax withheld on his behalf.

S-corporations. S-corporations must remit the form 1099’s to the shareholders by the fifteenth day of the third month following the close of the S-corporation’s tax year.

Partnerships. Partnerships must remit the form 1099’s to the partners by the fifteenth day of the third month following the close of the partnership’s tax year.

8. WHEN MAY SHAREHOLDERS AND PARTNERS CREDIT THE AMOUNT WITHHELD AGAINST THEIR TAXES?⁴

Taxes withheld in the name of the nonresident shareholder or partner must be used as a credit against taxes due at the time the nonresident files income taxes for the tax year. Each shareholder or partner will account for the taxes withheld in his tax year in which the S-corporation’s or partnership’s tax year ends.

⁴For simplicity, the return due dates illustrated refer to the 15th day of a specific month. See Footnote 2 for the date tax payments and returns are due if the end of the period falls on a Saturday, Sunday or a legal holiday.

For example:

1. Calendar year taxpayers. A calendar year S-corporation remits withholding taxes for 2016 on March 15, 2017. The individual shareholder may claim a credit on his 2016 individual income tax return (generally filed on or before April 15, 2017) for the taxes withheld by the S-corporation on his behalf.
2. Other than calendar year taxpayers. A calendar year partnership remits the withholding taxes for 2016 on March 15, 2017 and has a corporate partner with a March 31 year end. The corporate partner may claim a credit in its entirety on its SC1120 corporate income tax return for the year ended March 31, 2017 (generally filed on or before July 15, 2017)⁵ for the taxes withheld by the partnership on its behalf.
3. Other than calendar year entity. An S-corporation with a January 31, 2017 year end remits the withholding taxes on behalf of its nonresident shareholders on April 15, 2017. The calendar year end shareholder may claim a credit on his 2017 individual income tax return (generally filed on or before April 15, 2018) for the taxes withheld by the S-corporation on his behalf.

A copy of form 1099-MISC must be attached to the nonresident shareholder's or partner's South Carolina income tax return as verification for claiming credit for the withholding taxes paid.

9. HOW DOES THE WITHHOLDING AFFECT ESTIMATED PAYMENTS?

The amount withheld by the entity on behalf of the shareholder or partner is deemed a payment of estimated tax. An equal part of the amount is deemed paid on each estimated tax due date for the previous tax year.

10. WHAT ARE THE WITHHOLDING REQUIREMENTS WHEN A PASS THROUGH ENTITY IS THE OWNER OF AN ENTITY THAT IS ALSO A PASS THROUGH ENTITY (i.e., Tiered Partnerships)?

Each partnership is generally required to withhold income taxes on a nonresident partner's share of South Carolina taxable income. For tiered partnerships, if the upper tier withholds on the income of its nonresidents, the lower tier partnership may use that amount withheld as a credit against amounts otherwise due. The lower tier partnership would withhold on any other sourced income on behalf of its nonresident partners.

For example, assume Partnership A (lower tier partnership) is an operating, non-South Carolina partnership with two partners (one partner is a resident of South Carolina.) Partnership A owns an interest in Partnership B (upper tier partnership), a South Carolina partnership. Partnership A may claim credit for the amount withheld by the upper tier partnership on behalf of Partnership A. The credit will reduce the amount of any further nonresident withholding due, if any, from the lower tier partnership's other sources of income.

⁵Effective for tax years beginning after 2015, returns of C corporations are due on or before the fifteenth day of the fourth month following the tax year. Prior to this date, returns of C corporations were generally due on or before the fifteenth day of the third month following the tax year.

PART II - SPECIFIC QUESTIONS CONCERNING THE AFFIDAVIT **(SC FORM I-309 or its equivalent)**

11. WHAT IS THE PURPOSE OF THE AFFIDAVIT?

South Carolina form I-309, “Nonresident Shareholder or Partner Affidavit and Agreement,” is to be used by any nonresident S-corporation shareholder or partner to request an exemption from withholding required under Code Section 12-8-590.

12. IS THERE A PRESCRIBED AFFIDAVIT FORM?

The Department has a preprinted affidavit, form I-309, entitled “Nonresident Shareholder or Partner Affidavit and Agreement – Income Tax Withholding” available for use by shareholders and partners. A copy of the affidavit is available on the Department’s website, www.dor.sc.gov. In lieu of the Department’s affidavit, an affidavit containing the same information as the Department’s will be accepted.

13. WHAT DOES A SHAREHOLDER OR PARTNER AGREE TO WHEN SIGNING THE AFFIDAVIT?

In filing the affidavit, the shareholder or partner agrees to timely file appropriate South Carolina tax returns and make payment of all South Carolina taxes required by law and agrees to be subject to the personal jurisdiction of the Department and the courts of South Carolina for the purpose of determining and collecting any South Carolina taxes, including estimated taxes, interest and penalties.

14. WHEN DO SHAREHOLDERS OR PARTNERS EXECUTE THE AFFIDAVIT?

A shareholder or partner should submit an affidavit directly to the S-corporation or partnership only in the first year in which the shareholder or partner agrees to the terms contained in the affidavit.

15. WHEN DOES THE S-CORPORATION OR PARTNERSHIP SUBMIT THE AFFIDAVITS TO THE DEPARTMENT?

The S-corporation or partnership should remit all affidavits to the Department at one time.

S-corporations. S-corporations should attach the affidavits to form SC1120S-WH, “Withholding Tax on Income of Nonresident Shareholders,” and file with the Department on or before the fifteenth day of the third month following the close of the S-corporation’s tax year. Affidavits should not be attached to form SC1120S, “S-Corporation Income Tax Return,” or form SC1120-T, “Application for Automatic Extension of Time to File Corporation Tax Return.”

In future years if the S-corporation needs to file additional affidavits, the affidavits must be filed with form SC1120S-WH even though the S-corporation may not otherwise be required to file a form SC1120S-WH (see question #4). Any additional affidavits should be filed with the Department on or before the fifteenth day of the third month following the close of the S-corporation's tax year.

Partnerships. Partnerships should attach the affidavits to form SC1065, "Partnership Return," or form SC8736, "Request for Extension of Time to File South Carolina Return for Fiduciary and Partnership," and file with the Department on or before the fifteenth day of the third month following the close of the partnership's tax year.

16. HOW LONG IS AN AFFIDAVIT VALID?

Once remitted to the Department, affidavits remain valid for all subsequent tax years and should not be resubmitted to the S-corporation, partnership or the Department.

The affidavit is not valid if (1) the shareholder's or partner's nonresident status changes, (2) the shareholder's or partner's request for the withholding exemption is revoked by the Department, or (3) the shareholder or partner revokes the affidavit in writing and notifies the S-corporation or partnership and the Department.

17. DOES AN AFFIDAVIT NEED TO BE SUBMITTED BY A SHAREHOLDER OR PARTNER WHO REPORTS HIS INCOME ON A COMPOSITE RETURN?

No, the affidavit should not be completed by a shareholder or partner whose income will be reported on a South Carolina composite individual income tax return.

PART III - SPECIFIC QUESTIONS CONCERNING A COMPOSITE RETURN AND SC I-338

18. WHAT IS THE PURPOSE OF A COMPOSITE RETURN?

A composite return allows S-corporations or partnerships (including limited liability companies taxed as an S-corporation or partnership) to compute and report the South Carolina income and tax attributable to two or more of their nonresident shareholders or partners on a single tax return.

S-corporations and partnerships are not required to withhold income tax pursuant to Code Section 12-8-590 on behalf of any nonresident shareholder or partner whose income is reported on the composite return.

19. WHO MAY PARTICIPATE IN FILING A COMPOSITE RETURN?

An S-corporation or partnership may file a composite individual income tax return on behalf of the nonresident shareholders or partners that are individuals, trusts, or estates in which the income is taxed to the trust or estate. All participating shareholders or partners must have the same tax year. A composite return may be filed even if some of the nonresident fiduciary and individual shareholders and partners eligible to participate in filing a composite return choose not to participate or some have South Carolina income from sources other than the S-corporation or partnership.

Corporate partners may not be included on the composite return since they are required to file an annual report and pay a license fee.

Note: A nonresident participating in the composite return that has South Carolina income from sources other than the entity filing the composite return is required to file appropriate returns and make payment of all South Carolina taxes required by law. Taxes paid for the nonresident with the composite return reduce taxes due at the time the nonresident may file a separate return for the tax year reporting South Carolina income from all sources.

20. WHAT FORM IS USED TO FILE THE COMPOSITE RETURN?

A form SC1040, "Individual Income Tax Return," is modified and used by the S-corporation or partnership to file a composite return on behalf of its fiduciary and individual shareholders and partners. The taxpayer name, address, and identifying number used on the SC1040 composite return should be the S-corporation's or partnership's. A composite return is signed by an authorized officer of the S-corporation, an authorized partner or an authorized member of a limited liability company taxed as an S-corporation or partnership.

21. HOW IS A COMPOSITE RETURN COMPLETED?

Code Section 12-6-5030(B) provides that the S-corporation or partnership determines each participant's share of the S-corporation's or partnership's tax due using one of two methods. Each method is briefly explained below.

Method 1 – If a Participant Provides a Composite Return Affidavit (Form I-338 or Equivalent):

For a participant who provides a composite return affidavit to the Department through the entity stating that he has no South Carolina income other than the income from the entity then the tax can be computed on the South Carolina composite individual income tax return in one of two ways:

- A. Regular Calculation. The S-corporation or partnership may choose to compute each participating shareholder's or partner's South Carolina income tax in the same manner as if he was separately reporting his own income and deductions. In other words, each shareholder or partner would be entitled to his prorated share of the standard or itemized deduction as well as his prorated personal exemption amount from his federal return pursuant to Code Section 12-6-1720(2). After separately computing each shareholder's or partner's tax, these amounts should be added together to arrive at the total tax due on the composite return.

B. **Simplified Calculation.** The S-corporation or partnership may choose to report each participating shareholder's or partner's entire share of South Carolina income without regard to the proration of deductions and exemptions. Each participating shareholder's or partner's South Carolina income tax should be separately computed (i.e., apply the tax table separately to each shareholder's or partner's taxable income). The separate tax amounts should then be added together to arrive at the total tax due on the composite return.

Method 2 – If a Participant Does **Not** Provide a Composite Return Affidavit (SC Form I-338 or its equivalent) or a Participant has South Carolina Income from Sources Other Than the Entity:

For a participant who does not provide a composite return affidavit to the Department through the entity stating that he has no South Carolina income other than the income from the entity then the tax reported on the South Carolina composite individual income tax return must be computed as follows.

The S-corporation or partnership reports each participating shareholder's or partner's entire share of South Carolina income without regard to the proration of deductions and exemptions by using the active trade or business income rate provided in Code Section 12-6-545 on his active trade or business income,⁶ and using the highest marginal rate in Code Section 12-6-510 for other income. Each participating shareholder's or partner's tax should be separately computed. The separate tax amounts should then be added together to arrive at the total tax due on the composite return.

22. WHEN IS THE COMPOSITE RETURN DUE?

The composite return is due on or before the fifteenth day of the fourth month following the shareholders' or partners' tax year end. This will generally be a calendar year with the composite return due on or before the following April 15.

The composite return may be extended by the S-corporation or partnership filing a modified form SC4868, "Request for Extension of Time to File South Carolina Individual Income Tax Return." The taxpayer name, address, and identifying number used on the composite return extension request should be the S-corporation's or partnership's. Any tax estimated to be due must be paid with the timely filed extension.

Note: A composite return is not extended by means of an S-corporation or partnership extension.

The tax due in connection with the composite return is subject to the declaration of estimated tax rules. In general, composite estimated tax payments are required to be made by the S-corporation or partnership on behalf of any nonresident shareholder or partner participating in the composite return whose expected amount of tax owed with the composite return will be \$100 or more.

⁶See SC Revenue Ruling #08-2, "Tax Rate Reduction on Active Trade or Business Income from a Pass Through Business" for more information on Code Section 12-6-545, "Income tax rates for pass through trade and business income; determination of income related to personal services."

23. IS THERE A PRESCRIBED FORMAT FOR A COMPOSITE RETURN AFFIDAVIT?

The Department has a preprinted composite return affidavit, Form I-338, "Composite Return Affidavit," available for use by shareholders and partners. A copy is available on the Department's website, www.dor.sc.gov. In lieu of the Department's Form I-338, an affidavit containing the same information as the Department's will be accepted.

24. WHERE AND WHEN DO SHAREHOLDERS OR PARTNERS PROVIDE THE COMPOSITE RETURN AFFIDAVIT?

The composite return affidavit is not mandatory. If a composite return affidavit is completed by the nonresident shareholder or partner, then it is submitted to the S-corporation or partnership. This will allow the entity optional methods for computing the participant's tax due on the composite return. A composite return affidavit is only valid for the current tax year.

25. WHEN DOES THE S-CORPORATION OR PARTNERSHIP SUBMIT THE COMPOSITE RETURN AFFIDAVITS TO THE DEPARTMENT?

The S-corporation or partnership should remit all affidavits regarding no other sources of nonresident partner or shareholder South Carolina income (i.e., Form I-338 or its equivalent) provided by participating partners or shareholders to the Department each year with the composite return.

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/W. Hartley Powell

W. Hartley Powell, Director

February 21, 2017
Columbia, South Carolina