



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF THE CHIEF COUNSEL

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Dear _____ :

This letter responds to your request for information dated March 20, 2009 in which you asked about your income tax withholding obligations. This letter analyzes the particular claim that your employee has raised, and then generally summarizes your income tax withholding obligations.

Analysis of Your Employee's Claim

Courts and the Service have categorically rejected Taxpayers' claims that they are not subject to income tax because the Internal Revenue Code's (the Code) definition of "United States" does not include the fifty states. (See generally Betz v. United States, 40 Fed. Cl. 286 (Fed. Cl. 1998)).

In particular, your employee has provided you with a "Withholding Exemption Certificate." The Internal Revenue Service did not draft this form. Your employee argues in this form that he is not subject to federal income tax because he is not a citizen or resident of the United States. His basic premise is that the Code's definition of the "United States" is confined to the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, or "any other U.S. territory or enclave." Put differently, he argues that the Code's definition of "United States" does not include any of the fifty states, such as your state of Pennsylvania. It is not uncommon for taxpayers to raise claims like these.

The Sixteenth Amendment to the Constitution provides Congress with the "power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." Courts have long recognized this amendment's ratification and validity. See, e.g., United States v. Sitka, 845 F.2d 43, 46-47 (2d Cir. 1988). It was pursuant to this authority that Congress enacted the Code.

The Code applies to “United States persons.” Section 7701 of the Code states that this term includes every “citizen or resident of the United States,” and that the term “United States” includes “the States and the District of Columbia.” (See sections 7701(a)(30)(A) and 7701(a)(9) of the Code).

Employers’ Income Tax Withholding Obligations

To summarize briefly, an employer must withhold income taxes every time it makes a payment of wages. An employee who refuses to provide an employer with a valid income tax withholding certificate will be subject to income tax withholding as a single person with no withholding exemptions.

More explicitly, § 3402 of the Code provides that, except as otherwise specifically provided in § 3402, every employer making payment of wages shall withhold federal income tax as determined in accordance with prescribed tables or computational procedures. Section 3401(a) provides that the term “wages” means all remuneration for services performed by an employee for his employer unless a specific exemption under § 3401(a) applies. For example, remuneration for services performed by a domestic worker in a private home is specifically excluded from the definition of wages by § 3401(a)(3).

Under § 3402(f)(2)(A) of the Code and § 31.3402(f)(2)-1(a) of the Employment Tax Regulations, on or before the date on which an individual commences employment with an employer, the individual must furnish the employer with a signed withholding exemption certificate relating to the employee’s marital status and the number of withholding exemptions which the employee claims. The employer is required to request a withholding exemption certificate from each employee, but if an employee fails to furnish such certificate, the employer must withhold federal income tax from the employee as if the employee were a single person with no withholding exemptions.

Section 31.3402(f)(5)-1 of the Employment Tax Regulations provides that Form W-4, Employee’s Withholding Allowance Certificate, is the form prescribed for the withholding exemption certificate required to be furnished to the employer under § 3402(f)(2) of the Code. A Form W-4 must be prepared in accordance with the instructions and regulations applicable thereto, and must set forth fully and clearly the data therein called for. An employer may not accept a substitute form developed by an employee, and the employee submitting such form will be treated as failing to furnish a withholding exemption certificate. In addition, any alteration of or unauthorized addition to a withholding exemption certificate shall cause such certificate to be invalid.

Section 31.3402(f)(2)-1(e) of the Employment Tax Regulations provides that if an employer receives an invalid withholding certificate, the employer shall consider it a nullity for purposes of computing withholding. Since an altered certificate is an invalid

withholding exemption certificate, it can not authorize an employer to cease withholding tax.

Section 31.3402(f)(2)-1(e) of the Employment Tax Regulations further provides that if an employer receives an invalid withholding certificate, the employer shall inform the employee who submitted the certificate that it is invalid and shall request another withholding exemption certificate from the employee. If the employee who submitted the invalid certificate fails to comply with the employer's request, the employer must withhold federal income tax from the employee as if the employee were a single person with no withholding exemptions. However, if a valid prior certificate is on file it remains controlling.

A discussion of constitutional issues associated with the requirement to furnish Form W-4 can be found in United States v. Drefke, 707 F.2d 978 (8th Cir. 1983), cert. denied, Jameson v. United States, 464 U.S. 942 (1983). Drefke furnished Forms W-4 in which he claimed exemption from federal income taxes and certified that he had not incurred a liability for federal income taxes in the preceding year. He was convicted under § 7205 of the Code of filing false withholding exemption certificates.¹ He argued that § 7205 giving rise to his conviction constituted punishment for failure to give self incriminating information. The Eighth Circuit stated that the Fifth Amendment right against self-incrimination does not authorize individuals to refuse to disclose information concerning their income.

¹ An individual may be prosecuted under § 7205 for filing a false withholding exemption certificate or for willfully failing to supply information. Section 7205 provides:

Any individual required to supply information to his employer under § 3402 who willfully supplies false or fraudulent information or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under § 3402, shall, in addition to any other penalty provided by law, upon conviction thereof, be fined not more than \$1,000, or imprisoned not more than one year, or both.

This letter has called your attention to certain general principles of the law. It is intended for informational purposes only and does not constitute a ruling. See Rev. Proc. 2009-1, §2.04, 2009-1 IRB 1 (Jan. 5, 2009). If you have any additional questions, please contact our office at .

Sincerely,

Lynne Camillo
Chief, Employment Tax Branch 2
Tax Exempt & Government Entities