
State of South Carolina
Department of Revenue
301 Gervais Street, P. O. Box 125, Columbia, South Carolina 29214

SC REVENUE RULING #08-1

SUBJECT: Nexus
(Income Tax)

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

MODIFIES: SC Revenue Ruling #98-3

AUTHORITY: S.C. Code Ann. Section 12-4-320 (2000)
S.C. Code Ann. Section 1-23-10(4) (2005)
SC Revenue Procedure #05-2

SCOPE: The purpose of a Revenue Ruling is to provide guidance to the public and to Department personnel. It is an advisory opinion issued to apply principles of tax law to a set of facts or general category of taxpayers. It is the Department's position until superseded or modified by a change in statute, regulation, court decision, or another Departmental advisory opinion.

BACKGROUND INFORMATION:

Nexus is a sufficient connection between a person and a state, and a sufficient connection between an activity, property, or transaction and a state, that allows the state to subject the person, and the activity, property, or transaction to its taxing jurisdiction. The Due Process and Commerce Clauses of the United States Constitution, 15 U.S.C. §381 (Public Law 86-272) and other federal statutes provide limitations on a states powers to tax out of state corporations.

Over the years, the Courts have provided limitations and guidelines in determining whether certain activities create nexus in a taxing state. For example, see *Quill Corp. v. North Dakota* 112 S. Ct. 1904 (1992), *Wisconsin Department of Revenue v. William Wrigley, Jr., Co.*, 112 S. Ct. 2447 (1992), *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 104 S. Ct. 1868 (1984), *Complete Auto Transit, Inc. v. Brady*, 97 S. Ct. 1076 (1977), and *Geoffrey, Inc. v. South Carolina Tax Commission*, 437 S.E. 2d 13 (S.C. 1993) cert. denied 114 S. Ct. 550 (1993).

In *Geoffrey*, the South Carolina Supreme Court determined that the licensing of trademarks and symbols to a South Carolina retailer and the maintaining of accounts receivable in South Carolina by a nonresident taxpayer creates nexus for South Carolina income tax purposes even though the taxpayer lacked physical presence in South Carolina. The Court determined that Geoffrey purposely directed its activities toward South Carolina, and that Geoffrey owned intangible property in South Carolina. Each of these activities was sufficient to satisfy the nexus requirements of the Due Process Clause and the Commerce Clause.

The purpose of this advisory opinion is to address some of the common questions that have arisen relating to taxpayers concerned about the implication of *Geoffrey*. Specifically, this document clarifies SC Revenue Ruling #98-3 and provides examples that show activities or relationships which will not, by themselves, create income tax nexus with South Carolina. A combination of several different activities or relationships, even if each by itself does not create nexus, may create nexus with South Carolina. In addition, any variance from the facts stated in the examples or facts not stated in the examples may result in a different answer.

This advisory opinion reflects the Department's official position regarding *Geoffrey* and income tax nexus at this time. Since developments in this area are constantly taking place, any response is subject to change due to a future statute, regulation, court decision, or advisory opinion. Any change in the Department's position that is not the result of a court case or change in statute or regulation will be prospective. Any change that is the result of a court case will apply to all periods open under the statute unless the court states otherwise, and any change in statute or regulation will be applicable as of the effective date established by Congress or the General Assembly.

Questions concerning the existence of nexus with South Carolina should be directed to the Department's Nexus/Discovery Section at 803-898-5671 or 803-898-5886. For additional assistance concerning income tax nexus, see South Carolina Revenue Rulings #97-15 and #03-4.

EXAMPLES - Each example described below is based solely upon the facts indicated and assumes there are no other facts and the person in the example has no other nexus creating connections with or activity in South Carolina. Each example refers only to income tax nexus.

Authors

✓ A New York best selling author's books are sold nationwide, including in South Carolina. The author does not have nexus with South Carolina just because his books are sold in South Carolina.

Celebrities

✓ A Chicago basketball player's picture is on nationally distributed cereal boxes, T-shirts, and television ads in South Carolina. The celebrity does not have nexus with South Carolina.

✓ A Tennessee country singer's music is played on South Carolina radio stations and a California actor's movies are played in South Carolina theaters. The singer and the actor do not have nexus with South Carolina. However, a singer who comes to South Carolina for a live performance or actor who comes to South Carolina to film a movie has income tax nexus with South Carolina.

Subsidiary

✓ A North Carolina corporation that does not do any business in South Carolina owns a subsidiary that is incorporated in and transacts an unrelated, non-unitary business in South Carolina. The North Carolina company does not have nexus with South Carolina.

Bank Accounts

✓ A North Carolina company does not conduct business in South Carolina. Its only connection with South Carolina is the maintenance of bank accounts in South Carolina. The company does not have nexus with South Carolina.

Debts

✓ A New York company does not conduct business in South Carolina. Its only activity in South Carolina is negotiating and obtaining bank loans from a South Carolina bank. Officers of the New York company visit South Carolina for one or two days twice a year to discuss business with the South Carolina bank. The company does not have nexus with South Carolina.

✓ A North Carolina finance company does business only in North Carolina and Tennessee. It does not solicit business from South Carolina. The company makes a personal loan to a North Carolina resident who moves to South Carolina the following year. The finance company does not have nexus with South Carolina. The result would not change if the North Carolina resident who moved to South Carolina had his personal car secured by the North Carolina loan. Further, the finance company does not have nexus with South Carolina if the South Carolina borrower contacts the North Carolina finance company to renew the loan.

✓ A North Carolina finance company does business only in North Carolina. It does not solicit business from South Carolina. A South Carolina resident travels to North Carolina and asks the finance company for a personal loan. The finance company approves the loan in North Carolina and sends the check to the South Carolina resident. The finance company does not have nexus with South Carolina.

✓ A New York hotel advertises in South Carolina. A South Carolina resident incurs a large bill at the hotel. The hotel agrees that the debt can be paid in 12 monthly installments. The hotel does not have nexus with South Carolina.

✓ A New York company is in the business of packaging and selling credit card and mortgage loans to the public throughout the United States as passive investments. An insignificant number of debtors and an insignificant amount of the property securing the loans are located in South Carolina. The passive investors who purchase these securities do not have nexus with South Carolina.

Sales of Tangible Personal Property, Including Internet Sales

Each example described in this section is based upon the assumption that the only activity in which nexus is a question is the activity described in the example; any other activity the taxpayer has in South Carolina is protected under Public Law 86-272.¹

¹ The pertinent parts of Public Law 86-272 are provided in Exhibit A.

Public Law 86-272 limits the power of South Carolina to impose net income taxes on income that out-of-state companies derive from the sale of personal property when the only business activity within South Carolina is the solicitation of orders by such company for sales of tangible personal property, which orders are sent outside South Carolina for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside South Carolina.

✓ A California retailer makes sales to South Carolina customers by means of an 800 telephone order number. The company advertises in South Carolina. The company does not have nexus with South Carolina.

✓ An Ohio company has a web site server in North Carolina. The web site can be accessed in South Carolina through a South Carolina or out of state unrelated third party Internet service provider. A web site which is accessible in, but not located in, South Carolina is viewed as the equivalent of a 800 telephone number. Soliciting through electronic mail is viewed as the equivalent of soliciting by letter. The Ohio company does not have nexus with South Carolina.

✓ A New York manufacturing company is selling tangible personal property with a trademark or trade name it owns on the product, such as a sport drink, to South Carolina retailers. The trademark or trade name is used by retailers in advertising in South Carolina. The only business activity of the New York company within South Carolina consists of the solicitation of orders for sales of tangible personal property. The orders are sent outside of South Carolina for acceptance or rejection, and, if accepted, are filled by shipment or delivery from a point outside South Carolina. The South Carolina sales by the New York company create accounts receivable in South Carolina. Based upon Public Law 86-272, the activities of the New York company in South Carolina described in this example do not create nexus with South Carolina. *Geoffrey* does not remove the company's protection under Public Law 86-272. Note that Public Law 86-272 does not protect a company which only licenses trademarks and trade names.

✓ A Georgia company is selling tangible personal property to retailers in South Carolina. The only business activity of the Georgia company within South Carolina consists of the solicitation of orders for sales of tangible personal property. The orders are sent outside of South Carolina for acceptance or rejection, and, if accepted, are delivered from a point outside South Carolina in the company's own delivery truck. Based upon Public Law 86-272 and South Carolina Revenue Ruling #97-15, the activities of the Georgia company do not create nexus with South Carolina.

✓ A Georgia company does business in Georgia and Tennessee. It does not conduct business in South Carolina. A salesperson enters South Carolina on his own initiative and makes a single insignificant sale. This is done without the knowledge of the company. The sale is approved for purposes of goodwill and will not happen again in South Carolina. The company does not have nexus with South Carolina.

Employee Activities

✓ A North Carolina company sends various employees (*e.g.* legal staff and witnesses) to South Carolina to assist its independent legal counsel defend a lawsuit. The employees are temporarily present in South Carolina. Defending the lawsuit in South Carolina courts does not give the North Carolina company nexus with South Carolina. The South Carolina law firm providing counsel is taxable in South Carolina.

✓ An Ohio manufacturer does not conduct business in South Carolina. The company sends its employees to South Carolina for less than 5 days to purchase raw materials and inventory. The company does not have nexus in South Carolina.

Printers

✓ A Kentucky retailer's only South Carolina activities are the solicitation of orders and activities ancillary to solicitation. The retailer contracted with a commercial printer located in South Carolina to print advertisements. The retailer leases tangible personal property located at the South Carolina printer for use in connection with the printing contract. The printer, once the work is complete, ships the printed material to a Tennessee company for addressing and mailing. The retailer does not have nexus with South Carolina. See South Carolina Code Section 12-6-555.

Personal Property

✓ A Kentucky company sends its business records to South Carolina temporarily for use by its independent auditors. The company does not have nexus with South Carolina.

Seminars, Meetings, and Other Similar Visits

✓ Employees of a New York company attend an annual training seminar, convention, retreat, or board of directors meeting in South Carolina for 14 or less consecutive days each year. The employees do not conduct or solicit any business in person with anyone outside of the company. During their stay, employees stay in contact with the New York office and conduct incidental business via telephone, e-mail, or fax in South Carolina. Since the conduct of incidental business over the phone, e-mail, and fax in South Carolina is not a purpose of the visit in South Carolina and is for a limited time, it is considered *de minimis* and the company does not have nexus with South Carolina. This result would not change if the employees of the New York company were in South Carolina on a company yacht docked in Charleston, South Carolina while the employees attended seminars and social functions, or if the employees flew into South Carolina on a company plane.

✓ An Ohio company does not conduct business in South Carolina. Each year the highest performing sales person is given an expense paid week vacation to Myrtle Beach, South Carolina. The company does not have nexus with South Carolina.

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/Ray N. Stevens

Ray N. Stevens, Director

January 11 _____, 2008
Columbia, South Carolina

EXHIBIT A

Public Law 86-272, as codified at 15 U.S.C. Section 381, places certain limits on the power of a state to impose a tax on the income derived from within its borders. It reads, in pertinent part:

(a) No State, or political subdivision thereof, shall have power to impose... a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

(b) The provisions of subsection (a) of this section shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to -

(1) any corporation which is incorporated under the laws of such State;
or

(2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State.

(c) For purposes of subsection (a) of this section, a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance, of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, of tangible personal property.

(d) For purposes of this section -

(1) the term “independent contractor” means a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities; and

(2) the term “representative” does not include an independent contractor. (Emphasis added.)