



SC INFORMATION LETTER #94-5

SUBJECT: ADMINISTRATIVE PRONOUNCEMENT
Geoffrey, Inc. v. South Carolina Tax Commission
(Income Tax)

DATE: February 22, 1994

SUPERSEDES: SC Information Letter #93-20

REFERENCE: S. C. Code Ann. Section 12-7-230 (Supp. 1993)

AUTHORITY: S. C. Code Ann. Section 12-4-320 (Supp. 1993)
SC Revenue Procedure #93-6

SCOPE: An Information Letter is a document issued for the purpose of disseminating general information or information concerning an administrative pronouncement.

Information Letters issued to disseminate general information have no precedential value and do not represent the official position of the Department. Information Letters designated as administrative pronouncements do represent the official position of the Department.

BACKGROUND INFORMATION:

Taxpayers should be aware of the South Carolina Supreme Court decision in Geoffrey, Inc. v. South Carolina Tax Commission, S.C. , 437 S.E. 2d. 13, cert. den. 114 S.Ct. 550 (1993).

In 1984, Geoffrey Inc. ("Geoffrey"), a wholly-owned, second-tier subsidiary of Toys R Us, Inc., became the owner of several valuable trademarks and trade names (including "Toys R Us"). Geoffrey executed a License Agreement with Toys R Us that allows Toys R Us to use the "Toys R Us" trade names as well as other trademarks and trade names in most states.

As consideration for the licenses granted, Geoffrey receives a royalty of 1% of the net sales by Toys R Us and its subsidiaries of the "Licensed Products sold or the Licensed Services rendered under the Licensed Mark." The aggregate sales of all Toys R Us stores is reported to Geoffrey on

a monthly basis and the royalty payment is made annually via wire transfer from a Toys R Us account in Pennsylvania to a Geoffrey account in New York.

The South Carolina Supreme Court held that the taxation of this royalty income did not violate the Due Process Clause or the Commerce Clause of the U.S. Constitution. Specifically the South Carolina Supreme Court held:

1. By electing to license its trademarks and trade names to Toys R Us, Geoffrey purposely sought the benefit of economic contact with South Carolina.
2. Geoffrey has two intangibles in South Carolina:
 - a. Geoffrey has a franchise (license of a trademark and trade name) in South Carolina.
 - b. Sales by Toys R Us in South Carolina create an account receivable for Geoffrey.
3. Physical presence, with respect to income tax and corporate license fees, is not necessary to meet the substantial nexus requirements of the Commerce Clause.

Accordingly, the Court found "that Geoffrey's purposeful direction of activity toward South Carolina as well as its possessing intangible property [in South Carolina] provide a definite link between South Carolina and the income derived by Geoffrey from the use of its trademarks and trade names in this State."

NOTICE TO SIMILARLY SITUATED TAXPAYERS:

Before a state can require a business or company to remit taxes, the business or company must have a minimal connection or link with the taxing state known as "nexus". The Geoffrey case concerns "nexus" for income tax purposes. Therefore, the procedures in SC Revenue Procedure #92-2, which concern taxpayers who have nexus with South Carolina but who are not registered with the State to remit income taxes, will apply.

The following outlines the relevant portions of this procedure for income tax purposes.

I. VOLUNTARY FILERS:

For purposes of this document, a taxpayer who has nexus with South Carolina is considered a voluntary filer if:

- A. the taxpayer registers to remit income taxes without having been previously contacted by the Department of Revenue; or,
- B. the taxpayer, upon receiving and entirely completing a Department of Revenue questionnaire regarding the taxpayer's business activities within this State, registers

or requests to be registered when the questionnaire is returned to the Department of Revenue; or

- C. the taxpayer, upon receiving, entirely completing and returning a questionnaire regarding the taxpayer's business activities in this State within the time stated in the letter accompanying the questionnaire, agrees to register if nexus is determined to exist by the Department of Revenue.

If a taxpayer qualifies as a voluntary filer as set forth above:

- A. South Carolina will accept voluntary registration, filing of returns and payment of all required taxes for three (3) back years (or less, if nexus existed for less than three years.)
- B. Interest will be applied in accordance with the South Carolina Code.
- C. Penalties will be waived except in cases of material misrepresentation of facts or fraud.

II. NON-VOLUNTARY FILERS:

For purposes of this document, a taxpayer having nexus for income tax purposes with South Carolina is considered a non-voluntary filer if:

- A. the taxpayer does not qualify as a voluntary filer as defined above in Section I; or,
- B. the taxpayer, has been sent, but has not timely or entirely completed and returned the Department of Revenue questionnaire on the taxpayer's business activities in this State; or,
- C. the taxpayer has returned the questionnaire, but has not agreed to register if the Department of Revenue finds nexus exists; or,
- D. the taxpayer has been informed that he has been selected for audit purposes.

If a taxpayer is a non-voluntary filer:

- A. South Carolina will request registration, filing of returns and payment for all required taxes for ten (10) back years (or less, if nexus existed for less than ten years.) See Code Section 12-49-70 concerning the presumption of payment of taxes after ten years.
- B. Interest will be applied in accordance with the South Carolina Code.
- C. Penalties will be assessed.

Where the Department of Revenue finds a non-voluntary filer has nexus with South Carolina for income tax purposes, but refuses to register, file returns, or pay all required taxes, steps will be taken to enforce compliance.

III. COMPROMISE OF TAX LIABILITY

In accordance with Code Section 12-4-320(3) the Department of Revenue may compromise any tax, interest or penalty imposed by Title 12 of the South Carolina Code. Thus, if nexus for income taxes purposes is not clear, (i.e. if it is unclear whether or not a court would determine that nexus exists) the Department of Revenue and the taxpayer may agree to compromise the income tax that may be due. The determination as to whether to accept a compromise of taxes rests with the Department of Revenue.

IV. FOR MORE INFORMATION, CALL OR WRITE ...

If you would like to confer with someone regarding the Geoffrey case and whether nexus exists with South Carolina, please contact Karen Law or John Swearingen by telephoning (803) 737-4674 or (803) 737-4617 respectively, or by letter at P.O. Box 125, Columbia, South Carolina, 29214.

For additional information concerning income tax nexus, see SC Revenue Ruling #93-10 - "The Effect of 15 U.S.C. Section 381 on South Carolina's Imposition of Income Tax".