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Non-Resident Alien Tax Treaty Policy

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Executive Summary

Non-Resident aliens are individuals who are not U.S. citizens or residents, and are subject to the same federal income tax withholding requirements as other employees for all of their income that is from U.S. sources, with some exceptions. The U.S. has income tax treaties with more than 45 countries that exempt or reduce the amount of withholding from wages earned by non-resident aliens in the U.S. if certain conditions are met. Some treaties have different exemptions or reductions for income earned by independent contractors and by employees.

Considerations

This policy applies to all Commonwealth Branches and Departments.

Policy

Substantial Presence Test

A "Substantial Presence Test" is used to determine the residence status of a foreign citizen for withholding tax purposes.

A foreign citizen is considered a resident alien for tax purposes if:

- Foreign citizens that are a lawful permanent resident of the United States (had a "Green Card") at any time during the current full tax reporting year.
- Physically present in the U.S. for at least 31 days during the current full tax reporting calendar year; and
- 183 days during the current full tax reporting year and the 2 preceding tax reporting years, counting all the days of physical presence in the current tax reporting year, but only one-third the number of days of presence in the first preceding tax reporting year, and only one-sixth the number of days in the second tax reporting preceding year.

Foreign citizens who do not meet these requirements are considered non-resident aliens for tax purposes. The "Substantial Presence Test" has nothing to do with the foreign citizen's intent in staying in the U.S. or whether they have an immigrant or nonimmigrant visa.

For further information on the "Substantial Presence Test" and "Green Card Test", search for these terms on the IRS website. Search also for the term "Tax Topic 851", and see Publication 519 under IRS Publications. The IRS website is: http://www.irs.gov.

Tax Treaty Benefits

Residents of certain foreign countries may be entitled to reduced tax rates or tax exemption under a tax treaty between their country of residence and the United States. To claim benefits of a treaty, an employee must have a visa and be a resident of one of the treaty countries. An employee can claim benefits of only one treaty at any given time. Employees wishing to claim benefits under a tax treaty must submit a written statement to their employer, along with applicable forms (W-4, Form 8233, Form W-8BEN).

According to IRS regulations, if you pay wages to nonresident aliens, you must withhold income tax, social security, and Medicare taxes as you would for a U.S. citizen (unless excepted by federal regulation).

The Commonwealth is required to produce an IRS Form 1042-S for each non-resident alien employee affected by special withholding rates or affected by different taxation rates on specific types of earnings, such as scholarships, grants and fellowships. Earnings reported on a Form 1042-S are not reported on a Form W-2; so, an employee may need both a Form W-2 and a Form 1042-S if some earnings are covered by the special tax treaty rates and some are not.

Non-Resident Alien Paperwork

Employers must obtain this paperwork from each non-resident alien:

- Employee's social security number, taxpayer identification number or foreign visa;
- A completed Form W-8BEN (Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding), attesting to the non-resident alien's identity, foreign status and exemption from withholding based on an income tax treaty, if applicable;
- A completed Form W-4 (Employee's Withholding Allowance Certificate).

Claiming Exempt on Form W-4

Non Resident Alien employees who claim an exemption from tax withholding on their Form W-4 must submit a new Form W-4 annually, attesting to their exempt status. Claims of exemption can be in effect for a maximum of one calendar year at which time the employee must re-file to claim Exempt status. If the employee does not submit a new Form W-4 for the new calendar year by February 15th of that year, they will have their tax status reset to the single status rate, with no withholding allowances.

Information Sources

Legal Authority

- IRS Publication 515: Withholding of Tax on Nonresident Aliens and Foreign Corporations
- IRS Publication 519: U.S. Tax Guide for Aliens
- IRS Publication 901: U.S. Tax Treaties
- Internal Revenue Code § 1441
- Internal Revenue Code §§ 871-879
- M.G.L. c. 7A §§ 3, 7, 8

Links

- http://www.irs.gov

Contacts

- CTR Solution Desk