

AN ACT

RELATING TO TAXATION; AMENDING THE WITHHOLDING TAX ACT TO REQUIRE PASS-THROUGH ENTITIES TO FILE INFORMATION RETURNS AND TO WITHHOLD TAX FROM CERTAIN OWNERS.

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

Section 1. Section 7-3-2 NMSA 1978 (being Laws 1990, Chapter 64, Section 1, as amended) is amended to read:

"7-3-2. DEFINITIONS.--As used in the Withholding Tax Act:

A. "department" means the taxation and revenue department, the secretary of taxation and revenue or any employee of the department exercising authority lawfully delegated to that employee by the secretary;

B. "employee" means either an individual domiciled within the state who performs services either within or without the state for an employer or, to the extent permitted by law, an individual domiciled outside of the state who performs services within the state for an employer;

C. "employer" means a person, or an officer, agent or employee of that person, having control of the payment of wages, doing business in or deriving income from sources within the state for whom an individual performs or performed any service as the employee of that person, except that if the person for whom the individual performs or

performed the services does not have control over the payment of the wages for such services, "employer" means the person having control of the payment of wages;

D. "Internal Revenue Code" means the Internal Revenue Code of 1986, as amended;

E. "owner" means a partner in a partnership not taxed as a corporation for federal income tax purposes for the taxable year, a shareholder of an S corporation or of a corporation other than an S corporation that is not taxed as a corporation for federal income tax purposes for the taxable year, a member of a limited liability company or any similar person holding an ownership interest in any business association, other than a sole proprietorship, not taxed as a corporation for federal income tax purposes for the taxable year;

F. "pass-through entity" means any business association other than:

- (1) a sole proprietorship;
- (2) an estate or trust; or
- (3) a corporation, limited liability

company, partnership or other entity not a sole proprietorship taxed as a corporation for federal income tax purposes for the taxable year;

G. "payor" means any person making payment of a pension or annuity to an individual domiciled in New Mexico;

H. "payroll period" means a period for which a payment of wages is made to the employee by his employer;

I. "person" means any individual, club, company, cooperative association, corporation, estate, firm, joint venture, partnership, receiver, syndicate, trust or other association and, to the extent permitted by law, any federal, state or other governmental unit or subdivision or an agency, department or instrumentality thereof;

J. "wagerer" means any person who receives winnings that are subject to withholding;

K. "wages" means remuneration in cash or other form for services performed by an employee for an employer;

L. "winnings that are subject to withholding" means "winnings which are subject to withholding" as that term is defined in Section 3402 of the Internal Revenue Code;

M. "withholdee" means:

(1) an individual domiciled in New Mexico receiving a pension or annuity from which an amount of tax is deducted and withheld pursuant to the Withholding Tax Act;

(2) an employee; and

(3) a wagerer; and

N. "withholder" means a payor, an employer or any person required to deduct and withhold from winnings that are subject to withholding."

Chapter 243, Section 5, as amended) is amended to read:

"7-3-5. WITHHOLDER LIABLE FOR AMOUNTS DEDUCTED AND WITHHELD--EXCEPTIONS.--Every withholder or pass-through entity shall be liable for amounts required to be deducted and withheld by the Withholding Tax Act regardless of whether the amounts were in fact deducted and withheld, except that:

A. if the withholder 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, the withholder shall not be liable for those amounts not deducted and withheld; or

B. if the withholder's or pass-through entity's failure to deduct and withhold the required amounts was due to reasonable cause, the withholder or pass-through entity shall not be liable for amounts not deducted and withheld."

Section 3. A new section of the Withholding Tax Act is enacted to read:

"INFORMATION RETURN REQUIRED FROM PASS-THROUGH ENTITY--WITHHOLDING.--

A. A pass-through entity doing business in this state shall file an annual information return with the department on or before the due date of the entity's federal return for the taxable year. The information return shall be signed by the business manager or one of the owners of the pass-through entity.

B. The information return required by this section shall contain all information required by the department, including:

- (1) the pass-through entity's gross income;
- (2) the pass-through entity's net income;
- (3) the amount of each owner's share of the pass-through entity's net income; and
- (4) the name, address and tax identification number of each owner entitled to a share of net income.

C. A pass-through entity shall 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 net income.

D. At the time of filing the information return required by this section, the pass-through entity shall deduct and withhold from each nonresident owner's share of net income an amount equal to the owner's share of net income multiplied by a rate set by department regulation. In the case of an owner who is an individual or entity not taxed as a corporation for federal income tax purposes for the taxable year, the rate shall not exceed the rate for composite returns. In the case of an owner that is a corporation or other entity taxed as a corporation for the taxable year, the rate shall not exceed the maximum rate for corporate income

tax.

E. The provisions of Subsection D of this section shall not apply with regard to the share of net income of a nonresident owner who has executed an agreement with the department that the owner will report and pay tax, if required, on its own return pursuant to the Income Tax Act or the Corporate Income and Franchise Tax Act.

F. Amounts deducted from the owner's share of net income under the provisions of this section shall be a collected tax. No owner shall have a right of action against the pass-through entity for any amount deducted and withheld from the owner's share of net income."

Section 4. APPLICABILITY.--The provisions of this act are applicable to taxable years beginning on or after January 1, 1999.

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