



Department of Taxation and Finance

Important:

The New York City nonresident earnings tax was eliminated for New York State nonresidents on or after July 1, 1999 as the result of a New York State Court of Appeals decision. Accordingly, this TSB-M cannot be relied upon for issues related to the nonresident earnings tax on or after July 1, 1999.

For information concerning other nonresident income taxes, see [Filing information for New York State nonresidents \(ny.gov\)](#).

[See *City of New York, et al., v. State of New York, et al.*, NY Court of Appeals, 94 NY2d 577, 709 NYS2d 122; Chapter 5 of the Laws of 1999.]

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New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-M-91- (6) I
Income Tax
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Employers' Requirements Concerning Withholding
of New York State, New York City and Yonkers Personal
Income and Nonresident Earnings Taxes

The Department has become aware that some misunderstandings exist concerning employers' requirements relating to the withholding of New York State, New York City and Yonkers personal income taxes and nonresident earnings taxes. The following guidance is being provided to employers to enable them to correct certain withholding tax problems identified by the Department's audit staff and thus avoid the imposition of penalties and interest for failure to properly comply with the withholding tax rules.

General Withholding Requirements

Section 671 of the New York State Tax Law provides that every employer maintaining an office or transacting business in New York State and making payment of any wages subject to New York State personal income tax must deduct and withhold tax from those wages. The amount of tax to be withheld is to be determined using the appropriate method specified in Part 160 of the personal income tax regulations. Section 675 of the Tax Law provides that every employer required to deduct and withhold is made liable for the tax, including any additions to tax, penalties or interest with respect to the tax.

An employer is not relieved of its requirement to withhold, even if the employee makes estimated tax payments or otherwise satisfies the tax liability on the wages paid by the employer. However, section 676 provides that if the employer fails to deduct and withhold as required and thereafter the employee satisfies the tax liability on the wages, the amount of tax required to be deducted and withheld will not be collected from the employer, but the employer will not be relieved of liability for any additions to tax, penalties or interest otherwise applicable to the employer's failure to deduct and withhold.

Example: A corporation withholds taxes on all employees except the corporate officers. The officers make estimated tax payments for their own accounts, file New York income tax returns, and pay the taxes due on their wages. The taxes required to be withheld from the officers' wages will not be collected from the corporation; however, the corporation will be liable for penalties and interest applicable to its failure to properly withhold.

The preceding requirements also apply for purposes of the New York City and Yonkers personal income taxes and nonresident earning taxes.

Wages Subject to Withholding

Regular Wages

Compensation, including tips and supplemental unemployment compensation benefits, regarded as wages for federal income tax withholding purposes are also wages for purposes of withholding New York State, New York City and Yonkers personal income and nonresident earnings taxes unless an allocation is required, as in the case of nonresidents, or an exception applies, such as the \$3,000 annual threshold applicable to the nonresident earnings taxes, for New York State, New York City or Yonkers purposes.

Supplemental Wages

If supplemental wages (bonuses, commissions, overtime pay, sales awards, etc.) are paid at the same time as regular wages, the New York State, New York City or Yonkers personal income or nonresident earnings taxes to be withheld should be determined as if the total of the supplemental and regular wages were a single wage payment for the regular payroll period. If supplemental wages are paid at a different time, the employer may determine the tax to be withheld by adding the supplemental wages either to the regular wages for the current payroll period or to the regular wages for the last preceding payroll period within the same calendar year. However, if New York State and the applicable city tax has been withheld from an employee's regular wages, the employer may withhold tax from the supplemental wages at rates determined pursuant to regulations issued by the Commissioner of Taxation and Finance, without any allowance for exemptions or deductions. Effective October 1, 1991, the rates are 8.375% for New York State, 1.256% for the Yonkers resident income tax surcharge, .45% for the New York City nonresident earnings tax and .50% for the Yonkers nonresident earnings tax. The New York City resident personal income tax rate is 4.46% for calendar years 1991 and 1992.

Employee Withholding Tax Certificates

Employee Requirements

An employee must complete Form IT-2104, Employee's Withholding Allowance Certificate, if the number of withholding allowances the employee is entitled to claim for New York State, New York City or Yonkers purposes is different from the number the employee is entitled to claim on federal

Form W-4. Under certain circumstances, the employee may not be entitled to claim the same number of allowances for state and city purposes as claimed for federal tax purposes.

An employee who meets the conditions to be exempt from state and city withholding taxes must file with the employer Form IT-2104-E, Certificate of Exemption from Withholding. Otherwise, the employer is required to withhold state and city taxes from the employee's wages.

Employer Requirements

If an employee files Form IT-2104 or IT-2104-E, the employer must withhold (or not withhold) in accordance with the certificate filed. If the employee does not file Form IT-2104 or Form IT-2104-E, the employer must withhold based upon the number of allowances claimed on federal Form W-4. If the employee has not filed federal Form W-4 with the employer, the employee must file Form IT-2104 or Form IT-2104-E.

An employer must send the Tax Department a copy of any withholding tax certificate received during a calendar quarter from an employee who is still employed by that employer at the end of the calendar quarter if:

- a) The employee files Form IT-2104, Employee's Withholding Allowance Certificate, claiming more than 14 withholding allowances; or
- b) The employee files Form IT-2104-E, Certificate of Exemption from Withholding, and the employer reasonably expects that the employee's wages will usually exceed \$200 per week.

A copy of any written statement received from the employee in support of the claims made on the certificate must be included with the submission.

The due dates for submitting certificates are as follows:

<u>Reporting Period</u>	<u>Due Dates</u>
January - March	April 30
April - June	July 31
July - September	October 31
October - December	January 31

In addition, the employer must include with the submission a statement showing the employer's name, address, employer identification number and the number of certificates submitted.

This information is to be mailed to:

NYS Tax Department
Income Tax Audit Administrator
Withholding Certificate Coordinator
Building 9, W. A. Harriman Campus
Albany, New York 12227

After the copies are submitted, the employer shall continue to withhold tax from the employee's wages or continue to exempt the employee's wages from withholding based on the withholding certificate submitted unless or until the employer is notified in writing by the Tax Department that the certificate is defective.

If the Tax Department determines that an employee's withholding certificate is defective, the employer will be advised in writing that this employee is entitled to no more than a specified number of withholding allowances. Upon receipt of the notice, the employer must withhold tax based on the specified number of allowances. In such a case, the employer will be provided with two copies of the notice, one for the employer's records and one to be given to the employee. A separate notice will be mailed by the Tax Department to the employee.

If the employee files a new withholding certificate, the employer may withhold on that basis only if the new certificate claims allowances not greater than the amount specified by the Tax Department.

If the employee wishes to file a new withholding certificate claiming a number of allowances greater than the number allowed by the Tax Department, the employee must detail either on the new certificate or in an attached statement any justification to support the claim. The employee may then submit the new certificate directly to the Tax Department or to the employer, who must then forward a copy to the Tax Department. The employer shall disregard the new certificate unless and until notified in writing by the Tax Department to withhold tax on the basis of the new certificate.

Special Situations

The Department has also found that many employers are not complying with the withholding tax requirements in the following areas:

- S An employer who maintains an office in New York State or transacts business in the state must withhold on those nonresident employees who perform services in New York State.
- S An employer who maintains an office or transacts business in New York State is required to withhold tax on New York State resident employees who work in other states.

Penalties

- S Penalties that may be applicable to employers who are not in full compliance with the New York State withholding tax requirements include, but are not limited to:
 - S The late filing and late payment penalties under sections 685(a)(1) and 685(a)(2) of the Tax Law.
 - S The negligence penalty under section 685(b) where it can be shown that the employer did not take the steps a prudent person would have taken to insure compliance with the Tax Law.
 - S The penalty for willful failure to collect and pay over withholding taxes under section 685(g) of the Tax Law.