NEW YORK STATE BAR ASSOCIATION
TAX SECTION

REPORT ON NEW YORK'S PERSONAL INCOME TAX WITHHOLDING REQUIREMENTS: ANALYSIS AND RECOMMENDATIONS

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Report No. 1047

I. Introduction

A. Executive Summary

The New York State Department of Taxation and Finance (the "Department") has asked us to review New York's income tax withholding requirements and to recommend changes for administrative or legislative consideration. This report[1] addresses many important aspects of New York's withholding tax requirements, with a focus on employers with nonresident employees. One of the issues concerns the difficult calculation issues that arise in determining an employer's tax liability. The report also addresses whether withholding should be required where an employee's presence in New York is insignificant or inconsequential. We have reviewed this issue in detail and provided suggestions for a "de minimis" standard. Finally, there are several areas of New York law where it is unclear whether employers are required to withhold tax, particularly with respect to certain types of compensation. This report analyzes these issues and suggests clarification.

B. New York's Withholding Tax Rules

It is important to begin with a brief synopsis of New York's withholding tax requirements. Generally, employees are required to pay personal income taxes on their wages or

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[1] The principal authors of this report were Paul Comeau and Timothy Noonan. Helpful comments were received from Peter Faber, Samantha Fong, Maria Jones, Carolyn Lee, Arthur Rosen, Mike Schler, Irwin Slomka and Jack Trachtenberg.

other compensation. However, New York, like the federal government, has enacted various rules requiring that employers "withhold" their employees' personal income taxes from their wages and remit such taxes to the State on the employees' behalf. Under Tax Law § 671(a)(1), every employer maintaining an office or transacting business in the State and making payment of taxable wages must deduct and withhold from such wages the amount of tax approximately equal to tax the employee will owe at the end of the year:

> Every employer…shall deduct and withhold…a tax computed in such manner to result, so far as practicable, in withholding from the employee's wages during each calendar year an amount substantially equivalent to the tax reasonably estimated to be due under this article.

This responsibility to withhold is very broad. By statute it extends to "every employer maintaining an office or transacting business in the State."[2] The term "office," though undefined, presumably refers to a fixed place of business in the State. It is unclear whether, for Tax Law purposes, the term "transacting business" is equivalent to the "doing business" test employed in the corporate tax area or is something less.[3] Specific exceptions, such as P.L. 86-272 (applicable to "mere solicitation" in the state) do not apply for withholding tax purposes. Generally, an employer will have an obligation to withhold tax on compensation paid to its

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2 Tax Law § 671(a)(1).

3 *See* 20 NYCRR § 1-3.2 for the corporate tax standard.

employees who reside in New York or work in New York, even those who merely travel to New York for business purposes.

The failure to comply with New York's withholding tax responsibilities can have very substantial consequences. Under New York's rules, employers are held liable for failing to withhold the appropriate amount of tax.[4] This liability exists even if the employee pays personal income taxes as required (thereby making the State whole). Under New York's rules, the employer can still be held liable for any interest, penalties or other charges not borne by the employee.[5] The liability for withholding taxes extends not only to the employer, but also to certain "responsible" employees, owners or officers. Such persons can be held personally liable for their employer's failure to withhold if they are deemed to be "responsible officers" of the company.[6]

C. Areas of Concern

Given these consequences, certainty regarding obligations in the withholding tax area is highly desirable. Generally, at least with respect to New York State or City residents, the rules are basic and understandable. Employers are required to withhold the appropriate amount of New York State personal income tax on *all* wages paid to New York residents.[7]

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[4] Tax Law § 675.

[5] Tax Law § 676.

[6] Tax Law § 685(g); *Matter of Oehler*, Tax Appeals Tribunal (July 10, 2003).

[7] 20 NYCRR § 171.5.

There is greater complexity with respect to nonresidents working in New York. If all of the nonresident's services are performed exclusively in New York, tax must be withheld from all wages paid to the employee.[8] But if the nonresident employee works partly inside and partly outside New York, only wages paid for services performed inside the State are subject to withholding.[9] The amount of wages allocable to New York State for purposes of determining applicable withholding tax is that part of the employee's total compensation that "the number of days worked in New York State bears to the number of days worked both in and out of New York State, exclusive of non-working days."[10]

The practical application of these withholding tax provisions presents certain problems for an employer.

The first set of problems relates to the manner in which an employer's withholding tax liability is calculated. As noted above, New York requires an employer to withhold that amount of tax which it estimates will be due from the employee at the end of the taxable year.[11] However, the amount of tax an employee will owe for a particular tax year may not be known until the tax year is over. Under the present withholding tax system, an employer is required to make withholding tax decisions throughout the tax year, adjusting as needed for

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8 *See id.* at § 171.6(a).

9 *See* 20 NYCRR § 171.6(b)(i).

10 *Id.*; *see also* Publication 50, Employer's Guide to Unemployment Insurance, Wage Reporting and Withholding Tax (January 1, 2001).

11 *Id.*

each payroll period. Since it is difficult or impractical to adjust withholding frequently during the year, employers are generally forced to make withholding tax decisions at the start of the year, before they have all or even *any* of the information necessary to make the right decisions.

In addition to these withholding tax calculation issues, employers have also encountered difficulties in determining the obligation to withhold. In some circumstances, there are questions surrounding "how much" activity is required in New York before an employer is required to withhold tax. In addition, there are several areas of New York law where it is unclear whether employers have any liability to withhold tax on certain types of compensation. Guidance is needed in these areas.

In this report, we will discuss all of these issues and review several suggestions.

II. The Employer's Calculation of the Withholding Tax

A. Residency Status

1. Analysis

As noted above, withholding requirements can differ significantly for resident and nonresident employees. Making a determination about a particular employees' residency status, however, can be very difficult for an employer. Under New York's rules, an employee can be treated as a resident if he or she is "domiciled" in New York or if the employee is a "statutory

resident," i.e., maintains a permanent place of abode in New York and spends more than 183 full or partial days in New York during the year.[12]

"Domicile" is an elusive term. From a technical, legal standpoint, domicile is defined as "the place which an individual intends to be such individual's permanent home -- a place to which an individual intends to return whenever such individual may be absent."[13] The taxpayer's intent is paramount.[14] Proof of a domicile change requires both a physical and an emotional relocation, such that the primary focus or center of the person's life shifts from the old home in New York to the new place of domicile.[15] Obviously, much or all of the information needed to make this determination is in the mind of the employee, not in the possession of the employer.

Employers encounter similar difficulties determining whether an employee is a "statutory resident." Under New York's rules, any nonresident individual who maintains a permanent place of abode in New York is required by law to keep adequate records showing that he or she did not spend more than 183 days in New York during the tax year. The burden of proof is on the individual to show presence in New York for less than 184 days, and any part of a

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[12] Tax Law § 605.

[13] 20 NYCRR § 105.20(d)(1).

[14] *Aetna National Bank v. Kramer*, 126 NYS 970 (1911).

[15] New York Residency Audit Guidelines at ¶ .4(C).

day spent in New York is generally counted as a New York day.[16] In one year the employee might spend only 182 days in New York (not a statutory resident) while the next year an employee might spend 184 days in New York (a statutory resident). Some of the "New York" days might involve shopping or tourism days, during weekends or vacations. An employee might have 184 days in the State (State resident) but only 183 days in New York City (a City nonresident). Because employers may not have detailed information as to their employees' whereabouts—and indeed it may not be desirable as a policy matter for New York to require that level of information as a prerequisite to the satisfaction of the *employer's* tax obligations—it is desirable to create some mechanism for employers that fairly reflects the New York law without unduly subjecting them to exposure based on facts they cannot readily ascertain from their own business records.

Apart from the day count, the abode requirement of statutory residence can also be problematic for an employer. If an employer furnishes a corporate apartment or other living quarters, it is difficult to argue that the employer is unaware of the New York abode, but even in these instances a factual determination is required as to whether the living quarters constitute a "permanent place of abode" for the employee. Are multiple employees using the apartment? Is the employee in New York on a temporary assignment? In these two instances, the apartment might not constitute a permanent place of abode, as defined in New York's regulations. Apart from the "corporate apartment," the employee might acquire or dispose of New York living

[16] 20 NYCRR § 132.18.

quarters during the year. A Connecticut domiciliary with a vacation home in the Hamptons and full time employment in New York City could be treated as a State (not City) resident in a given year if full or part days in the State exceed 183 days. The vacation home could satisfy the "place of abode" requirements, even though it is unrelated to the New York City employment.

Obviously, given these difficulties, it seems clear that employers cannot be expected to independently determine and verify an employee's resident status on a year-to-year basis, other than through employee disclosures such as change of address notices.

2. Considerations

For the foregoing reasons, we suggest that, when determining the resident status of an employee, employers should be permitted to rely on the primary residence address declared by the employee in the employer's payroll records. It might also be appropriate for the State to require resident withholding for all employees working in New York unless the employee signs a form prior to receipt of the wages in question claiming nonresident status. If the individual who provides such certification is, nevertheless, taxable as a New York State or City resident, the additional payment obligation should fall solely on the employee.

B. The Convenience Rule

1. Analysis

If a nonresident employee works partly inside and partly outside New York, only wages paid for services performed inside the State are subject to withholding.[17] The amount of wages allocable to New York State for purposes of determining applicable withholding tax is that part of the employee's total compensation that "the number of days worked in New York State bears to the number of days worked both in and out of New York State, exclusive of non-working days."[18] If an employee is working from an office or other fixed place of business, the activity is usually sourced to that location.

However, this method of reporting may not be correct if New York's convenience rule is applied. New York is one of only four states with a convenience rule.[19] Under New York's rule, days worked outside New York will be treated for allocation purposes as non-New York work days only if the work is performed outside of New York because of employer

[17] *See* 20 NYCRR § 171.6(b)(i).

[18] *Id.*; *see also* Publication 50, Employer's Guide to Unemployment Insurance, Wage Reporting and Withholding Tax (January 1, 2001).

[19] The other three states are New Jersey, Pennsylvania and Nebraska.

necessity and not for the convenience of the employee.[20] However, this rule does not apply unless the employee performs at least some services in New York during the year.[21]

The following example illustrates how difficult it is for an employer to apply the convenience rule to its withholding tax practices:

Assume that a New York employer has a nonresident employee who does not expect to come into New York State at all during the next year. The employee is a telecommuter and works from her home in New Jersey. Under present case law, no part of her compensation would be New York source income because the Department concedes that it cannot tax a nonresident who never sets foot in the State. In late December, the employee decides to attend a business meeting in New York that lasts for five days. Under the convenience rule as applied by the Department, all of her compensation for the year will become New York income if the nature of her work was such that she could have done it at the employer's New York office.

This example admittedly oversimplifies to illustrate the problem, but clearly it is the case that the convenience rule introduces an element of uncertainty in the sourcing of an employee's wages, and this uncertainty can create problems for employers, especially when later events affect the taxation of prior payments.

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[20] 20 NYCRR § 132.18. The constitutionality of this rule in the context of an employee of a New York law school has recently been upheld by New York's Court of Appeals. *See Zelinsky v. Tribunal* (Court of Appeals, 11/24/03).

[21] *Lopez, Edwards, Frank & Co., LLP*, TSB-A-99(4)I, *Gleason v. State Tax Commission*, 76 A.D.2d 1035 (3d. Dept. 1980).

2. Considerations

Because the amount an employer is required to withhold must reflect their employees' expected tax liability, presumably the Department expects employers to apply the convenience rule when determining proper New York withholding. Without more specific guidance, this rule will be very difficult for employers to apply given the myriad circumstances in which work is performed in the current economy and the somewhat subjective nature of the rule.

We recommend that the Department clarify the application of the convenience rule as it applies to an employer's withholding tax responsibilities. The Department could consider applying a different rule to employers -- such as a rule only requiring New York withholding when an employee is physically present in New York. Or perhaps there should be a "good faith" component to the rule. Under this standard, a good faith determination by the employer that the employee's services were performed out-of-state for the employer's necessity would absolve the employer of any liability for the failure to withhold. But whatever the standard, we believe it is necessary for the Department to provide some clarification in this context.

C. Adjustments During the Year

1. Analysis

As noted above, if a nonresident employee works partly inside and partly outside New York, only wages paid for services performed inside the State are subject to withholding.[22] However, New York's regulations generally require 100% New York withholding for all wages paid to nonresidents, even for those who work partly in New York during the year, unless the employee files a Form IT 2104.1, *Employee's Withholding Allowance Certificate*, specifying a different allocation.[23] Regulations state that an employer should allocate based on the percentages shown on the Form IT-2104.1, "but must nevertheless make necessary adjustments during the year so that the proper amount…is withheld…."[24] Similarly, the portion of wages allocable for a year may be determined by an employer based on actual experience for the prior year but "the employer must make any necessary adjustments during the year to insure that the required tax is withheld."[25]

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22 *See* 20 NYCRR § 171.6(a).

23 20 NYCRR § 171.6(b)(5).

24 20 NYCRR § 171.6(b)(2).

25 20 NYCRR § 171.6(b)(3).

2. Considerations

Requiring that employers track their employees' workdays on a day-to-day or week-to-week basis creates a very difficult standard for employers to meet. This may result in reduced compliance.

One way to resolve this problem would be simply to require withholding on ALL wages paid to a nonresident employee, regardless of where the wages are earned, if his or her principal office is in New York. Similarly, if a nonresident's principal office was outside New York, no New York withholding would be required, even if the employee spends time in New York. Additional taxes could be paid (or refunds claimed) when the employee files his or her return. This change would make New York's withholding tax rules for nonresidents understandable and easy to apply, and would resolve many of the issues addressed in this report.

Another approach would be to base withholding on the actual allocation of a nonresident's income for the *prior year*. Like the current system, the employer would rely on the allocation specified by the employee on Form IT 2104.1, and the employee would generally be required to base this allocation on the prior years' allocation. However, the employee and the employer would not be required to update this information throughout the year.[26] Instead, the employer could rely on the prior years' allocation throughout the entire tax year in determining the proper amount to withhold.

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[26] Of course, an employee may wish to update withholding to avoid penalties for underpayment of estimated taxes.

III. The Need for a *De Minimis* Rule

A. Tracking Every Workday

1. Analysis

Under the current system, if a nonresident employee has any taxable New York wages, withholding is required.[27] Except where a visiting employee has New York income below the employee's personal exemptions (a very low threshold), there is no permissible minimum level of activity or payments. Withholding is always required. This could create a situation where an employer is required to withhold tax on employees who work in New York for as little as one day per year.

This rule negatively impacts both employers and the State. Assume that a California-based executive visits bankers, attorneys or customers or attends trade shows or seminars in New York only five days per year. Or consider an executive based in New Jersey or Connecticut who travels to New York for a 3-hour lunch meeting, returning to his or her out-of-state office after the meeting. Under a strict reading of New York's rules, withholding is required in these instances.[28] Employers fear the administrative burdens associated with such

[27] New York, unlike some other states, does not have a de minimis test, except where the visiting employee has New York income below the employee's personal exemptions. 20 NYCRR § 171.6(b)(4).

[28] These issues arise frequently in withholding tax audits. Some auditors' reason that employers "know" about these visits and track them via the expense reports, but employers assert that payroll and expense report accounting are very different and are not usually cross-referenced. Employers usually do not track the daily location of employees. Even if they did, they might not know whether a visit to a location was due to convenience or necessity, or the duration of the visit.

strict compliance. In many cases, employers simply are not complying because of the difficulty in doing so. There is also an overriding policy concern. New York's current rules seem to encourage employees to have lunch, meetings, seminars and all other business activity *outside* New York. Finally, even the U.S. Supreme Court has recognized that a de minimis rule is implicit in all statutory enactments.[29] This principle is based on the maxim *de minimis non curat lex*: "the law cares not for trifles."

2. Considerations

One obvious question is whether New York should have a de minimis test, and, if so, what the appropriate test might be.

Initially, we should mention that the proposal suggested in Part II (Section 3), which only requires withholding if the employee's principal office is in New York, would solve this "de minimis" issue. If such a rule is employed, there would be no need to create special rules for nonresidents occasionally visiting New York. Under all circumstances, withholding would only be required if the employee's principal office was in New York.

Nonetheless, we have considered possible de minimis rules in the absence of the "principal office" standard. In doing so, we have examined rules in other states. Connecticut excludes visits to that state if they are casual, isolated or inconsequential.[30] Georgia does not

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[29] *See Wisconsin Department of Revenue v. Wrigley*, 504 U.S. 214(1991).

[30] Conn. Agencies Regs. § 12-711(b)-4(c)(2).

require withholding in respect of an employee's income unless the Georgia allocation exceeds 5% of an employee's total compensation.[31] There is also a pending New York regulation, albeit in a different tax context, creating a de minimis rule for attendance at a trade show.[32] Under this proposed regulation, an employee's attendance at a trade show for less than 14 days will not create "nexus" for corporate franchise tax purposes. The regulation is silent as to "nexus" for sales or withholding tax purposes.

We believe a de minimis test with both quantitative and qualitative standards is needed. Under a quantitative standard, for instance, no withholding would be required unless the employee was present in New York for more than 14 full or partial work days during any given year. Such a test could also have a "qualitative" standard, requiring withholding (regardless of the number of days spent in New York) when the compensation for services performed in New York exceeds a certain dollar amount, such as $50,000.[33]

The selection of a specific standard, however, is a policy question that may be beyond the scope of this report. Nevertheless, we believe that the adoption of some de minimis standard would clearly be beneficial in providing certainty to employers as to their obligations

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31 Ga. Code Ann. § 48-7-100(10)(K).

32 20 NYCRR § 1-3.2(e) (Proposed Oct. 28, 2003).

33 Our suggestions encompass only proposed changes in the employer withholding context. Thus, an employee would be required to pay New York personal income taxes on all New York source payments, even if his or her presence in New York falls below the de minimis standards for withholding. Nonetheless, a de minimis standard in the personal income tax area may be desirable and it warrants further consideration. Such a discussion, however, is outside the scope of this report.

and enhancing compliance in situations where employers might otherwise be creating their own practical thresholds of compliance, different from those the Department might consider appropriate. We will be pleased to discuss this further with the Department, and to review any proposals for a modification of existing rules.

IV. Treatment of Specific Payments

A. Taxable and Exempt Income

1. Analysis

Generally, employers must withhold on all New York wages paid to a nonresident, with the tax equal to an estimate of the employee's liability. Thus, employers must look to the personal income tax law, regulations and case law for support. For instance, some categories of income such as pensions, annuities, noncompete payments, termination pay, and even certain stock options and bonuses with forfeiture features are not subject to withholding when paid to nonresidents because they are exempt from taxation altogether.[34] Indeed, over time, case law in the personal income tax area has developed a host of rules to determine the taxability of various categories of income. The Department's Nonresident Audit Guidelines have been amended to reflect many of these changes. New York's personal income tax regulations, however, have not. They do not reflect the current state of the law, and in some

[34] *See*, *e.g.*, *Matter of Colitti*, Tax Appeals Trib. (June 13, 2003).

cases, contradict it. This uncertainty in the personal income tax area creates obvious confusion for employers when trying to determine the proper amounts to withhold.

For example, the regulations state that pensions paid to nonresidents are taxable in New York if they do not constitute an "annuity" and are attributable to services performed by the nonresident in the State.[35] But federal legislation, effective in 1996, prohibits the states from taxing a nonresident's retirement income, which includes many non-annuity pension payments.[36] To date, the impact of this federal legislation has been addressed only in a series of advisory opinions issued by the Department.[37] The regulations have remained unchanged. An employer looking to the personal income tax regulations, therefore, may be led astray.

The regulations also state that termination pay is allocable to New York State based on New York compensation over total compensation for the year of retirement and the preceding three years.[38] Yet case law clearly establishes that, unlike normal severance, New York may not impose its income tax on termination pay granted to a nonresident employee if it was paid to buy out the remainder of the employee's employment contract.[39] For example, if a nonresident employee with a five-year employment contract is terminated after one year and

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35 20 NYCRR § 132.20.

36 P.L. § 104-95

37 *See e.g.*, TSB-A-01(2)I (May 23, 2001).

38 20 NYCRR § 132.20.

39 *See Matter of McSpadden*, Tax Appeals Trib. (Sept. 15, 1994); *Matter of Davis*, Admin. Law Judge (Jan. 14, 1999).

receives a lump sum as consideration for the cancellation of the balance, the lump sum is not taxable. It is treated as a payment for an intangible (i.e., the balance of the contract) and not for services performed in New York.

Similarly, the case law has made clear that New York may not tax a nonresident's deferred bonus or stock option payments where receipt of the income is subject to forfeiture or repayment if the employee competes with the employer prior to or following receipt.[40] New York's tax regulations, however, provide no guidance on the taxation of stock options. Instead, the Department has put forth some guidance in a Technical Services Bureau Memorandum,[41] but this does not discuss the full range of employee issues presented, and makes no mention of the employer's withholding tax responsibilities.

These and other similar questions make employer withholding extremely difficult. Without the proper clarity, employers are unable to reasonably determine what their employees' ultimate tax liability will be.

2. Considerations

In New York's sophisticated business environment, options, bonuses, termination pay and similar types of financial arrangements are common. It is important for employers to understand their obligations to withhold tax on such payments; and it is important for employees

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40 *Matter of Colitti*, *supra*; *Matter of Clapes,* Admin. Law Judge (Sept. 18, 2003).

41 TSB-M-95(3)I.

to know their New York State responsibilities, particularly where the timely filing and payment of New York taxes will entitle them to home-state tax credits that may become time-barred if the employee's responsibility is not identified until a later year.

We, therefore, recommend that the personal income tax regulations be updated and revised to better identify taxable and nontaxable categories of income in accordance with recent case law. Similar changes should be made to the withholding tax regulations. Further, exemption forms should be made available for employees to claim exclusions based on cited statutes, regulations, bulletins or case law. Employers who accept and retain these forms in good faith should be relieved of the duty to withhold, with any further tax obligation falling solely on the employee.

B. Treatment of "Wages"

1. Analysis

According to New York's tax regulations, payments that are considered wages for federal withholding purposes are also "wages" for New York State withholding purposes.[42] Thus, New York wages include "all remuneration for services performed," including "stocks, bonds or other forms of property."[43] New York's regulations also state, however, that federal

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[42] 20 NYCRR § 171.3.

[43] Treas. Reg. §§ 31.3401(a)-1(a)(1), (a)-1(a)(4).

rules and definitions do not apply where they are "clearly inconsistent with and inapplicable to the provisions of [the New York Law]."[44] This raises the following concerns.

First, as noted above, certain categories of income, such as pensions, termination pay and noncompete payments may not be taxable in New York when received by nonresidents, even if they are taxable as wages for federal income tax purposes. New York's regulations and instructions, however, appear to include these exempt items as subject to withholding.[45]

Second, there is a question whether stock option and other deferred payments are even subject to New York withholding because it is not clear that they constitute "wages" as the term is defined for state withholding purposes. The Tax Law distinguishes between "wages" and "remuneration for services . . . which do not constitute wages."[46] The latter may only be subject to New York withholding if the Department has provided for withholding by regulation, and the employer and employee agree to such withholding.[47] Moreover, New York has specifically extended its withholding requirements to certain non-wage payments, including certain deferred payments, by treating the payments "as if they were wages."[48] But stock option income is not among the types of payments enumerated for such treatment.[49] This omission might imply that

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44 20 NYCRR § 171.1(b).

45 *See id.* at § 171.3.

46 Tax Law §§ 671(a)(1), (2).

47 *Id.* at § 671(a)(2).

48 *Id.* at § 671(b)(1).

49 *Id.*

certain deferred compensation, such as stock option income, is not "wages" for New York withholding purposes. The regulations provide no guidance on the subject.

2. Considerations

We recommend that the regulations be reviewed and revised so as to clarify the distinction between those categories of income that are subject to withholding and those that are not. Additionally, the regulations should be revised to provide guidance regarding an employer's obligation to withhold on non-wage income such as stock options and other deferred payments.

C. Nonresident Allocation of Stock Options and Other Deferred Income

1. Analysis

New York's tax regulations state that an employer must withhold personal income tax from wages paid to nonresidents for services performed in New York.[50] If the nonresident employee performs services partly within and partly without New York, the employer is required to withhold only from those wages paid for services performed in the State.[51] With few exceptions (e.g., commission salesmen), the employer should allocate the employee's "total compensation" to New York based on the ratio of days the employee worked in the State to the number of days the employee worked everywhere.[52] Where supplemental wages such as

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50 20 NYCRR § 171.6(a).

51 *Id*. at § 171.6(b).

52 *Id*. at § 171.6(b)(2).

bonuses, commissions or sales awards are paid at the same time as regular wages, the withholding "should be determined as if the total of the supplemental and the regular wages were a single wage payment for the regular payroll period."[53] Where paid at a different time, an employer should add the supplemental wages to the regular wages for either the current payroll period or the last preceding payroll period within the same calendar year.[54]

Again, these regulations fail to clearly explain the withholding obligations of an employer who pays stock option income to nonresident employees. On the one hand, the statute and regulations appear to treat this "supplemental" income as if it were a "single wage," thereby requiring withholding based on factors for the year of receipt. TSB-M-95(3)I, however, implies that employers should withhold using a multi-year approach, which allocates stock option income to the State based on New York work days over total work days from the date of grant to the date of exercise.

2. Considerations

We recommend that the withholding tax regulations be reviewed and revised to clarify the proper allocation method for stock option and other deferred payments. To the extent such payments are deemed "wages" subject to withholding, the regulations should clearly explain how the employer should withhold on this type of income. All rules for withholding on

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53 *Id.* at § 171.4(b)(1).

54 *Id.*

this type of income should be embodied in the regulations so as to clearly and formally set forth the employers' withholding tax responsibilities.