

Withholding of Illinois income tax not required for Compensation paid to a nonresident for services not performed in Illinois.

June 4, 2021

Re: Illinois income tax

Dear NAME:

This is in response to your letter dated May 28, 2021, in which you request information regarding Illinois income tax. The nature of your request and the information you have provided require that we respond with a General Information Letter, which 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 found on the Department's web site at www.tax.illinois.gov.

Your letter states as follows:

I am writing to request a General Information Letter on a tax issue as described below.

Should an IL employer withhold IL income tax from an employee who does *not* work or reside in Illinois? To be clear, I mean an employee who does no work whatsoever in Illinois, and who does not even travel (nor telecommute) to Illinois during their employment.

I was employed by the SCHOOL to mentor graduate students in STATE2 for tax years YYYY-YYYY and STATE3 for tax years YYYY-YYYY, while I was a resident of STATE1. The SCHOOL withheld Illinois state income tax from my wages for these years.

I also realize that it is probably too late to recover these taxes from the Illinois Department of Revenue. I am attempting to recover my wages from the SCHOOL

RULING

During the tax years in questions, the Illinois Income tax provided as follows. Section 701 of the Illinois Income Tax Act (35 ILCS 5/701) provided, in part:

(a) In General. Every employer maintaining an office or transacting business within this State and required under the provisions of the Internal Revenue Code to withhold a tax on:

(1) compensation paid in this State (as determined under Section 304(a)(2)(B) to an individual; or

(2) payments described in subsection (b) shall deduct and withhold from such compensation for each payroll period (as defined in Section 3401 of the Internal Revenue Code) an amount equal to the amount by which such individual's compensation exceeds the proportionate part of this withholding exemption (computed as provided in Section 702) attributable to the payroll period for which such compensation is payable multiplied by a percentage equal to the percentage tax rate for individuals provided in subsection (b) of Section 201.

(b) Payment to Residents. Any payment (including compensation, but not including a payment from which withholding is required under Section 710 of this Act) to a resident by a payor maintaining an office or transacting business within this State (including any agency, officer, or employee of this State or of any political subdivision of this State) and on which withholding of tax is required under the provisions of the Internal Revenue Code shall be deemed to be compensation paid in this State by an employer to an employee for the purposes of Article 7 and Section 601(b)(1) to the extent such payment is included in the recipient's base income and not subjected to withholding by another state. Notwithstanding any other provision to the contrary, no amount shall be withheld from unemployment insurance benefit payments made to an individual pursuant to the Unemployment Insurance Act unless the individual has voluntarily elected the withholding pursuant to rules promulgated by the Director of Employment Security.

Section 304(a)(2)(B) of the Illinois Income Tax Act (35 ILCS 5/304) provided that, for employees other than professional athletes:

Compensation is paid in this State if:

(i) The individual's service is performed entirely within this State;

(ii) 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

(iii) 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.

In Article 3 of the Illinois Income Tax Act, Section 301(a) of the Illinois Income Tax Act (35 ILCS 5/301) provided:

All items of income or deduction which were taken into account in the computation of base income for the taxable year by a resident shall be allocated to this State.

The amount of Illinois wages that should be reported on the Form W-2 is the amount “paid in this State” on which withholding is required. According to your letter, you were employed by the SCHOOL to mentor graduate students in STATE2 for tax years 2016-2018 and STATE3 for tax years 2017-2018, while you were a resident of STATE1. The SCHOOL withheld Illinois state income tax from your wages for those years. Based on the information you provided, if you were not an Illinois resident, and none of the services you provided were performed within Illinois, then, pursuant to Section 304 of the Illinois Income Tax Act, as in effect during the taxable years in question, your compensation does not appear to be compensation “paid in Illinois.” As such, your former employer was not required by Section 701 to withhold Illinois income taxes from your compensation.

Section 911(a) of the Illinois Income Tax Act, 35 ILCS 5/911(a), as in effect during the tax years in question, provided as follows:

(a) In general. Except as otherwise provided in this Act:

(1) A claim for refund shall be filed not later than 3 years after the date the return was filed (in the case of returns required under Article 7 of this Act respecting any amounts withheld as tax, not later than 3 years after the 15th day of the 4th month following the close of the calendar year in which such withholding was made), or one year after the date the tax was paid, whichever is the later; and

(2) No credit or refund shall be allowed or made with respect to the year for which the claim was filed unless such claim is filed within such period.

Pursuant to Section 911(a), you may still be able to file a return seeking a refund for tax year 2018.

Further guidance on when compensation is considered “paid in this State” and subject to withholding, can be found at 86 Ill. Adm. Code Section 100.7010, which can be found at:

<http://www.ilga.gov/commission/jcar/admincode/086/086001000S70100R.html>

and in Publication 130, which can be found at:

<https://www2.illinois.gov/rev/research/publications/pubs/Documents/pub-130.pdf>

As stated above, this is a general information letter which 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 are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of Section 1200.110(b). If you have any further questions regarding this letter, you may contact me at (217) 782-2844.

Sincerely,

Michael D. Mankowski
Associate Counsel - Income Tax

cc: Daily File
Correspondence file: