SENATE BILL 212

50TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2012

INTRODUCED BY

Timothy Z. Jennings

AN ACT

RELATING TO TAXATION; CLARIFYING PROVISIONS IN THE OIL AND GAS PROCEEDS AND PASS-THROUGH ENTITY WITHHOLDING TAX ACT; EXCEPTING INSURANCE COMPANIES FROM WITHHOLDING PROVISIONS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 7-3A-3 NMSA 1978 (being Laws 2003, Chapter 86, Section 6, as amended) is amended to read:

"7-3A-3. WITHHOLDING FROM OIL AND GAS PROCEEDS AND NET INCOME.--

A. Except as otherwise provided in this section, a remitter shall deduct and withhold from each payment of oil and gas proceeds being made to a remittee <u>for each quarter</u> an amount equal to the rate specified in Subsection D of this section multiplied by the amount prior to withholding that otherwise would have been payable to the remittee.

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B. Except as otherwise provided in this section, a pass-through entity shall deduct and withhold from each owner's distributed share of net income for that [~~quarter~~] calendar year an amount equal to the rate specified in Subsection D of this section multiplied by the owner's distributed share of that net income, reduced, but not below zero, by the amount required to be withheld from the owner's distributed net income under Subsection A of this section.

C. The obligation to deduct and withhold from payments or distributed net income as provided in Subsections A and B of this section does not apply to payments that are made to:

(1) a corporation whose principal place of business is in New Mexico or an individual who is a resident of New Mexico;

(2) remittees with a New Mexico address as shown on internal revenue service form 1099-Misc or a successor form or on a *pro forma* 1099-Misc or a successor form for those entities that do not receive an internal revenue service form 1099-Misc;

[~~(2)~~] (3) the United States, this state or any agency, instrumentality or political subdivision of either;

[~~(3)~~] (4) any federally recognized Indian nation, tribe or pueblo or any agency, instrumentality or political subdivision thereof; or

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[~~(4)~~] (5) organizations that have been granted exemption from the federal income tax by the United States commissioner of internal revenue as organizations described in Section 501(c)(3) of the Internal Revenue Code.

D. Except as provided in Subsection [~~I~~] H of this section, the rate of withholding shall be set by a department directive; provided that the rate may not exceed the higher of the maximum bracket rate set by Section 7-2-7 NMSA 1978 for the taxable year or the maximum bracket rate set by Section 7-2A-5 NMSA 1978 for the taxable year; and provided further that remitters shall be given ninety days' notice of a change in the rate.

[~~E. Except as provided in Subsection I of this section, if a pass-through entity has been in existence for at least one full taxable year prior to the current calendar year, the pass-through entity may use one-fourth of its total net income for the preceding full taxable year to compute the amount required to be deducted and withheld each quarter under Subsection B of this section.~~

~~F.~~] E. If a remitter receives oil and gas proceeds from which an amount has been deducted and withheld pursuant to the Oil and Gas Proceeds and Pass-Through Entity Withholding Tax Act or a pass-through entity has deducted and withheld an amount pursuant to the Oil and Gas Proceeds and Pass-Through Entity Withholding Tax Act from the distributed net income of

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an owner that is also a pass-through entity, the remitter or payee pass-through entity may take credit for that amount in determining the amount the remitter or payee pass-through entity must withhold and deduct pursuant to this section.

[~~G.~~] F. If the amount to be withheld from all payments to a remittee in a calendar quarter has not exceeded thirty dollars ($30.00) and a payment to a remittee is less than ten dollars ($10.00), no withholding is required. If the amount to be withheld from an owner's share of distributed net income in any calendar quarter is less than thirty dollars ($30.00), no withholding is required.

[~~H.~~] G. Except as provided in Subsection [~~I~~] H of this section, at the option of a remitter or pass-through entity, a remitter or pass-through entity may agree with a remittee or an owner that the remittee or owner pay the amount that the remitter or pass-through entity would have been required to withhold and remit to the department on behalf of the remittee or owner pursuant to the Oil and Gas Proceeds and Pass-Through Entity Withholding Tax Act. The payments by the remittee or owner shall be remitted on the dates set forth in Section 7-3A-6 NMSA 1978 on forms and in the manner required by the department.

[~~I.~~] H. Excluding wages, a personal services business shall deduct and withhold an amount equal to the owner's share of distributed net income multiplied by the highest rate for single individuals provided in Section 7-2-7 NMSA 1978.

I. If the remittee is an insurance company and falls under the provisions of Section 59A-6-6 NMSA 1978, no withholding is required pursuant to this section."

SECTION 2. Section 7-3A-4 NMSA 1978 (being Laws 2003, Chapter 86, Section 7, as amended) is amended to read:

"7-3A-4. DEDUCTIONS CONSIDERED TAXES.--Amounts deducted under the provisions of the Oil and Gas Proceeds and Pass-Through Entity Withholding Tax Act are a collected tax. A remittee who receives payment of oil and gas proceeds or an owner with a share of distributed net income does not have a right of action against the remitter or pass-through entity for the amount deducted and withheld from the oil and gas proceeds or net income."

SECTION 3. Section 7-3A-5 NMSA 1978 (being Laws 2003, Chapter 86, Section 8, as amended) is amended to read:

"7-3A-5. REMITTERS AND PASS-THROUGH ENTITIES LIABLE FOR AMOUNTS DEDUCTED AND WITHHELD--EXCEPTIONS.--

A. Every remitter or pass-through entity is liable for:

(1) amounts required to be deducted and withheld by the Oil and Gas Proceeds and Pass-Through Entity Withholding Tax Act regardless of whether the amounts were in fact deducted and withheld; and

(2) for the amounts that a remittee or an owner has agreed to remit pursuant to Subsection [~~H~~] G of Section 7-3A-3 NMSA 1978, once the department has notified the remitter or pass-through entity that the remittee or owner has failed to remit.

B. A remitter or pass-through entity is not liable for amounts required to be deducted and withheld by the Oil and Gas Proceeds and Pass-Through Entity Withholding Tax Act but not deducted or withheld if:

(1) the remitter or pass-through entity fails to deduct and withhold the required amounts and if the tax against which the required amounts would have been credited is paid; or

(2) the remitter's or pass-through entity's failure to deduct and withhold the required amounts is due to reasonable cause.

[~~C. The making of a timely election for federal income tax purposes that changes the net income of a pass-through entity in a prior quarter is a reasonable cause for failure to withhold and deduct the required amounts on the change in net income due to the election.~~]"

SECTION 4. Section 7-3A-6 NMSA 1978 (being Laws 2003, Chapter 86, Section 9, as amended) is amended to read:

"7-3A-6. DATE PAYMENT DUE--FORM.--

A. Amounts withheld under the provisions of the Oil

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and Gas Proceeds and Pass-Through Entity Withholding Tax Act by a remitter are due on or before the twenty-fifth day of the month following the end of the calendar quarter when the taxes were required to be withheld.

B. Amounts withheld under the provisions of the Oil and Gas Proceeds and Pass-Through Entity Withholding Tax Act by a pass-through entity are due on or before the twenty-fifth day of the month following the end of the calendar year when the taxes were required to be withheld.

C. The amount withheld shall be remitted on a form and in a manner required by the department, provided that amounts withheld and remitted from oil and gas proceeds are kept distinct from every other tax or withheld amount."

SECTION 5. Section 7-3A-7 NMSA 1978 (being Laws 2003, Chapter 86, Section 10, as amended) is amended to read:

"7-3A-7. STATEMENTS OF WITHHOLDING.--

A. Every remitter shall:

(1) file an annual statement of withholding for each remittee that:

(a) is available in [~~a form prescribed by the department~~] electronic format and includes a form 1099-Misc or a successor form or on a *pro forma* 1099-Misc or a successor form for those entities that do not receive an internal revenue service form 1099-Misc;

(b) is filed with the department on or

before the last day of February of the year following that for which the statement is made; and

(c) includes the total oil and gas proceeds paid to the remittee and the total amount of tax withheld for the calendar year; and

(2) provide a copy of the annual statement of withholding to the remittee on or before February 15 of the year following the year for which the statement is made.

B. The department shall develop and adopt rules regarding the filing of a report pursuant to this section and the attachment of form 1099-Misc or a successor form or a *pro forma* 1099-Misc or a successor form, if the remitter is not able to file those forms in an electronic format.

C. Every remitter shall file an electronic report of the remittees who have certified that the remittee is responsible for filing the remittee's own oil and gas proceeds tax report and for paying the remittee's oil and gas proceeds tax liability due.

[~~B.~~] D. Every pass-through entity doing business in New Mexico shall:

(1) file an annual information return with the department that:

(a) is filed on or before the due date of the entity's federal return for the taxable year;

(b) is signed by the business manager or one of the owners of the pass-through entity; and

(c) contains all information required by the department, including the pass-through entity's gross income; the pass-through entity's net income; the amount of each owner's share of the pass-through entity's distributed net income; and the name, address and tax identification number of each owner entitled to a share of distributed net income; and

(2) provide to each of its owners sufficient information to enable the owner to comply with the provisions of the Income Tax Act and the Corporate Income and Franchise Tax Act with respect to the owner's share of distributed net income.

[~~C.~~] E. The department shall compile each year the annual statements of withholding received from the remitters and the annual information returns received from pass-through entities and compare the compilations with the records of corporations, individuals, estates or trusts filing income tax returns."

SECTION 6. Section 7-3A-8 NMSA 1978 (being Laws 2003, Chapter 86, Section 11, as amended) is amended to read:

"7-3A-8. WITHHELD AMOUNTS CREDITED AGAINST INCOME TAX.--The entire amount of oil and gas proceeds and distributed net income upon which the tax was deducted and withheld or upon which payments were made by owners in lieu of withholding shall be included in the base income of the remittee for purposes of the Income Tax Act and the Corporate Income and Franchise Tax Act. The amount of tax deducted and withheld or payments made by owners in lieu of withholding pursuant to the Oil and Gas Proceeds and Pass-Through Entity Withholding Tax Act during the taxable year shall be credited against any income tax or corporate income tax due from the remittee or owner."

SECTION 7. APPLICABILITY.--The provisions of this act apply to taxable years beginning on or after January 1, 2012.