

SC REVENUE PROCEDURE #09-3

SUBJECT: Administration of Advisory Opinions
(All Laws Administered by the Department)

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

SUPERSEDES: SC Revenue Procedure #05-2

REFERENCE: S.C. Code Ann. Section 12-4-320 (2008)
S.C. Code Ann. Section 1-23-10(4) (Supp. 2008)

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 It is effective until superseded or modified by a change in statute, regulation, court decision, or another Departmental advisory opinion.

I. BACKGROUND INFORMATION

The Policy Section (“Policy”) recommends advisory opinions to the Director for approval. They are intended to provide the public with guidance as to the Department’s position so members of the public will not be surprised by its opinion and to ensure that the Department’s position is the same from office to office and employee to employee.

The Department issues advisory opinions referred to as: (1) Revenue Rulings, (2) Revenue Procedures, (3) Private Letter Rulings, and (4) Information Letters.

II. DISTINGUISHING ADVISORY OPINIONS FROM REGULATIONS

The Department promulgates binding rules through regulations issued in accordance with the State’s administrative procedures act (“APA”) (Code §1-23-10 *et seq.*) and Code §12-4-320(1). Also, the Department announces general statements of position for guidance through advisory opinions which are not regulations and do not have the force of law. See Code §§1-23-10(4) and 12-4-320. Advisory opinions are issued at the Director’s discretion. Under some circumstances, legislation or a regulation may be more appropriate. In such instances, the Department will suggest legislation to the General Assembly or initiate procedures under the APA to propose a regulation, or both. The Director may issue an advisory opinion to provide the public with the

Department's position during the legislative or regulatory process. If so, the advisory opinion may be used as the basis for the notices required for the promulgation of a regulation which is published in the State Register.

The purposes of advisory opinions are:

1. To provide guidance to the general public and to employees concerning the application of laws administered by the Department that are not adequately covered by statute, case law, or regulation. This guidance represents the position of the Department and is intended to assist the public by giving them notice of the Department's position.
2. To provide procedural guidance to the general public and employees to assist in delineating procedures to follow to efficiently achieve compliance.
3. To promote uniform application of laws by the Department.
4. To respond to a member of the public's request for guidance on the application of the law in a particular situation.
5. To assist taxpayers in determining the tax consequences of a planned transaction.
6. To make public the Department's position on matters to ensure there is no possibility that the Department's positions are only available to a few practitioners.

III. DESCRIPTION OF ADVISORY OPINIONS

Advisory opinions consist of Revenue Rulings, Revenue Procedures, Private Letter Rulings, and Information Letters. These advisory opinions remain in effect unless superseded or modified by a change in statute, regulation, court decision, or another Departmental advisory opinion. If applicable, an advisory opinion will state on its face that it is being issued to supersede or modify an existing one, and the advisory opinion being revoked or modified will also be identified. Each type of advisory opinion is described in the below sections.

A. Revenue Ruling

Definition. A Revenue Ruling is an advisory opinion intended to provide guidance to the public and to Department personnel. It is issued to apply principles of law to a set of facts or general category of taxpayers. A Revenue Ruling does not have the force or effect of law. It is the Department's position until superseded or modified by a change in statute, regulation, court decision, or another Departmental advisory opinion.

Reasons for Issuing a Revenue Ruling. Reasons for issuing a Revenue Ruling may include:

1. The law or regulations are not clear and the issue may affect many people;

2. There is inconsistency in the treatment of an issue within the Department; or
3. When a request for an advisory opinion from one person concerns an issue that will affect many people.

Reasons for Not Issuing a Revenue Ruling. The Department may exercise its discretion not to issue a Revenue Ruling for any reason, including:

1. When the laws or regulations are clear;
2. When legislation or a regulation is more appropriate. In such instances, the Department will suggest legislation to the General Assembly or initiate procedures under the APA to propose a regulation, or both. The Director may issue a Revenue Ruling to provide the public with the Department's position during the legislative or regulatory process. The Revenue Ruling may be used as the basis for the notices required for the promulgation of a regulation and published in the State Register;
3. In response to inquiries concerning alternative treatments or purely hypothetical situations;
4. On a matter that concerns only one person;
5. On inquiries concerning federal tax matters unless such inquiries concern differences in treatment for federal and state purposes. Other inquiries concerning federal tax matters should be directed to the Internal Revenue Service. The Department will abide by revenue rulings of the Internal Revenue Service until or unless the Department specifies otherwise. The determination that the Department will not abide by an Internal Revenue Service revenue ruling will be prospective, provided that all of the provisions of federal law in question have been specifically adopted by South Carolina;
6. On a matter that is being litigated or may be litigated in the near future; or
7. When requests can best be handled by another means or by another section within the Department.

B. Revenue Procedure

Definition. A Revenue Procedure is intended to provide procedural guidance to the general public and Department personnel. 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 effective until superseded or modified by a change in statute, regulation, court decision, or another Departmental advisory opinion.

Reasons for Issuing a Revenue Procedure. Reasons for issuing a Revenue Procedure may include:

1. A procedural inconsistency exists within the Department;
2. The law or regulations are not clear with respect to the procedures a person should follow to comply with the law; or
3. When its issuance will assist the public in meeting their tax obligations in an effective and efficient manner.

Reasons for Not Issuing a Revenue Procedure. The Department may exercise its discretion not to issue a Revenue Procedure for any reason, including:

1. When the law or regulations concerning an administrative matter are clear;
2. When legislation or a regulation is more appropriate. In such instances, the Department will suggest legislation to the General Assembly or initiate procedures under the APA to propose a regulation, or both. The Director may issue a Revenue Procedure to provide the public with procedural guidance during the legislative or regulatory process. The Revenue Procedure may be used as the basis for the notices required for the promulgation of a regulation and published in the State Register;
3. On a matter that concerns only one person; or
4. When requests can best be handled by another means or by another section within the Department.

C. Private Letter Ruling

Definition. The purpose of a Private Letter Ruling is to provide guidance to a specific taxpayer at the taxpayer's request. It is an advisory opinion issued to a specific taxpayer by the Department to apply principles of law to a specific set of facts or a particular tax situation. It is the Department's opinion limited to the specific facts set forth, and is binding on agency personnel only with respect to the person to whom it was issued and only until superseded or modified by a change in statute, regulation, court decision, or another Departmental advisory opinion, providing the representations made in the request reflect an accurate statement of the material facts and the transaction was carried out as proposed.

Reasons for Issuing a Private Letter Ruling. Reasons for issuing a Private Letter Ruling may include:

1. Upon written request of a specific person, or that person's representative who has a power of attorney; and

2. The law and regulations are not clear.

Reasons for Not Issuing a Private Letter Ruling. The Department may exercise its discretion not to issue a Private Letter Ruling for any reason, including:

1. When the law or regulations are clear;
2. When legislation or a regulation is more appropriate. In such instances, the Department will suggest legislation to the General Assembly or initiate procedures under the APA to propose a regulation, or both;
3. In response to inquiries concerning alternative treatments or purely hypothetical situations;
4. On matters scheduled for audit or in audit, appeal or litigation;
5. On a matter that is being litigated or may be litigated in the near future;
6. On inquiries concerning federal tax matters unless such inquiries concern differences in treatment for federal and state purposes. Other inquiries concerning federal tax matters should be directed to the Internal Revenue Service. The Department will abide by private letter rulings of the Internal Revenue Service, issued to the taxpayer for the transaction in question, until or unless the Department specifies otherwise. The determination that the Department will not abide by an Internal Revenue Service private letter ruling will be prospective, provided that all of the provisions of federal law in question have been specifically adopted by South Carolina;
7. For a member of the public whose request for an advisory opinion does not contain the information listed in Section IV of this advisory opinion; or
8. When requests can be best handled by another means or by another section within the Department.

D. Information Letters

Definition. An Information Letter is a written statement issued by the Department to announce general information useful in complying with the laws administered by the Department. An Information Letter has no precedential value.

Reasons for Issuing an Information Letter. Reasons for issuing an Information Letter may include:

1. A code section or regulation is added, amended, or rescinded, or a case is decided and the Department wants to notify the public;

2. To publish information to Department employees and the public that is based on data supplied by other agencies, such as per capita income figures and county rankings for job tax credit purposes;
3. To publish information to Department employees and the public that is supplied by the Internal Revenue Service regarding similar provisions adopted by South Carolina, such as interest rates;
4. A previous Information Letter is being revised; or
5. A previous advisory opinion is being updated to revise contact information, such as a new phone number.

Reasons for Not Issuing an Information Letter. The Department may exercise its discretion not to issue an Information Letter for any reason, including:

1. When the primary purpose is to provide interpretations or procedural guidance; or
2. When announcements of general information can best be handled by other means or by another section within the Department.

IV. REQUESTING AN ADVISORY OPINION

Request from Persons Outside the Department. Requests for an advisory opinion should be in writing and submitted to:

Policy - Advisory Opinion Request
South Carolina Department of Revenue
301 Gervais Street
P.O. Box 12265
Columbia, South Carolina 29211

Policy may forward any request to another section within the Department if it is determined that it is more appropriate for another section to respond to the request. The research, review, and technical sections of the Department, and other persons a section administrator appoints, are responsible for providing informal advice and assistance to persons outside the Department and to employees of their section. These sections or persons are referred to in this document as the “review group.”

Request from Persons Within the Department. An advisory opinion may be prepared at the request of the Director, a deputy director, an administrator of a section, or based on a recommendation by Policy. Requests from other persons within the Department must be in writing and routed to Policy in a manner approved by an administrator.

Response to Requests for Advisory Opinions. Requests for advisory opinions will usually be worked on in the order received, unless reasons are given to do otherwise. If timing is important, the requesting party should provide reasons for extending expedited treatment. Policy will strive to respond to all requests as expeditiously as possible. The ultimate determination as to the type of advisory opinion to be issued or whether or not an advisory opinion should be issued rests with the Director.

Content of Request. Requests for advisory opinions should contain the following information:

1. Name, address, and telephone number of person requesting the advisory opinion;
2. A power of attorney, if the person is represented by a third party;
3. Specific questions to be answered or procedures to be addressed;
4. Complete statement of all relevant facts;
5. For advisory opinions requested by a specific taxpayer, a statement of what, if any, information the taxpayer wishes to remain confidential. This statement is important since Private Letter Rulings are published with information deleted that the taxpayer informs Policy in writing that it wishes to remain confidential;
6. Relevant code sections, regulations, and court decisions. Applicants should refer to any legislation, court decisions, regulations, or advisory opinions which appear to support their position;
7. Copies of relevant documents (*i.e.*, contracts, wills, deeds, etc., if any); and,
8. Whether:
 - (a) the person requesting the opinion has the same issue under audit or appeal by the Department or any other taxing or revenue authority;
 - (b) the person has been notified that an examination is pending;
 - (c) the issue is being litigated by the person or is about to be litigated;
 - (d) the Department, or any other taxing or revenue authority, has previously issued an advisory opinion on the same issue (please cite or attach a copy of the advisory opinion); or
 - (e) the Attorney General's Office has been, or will be, requested to issue an opinion concerning the issue.

Examinations Prior to an Advisory Opinion Being Issued. If, prior to the issuance of a Private Letter Ruling, a person is notified of a pending examination by the Department, or other taxing or revenue authority, the person should notify Policy of the pending examination and notify the examining auditor of the request for an advisory opinion.

V. PROCEDURES FOR ISSUANCE OF AN ADVISORY OPINION

A. Procedure for Issuing Revenue Rulings and Revenue Procedures

1. Policy, upon the receipt of a request, will acknowledge receipt in writing. If Policy receives a request which: (a) is not a request for an advisory opinion described in this advisory opinion or (b) is not a request for which an advisory opinion will be issued, then Policy will forward it to the appropriate section within the Department.
2. Policy will gather all necessary information and research the issues. Policy may request any additional information or documentation it deems necessary from any person. The person making the request will be informed that if any additional information or documentation requested is not provided within 30 days, Policy may consider the request withdrawn and the file closed. If necessary, additional time may be requested and will be granted. Policy will determine the type of advisory opinion to be drafted and will draft a proposed advisory opinion.
3. All proposed Revenue Rulings and Revenue Procedures will be marked “DRAFT” and circulated within the Department for comments. At the discretion of Policy, the proposed advisory opinion may be modified based on employee comments and an amended draft may be circulated.
4. All proposed Revenue Rulings (including those requested by a specific person) and Revenue Procedures will be marked “DRAFT” and made available to interested parties and the public for comments before consideration of the advisory opinion by the Director. A time will be given for responses to be submitted to Policy and a time will be scheduled for a conference at the Department where interested parties and the public may comment, suggest alternatives, and ask questions about the proposed advisory opinion should a conference be requested. The scheduled time for receiving written comments will generally be two weeks to a month from the date the draft is made public. The conference will be held only if one is requested by the date for receiving comments; otherwise it will be cancelled. At the discretion of Policy, the proposed advisory opinion may be modified based on public comments.

The draft advisory opinion, comment closing date, and, if a conference is requested, conference place and date, will be published on the Department’s website at www.sctax.org. A request to receive this information automatically via e-mail can be made by subscribing on the Department’s website to the Policy Listserver.

Note: Advisory opinions marked “DRAFT” are staff drafts and are not the position of the Department.

5. All proposed Revenue Rulings and proposed Revenue Procedures are presented to the Director for consideration. If approved by the Director, the advisory opinion will be issued. If the proposed advisory opinion is not approved by the Director, then the Director will instruct Policy to make changes and issue the advisory opinion, circulate an amended draft, or communicate to whomever necessary that the advisory opinion will not be issued.

B. Procedure for Issuing Temporary Advisory Opinions

1. Due to time constraints and emerging issues, it may be necessary to provide written guidance in a short amount of time. In such instances, the Director may instruct Policy to issue a temporary advisory opinion, or may issue the Department's position through a news release, in court filings, or by any other means.
2. The advisory opinion will be issued as a "Temporary Revenue Ruling" or "Temporary Revenue Procedure" and will be immediately distributed.
3. The temporary advisory opinion will become a proposed Revenue Ruling or a proposed Revenue Procedure. The proposed advisory opinion will be circulated within the Department and made available to interested parties and the public for comment. A time will be given for responses to be submitted to Policy and a time will be scheduled for a conference at the Department where, should a conference be requested, interested parties and the public may comment, suggest alternatives, and ask questions about the proposed advisory opinion. The scheduled time for receiving written comments will generally be two weeks to a month from the date the proposed advisory opinion is made public. The conference will be held only if someone requests a conference by the date for receiving comments; otherwise it will be cancelled. At the discretion of Policy, the proposed advisory opinion may be modified based on public comments.

The proposed advisory opinion, comment closing date, and, if a conference is requested, conference date will be published on the Department's website at www.sctax.org. A request to receive this information automatically via e-mail can be made by subscribing on the Department's website to the Policy Listserver.

4. The proposed final Revenue Ruling or proposed final Revenue Procedure will be presented to the Director for consideration. If approved by the Director, the final advisory opinion will replace the temporary advisory opinion and will be issued.

If the proposed final advisory opinion is not approved by the Director, then the Director will instruct Policy to make changes and issue the final advisory opinion, circulate an amended draft, or revoke the temporary advisory opinion by issuing an advisory opinion merely stating that the temporary advisory opinion is revoked. See the discussion in Section VII for the use of a temporary advisory opinion.

C. Procedure for Issuing Private Letter Rulings

1. If Policy receives a request which: (a) is not a request for a Private Letter Ruling described in this advisory opinion or (b) is not a request for which a Private Letter Ruling will be issued, then Policy will determine whether or not an advisory opinion can be issued on the matter or will forward it to the appropriate section within the Department for an informal response. Policy will notify the person making the request that the request has been referred to another section or that an advisory opinion will not be issued on the matter.
2. Policy will gather all necessary information and research the issues. Policy may meet with or request any additional information or documentation from any person it deems necessary. The person making the request will be informed that if any additional information or documentation requested is not provided within 30 days, Policy may consider the request withdrawn and the file closed. If necessary, additional time may be requested and will be granted. Policy will determine the type of advisory opinion to be drafted and will draft a proposed advisory opinion. If Policy determines the issue raised will affect many people, a Revenue Ruling may be issued rather than a Private Letter Ruling.
3. All proposed Private Letter Rulings will be marked “DRAFT” and circulated within the Department for comments. At the discretion of Policy, the proposed advisory opinion may be modified based on employee comments and an amended draft may be circulated.
4. A “Notice of Proposed Advisory Opinion” will be sent to the person requesting the advisory opinion, or that person’s representative who has a power of attorney, for comments before consideration of the advisory opinion by the Director. A time, generally 30 days from the time the draft is sent, will be given for a response to be submitted to Policy. Additional time will be granted upon request. Written comments will be reviewed and, at the discretion of Policy, the proposed advisory opinion may be modified. The requesting party will be given an opportunity to: (1) provide additional information or arguments if they disagree with the proposed advisory opinion or (2) withdraw the request for the proposed advisory opinion.

Note: Advisory opinions marked “DRAFT” are staff drafts and are not the position of the Department.

If additional information is provided, Policy may modify the draft at its discretion based on any new information presented. If the request is withdrawn, all correspondence and documents may be retained for future reference. Policy may furnish its views to appropriate Department personnel who may consider it for any reason within their authority.

5. All proposed Private Letter Rulings are presented to the Director for consideration. If approved by the Director, the advisory opinion will be issued. If the Private Letter Ruling is not approved by the Director, then the Director will instruct Policy to make changes and issue the advisory opinion, circulate an amended draft, or communicate to the person requesting it that the Private Letter Ruling will not be issued.

VI. FORMAT OF ADVISORY OPINIONS

Each type of advisory opinion will be numbered sequentially. The numbering sequence will begin anew each calendar year with the first two digits denoting the year of issuance (*i.e.*, SC Revenue Ruling #09-1, SC Revenue Procedure #09-1). Revenue Rulings, Revenue Procedures, Private Letter Rulings, Temporary Revenue Rulings, and Temporary Revenue Procedures will contain a place designated for the signature of the Director and the date of approval. Advisory opinions will be formatted at the discretion of the Policy Section.

VII. PUBLIC DISCLOSURE OF INFORMATION AND USE OF TEMPORARY ADVISORY OPINIONS AND PRIVATE LETTER RULINGS

Advisory opinions are available on the Department's Internet website. The Department's website is www.sctax.org. The Department may take other steps to accomplish disclosure, as deemed appropriate.

Use of a Temporary Revenue Ruling or Temporary Revenue Procedure. As discussed in Section V above, a Temporary Revenue Ruling or Temporary Revenue Procedure may be replaced by a final Revenue Ruling or final Revenue Procedure that is different. For transactions which occur after the temporary advisory opinion is issued and before the final advisory opinion is issued, members of the public may rely on the temporary advisory opinion or the final advisory opinion, whichever is more favorable to them.

Use of a Private Letter Ruling. A Private Letter Ruling may only be relied upon by the person to whom it is issued for the transaction to which it relates. It has no precedential value. If it is determined that the representations made in the request do not reflect an accurate statement of the material facts or the transaction was not carried out as proposed, the Private Letter Ruling may not be relied upon by the person who requested it. A reference to the Private Letter Ruling should be made on any relevant return, application, or document filed.

Although a Private Letter Ruling may not be relied upon by others, it is public information and is made available to the public to provide insight as to the thoughts of the Department on a particular matter. However, persons should be aware that the facts of a Private Letter Ruling request may be voluminous and only a summary of the facts may be set forth in the document.

VIII. QUESTIONS

For questions concerning this advisory opinion, contact Policy at policy@dor.sc.gov.

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/Ray N. Stevens
Ray N. Stevens, Director

March 20, 2009
Columbia, South Carolina