



Advisory Opinion: TSB-A-24(7)I

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether it is subject to withholding New York State personal income tax on payments made to an Italian citizen and resident, who is a non-employee member of the company's board of directors ("Foreign Board Member").

We conclude that Petitioner is not subject to the withholding requirement under Tax Law § 671 with respect to payments Petitioner makes to the Foreign Board Member.

Facts

Petitioner is a corporation with its principal place of business in Tonawanda, New York. Beginning in 2021, Petitioner appointed an Italian citizen and resident to its Board of Directors. The Foreign Board Member does not reside in, or regularly travel to, New York State. He has not been physically present in the United States since 2017, and he has no intention of regular travel to the United States in the future. The Foreign Board Member does not have a U.S. Social Security Number, though he is in the process of obtaining an Individual Taxpayer Identification Number (ITIN).

The Foreign Board Member is not an employee of the taxpayer. However, the Board of Directors recently passed a resolution to compensate him in an amount commensurate with the services he is providing to Petitioner. This compensation is taxable on the federal level under Article 16 of the US-Italian Income Tax Treaty (1999). Therefore, for federal tax purposes, Petitioner is required to withhold 30% and remit such amounts to the IRS electronically. Further, Petitioner is required to file an annual Form 1042 (Annual Withholding Tax Return for U.S. Source Income of Foreign Persons) and provide the Foreign Board Member with Form 1042-S reflecting both the gross pay and the amounts withheld.

Analysis

The United States government and the government of the Republic of Italy entered into a treaty in 1999 concerning the taxation of each country's respective citizens performing work in either country, namely, the Convention for the Avoidance of Double Taxation With Respect to Taxes on Income/ Convenzione per Evitare le Doppie Imposizioni in Materia di Imposte sul Reddito (<https://home.treasury.gov/system/files/131/Treaty-Italy-8-24-1999.pdf>) ("the Convention"). Article 2 of the Convention states that in the case of the United States, the treaty applies to "the Federal income taxes imposed by the Internal Revenue Code (but excluding social security taxes), and the Federal excise taxes imposed on insurance premiums paid to foreign insurers and with respect to private foundations." *Id.* The Convention has no relevant provisions relating to state taxation.

As the Convention is silent concerning the imposition of income taxes by the governments of individual states of the United States, a review of the substantive state law is necessary.

Tax Law § 671 provides, in pertinent part, that:

Every employer maintaining an office or transacting business within this state and making payment of any wages taxable under this article shall deduct and withhold from such wages for each payroll period a tax computed in such manner as to result, so far as practicable, in withholding from the employee's wages during each calendar year an amount substantially equivalent to the tax reasonably estimated to be due under this article resulting from the inclusion in the employee's New York adjusted gross income or New York source income of his wages received during such calendar year.

In order to determine who constitutes an “employee” for purposes of withholding requirements, the applicable state regulation refers back to the federal definition. 20 NYCRR 171.1(b). The applicable federal definition provides:

(c) Employee.--For purposes of this chapter, the term “employee” includes an officer, employee, or elected official of the United States, a State, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing. The term “employee” also includes an officer of a corporation.

26 U.S.C. § 3401(c)

A member of a board of directors who is not an officer of the corporation, but receives payment for his or her services, is not considered an employee of the corporation for purposes of the withholding requirement. See, e.g., Matter of Manhattan Manor Nursing Home, 117 App. Div. 2d 885 (3rd Dept. 1986); Matter of Baldwinsville Federal Savings & Loan, 263 App. Div. 915 (3rd Dept. 1942). Unlike a corporate officer, a board member’s work is not controlled by the corporation in such a way as to trigger an employment relationship for purposes of the withholding tax requirement under Tax Law § 671. Thus, Petitioner is not required to withhold New York State income tax from payments made to the Foreign Board Member.

Dated: April 24, 2024

/s/

Brian J. McCann
Principal Attorney

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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.