

Discusses Federal single state tax withholding requirements for certain employees of motor carriers. (This is a GIL.)

March 5, 2020

Re: Illinois income tax

Dear Xxxx:

This is in response to your letter received July 16, 2018, 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 2 Ill. Adm. Code 1200.120(b) and (c), which may be found on the Department's web site at [www.tax.illinois.gov](http://www.tax.illinois.gov). This General Information Letter replaces and supersedes the General Information Letter previously issued on September 17, 2018.

Your letter states as follows:

We would like to request a General Information Letter for a Withholding issue which many of our clients face. We work with interstate trucking companies who transport goods across state lines. They hire W2 workers from all over the United States. Below is the example of the issue we face and the reason for the request.

Our client is an Illinois company that hires a driver that lives in Arizona. Driver performs the service across interstate lines, and his loads usually originate near his home town and he returns back to his home town. His only contact with Illinois is that he is being dispatched from this state. The accountant for the driver claims that there should be no Illinois deduction, since the driver has nothing to do with Illinois. He effectively earns his income across state line and should therefore pay only to the state he lives in. We have provided Publication 130 as explanation. However, the confusion comes from the limited exception for employers that fall under Surface Transportation Board jurisdiction. It specifically lists that certain trucking companies fall under this exception, but it fails to define what is meant by "certain trucking companies." Do interstate trucking companies fall under the exception, and should the company withhold Illinois taxes for interstate drivers, or are they exempt under the STB jurisdiction?

Please, let us know if you need any further details on this matter, and what is the proper information we should provide to our clients.

## **RESPONSE**

Generally, 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.

In order to determine if the Federal protection referred to in 86 Ill. Adm. Code 100.2590(a)(1) applies to the compensation paid to an employee, one needs to first determine if the employee is paid compensation by certain motor carriers or a motor private carrier. In order for the motor carrier to qualify, it must "provide transportation" subject to jurisdiction of the Surface Transportation Board (formerly the "Interstate Commerce Commission), under 49 U.S.C. Subt. IV, Pt. B, Ch. 135, Subch. I. Second, the employee must "perform regularly assigned duties in 2 or more States." Applying the rules set forth above to the facts in your letter, Illinois withholding would not be required if the service the driver performs qualifies for protection under Federal law, as set forth in 86 Ill. Adm. Code

100.2590(a)(1). In the alternative, Illinois withholding would not be required if any service the driver performs in Illinois is merely incidental to the service performed in Arizona or another state. However, if Federal law does not apply and the service the driver performs in Illinois is more than merely incidental to the services performed in Arizona or another state, Illinois withholding is proper if the driver's base of operations is Illinois. Since a General Information Letter is designed to provide general information, the Department cannot provide further guidance on whether the particular employee referred to in your letter would qualify for the Federal protection referred to in 86 Ill. Adm. Code 100.2590(a)(1). To determine whether an employee does qualify for such protection, please refer to the legal resources provided by the Surface Transportation Board (formerly the "Interstate Commerce Commission") which, as of the date of this letter, can be found at <https://prod.stb.gov/resources/legal-resources/#statutes>

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