



SC REVENUE RULING #89-19

- SUBJECT:** Withholding on Sales of Real and Tangible Personal Property by Nonresidents
- EFFECTIVE DATE:** July 1, 1989
- SUPERSEDES:** S.C. Revenue Ruling #89-15 and any oral directives in conflict herewith. SC Revenue Ruling #89-15 may be relied upon until thirty days after the date this ruling is signed.
- REFERENCE:** S.C. Code Ann. Section 12-9-310 (As Amended 1989)
- AUTHORITY:** S.C. Code Ann. Section 12-3-170 (1976)
S.C. Revenue Procedure #87-3
- SCOPE:** A Revenue Ruling is the Commission's official interpretation of how tax law is to be applied to a specific set of facts. A Revenue Ruling is public information and remains a permanent document until superseded by a Regulation or is rescinded by a subsequent Revenue Ruling.
- PURPOSE:** This ruling is being issued in question and answer format on an emergency basis to provide guidance on the application of 12-9-310 as amended in the 1989 Appropriations Bill.

Section 12-9-310 has been amended, effective July 1, 1989, to require withholding on the proceeds of sales of real and tangible personal property paid to nonresidents. It requires anyone making payment (the "payor") to a nonresident of the proceeds of the sale of real property and tangible personal property to deduct and withhold on the payments an amount equal to seven percent of the total payment to individuals and five percent of the total payment to corporations.

When the nonresident seller files a South Carolina income tax return for the year of the sale and reports the gain or loss on the sale, the amount withheld will be applied against any income tax due and any excess will be refunded.

The following questions and answers are provided to give guidance in complying with this statute.

Definitions

1. Who is a Nonresident?

Subject to the exception in item g below, the following persons are nonresidents:

- a) Individual - Any individual having his or her fixed or permanent home outside of South Carolina at the time of the closing.
- b) Corporation - Any corporation which is not incorporated in S.C., unless 1) it does no business in its state of incorporation and 2) its principal place of business is South Carolina.
- c) Partnership - Any partnership whose principal place of business is located outside of South Carolina.
- d) Trust - Any trust that is being administered outside of South Carolina.
- e) Estate - Any estate of a decedent who at death had his or her fixed or permanent home outside of South Carolina.
- f) Co-ownership - If two or more persons sell property which they own as joint tenants with right of survivorship or as tenants in common, their respective residencies will be determined separately. Withholding is only required on the payments made to the nonresident co-owner or co-owners.
- g) Exception - Any seller who meets all of the following conditions will be considered a resident for purposes of this section:
 - 1) The seller has filed South Carolina income tax returns or appropriate extensions have been received for the seller's two income tax years immediately preceding the year of sale; and
 - 2) The seller is in business in South Carolina and will continue substantially the same business in South Carolina after the sale; and
 - 3) The seller will report the sale on a South Carolina income tax return for the current year and file it by its due date; and
 - 4) If the seller is a corporation or limited partnership, it is registered to do business in South Carolina.

If the seller furnishes an affidavit to the payor which meets the requirements contained in the answer to question 16 and certifies that the above four requirements are met, the payor will not be liable for withholding.

2. Can the payor rely on the seller's determination of residency?

If the seller furnishes the payor an affidavit which states that the seller is a resident of South Carolina and meets the requirements in the answer to question 16, the payor will not be liable for withholding.

3. The sale of what type of property will require withholding?

- a) The sale of any interest in real estate. This includes the sale of time shares, standing timber and minerals in place.
- b) The sale of tangible personal property will also require withholding, but only if it is sold as part of a transaction involving the sale of an interest in real estate.

4. What is a sale?

A sale is any transfer where gain or loss for South Carolina income tax purposes would be computed in accordance with Section 1001 of the Internal Revenue Code; i.e. any taxable sale or exchange.

It does not include tax exempt or tax deferred transactions. Examples of transactions which are not "sales" include, but are not limited to:

- a. Gifts and inheritances which are tax free under Section 102 of the Internal Revenue Code.
- b. Those like - kind exchanges which are tax deferred under Section 1031 of the Internal Revenue Code provided the property received in the exchange is located in South Carolina.
- c. Tax free exchanges of property for stock in a corporation which qualify under Section 351 of the Internal Revenue Code.
- d. Tax free exchanges of property for a partnership interest under Section 721 of the Internal Revenue Code.
- e. Transfers of property as part of a tax free corporate reorganization.
- f. Transfers of property from the U.S. Government, agencies of the U.S. Government, South Carolina and its agencies and political subdivisions. These transfers include any transfer made by a deed signed by a federal or South Carolina judicial or other government official acting in his or her official capacity.
- g. Transfers of property from organizations exempt from income taxes under Internal Revenue Code Section 501(a) and insurance companies exempt from South Carolina taxes on income.

5. What about the sale of a principal residence where the seller intends to defer his taxes by rolling over the proceeds into a new principal residence pursuant to Section 1034 of the Internal Revenue Code or intends to use his one time exclusion of up to \$125,000 pursuant to Section 121 of the Internal Revenue Code.

The payor will not be liable for withholding if he obtains an affidavit from the seller which meets the requirements contained in the answer to question 16 and states that:

- a) The sale will not be subject to taxes because of Section 1034 or 121 of the Internal Revenue Code; and
 - b) The seller acknowledges his obligation to file a South Carolina income tax return for the year of the sale; and
 - c) The seller acknowledges his obligation to file an amended South Carolina income tax return for the year of the sale if the seller fails to comply with Section 1034.
6. What about a sale that qualifies as an involuntary conversion or condemnation and the seller elects nonrecognition of the gain under Internal Revenue Code Section 1033?

The payor will not be liable for withholding if he obtains an affidavit from the seller which meets the requirements contained in the answer to question 16 and states that:

- a) The sale will not be subject to tax because of Section 1033 of the Internal Revenue Code; and
 - b) The seller acknowledges his obligation to file a South Carolina income tax return for the year of the sale; and
 - c) The seller acknowledges his obligation to file an amended South Carolina income tax return for the year of the sale if the seller fails to comply with Section 1033.
7. If the sales price is paid or advanced to an employee by an employer or a relocation service, will the payment to the employee and the ultimate sale of the property be treated as one sale or two separate sales or the purpose of withholding?

When the employee treats the ultimate sale as a sale on his income tax return and neither the employer nor the relocation service is required to treat it as a sale for income tax purposes, then the sale is from the employee to the ultimate purchaser and only it will be subject to withholding.

When the employer or relocation service is required to treat the advance and the ultimate sale as a purchase and sale by it, then each transaction, the sale from the employee to the employer or relocation service and the sale from the employer or relocation service to the ultimate purchaser, will be subject to withholding.

The payor may rely on an affidavit from the employer or relocation service which meets the requirements contained in the answer to question 16 and states that the transaction is, or is not, a taxable sale by the employer or relocation service and further states the residency of the seller (whether the seller is the employee, employer or relocation service).

Computing Withholding

8. What is the total payment subject to withholding?

The total payment subject to withholding is the net proceeds of the sale actually paid to the nonresident seller including the fair market value of any property to be transferred to the seller. Earnest money paid or other payments made by the payor prior to July 1, 1989, are not subject to withholding. The net proceeds of the sale are computed by reducing the total sales price by:

a. Mortgages and liens

Only mortgages and liens on the property being sold may be deducted from the sales price. Liens, mortgages or advances on credit lines in contemplation of the sale cannot be deducted. Unless the payor knows otherwise, the payor can presume that any liens, mortgages or advances on credit lines made more than one year before the closing are not in contemplation of the sale and may be deducted. If the lien, mortgage or credit line advance is made less than one year prior to the closing, the payor cannot deduct the mortgage, lien or credit line advance unless the payor obtains an affidavit from the seller, which states that the loan or advance was not made in contemplation of the sale and meets the requirements contained in the answer to question 16.

A loan or advance made in contemplation of the sale is a loan or advance which has as one of its purposes reducing the amount withheld. It does not include loans or advances where the entire proceeds are used to purchase or improve the property being sold and it does not include loans made prior to July 1, 1989.

b. Selling expenses, such as:

- 1) real estate commission
- 2) attorney fees
- 3) deed stamps
- 4) pro rata share of real property taxes
- 5) termite, heating & air letters

If a HUD-1 Settlement Statement is prepared and the seller does not receive any property in the transaction and no mortgages or advances on credit lines have been made in contemplation of the sale, the net proceeds of the sale will be equal to the cash to be paid to the seller as stated on line 603 of the HUD-1.

The seller's tax basis in the property cannot be deducted.

9. What about installment sales?

If the seller finances all or part of the transaction, the payor is required to withhold on each payment he makes to the seller. Withholding only applies to principal, nothing should be withheld on interest paid to the seller.

Rather than withholding on each payment, the payor and seller may agree that the payor may pay the withholding on the entire net proceeds of the sale at the time of the closing or make an election to pay the withholding on an annual basis with each annual withholding payment due when the first payment is made to the seller for each calendar year.

If the seller files a tax return reporting a loss on the sale or the entire gain on the sale, the seller may apply to the Commission for a letter exempting future principal payments from withholding. The Commission will forward a copy of the exemption to the seller and the payor. Upon receipt of the exemption letter, the payor is relieved from withholding on any future payments.

10. What is the withholding amount?

The withholding amount is 7% of the net proceeds computed in item 8 (and 9, if the sale is an installment sale) except when the nonresident seller is a corporation, then the withholding amount is 5% of the net proceeds.

The withholding amount for an association or trust that is taxed as a corporation is 5%.

Liability

11. Who is liable for the withholding and payment?

The payor has the ultimate liability for withholding and paying the tax to the Commission. Generally, the payor is the buyer. In certain instances a payor other than the buyer may be held liable.

An escrow agent holding money after the closing is responsible and secondarily liable for withholding on all payments made by the escrow agent to the seller.

Payments and Refunds

12. When is the payment due?

If the withholding amount is \$500 or more, the tax must be paid on or before the fifteenth day of the month following the month in which the sale took place.

If the withholding amount is less than \$500, the tax must be paid on or before the last day of the month following the calendar quarter in which the sale took place.

Although payment is not required before the time provided above, the payor or escrow agent may pay the withholding amount to the Commission as soon after the closing as desired.

13. How is the payment to be made?

The Commission has designed Form I-290 to use when paying the withholding amount. A copy is attached to this ruling.

If there is more than one seller, e.g. tenants in common, a separate Form I-290 should be used for each seller.

Four (five if the payor is not the buyer) copies of Form I-290 should be completed for each sale. The payor should send one copy to the Tax Commission with payment of the withheld amount. The seller should receive two copies, one to be sent in with his income tax return reporting the sale and one for his records. The payor should receive one copy for his records, and if the payor is not the buyer, the buyer should receive and retain one copy.

Send Form I-290 and payment of the amount withheld to:

South Carolina Tax Commission
Real Estate Withholding
P.O. Box 125
Columbia, South Carolina 29214

14. Can the withholding be used by the seller against estimated income tax payments?

The seller may apply amounts withheld against any estimated income tax payments.

15. Can part or all of the withholding be refunded if the amount withheld and sent to the Tax Commission was incorrect?

If the amount withheld and sent to the Tax Commission was incorrect because of an error in computing the amount or the seller and payor were unaware of the exceptions to the withholding at the time of the closing, then part or all of the withholding may be refunded to the seller.

The payor may submit a request for refund with (1) a corrected withholding form and (2) the reasons for the correction. The request should be mailed to:

PRO - Real Estate Withholding
P.O. Box 11189
Columbia, S.C. 29211-1189

Affidavits

16. When can the payor rely on an affidavit referred to in this Revenue Ruling?

A payor can rely on the facts contained in an affidavit referred to in this Revenue Ruling, if

a) It states under penalty of perjury:

- 1) The seller's name, address and social security number or taxpayer identification number; and
- 2) If the affiant is not the seller, the affiant's name, address and social security number or taxpayer identification number; and
- 3) The closing date of the sale; and
- 4) A description of the property. The description of real property must include the county it is in and its tax map number(s).

b) The payor does not know the affidavit is false.

17. What should the payor do with an affidavit from the seller?

The payor should retain the affidavit with his records and produce it if requested during an audit. The payor should not send the affidavit to the Tax Commission.

18. Where can I get an affidavit?

You can use a copy of the affidavit attached to this ruling or prepare your own.

Liens

19. Does the failure to withhold create a lien which takes priority over mortgages on the property?

Any lien on the property will have priority over the obligation to withhold as long as it is filed before the Tax Commission files a lien on the property. The Tax Commission will not file a lien on the property until it establishes that the withholding tax was due, assesses the tax, and issues a warrant after the payor fails to pay the assessed tax.

SOUTH CAROLINA TAX COMMISSION

s/S. Hunter Howard Jr.

S. Hunter Howard, Jr., Chairman

s/A. Crawford Clarkson Jr

A. Crawford Clarkson, Jr., Commissioner

Columbia, South Carolina
August 8, 1989

Seller's Affidavit South Carolina Withholding Tax

S.C. Code Section 12-9-310, 1976 Code of Laws, as amended, provides that a payor of the proceeds of a sale of a South Carolina real property interest must withhold tax if the seller is a nonresident.

The undersigned on oath, being first duly sworn, hereby certifies as follows:

1. This affidavit is being given in connection with a sale of real estate pursuant to SC Revenue Ruling #89-19.
2. I have attached to this affidavit a description of the real property and any tangible personal property being sold as part of this sale. The description of the real property includes the county it is in and its tax map number(s).
3. Unless block 14 is checked, the undersigned is the seller of the property described in the attached description.
4. The closing date of this sale is
5. The Seller's name is
6. The Seller's address is
(number, street or rural route)

(city, state and zip code)
7. The Seller's social security number or taxpayer identification number is:
8. The seller is a resident of South Carolina, as that term is defined in the South Carolina income tax laws (S.C. Code Section 12-1-10 et seq. as amended) and in S.C. Tax Commission Regulations and Rulings.
9. Pursuant to SC Revenue Ruling #89-19 the seller is deemed to be a resident of South Carolina because:
 - 1) The seller has filed South Carolina income tax returns or appropriate extensions have been received for the seller's two income tax years immediately preceding the year of sale; and
 - 2) The seller is in business in South Carolina and will continue substantially the same business in South Carolina after the sale; and
 - 3) The seller will report the sale on a South Carolina income tax return for the current year and file it by its due date; and
 - 4) If the seller is a corporation or limited partnership, it is registered to do business in South Carolina.
10. The sale of the property will not be subject to taxes because of Section 1033, 1034 or 121 of the Internal Revenue Code. The seller acknowledges his obligation to file a South Carolina income tax return for the year of the sale. If the seller fails to comply

with Section 1033 or 1034, the seller acknowledges an obligation to file an amended South Carolina income tax return for the year of the sale.

- 11. The seller is an organization exempt from income taxes under Internal Revenue Code Section 501(a) or is an insurance company exempt from South Carolina taxes on income.
- 12. The seller is an association or trust taxed as a corporation and is subject to withholding at 5%.
- 13. Any lien, mortgage or credit line advance which was made within one year prior to the closing was not made in contemplation of the sale as that phrase is defined in SC Revenue Ruling #89-19.
- 14. The undersigned is an employer or relocation company that has advanced the proceeds to an employee. The receipt of the sales price is not a taxable sale reportable on the undersigned's (employer's or relocation service's) income tax return. The employee [is not (check one)] a resident of South Carolina at the time of the closing.
- 15. The seller is an employer or relocation company that has paid an employee for the property. The receipt of the sales price is a sale reportable on the undersigned's income tax return.

The undersigned understands that this affidavit may be disclosed to the South Carolina Tax Commission and that any false statement contained herein could be punished by fine, imprisonment, or both.

Under penalties of perjury, I declare that I have examined this Affidavit and, to the best of my knowledge and belief, it is true, correct and complete.

(Signature)

(Name - please print)

If the person making the affidavit is not the Seller, complete the following:

(Affiant's Social Security Number or Taxpayer Identification Number)

(Affiant's Number, Street or Rural Route)

(Affiant's City, State and Zip Code)

SUBSCRIBED AND SWORN to
before me this ___ day
of _____, 1989.

Notary Public

My Commission Expires: