

IT 14-0001 GIL 01/24/14 Withholding – Other Rulings

No Illinois withholding is required from wages paid to a nonresident employee who performs some of his multistate services in Illinois, if the employee's base of operations is outside Illinois or if the employee's wages are exempt from withholding except by his state of residence under 49 U.S.C. § 14503(a)(1).

January 24, 2014

Re: Illinois income tax withholding
EMPLOYEE

Dear Xxxxx:

This is in response to a letter written by your employee, EMPLOYEE, regarding Illinois income tax withheld from his wages. Based on the information EMPLOYEE provided, it is not clear whether or not withholding is required. Therefore, we are providing the following information that you may use to determine whether Illinois income tax withholding is required. A GIL is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 86 Ill. Adm. Code 1200.120(b) and (c), which may be accessed from the Department's web site at www.Iltax.com.

Your employee's letter states as follows:

I talked to one of your agents on this matter and he told me to contact you for help. The problem is that there is 6 truck drivers here in CITY, STATE that live and work in CITY, STATE and the company that we work for is located in CITY, IL. Each week they deduct Illinois income taxes from our pay check even though we only work in CITY, STATE. I tried to tell them that we do not need to have this taken out because we do not work or live there in Illinois. So attached is the response I got back from them. This letter does not make sense to me because they the company pays corporate Illinois taxes for the business but we should not have to pay Illinois state income taxes there when we work in CITY, STATE. Please clear this up with us drivers in CITY, STATE and or the Company in Illinois. They will only change this if you tell them otherwise. This would be greatly appreciated for us here in CITY, STATE.

The attached letter, states:

We are in receipt of your letter requesting exemption from Illinois state tax withholding. Based on our thorough research with the Illinois Department of Revenue, we have substantiated that COMPANY is following the proper procedures outlined in Department of Revenue Publications by withholding Illinois state taxes from your wages. While you are a resident of STATE, your base of operations from which the service you provide is directed or controlled in the State of Illinois.

Therefore, we will continue to deduct Illinois state taxes from your wages. At the end of the tax year, you must file an IL 1040 and follow the guidelines provided for a non-resident of the state.

If you disagree with this decision, please have the Illinois Department of Revenue provide us written justification that supports a determination to exempt you from state withholding.

EMPLOYEE indicated during a phone conversation that some portion of his driving duties is performed in Illinois.

RULING

Section 701(a) of the Illinois Income Tax Act ("IITA" 35 ILCS 5/701) requires every employer maintaining an office or transacting business in Illinois to withhold Illinois income tax on wages that constitute "compensation paid in this State" under IITA Section 304(a)(2)(B). Section 304(a)(2)(B) states that compensation is paid in this State if:

- (1) The individual's service is performed entirely within this State;
- (2) The individual's service is performed both within and without this State, but the service performed without this State is incidental to the individual's service performed within this State; or
- (3) Some of the service is performed within this State and either the base of operations, or if there is no base of operations, the place from which the service is directed or controlled is within this State, or the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this State.

Department Regulations Section 100.3120(a)(2) elaborates on these rules as follows:

The [rules regarding compensation paid in this State] are to be applied in such manner that if they were in effect in other states an item of compensation would constitute compensation "paid in" only one state. Thus, if an item would, under these rules, constitute compensation paid in a state other than Illinois because the individual's service was localized in such other state ..., it could not also be compensation paid in Illinois.

Department Regulations Sections 100.7010(c)(2) and (3) provide rules for determining whether an individual's service in a particular state is incidental to the primary service performed:

(2) In determining whether an individual's service performed without this State is incidental to his service performed within this State for purposes of the test set forth in subsection (a)(1)(B), the term "incidental" means any service which is necessary to or supportive of the primary service performed by the employee or which is temporary or transitory in nature or consists of isolated transactions. The incidental service referred to above may or may not be similar to the individual's normal occupation so long as it is performed within the same employer-employee relationship. That is, an individual who normally performs all of his service in this State may be sent by his employer to another state to perform service which is totally different in nature from his usual work or he may be sent to do similar work. So long as such service is temporary or consists merely of isolated transactions, it will be considered to be incidental to his service performed within this State, and his entire compensation will be subject to withholding.

(3) In some cases, it may be difficult to determine whether service performed in another state is incidental to service performed within this State. In any such case, the facts (including any contract of employment) should be carefully considered. In many instances, the contract of employment will provide a definite territorial assignment which will be prima facie evidence that the service is localized within such territory. However, the presence or absence of a contract of employment is but one fact to be considered. In every case, the ultimate determination to be made is whether the individual's service

was intended to be and was in fact principally performed within this State and whether any service which was performed in another state was of a temporary or transitory nature or arose out of special circumstances at infrequent intervals. The amount of time spent or the amount of service performed without this State should not be regarded as decisive, in itself, in determining whether such service is incidental to service performed within this State. For example, an individual normally performing service within this State might be sent on a special assignment to another state for a period of months. The service in the other state would nevertheless be incidental to service within this State if such special assignment were an isolated transaction.

Department Regulations Section 100.7010(c)(4) contains examples that illustrate services that may be considered incidental to the primary service.

Department Regulations Section 100.7010(d)(2) provides rules for determining an employee's base of operations:

The term "base of operations" refers to the place or fixed center from which the individual works. An individual's base of operations may be his business office (which may be maintained in his home), or his contract of employment may specify a place at which the employee is to receive his directions and instructions. In the absence of more controlling factors, an individual's base of operations may be the place to which he has his business mail, supplies, and equipment sent or the place where he maintains his business records.

As can be seen, the base of operations of the employer is not controlling. Department Regulations Section 100.7010(d)(3) contains examples illustrating the determination of an employee's base of operations.

Department Regulations Sections 100.7010(b)(2) and 100.2590(a) reference certain Federal law that limits the authority of Illinois to subject certain nonresident employees of motor carriers to Illinois income taxation. Regulations Section 100.2590(a) provides, in part:

Federal law affects the authority of the State of Illinois to subject certain employees of railroads, motor carriers, merchant mariners, and air carriers to Illinois income taxation. By virtue of the provisions of federal law quoted in subsections (a)(1) through (4) below, compensation that would otherwise be subject to Illinois income taxation and withholding by virtue of IITA Sections 302(a) and 304(a)(2)(B) is subtracted from adjusted gross income in determining Illinois base income pursuant to IITA Section 203(a)(2)(N) and is not subject to Illinois income tax withholding.

...

49 USC 14503(a)(1) states that no part of the compensation paid by a motor carrier providing transportation subject to the jurisdiction of the [Interstate Commerce] Commission under subchapter I of chapter 135 of this title or by a motor private carrier to an employee who performs regularly assigned duties in 2 or more states as such an employee with respect to a motor vehicle shall be subject to the income tax laws of any state or subdivision of that state, other than the state or subdivision thereof of the employee's residence.

Applying the rules set forth above to the facts in this case, Illinois withholding would not be required if the service EMPLOYEE performs qualifies for protection under Federal law, as set forth in Department Regulations Section 100.2590(a). In the alternative, Illinois withholding would not be required if the service EMPLOYEE performs in Illinois is merely incidental to the service he performs

in STATE. However, if Federal law does not apply and the service EMPLOYEE performs in Illinois is more than merely incidental to the STATE services, Illinois withholding is proper if EMPLOYEE'S base of operations is Illinois.

As stated above, this is a GIL. A GIL does not constitute a statement of policy that applies, interprets or prescribes the tax laws, and it is not binding on the Department. If you have further questions regarding this GIL, please call (217) 782-7055.

Sincerely,

Brian L. Stocker
Associate Counsel (Income Tax)