TEI Endorses Mobile Workforce State Income Tax Simplification Act

July 22, 2011

On July 22, 2011, Tax Executives Institute submitted the following comments to the House Committee on the Judiciary and its Subcommittee on Courts, Commercial and Administrative Law, recommending the enactment of H.R. 1864, the Mobile Workforce State Income Tax Simplification Act of 2011. The Institute's comments were prepared under the aegis of its State and Local Tax Committee, whose chair is Linda H. Dickens of Texas Instruments, Inc. Committee member Tov B. Haueisen of General Electric Company contributed materially to the preparation of the submission. Daniel B. De Jong, TEI Tax Counsel, serves as legal staff liaison to the committee and coordinated the preparation of the submission.

Tax Executives Institute, the preeminent association of in-house tax professionals worldwide, urges prompt consideration and enactment of H.R. 1864, the Mobile Workforce State Income Tax Simplification Act of 2011. Employers nationwide have a direct stake in the development of fair and uniform rules governing nonresident taxation and withholding, regardless of whether they are large multinational corporations or small businesses that pursue opportunities outside their home state. Employees nationwide also have an interest in the enactment of the legislation, not only to minimize their exposure to unjust taxation but to bring a measure of certainty to an area of the tax law that can impede economic growth and efficiency. The Commerce Clause of the Constitution gives Congress plenary authority to remove barriers and open markets among the states. For example, Congress previously enacted legislation to preclude non-resident state taxation of certain distributions from nonqualified deferred compensation plans. That authority should be exercised here to limit the authority of states to tax certain income of employees for employment performed in other states and localities.

H.R. 1864 represents a balanced approach toward ameliorating employer and employee uncertainty in respect of individual state income taxation and withholding for individuals temporarily present in another state while discharging their employment responsibilities and preserving the states' ability to impose taxes commensurate with the benefits accorded nonresidents. Tax Executives Institute therefore strongly supports the enactment of H.R. 1864.

Background – About Tax Executives Institute

TEI is a voluntary, nonprofit association of corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. Founded in 1944, TEI is dedicated to the uniform and equitable enforcement of the tax law while reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers. TEI has approximately 7,000 individual members who represent more than 3,000 of the leading corporations in the United States, Canada, Europe, and Asia. The Institute's membership represents a cross-section of the business community whose employers are virtually without exception engaged in interstate commerce with employees who are regularly required to travel to states outside their state of residence to perform duties. Thus, the Institute has a direct interest in H.R. 1864.

Statement of the Compliance Challenge

In today's mobile economy, it is rare that a company's activities or customers are confined to a single state. Regardless of whether a company is large or small, privately held or publicly traded, the pursuit of new business knows no borders. Employees are regularly required to travel from their usual place of employment (*i.e.*, their "home" or residence state) to other states to fulfill their employment obligations. When they do, they and their employers (whether they be for profit, tax exempt, or governmental) become subject to a wide array of tax and withholding regimes. In some states, the "first dollar" earned in the nonresident state is subject to tax (and withholding).[1] In others, a minimum (but not uniform) day threshold exists[2] or an earnings threshold is utilized.[3] In still others, a combination of day and earnings thresholds is employed.[4]

It is against this patchwork of divergent and sometimes inconsistent regulatory regimes that employers and their employees must attempt to comply with their obligations. Even assuming information about the requirements is available (and understandable), the challenge of analyzing the rules, developing procedures to ensure compliance, and then undertaking to collect the necessary information and perform the required calculations is significant. Moreover, while some states may not vigorously enforce their rules in respect of all putatively affected employers and employees (*e.g.*, where the employer had adopted reasonable rules of administrative convenience to withhold tax when employees exceed a certain number of days in the state), the *potential* for enforcement action is itself burdensome.

Adverse Consequences of the Lack of Uniformity

The lack of uniformity in state laws concerning nonresident withholding and taxation is undeniable. In some situations, if a state does not permit a full tax credit for levies paid to another state, affected taxpayers will be taxed twice on the same income. Conversely, in those states in which a credit is allowed, a nonresident employee will be taxed more heavily if the tax rate in the work state is greater than the rate in the resident state. (This effect will be felt the most by employees who reside in states that do not impose an income tax.) The burden, however, is not limited to the higher taxes that are imposed. Administratively, taxpayers must shoulder the additional responsibility of keeping track of the different state standards and regimes — for example, day or dollar thresholds — that *may* apply to them.

Moreover, the tax and compliance burdens are not limited to any particular class of employee (*e.g.*, those who work for large multinational corporations or who are paid a salary compared with an hourly wage). Indeed, a government employee who travels to another jurisdiction to fulfill his or her employment responsibilities is subject to the same tax consequences as a privately employed individual. The affected class of employees also includes:

- An assistant college basketball coach who travels around the country recruiting high school students or scouting opponents.
- A campaign worker who moves from primary state to primary state to coordinate his or her candidate's efforts.
- An employee of the American Red Cross or another social service/welfare organization whose job takes him or her to one or more states devastated by a flood, tornado, or other natural disaster to coordinate relief efforts (or an individual whose employer allows him or her to take paid time-off to volunteer in such situations).
- A congressional investigator whose work requires him or her to travel to different states.
- An employee of a medical services company who installs software at hospitals or doctors' offices in multiple states.
- A state or federal tax auditor traveling to different states in order to conduct examinations.
- Newspaper reporters, medical professionals (e.g., doctors and nurses), construction crane installers, and any other employees whose assignments take them to various locations around the country.

Any or all of these employees and their employers could find themselves subject to and having to keep track of myriad state withholding and tax statutes. In addition, the federal and state governments, as employers, are not immune from this tracking obligation when their employees are required to perform their work duties in other states.

A Uniform Solution Is Needed

The current situation — with employees and employers being subject to a patchwork of varied and sometimes inconsistent withholding and tax rules — imposes an intolerable burden on interstate commerce. If the states were able to harmonize their rules, a federal approach might not be necessary, but history teaches that state-initiated uniformity in this area is unlikely. The Multistate Tax Commission[5] has engaged in an effort to draft a model state statute addressing the nonresident withholding issue. Lingering disagreements about monetary and physical presence jurisdictional thresholds, together with political barriers to enacting limitations on a state's ability to tax, eliminate any chance that states will widely adopt a model statute on par with that being considered by the Multistate Tax Commission. Concededly, some have striven to ameliorate the burden by adopting monetary thresholds and other *de minimis* rules. But because of the lack of uniformity, the relief brought by such measures has been modest at best.

A few examples are instructive. For those states that use a dollar threshold on income earned in a nonresident state, the threshold amounts vary, for example, California — no withholding on income shown to be equal to or below the amount stated in the Low Income Exemption Table (*i.e.*, monthly wages of $2,030 or less for 2011);[6] Idaho — below $1,000 threshold;[7] New Jersey — no withholding on wages below an employee's personal exemption;[8] and Oklahoma — no withholding if payments are less than $300.

States that employ a "days in state" measure are similarly uneven. Maine, for example, exempts nonresidents who work in the state for 10 days or less, while New Mexico exempts nonresidents who perform services in the state for 15 or fewer days during a calendar year. Other states require a nonresident form to be completed if that state has entered into a reciprocal agreement with its bordering state(s). These states include Illinois, Iowa, Kentucky, Maryland, Michigan, Montana, North Dakota, Pennsylvania, Virginia, and West Virginia. In these limited cases, residents from other (non-border) states nonetheless have full filing obligations.[9]

H.R. 1864: A Uniform Federal Solution

TEI recognizes the states' prerogative to design taxing systems to meet their particular needs. At the same time, individuals and the companies they serve should be reasonably able to predict with fair accuracy the extent of their tax obligations as they relate to any particular state. Currently, the plethora of conflicting rules makes predictability difficult, if not impossible, to achieve.

Article I, Section 8 of the Constitution — the Commerce Clause — vests in Congress the authority to enact laws to ensure that the states, through their tax laws or otherwise, do not unduly burden interstate commerce. The enactment of H.R. 1864 would be wholly consistent with this constitutional authority. Under the proposed legislation, no part of wages or other remuneration paid to an employee who performs duties in more than one state or locality will be subject to the income tax laws of any state other than the employee's residence state and the state or locality in which the employee is physically present performing duties for more than 30 days during the calendar year. Further de minimis safeguards are included to ensure that "work states" can appropriately tax nonresidents without placing undue burdens on individuals and their employers.

In addition, the legislative proposal provides that an employer may rely on an employee's determination whether the employee has spent time in a state or locality performing duties if there is no actual knowledge of fraud by the employee or collusion between the employer and the employee to evade tax. If the employer maintains a time and attendance system that tracks where an employee performs duties on a daily basis, however, then data from this system shall be used instead of the employee's determination. In addition, the bill protects the prerogatives of the states by ensuring that all employees, beyond the statutory minimums and safeguards, who earn income in a state, pay their fair share.

The bill appropriately balances the states' interest with the burdens imposed on interstate employers and employees. For example, it does not restrict states from taxing the wages of individuals who are residents of their state.

Conclusion

The technical and administrative challenges confronting individuals who strive to comply with the hodgepodge of rules applicable to employees who travel to other states to work are nothing short of daunting. Creating uniform tax rules is in the interest of all affected parties — employers, employees, legislatures, and tax regulatory bodies. Regrettably, states to date have not effectively addressed this problem. A federal legislative solution is required. H.R. 1864 addresses the current concerns regarding the taxation of nonresident individuals.

If you have any questions about the Institute's views or desire additional information regarding TEI's position on H.R. 1864, please contact TEI's Chief Tax Counsel, Eli J. Dicker, or Tax Counsel, Daniel B. De Jong, at 202.638.5601.

1. Alabama, Arkansas, Delaware, Kansas, Massachusetts, Missouri, Rhode Island, and Vermont require withholdings from residents and nonresidents performing services within their states without any exceptions. Ala. Admin. Code §§ 810-3-2-.01(3) and 810-3-71-.01(8); Ark. Code Ann. §§ 26-51-202(a) and 26-51-905; Del. Code Ann. 30 §§ 1121 and 1151; Kan. Stat. Ann. §§ 79-32,110(b) and 79-3296; Mass. Gen. L. Chapter 62B § 2; Mass. Regs. Code § 62.5A.1; Mo. Rev. Stat. § 143.041; Mo. Code Regs. 12 § 10-2.015(9); Miss. Code Ann. § 27-7-5(3); Miss. Admin. Code § 35.III.11.09.101; R.I. Gen. Laws §§ 44-30-2(a) and 44-30-71; and Vt. Stat. Ann. 32 §§ 5822(a) and 5841.
2. Arizona does not require withholding if the nonresident is physically present in the state for fewer than 60 days in a calendar year. Ariz. Rev. Stat. Ann. § 43-403(A). Hawaii does not require withholding if the nonresident individual does not perform services in the state for more than 60 days. Haw. Admin. Rules § 18-235-61-04(b). Nonresident individuals who work in the State of Maine are not subject to the state's withholding laws if they perform services in the state for 10 days or fewer. Me. Rev. Stat. Ann. 36 § 5142(8-A). New Mexico does not require withholding if the nonresident employee performs services in the state for 15 days or less. NMSA § 7-3-3(A)(2)
3. California, Idaho, New Jersey, Ohio, Oklahoma, South Carolina, Virginia, West Virginia, and Wisconsin measure their withholding liability for nonresident individuals on a specified dollar amount earned in the state. Cal. Unemp. Ins. Cd. §13020; Idaho Admin. Rules § 35.01.01.871; N.J. Rev. Stat. § 54A:7-1; N.J.A.C. § 18:35-7.2(b); New Jersey Division of Taxation Form NJ-WT; Ohio Rev. Code Ann. § 5747.06(A)(3); Okla. Stat. 68 § 2385.1(e); S.C. Code Ann. § 12-8-520(A); Va. Code Ann. § 58.1-461; W. Va. Code St. R. § 110-21-71.4.2.4; Wis. Stat. § 71.64(6). For example, in Idaho, nonresidents who earn less than a $1,000, for the year, for work performed in the state are exempt from withholding.
4. Georgia does not require withholding if the nonresident has not been employed in the state for more than 23 days or if the amount paid for services performed in Georgia does not exceed the lesser of five percent of total income received or $5,000. Ga. Code Ann. § 48-7-100(10)(K) and Ga. Code Ann. § 48-7-1(11)(A). The State of New York does not require withholding on wages paid for services performed in the state for a short time and if the wages will not exceed the employee's personal exemption.
5. "The Multistate Tax Commission is an intergovernmental state tax agency working on behalf of states and taxpayers to administer, equitably and efficiently, tax laws that apply to multistate and multinational enterprises." *See* www.mtc.gov/About.aspx?id=40.
6. Cal. Unemp. Ins. Cd. § 13020.
7. Idaho Admin. Rules § 35.01.01.871.
8. N. J. Rev. Stat. § 54A:7-1; N.J.A.C. § 18:35-7.2(b); New Jersey Division of Taxation Form NJ-WT.
9. Additionally, the District of Columbia does not withhold from any nonresident individual provided the necessary forms are completed and submitted.