

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-09(5)I
Income Tax
June 2, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I090306A

A petition dated March 6, 2009, received from [REDACTED] (Petitioner), concerns its proposed implementation of an online tool to allow its employees to complete their federal and state tax withholding forms electronically. Petitioner requests an opinion indicating whether a Form IT-2104 that is completed using an electronic submission system that satisfies the federal requirements for a valid electronic signature on the Federal Form W-4 also satisfies the signature requirements for Form IT-2104 under New York law.

We conclude that a Form IT-2104 that satisfies federal requirements for a valid electronic signature on the Federal Form W-4 under federal law does not necessarily satisfy the signature requirements for Form IT-2104 under New York law. The signature must also satisfy the requirements set forth by New York State's Electronic Signatures and Records Act and the Tax Department's electronic recordkeeping regulations.

Facts

Petitioner is considering the implementation of an online tool that will allow its employees to complete their federal and state tax withholding forms electronically. The electronic submission system incorporates an electronic signature that according to Petitioner "satisfies the five requirements for a valid electronic signature on the Federal Employee's Withholding Allowance Certificate (Form W-4) as enumerated in the Code of federal regulations (26 C.F.R. § 31.3402(f)(5)-(1)(c))." The system Petitioner is designing would store electronic copies of the completed forms that could be printed out. Because the forms will have been completed electronically, they would have the words "Electronic Signature on File" (instead of a signature) in the signature field. Petitioner seeks an advisory opinion "whether an IT-2104 which is completed in this manner would fall within the scope of New York's Electronic Signatures and Records Act (N.Y. St. Tech. Law §301 *et seq.*) and therefore be considered fully compliant with New York's tax laws."

Analysis

The fact that the online tool Petitioner anticipates implementing would comply with the federal requirements for electronic federal withholding tax forms is a positive circumstance from the Tax Department's perspective. However, that fact alone does not necessarily mean that the system is acceptable for New York State withholding forms. As noted in the Petition, New York State has its own electronic signature and recordkeeping laws and regulations. These must also be complied with. The Tax Department's requirements for electronic signatures and records are governed by New York State's Electronic Signatures and Records Act (State Technology Law, Article 3; hereinafter referred to as "ESRA") and ESRA Regulations (9 NYCRR Part 540), as well as Tax Department recordkeeping regulations applicable to electronic records (20 NYCRR Part 2402).

- Electronic Signatures

ESRA provides that "Electronic signature" means "an electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record." ESRA §302.3. Accordingly, any electronic signature that Petitioner decides to implement must comply with the requirements of this definition. New York State Office for Technology ("OFT"), designated by ESRA as "electronic facilitator," has also promulgated ESRA Regulations (9 NYCRR Part 540). The ESRA Regulations contain requirements governing the electronic signatures that governmental agencies may use or accept. Among other things, they require governmental entities to conduct "a business analysis and risk assessment when selecting an electronic signature to be used or accepted by that governmental entity." §540.4 (c). With regard to electronic income tax withholding allowance and exemption forms (all Form IT-2104 series forms, including the IT-2104), the Tax Department has concluded that, in addition to meeting the requirements of ESRA and the Department's recordkeeping regulations, such forms would be acceptable if created in an electronic system that conforms, in all applicable respects, to the requirements set forth in federal Publication 15-A.¹ By "acceptable," we mean that the records would not be deemed inadequate merely because they are in electronic format.

The ESRA Regulations also set forth a number of specific additional requirements which must be complied with "where the governmental entity agrees to accept an electronic signature that involves the services of a certification authority" (*see* 9 NYCRR §540.4 (d)). With respect to this latter set of requirements, if the electronic signing solution Petitioner proposes to use involves the services of a certification authority, then it would need to meet the requirements outlined by ESRA Regulation §540.4 (d), in addition to the other requirements of ESRA.

- Electronic Recordkeeping

ESRA and its Regulations also set forth standards regarding electronic records, which must be complied with. (*See* 9 NYCRR Part 540.5) As mentioned above, the Tax Department has promulgated its own regulations defining the requirements that must be met for the Department to consider records maintained in an electronic recordkeeping system as the equivalent of records maintained in a paper-based recordkeeping system. (*See* 20 NYCRR Part 2402) Essentially, the Department's regulations require a taxpayer using electronic recordkeeping systems to ensure that the electronic records alone, or in conjunction with other records, accurately reflect the information they include, and contain sufficient information to support and verify tax payments and/or entries on the taxpayer's returns or informational reports. Further, the taxpayer must provide the Department, upon its request, with the opportunity and, if necessary, the means to ensure the accuracy and integrity of the electronic records. This may include, but not be limited to, making available whatever facilities and computer resources may be necessary for the Department to carry out its audit procedures. Finally, the taxpayer must maintain, and make available to the Department if requested, documentation that explains the specific technologies, technical specifications and procedures the taxpayer uses to retain and otherwise manage its electronic records, and how these technologies, specifications and procedures ensure the accuracy and integrity of the taxpayer's electronic records. The taxpayer must also ensure that the electronic records contain sufficient

¹ IRS Publication 15-A (2009) Employer's Supplemental Tax Guide at p. 2-3. See <http://www.irs.gov/pub/irs-pdf/p15a.pdf>. These requirements, set out in Publication 15-A, are derived from the federal regulation mentioned in the Petition.

information to support and verify the entries made on the taxpayer's returns and to determine the correct tax liabilities.

Petitioner will need to review the above-referenced requirements to determine whether the proposed system complies. Ultimately, in order to be "accepted" by the Tax Department, the system must be compliant with ESRA, the ESRA Regulations, and the Department's recordkeeping regulations, and conform to the requirements set forth in IRS Publication 15-A as applicable to the New York State income tax withholding and exemption forms. As Petitioner recognizes, New York State has its own forms, and the electronic versions of these forms must contain the same language and information as required by the paper versions.

In providing this opinion, the Tax Department has merely set forth the applicable standards that must be met by an electronic system. The system would, of course, have to work *in practice* and produce appropriate records that comply with the laws and regulations described above. In the event of a problem, during an audit or otherwise, with the records created or produced by the electronic system, the Tax Department would, of course, have available to it all of the rights and remedies it has in the case of a records failure with a paper-based recordkeeping system.

DATED: June 2, 2009

/S/

Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.