Title 86 Part 100 Section 100.7035 Nonresident Partners, Subchapter S Corporation Shareholders, and Trust Beneficiaries (IITA Section 709.5)

Section 100.7035 Nonresident Partners, Subchapter S Corporation Shareholders, and Trust Beneficiaries (IITA Section 709.5)

a) In General. For each taxable year ending on or after December 31, 2008, every pass-through entity must withhold from each nonresident owner an amount equal to the distributive share of that owner under sections 702 and 704 and subchapter S of the Internal Revenue Code, whether or not distributed, of: the business income of the pass-through entity that is apportionable to Illinois plus, for taxable years ending on or after December 31, 2014, the nonbusiness income of the partnership, subchapter S corporation, or trust allocated to Illinois under IITA Section 303 (other than an amount allocated to the commercial domicile of the taxpayer under IITA Section 303), multiplied by the applicable tax rate for that owner under IITA Section 201(a) through (d). For taxable years ending on or after December 31, 2014, the liability for each nonresident owner shall be reduced (but not below zero) by any credit under IITA Article 2 that is distributable by the partnership, subchapter S corporation, or trust to that owner for the taxable year. (See IITA Section 709.5.)

b) Definitions. For purposes of this Section:

1) Certificate of Exemption. A certificate of exemption is a statement made in the form and manner prescribed by the Department that the owner completing the certificate undertakes to:

A) file all returns required to be filed under IITA Section 502;

B) timely pay all tax imposed under IITA Section 201 or required to be withheld under IITA Section 709.5; and

C) submit to the jurisdiction of the State of Illinois for purposes of collecting any amount owed in income tax, interest or penalties. (See IITA Section 709.5.)

2) Owner. The term "owner" of a pass-through entity means a partner in the partnership, a shareholder in the subchapter S corporation or a beneficiary of the trust.

3) Pass-through Entity. The term "pass-through entity" means a partnership (other than a publicly traded partnership under IRC section 7704 or an investment partnership under Section 100.9370), subchapter S corporation or trust.

c) Time for Filing Return and Paying Tax Withheld. A pass-through entity shall report the amounts withheld and the owners from whom the amounts were withheld, and pay over the amounts withheld, no later than the due date (without regard to extensions) of the tax return of the pass-through entity for the taxable year. (See IITA Section 711(a-5).) For purposes of abatement of penalties under UPIA Section 3-8, for taxable years ending on or after December 31, 2014, a pass-through entity shall be deemed to have reasonable cause for not filing the report by the due date required under this subsection if the report is filed no later than the due date under IITA Section 505 (including extensions) of the return of the pass-through entity for the taxable year.

d) Credit for Taxes Withheld. An owner from whom an amount of tax was withheld under subsection (a) with respect to its share of the income of a pass-through entity and paid to the Department is entitled to a credit equal to that amount against its liability under IITA Section 201 for the taxable year in which that business income is included in its base income. (See IITA Section 709.5(b).)

1) If the owner is a pass-through entity, it may claim some or all of that amount as a credit against the amount it is required to withhold from its owners under this Section, in lieu of claiming the credit against its liability under IITA Section 201. (See IITA Section 709.5(b).) Once a return claiming an amount of credit against the owner's liability under this Section or under IITA Section 201 has been filed, the owner may not claim that amount as a credit against any other liability.

2) For purposes of computing penalty and interest on late payment of tax due by an owner, the amount withheld and paid to the Department with respect to that owner is treated as paid no later than the last day of the taxable year of the pass-through entity withholding that amount. (See IITA Section 804(g)(2).)

e) Overpayments. A pass-through entity may not claim a refund or credit for any overpayment of withholding due under subsection (a) with respect to any owner. In addition, an owner has no right of action against the pass-through entity for overpayment of withholding. (See IITA Section 712.) In the case of any overpayment, the remedy is for the owner to file a timely claim for credit or refund for any amount withheld under subsection (a) with respect to it.

f) Underpayments. If a pass-through entity fails to timely pay the full amount of withholding due under this Section:

1) The pass-through entity is relieved of its obligation to pay any amount due with respect to an owner, if the owner has paid its liability under the IITA on the income from which withholding was required. However, the pass-through entity is not relieved of any penalty or interest otherwise applicable with respect to its failure to timely pay the withholding. (See IITA Section 713.)

2) No penalty or interest may be assessed against an owner for failure to timely pay a liability under the IITA (including a liability under this Section), to the extent that failure is the result of the failure of a pass-through entity to withhold and timely pay tax under this Section with respect to income of that owner, except when that pass-through entity's failure to timely pay the tax was caused by the owner and only to the extent the Department has not collected payment of interest or penalties from the pass-through entity with respect to that underpayment.

g) Exemption from withholding.

1) Pass-through entities are not required to withhold tax under this Section from any owner:

   A) who is exempt from taxation under IRC section 501(a) or under IITA Section 205;

   B) who is included on a composite return filed by the entity for the taxable year under IITA Section 502(f); or

   C) who is not an individual and, on the date withholding is required to be reported and paid for a taxable year, the pass-through entity has in its possession a valid certificate of exemption for that owner.

2) No owner has any right of action against a pass-through entity for withholding tax from that owner despite exemption under this subsection (g). (See IITA Section 712.) Instead, the owner must file a timely claim for refund of the withholding.

h) Certificates of Exemption

   1) For purposes of this Section, a certificate of exemption is valid if it:

      A) is completed using the form prescribed by the Department; and

      B) has not been revoked.

   2) Recordkeeping. Certificates of Exemption shall be retained by the pass-through entity and made available to the Department in the same manner as other records required to be maintained under IITA Section 501.

   3) Revocation. If an owner that has provided a pass-through entity with a Certificate of Exemption fails to timely file a return that reports its share of the income allocated or apportioned to Illinois by the pass-through entity or to timely pay the tax shown due on a return that reports its share of the business income apportioned to Illinois by the pass-through entity, the Department may at any time thereafter revoke the Certificate of Exemption by serving notice upon the pass-through entity at its usual place of business or by mail to the pass-through entity's last-known address. The revocation is effective with respect to all payments and returns of withholding due more than 60 days after the date the notification is issued by the Department. Once a notification has been issued by the Department with respect to a particular owner, the pass-through entity may not treat a Certificate of Exemption from the same owner as valid unless the pass-through entity has been notified by the Department, in writing, that it may again accept a Certificate of Exemption from that owner. Because revocation of a Certificate of Exemption imposes no additional tax liability, but merely affects the timing and method of payment, and no provision is made in the IITA for protest or review of a revocation, neither the owner nor the pass-through entity has any right to protest or seek review by the courts of a revocation.

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