
State of South Carolina
Department of Revenue
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SC REVENUE RULING #09-13

SUBJECT: Withholding on Sales of Real and Associated Tangible Personal Property by Nonresidents (Income Tax)

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

SUPERSEDES: SC Revenue Advisory Bulletin #02-6

REFERENCES: S. C. Code Ann. Section 12-8-580 (Supp. 2008)

AUTHORITY: S. C. Code Ann. Section 12-4-320 (Supp. 2008)
S. C. Code Ann. Section 1-23-10(4) (Supp. 2008)
SC Revenue Procedure #09-3

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 It is the Department's position until superseded or modified by a change in statute, regulation, court decision, or another Departmental advisory opinion.

INTRODUCTION

South Carolina Code Section 12-8-580 requires a person who purchases real property, or real property and associated tangible personal property, from a nonresident seller to withhold South Carolina income taxes from the seller. The withholding amount depends upon the type of taxpayer and the information the seller provides the buyer. The buyer is responsible for collecting and remitting the withholding to the Department on Form I-290. The seller must report the gain or loss on the sale on a timely filed South Carolina income tax return; any excess withholding calculated on the seller's income tax return is then refunded. Exceptions to the withholding requirements exist and are explained in this document.

The purpose of this advisory opinion is to address some of the common questions concerning complying with this withholding provision. For ease of reading, this question and answer document is divided into the following categories:

- ❶ Nonresident Seller Subject to Withholding
- ❷ Sales Subject to Withholding
- ❸ Seller's Affidavit of Fact
- ❹ Determining the Withholding Amount
- ❺ Remitting Withholding – Forms and Due Dates
- ❻ Revising Amount Withheld for Additional Information
- ❼ Special Rules for Like Kind Exchanges and Installment Sales

❶ **NONRESIDENT SELLER SUBJECT TO WITHHOLDING**

Question 1 – Definition of “Nonresident Seller”:

Q. Who is a nonresident seller subject to withholding?

A. A nonresident seller is:

- 1. An individual whose permanent home is outside of South Carolina on the date of closing.
- 2. A corporation incorporated outside of South Carolina (see exception below.)
- 3. A partnership whose principal place of business is located outside of South Carolina.
- 4. A trust administered outside of South Carolina.
- 5. An estate of a decedent whose permanent home was outside of South Carolina at the time of death.

Question 2 – Exception to Definition of Nonresident Seller:

Q. Can a nonresident seller be deemed a South Carolina resident?

A. Yes. A nonresident seller who is a “deemed resident” is not subject to withholding if the “deemed resident” conditions listed below are met.

Question 3 – Definition of “Deemed Resident”:

Q. Who is a “deemed resident” not subject to withholding?

A. A nonresident seller is a “deemed resident” if the following conditions are met:

- 1. a. The seller is a corporation incorporated outside South Carolina, has its principal place of business in South Carolina, and does no business in its state of incorporation, or

- b. The seller (i) has been in business in South Carolina during the last two taxable years, including the year of sale, (ii) will continue substantially the same business in South Carolina after the sale, (iii) is not delinquent with respect to filing any South Carolina income tax returns, (iv) has filed at least one South Carolina income tax return, and (v) has a certificate of authority to do business in South Carolina or is registered to do business in South Carolina, and
- 2. The seller provides the buyer with an affidavit certifying (a) the “deemed resident” requirements, and (b) that the seller agrees to report the sale on a timely filed South Carolina income tax return.

Question 4 – Residency if More Than One Owner

- Q. Who is the seller(s) subject to withholding if there is more than one owner in the property?
- A. If two or more persons sell property which they own as joint tenants with right of survivorship or as tenants in common, then each seller’s respective residency is determined separately. Withholding is only required on the nonresident owner(s).

Question 5 – Employee Relocation Services

- Q. Who is the seller subject to withholding when an employer pays or advances the sales price to an employee when an employee’s property is sold in connection with a job transfer?
- A. When the employee is reporting the ultimate sale on his income tax return, then the sale is from the employee to the ultimate purchaser and only that one transaction is subject to withholding.

When the employer or relocation service is reporting the ultimate sale as a purchase and sale by it, both the sale from the employee to the employer or relocation service and the ultimate purchase are subject to withholding.

Note: The identity of the seller should not be determined by looking at the deed.

② SALES SUBJECT TO WITHHOLDING

Question 6 – Definition of Sale:

- Q. What is a sale subject to withholding?
- A. A sale is any transfer where gain or loss for South Carolina income tax purposes is computed in accordance with Internal Revenue Code §1001 (*i.e.*, any taxable sale or exchange). A sale takes place when it takes place for South Carolina income tax purposes.

If the seller retains the deed purely as a security device, the sale takes place when the benefits and burdens of ownership are transferred, not when the deed is finally delivered.

Question 7 – Property Subject to Withholding:

Q. What sales are subject to withholding?

A. The sale of the following property is subject to withholding:

1. Any interest in real estate. This includes the sale of time shares, leases, and minerals in place.

Note: The transfer of title to real estate held solely to secure a loan in connection with the assignment of the loan is not subject to withholding. For example, where a deed is retained merely as a security interest by a seller who has sold property to a buyer under a “land contract,” no withholding is required for a transaction in which the seller assigns his rights under the land contract, including possession of the deed.

2. Tangible personal property sold as part of a transaction involving the sale of an interest in real estate.

Question 8 – Timber:

Q. When is the sale of timber subject to withholding?

A. A contract for the sale of timber and the underlying land is a contract for the sale of real property. In such transactions, both the standing timber and the underlying land are subject to withholding. The sale of only timber to be cut, however, is not subject to withholding since it is the sale of personal property under South Carolina Information Letter #94-31 (Administrative Pronouncement).

Question 9 – Property Exempt From Withholding:

Q. What types of sales are not subject to withholding?

A. A sale does not include tax exempt or tax deferred transactions, other than installment sales. Below are examples of transactions that are not subject to withholding.

EXAMPLE A

Examples of transactions that are not “sales” subject to withholding include:

1. Sales of a principal residence where the entire gain is excluded under Internal Revenue Code §121. Note: Tax must be withheld on the portion of the gain, if any, not excluded for federal purposes.
2. Gifts and inheritances that are tax free under Internal Revenue Code §102.

3. Like kind exchanges that are tax deferred under Internal Revenue Code §1031. Note: Tax must be withheld where replacement property has not been identified at the time of sale. See Question & Answer 22 for a discussion of withholding when a simultaneous exchange does not take place.
4. Tax free exchanges of property for stock in a corporation under Internal Revenue Code §351.
5. Transfers of property as part of a tax free corporate reorganization.
6. Tax free exchanges of property for a partnership interest under Internal Revenue Code §721.
7. 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.
8. Transfers of property from organizations exempt from income taxes under Internal Revenue Code §501(a) and insurance companies exempt from South Carolina taxes on income.
9. Involuntary conversions or condemnation excluded under Internal Revenue Code §1033.

Question 10 – Sales Exempt from Withholding by Special Approval:

Q. Are other transactions not listed above exempt from the withholding requirements?

A. Yes. The Department may exempt certain other classes of transactions from this withholding provision if it determines that the benefits to the State are insufficient to justify the burdens imposed on the buyer and seller. Although this exception has rarely been used, a taxpayer requesting an exemption should contact the Department's Withholding Section and submit a complete summary of the relevant facts for approval.

Infrequent or unusual situations are reviewed by the Department on a case by case basis. For example, the Department has allowed a nonresident REIT subsidiary selling real estate in South Carolina to be a "deemed resident" exempt from withholding since it owned other property in South Carolina. The only reason the subsidiary did not file its own South Carolina income tax return was because the parent REIT files a South Carolina return that includes the subsidiary's sales.

③ SELLER'S AFFIDAVIT OF FACT

Question 11 – Purpose of Seller's Affidavit

Q. What is a "Seller's Affidavit"?

A. A "Seller's Affidavit" is an affidavit of fact that is provided by the nonresident seller, under penalty of perjury, to the buyer. A properly completed affidavit may relieve the buyer from

withholding if the seller is a resident, a deemed resident, or if the sale is tax exempt, or it may allow the buyer to withhold on the gain stated instead of a higher amount.

South Carolina Form I-295 may be used as a “Seller’s Affidavit.” A substitute affidavit is acceptable in lieu of Form I-295 providing all information on Form I-295 is reflected on the substitute affidavit.

Question 12 – Content of Seller’s Affidavit:

Q. What does the seller attest to in the “Seller’s Affidavit”?

A. The affidavit may be used to indicate the following:

1. The seller is a South Carolina resident.
2. The seller is a deemed resident.
3. The seller is a tax exempt organization.
4. The amount of gain recognized or the amount the gain will not exceed.
5. The withholding is based on the entire net proceeds since the appropriate percentage (5% or 7%) of the amount realized or gain recognized exceeds the net proceeds due to a mortgage being paid off at closing.
6. The withholding from the installment sale is based on an amortization schedule.
7. The gain is not recognized because of Internal Revenue Code §121 (sale of principal residence) or §1033 (involuntary conversion).
8. The gain is not recognized because of Internal Revenue Code §1031 (like kind exchange).
9. An employee’s property is being sold by an employer or relocation company in connection with a transfer.

Note: There is no requirement that the buyer obtain a Seller’s Affidavit. The buyer must, however, have evidence to prove that the appropriate amount was withheld; the Seller’s Affidavit is one method of providing such proof.

Question 13 – Reliance on Seller’s Affidavit:

Q. Can the buyer rely on the Seller’s Affidavit?

A. The buyer may rely on the “Seller’s Affidavit” if the buyer does not know the affidavit is false, and the seller, under penalties of perjury, states the following:

1. Seller’s name, address, and social security number or other federal tax identification number.
2. Date of the sale.
3. Description of the property, including the real property county location and tax map number.

4. A reason for the calculation of the withholding amount. See check-off blocks providing reasons on the “Seller’s Affidavit”.

The buyer should retain the affidavit and provide it if requested during an audit.

④ DETERMINING THE WITHHOLDING AMOUNT

Question 14 – Rate:

Q. What is the withholding amount?

A. The amount of withholding depends on the type of taxpayer and the information the seller provides the buyer. The withholding amount is based on one of the following amounts:

1. Based on gain recognized in the “Seller’s Affidavit”. The withholding amount is 7% of the gain recognized on the sale by a nonresident individual, partnership, trust, or estate, or 5% of the gain recognized on the sale by a nonresident corporation or other nonresident entity, if the seller provides the buyer with a Seller’s Affidavit stating the amount of gain.
2. Based on amount realized. The withholding amount is 7% of the amount realized on the sale by a nonresident individual, partnership, trust, or estate, or 5% of the amount realized on the sale by a nonresident corporation or any other nonresident entity, if the seller does not provide the buyer with a Seller’s Affidavit stating the amount of gain.
3. Based on net proceeds. The withholding amount is 100% of the entire net proceeds payable to the nonresident seller if the amount required to be withheld based on either the gain recognized in the Seller’s Affidavit or the amount realized exceeds the net proceeds payable to the seller.

Question 15 – Definitions:

Q. What are definitions of the terms “amount realized,” “gain recognized,” “net proceeds,” “sales price,” and “selling expenses” referred to in this advisory opinion that are used in computing withholding?

A. These terms have the same meaning as defined in the Internal Revenue Code.

Note: Simplified definitions are provided below for illustrative purposes and should not be relied upon as a substitute for the original sources of authority or obtaining professional advice.

Sales price. Sales price is the gross selling price. It does not include a reduction for selling expenses, existing mortgage or other encumbrances on the property (whether or not assumed or taken subject to by the buyer), or interest or original issue discount. The term is used as it is in U.S. Treasury Regulation 15A.453-1(b)(2)(ii).

Selling expenses. Selling expenses include real estate commissions, advertising fees, legal fees, deed recording fees, and termite or heat/air letter fees.

Amount realized. The amount realized on the sale is the selling price less selling expenses. The term is defined in Internal Revenue Code §1001(b) as adopted for South Carolina income tax purposes.

Gain. Gain is computed as provided in Internal Revenue Code §1001(a) as adopted for South Carolina income tax purposes. Gain is the amount required to be included in the seller's South Carolina gross income. If the amount realized is more than the adjusted basis, the difference is a gain. If the amount realized is less than the adjusted basis, the difference is a loss.

Net proceeds. The net proceeds payable to the seller is computed by reducing the sales price by mortgages or liens paid at closing on the property being sold and selling expenses.

Note: Mortgages, liens, advances on credit lines, and other debt secured by the properties assumed by the buyer in contemplation of the sale (*i.e.*, has as one of its purposes reducing the amount withheld) may not be deducted from the sales price. Loans or advances where the entire proceeds are used to purchase or improve the property being sold are not loans in contemplation of the sale. Unless the buyer knows otherwise, the buyer 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 buyer cannot deduct the mortgage, lien, or credit line advance unless the buyer obtains an affidavit from the seller, which states that the loan or advance was not made in contemplation of the sale.

EXAMPLE B

The two sales in this example are based on the following facts, unless otherwise indicated.

- The cash sales price of real property sold on May 1 is \$250,000.
- Selling expenses are \$20,000
- The adjusted basis of the property is \$60,000.
- The nonresident seller is a corporation subject to withholding at 5%.
- The closing date of the transaction is May 10.
- The seller provides a "Seller's Affidavit" in Sale 2 only.

Sale 1 Withholding Based on Amount Realized		Sale 2 Withholding Based on Gain Stated in Seller's Affidavit	
Sales Price	\$250,000	Amount Realized	\$230,000
Less: Selling expenses	\$ 20,000	Less: Adjusted Basis	\$ 60,000
Amount Realized	\$230,000	Gain (loss)	\$170,000
Rate	5%	Rate	5%
Amount to Withhold	\$ 11,500	Amount to Withhold	\$ 8,500

Sale 1 – This illustrates the computation of withholding based on the amount realized since the seller did not provide the buyer with a “Seller’s Affidavit” stating the gain. The buyer must remit the \$11,500 withheld to the Department by June 15.

Sale 2 – This illustrates the computation of withholding based on the gain stated in the “Seller’s Affidavit” provided to the buyer. The buyer must remit the \$8,500 withheld to the Department by June 15.

EXAMPLE C

Same facts as Example B. Additional facts are:

- The seller has a \$225,000 mortgage on the property that is paid off at closing.
- The loan giving rise to the mortgage was not in contemplation of the sale.

Sale 3 Withholding Based on Net Proceeds	
Amount Realized	\$230,000
Less: Loan Payoff	\$225,000
Net Proceeds	\$ 5,000
Amount to Withhold	\$ 5,000

Sale 3 - This illustrates the computation of withholding based on 100% of the net proceeds payable to the seller.

⑤ REMITTING WITHHOLDING – FORMS AND DUE DATES

Question 16 – Liable Party:

Q. Who is required to remit the withholding?

A. The buyer is liable for collecting and remitting the withholding to the Department. If a lending institution, real estate agent, or closing attorney in fact withholds the tax, it is required to timely remit the withholding to the Department.

Question 17 – Tax Form and Due Date:

Q. How is withholding remitted to the Department?

A. The buyer remits the withholding to the Department on Form I-290, “Nonresident Real Estate Withholding,” on or before the 15th day of the month following the month in which the sale takes place. See exceptions to this due date for installment sales.

If there is more than one seller (*e.g.*, tenants in common) a separate Form I-290 should be used for each seller. If the seller is an S corporation, partnership, estate, or trust, the buyer should issue one Form I-290 to the entity and report the total amount of withholding.

Question 18 - Form I-290 and Form I-295 (Seller's Affidavit):

Q. Who receives a copy of Form I-290 and Form I-295?

A. The buyer sends one copy of Form I-290 to the Department with each withholding payment and sends one copy to the seller. Also, the buyer and the seller should retain a copy of Form I-290 for their records. The buyer should retain Form I-295, the Seller's Affidavit," and provide it if requested during an audit. The "Seller's Affidavit" is not sent to the Department.

If the seller is an S corporation, partnership, estate, or trust, the entity will allocate the tax withheld to each shareholder, partner, or beneficiary in proportion to their percentage ownership. This amount should be reported on the applicable federal Schedule K-1 as an "Other credit" or "Other" and identified as "South Carolina Income Tax Withheld on Nonresident Real Estate Sale."

Question 19 – Seller Responsibilities (Income Tax Return or Estimated Payments):

Q. Does the seller report the sale on a South Carolina income tax return?

A. Yes. The seller should file a South Carolina income tax return to report the gain or loss on the sale. The amount withheld on Form I-290 is applied against any income tax due; any excess withholding is refunded to the seller. A copy of Form I-290 or Form I-290X, if used, must be attached to the seller's income tax return reporting the sale as verification of the withholding amount.

The seller may apply amounts withheld against an estimated income tax liability, if any. The seller should report amounts withheld as estimated taxes paid during the period in which the withholding was actually withheld. For example, if a seller is a calendar year individual taxpayer and payment is made to the seller on April 20th, the seller will report this as an estimated payment made after April 15th and before June 30th.

⑥ REVISING AMOUNT WITHHELD FOR ADDITIONAL INFORMATION

Question 20 – Revising the Amount Withheld:

Q. Can the amount withheld and remitted on Form I-290 be revised?

A. Yes. In order to revise the amount of withholding originally remitted to the Department on Form I-290 before the seller's South Carolina income tax return is filed for the year of the sale, the seller may submit Form I-290X, "Nonresident Real Estate Withholding - Amended," with the Department.

A portion of the withholding previously remitted with Form I-290 may be refunded to the seller. The seller must enclose the original Form I-290 completed at closing, an attachment explaining the reasons for the revision, and any supporting computations. The seller continues to be required to file a South Carolina income tax return to report the sale; any further refund of the withholding payment is claimed on the seller's South Carolina income tax return.

Question 21- Reasons for Revising the Withholding Amount:

Q. What are the reasons Form I-290X can be filed?

A. The reasons for filing Form I-290X, an amended nonresident withholding form, are:

1. The seller did not provide an affidavit to the buyer at the time of sale and the withholding was based on the amount realized. The seller is amending the return to state the amount of gain recognized on the sale.
2. The amount withheld and remitted to the Department was incorrect because of an error in computing the withholding amount, including an overstatement of the amount of gain.
3. The amount was erroneously withheld and remitted to the Department because the parties were unaware of the applicable withholding exceptions at closing.

⑦ SPECIAL RULES FOR LIKE KIND EXCHANGES AND INSTALLMENT SALES

Question 22- Deferred Like Kind Exchanges:

Q. Is withholding required on nontaxable like kind exchanges?

A. The rules depend on the type of transaction, *i.e.*, whether or not a simultaneous exchange takes place. The following rules apply:

1. If a simultaneous exchange takes place. The nonresident seller may furnish the buyer a "Seller's Affidavit" stating (a) the transaction is a nontaxable like kind exchange under Internal Revenue Code §1031 and (b) whether the entire gain is deferred under Internal Revenue Code §1031 or the amount of gain that will be partially recognized. Withholding is required as provided in this advisory opinion to the extent the "Seller's Affidavit" states gain will be recognized.

2. If a simultaneous exchange does not take place. Since there is no guarantee when the first property is transferred that the intended deferred nontaxable like kind exchange transaction will be successfully completed, there are two withholding options available. The two options are:

Option 1 – The seller may choose to use personal funds to pay the South Carolina withholding so that all of the funds could be reinvested in the like kind exchange. The buyer remits the withholding to the Department on Form I-290 on or before the 15th day of the month following the month the first property is transferred. If the Internal Revenue Code §1031 exchange occurs, the seller can revise the amount of withholding originally remitted to the Department on Form I-290X to request a refund of withholding since it has been determined the transaction qualifies as a nontaxable exchange.

Option 2 – If the buyer and seller agree to use a qualified intermediary, then the withholding requirements may be satisfied as follows:

1. The seller furnishes the buyer a “Seller’s Affidavit” stating it is intended that the transfer qualify as a nontaxable like kind exchange under Internal Revenue Code §1031. If using South Carolina Form I-295 as the “Seller’s Affidavit,” box 16c would be marked to indicate the seller’s intent.
2. Form I-290 is completed as if the sale is taxable and given to a qualified intermediary along with the amount necessary to pay the withholding.
3. The buyer enters into a contract with the qualified intermediary that provides that the qualified intermediary will file Form I-290 and pay the withholding for the buyer if the transaction does not qualify. (The buyer remains liable for the payment.) The payment must be made by the 15th day of the month following the month it is first apparent that the transaction will not qualify. It will be apparent that the transaction will not qualify on the earlier of the date the exchange is abandoned, or the time for the exchange expires.
4. If the transaction qualifies as a nontaxable like kind exchange, Form I-290 is not filed and no payment is made to the Department. The buyer should retain the “Seller’s Affidavit” and the contract with the qualified intermediary and provide them if requested during an audit. These documents are not sent to the Department.
5. If a portion, but not all, of the proceeds are used to purchase qualifying replacement property, the buyer in signing the original Form I-290 (see 2 above) authorizes the qualified intermediary to submit a “modified” Form I-290 to the Department indicating the revised amount realized or gain and actual amount of withholding to be remitted based on the transaction as completed. The qualified intermediary submits the withholding to the Department with the “modified” Form I-290. The original Form I-290 provided in #2 above should be retained, but does not need to be submitted to the Department. The qualified intermediary sends one copy of the “modified” Form I-290 to the buyer and seller.

Question 23 - Installment Sale General Rules:

Q. What are the general rules for withholding on installment sales?

A. In general, the buyer must withhold on each payment to the seller. The buyer must complete and provide Form I-290 to the seller and the Department each time a withholding payment is remitted to the Department.

Question 24 – Installment Sale Exceptions:

Q. Are there exceptions to the general rule for withholding on each payment of an installment sale?

A. Yes. The buyer may withhold on a lesser amount based upon one of the following methods:

1. Amortization Schedule. If the seller gives the buyer an amortization schedule stating the principal and interest portion of each payment, then the buyer will use the “principal payment amount” of each payment to compute withholding. Note: The total amount of debt assumed or taken subject to by the buyer is deemed to be a principal payment at the time of the sale.
2. Gain. If the seller gives the buyer a “Seller’s Affidavit” stating the gain to be recognized for each payment, then the buyer will use the “gain” of each payment to compute withholding.
3. Elect Out of Installment Sale Treatment for South Carolina Purposes. If the seller gives the buyer a “Seller’s Affidavit” stating that, for South Carolina income tax purposes, he will elect out of installment sales treatment, as defined by Internal Revenue Code §453, then the buyer will remit the entire amount of withholding tax in one payment.

Question 25 – Special Relief for Withholding on Installment Sales:

Q. Is there any special relief from having to withhold and pay small amounts from installment sales?

A. Yes. Generally, the buyer remits withholding to the Department on or before the 15th day of the month following the month in which the payment takes place. The following special due dates, however, apply to withholding on installment sales:

1. Withholding on a payment is under \$500. The buyer may wait to remit the withholding to the Department on any withholding payment that is less than \$500 until the 15th day of the month following the month when the withholding totals \$500 or more. The withholding must be remitted by January 15th of the following year, however, if the withholding during a calendar year is less than \$500.
2. Withholding for the year is under \$350. Withholding is not required for any year where the total amount to be withheld for the calendar year is less than \$350. Sales to a single buyer or to a related group of buyers are aggregated to determine if this limitation has been exceeded.

3. Seller reports sale – No further withholding. A seller who reports the entire gain or loss on the installment sale on a South Carolina income tax return may request the Department's Withholding Section provide a letter exempting future principal payments from withholding. The Department will send a copy of the exemption to both the seller and the buyer; the buyer is relieved of withholding on future payments upon notification by the Department.

EXAMPLE D

This example is based on the following facts.

- The selling price of the real estate sold on January 1 is \$250,000 (\$200,000 cash + \$50,000 mortgage assumed by the buyer.) The loan giving rise to the mortgage was not made in contemplation of the sale. The buyer is not receiving any proceeds at closing.
- The buyer will make quarterly installment payments of \$12,829 for 5 years at 10% interest.
- Selling expenses are \$2,000.
- The amount realized is \$248,000 (\$200,000 cash + \$50,000 mortgage assumed by buyer - \$2,000 selling expenses.)
- The adjusted basis is \$40,000.
- The gain is \$208,000 (\$248,000 amount realized - \$40,000 adjusted basis.)
- The total contract price is \$208,000 (\$250,000 sales price – (\$40,000 adjusted basis + \$2,000 selling expenses)).
- The seller is an individual subject to withholding at the rate of 7%.

For simplicity, this example shows the withholding for Year 1 only; it does not show computation of withholding for the entire installment period.

In addition to the terms previously defined in this advisory opinion, the following terms are defined for installment sale purposes as follows:

1. "Payment amount" means the total amount of each payment made by the buyer. It includes interest, whether stated or imputed. The total amount of debt assumed or taken subject to by the buyer is deemed to be a payment made at the time of the sale. If at any time the amount of withholding due is greater than the net proceeds payable to the seller, then (1) the net proceeds will be withheld and paid to the Department, (2) the balance of withholding that was otherwise due and not paid will be carried forward, and (3) the buyer will withhold and pay the Department out of the funds to be paid to the seller on the next installment payment date.
2. "Total contract price" is the "sales price" reduced by that portion of any "qualifying indebtedness" assumed or taken subject to by the buyer that does not exceed the seller's basis in the property. For the purposes of determining "total contract price" the seller's basis includes selling expenses. (See U.S. Treasury Temporary Regulation 15A.453-1(b)(2)(iii) and (iv).)

		Sale 1 Withholding Based on Amount Realized		Sale 2 Withholding Based on Amortization Schedule and Seller's Affidavit		Sale 3 Withholding Based on Gain Stated in Seller's Affidavit and an Amortization Schedule	
Installment Payment Date	Withholding Payment Due Date	Payment	Amount Withheld	Payment	Amount Withheld	Payment	Amount Withheld
1/1 *	5/15 *	\$50,000**	\$3,472	\$50,000**	\$3,472	\$8,000***	\$560
4/1	5/15	\$12,829	\$ 891	\$ 7,829	\$ 543	\$7,829	\$548
7/1	8/15	\$12,829	\$ 891	\$ 8,025	\$ 557	\$8,025	\$562
10/1	11/15	\$12,829	\$ 891	\$ 8,226	\$ 571	\$8,226	\$576

*Note: Since the seller is not receiving any net proceeds at the January 1 closing, the withholding amount will be held until the next payment due date on April 1. The buyer must remit the withholding to the Department by May 15, August 15, and November 15.

**Amount of mortgage assumed by the buyer.

*** Mortgage assumed by buyer less adjusted basis and selling expenses.

Sale 1 – This illustrates the computation of withholding based upon the amount realized since the seller did not provide the buyer with a “Seller’s Affidavit” stating the gain or by attaching an amortization schedule.

The formula used to compute the withholding based upon the amount realized is:

$\frac{\text{Amount Realized} \times 5\% \text{ or } 7\% *}{\text{Sales Price}}$	x	Payment or mortgage amount the buyer is taking the property subject to
* See Q & A 14 for determination of the withholding rate.		

Based on the above facts, the withholding amounts are computed as follows:

Mortgage payment: $\frac{\$248,000 \times 7\%}{\$250,000} \times \$50,000 = \$3,472$

Each installment payment: $\frac{\$248,000 \times 7\%}{\$250,000} \times \$12,829 = \$ 891$

Sale 2 – This illustrates the computation of withholding based on an amortization schedule provided by the seller stating the principal and interest portions of each payment. In this example, the amortization schedule reflects principal amounts of \$7,829, \$8,025, and \$8,226.

The formula used to compute the withholding based upon an amortization schedule is:

$\frac{\text{Amount Realized} \times 5\% \text{ or } 7\%*}{\text{Sales Price}} \times \text{Principal portion of each payment}$ <p>* See Q & A 14 for determination of the withholding rate.</p>
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Based on the above facts, the withholding amounts are computed as follows:

Mortgage payment: $\frac{\$248,000 \times 7\%}{\$250,000} \times \$50,000 = \$3,472$

Installment payment 1: $\frac{\$248,000 \times 7\%}{\$250,000} \times \$7,829 = \543

Installment payment 2: $\frac{\$248,000 \times 7\%}{\$250,000} \times \$8,025 = \557

Installment payment 3: $\frac{\$248,000 \times 7\%}{\$250,000} \times \$8,226 = \571

Sale 3 – This illustrates the computation of withholding based upon the gain stated on the sale in the “Seller’s Affidavit” and based on the amortization schedule provided by the seller stating the principal and interest portions of each payment. In this example, the gain stated by the seller in the “Seller’s Affidavit” is \$208,000 and the amortization schedule reflects principal amounts of \$7,829, \$8,025, and \$8,226.

The formula used to compute withholding based on the gain depends upon whether the buyer assumes a mortgage on the property. The formula is either:

Formula 1 – If the buyer assumes or takes the property subject to a mortgage:	
$\frac{\text{Gain Stated} \times 5\% \text{ or } 7\%*}{\text{Total Contract Price}}$	$\times (\text{Mortgage less basis and selling expenses}) \text{ or payment}$
Formula 2 - If the buyer does <u>not</u> assume a mortgage on the property:	
$\frac{\text{Gain Stated} \times 5\% \text{ or } 7\%*}{\text{Selling Price}}$	$\times \text{Payment}$
* See Q & A 14 for determination of the withholding rate.	

Based on the above facts, the buyer assumes a mortgage and the withholding amounts are computed under Formula 1 as follows:

$$\text{Mortgage payment: } \frac{\$208,000 \times 7\%}{\$208,000} \times \$8,000 = \$560$$

$$\text{Installment payment 1: } \frac{\$208,000 \times 7\%}{\$208,000} \times \$7,829 = \$548$$

$$\text{Installment payment 2: } \frac{\$208,000 \times 7\%}{\$208,000} \times \$8,025 = \$562$$

$$\text{Installment payment 3: } \frac{\$208,000 \times 7\%}{\$208,000} \times \$8,226 = \$576$$

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/Ray N. Stevens

Ray N. Stevens, Director

October 14, 2009
Columbia, South Carolina

Seller's Affidavit
Nonresident Seller Withholding
SC Code Section 12-8-580

THIS IS AN AFFIDAVIT OF FACTS. WHETHER OR NOT THIS AFFIDAVIT IS SUFFICIENT TO RELIEVE THE BUYER OF THE RESPONSIBILITY TO WITHHOLD IS GOVERNED BY SC REVENUE RULING #09-13. PLEASE READ THIS AFFIDAVIT CAREFULLY IN CONJUNCTION WITH THIS ADVISORY OPINION.

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 #09-13.
2. I have attached to this affidavit a description of the real property and any tangible personal property being sold as a part of this sale. The real property is located in the county of _____ and its tax map number(s) is _____.
3. 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 undersigned acknowledges his obligation to file a South Carolina income tax return for the year of sale.
9. ☐ **Resident.** The seller is a resident of South Carolina, as that term is defined in the South Carolina income tax laws (Code Section 12-6-30 et seq.).
10. ☐ **Deemed Resident.** Pursuant to Code Section 12-8-580(C) and Revenue Ruling #09-13, the seller is deemed to be a resident of South Carolina because:
 1. a. The seller is a corporation incorporated outside South Carolina, has its principal place of business in South Carolina, and does no business in its state of incorporation, or

b. The seller (i) has been in business in South Carolina during the last two taxable years, including the year of sale, (ii) will continue substantially the same business in South Carolina after the sale, (iii) is not delinquent with respect to filing any South Carolina income tax returns, (iv) has filed at least one South Carolina income tax return, and (v) has a certificate of authority to do business in South Carolina or is registered to do business in South Carolina and

2. The seller agrees to report the sale on a timely filed South Carolina income tax return.

11. ☐ **Tax-Exempt Organizations.** 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. ☐ **Gain Amount.** The seller affirms pursuant to Code Section 12-8-580(B) that the amount of gain required to be recognized on this transaction and on which buyer is to make the requisite withholding will not exceed \$ _____.
13. ☐ **Withholding Amount Equals Entire Net Proceeds.** If the withholding amount is limited to the entire net proceeds, 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. See Question and Answer 15 in SC Revenue Ruling #09-13 for a discussion of loans made in contemplation of the sale.
14. **Installment Sale.**
- ☐ The seller will report this sale on the installment method for South Carolina income tax purposes, and has attached an amortization schedule correctly designating the principal and interest portions of the payments. If withholding is to be limited to the gain, the seller has entered the gain amount in item 12.
- ☐ The seller elects out of the installment sale method for South Carolina purposes and will report the entire withholding in one payment. If withholding is to be limited to the gain, the seller has entered the gain amount in item 12.
15. ☐ **Principal Residence or Involuntary Conversion - Nonrecognition of Gain.** The sale of the property will not be subject to taxes because of Internal Revenue Code Section 121 (sale of a principal residence) or Internal Revenue Code Section 1033 (involuntary conversions.) If the seller fails to comply with Section 1033, the seller acknowledges an obligation to file an amended South Carolina income tax return for the year of the sale.

16. **Like Kind Exchange.**

- a. ☐ In a simultaneous exchange, the entire gain is deferred under Internal Revenue Code Section 1031.
- b. ☐ A gain will be partially recognized. Enter the gain amount in item 12.
- c. ☐ The gain is intended to be deferred under Internal Revenue Code Section 1031 using a qualified intermediary and the steps required by SC Revenue Ruling #09-13 have been completed. The seller authorizes the qualified intermediary to release modified forms and any other information relevant to the withholding, including information otherwise confidential in Code Section 12-54-240 as described in SC Revenue Ruling #09-13, Question 22, Option 2.

17. ☐ **Employee Relocation.** The transaction involves the sale of an employee's property which is being sold by an employer or relocation company in connection with the employee's transfer. For income tax purposes the sale is treated as a sale by the employer or relocation company.

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

(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 Street Address)

(Affiant's City, State and Zip Code)

SUBSCRIBED AND SWORN to

Before me this _____ day of

_____, year of _____

(Notary Public)

My Commission Expires: _____