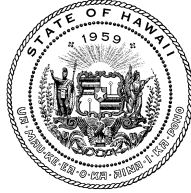


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November 10, 2009

LETTER RULING NO. 2009-07

[redacted]

Re: Hawaii Income Tax Withholding Obligation for Crew Members Working on Research Vessels

Dear [redacted]:

This responds to your letter dated [redacted], requesting a determination on whether your research organization client, [redacted] ("Research Organization"), should withhold Hawaii income taxes of its employee crew members for services they perform on oceangoing research vessels.

SHORT ANSWER

Research Organization should not withhold Hawaii income taxes on wages earned by its employee crew members performing services on oceangoing research vessels. However, Research Organization may withhold wages of an individual crew member if it enters into a voluntary agreement with that crew member.

FACTS

Research Organization hires personnel and procures goods and services to conduct research on behalf of its clients. While most of the projects handled by Research Organization are in the state of Hawaii, many transcend the boundaries of the state into different parts of the world.

Research Organization conducts research activities aboard one or more oceangoing vessels. During its research voyages, which can last several months, the vessels may sail in Hawaiian waters, in other states' waters, in the waters of U.S. territories and possessions, in the waters of foreign countries and in international waters. The vessels have their home port in

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Honolulu, Hawaii but make port calls in other Hawaii ports and out-of-state ports including those in other states, U.S. territories and possessions, and foreign countries.

Research Organization retains officers and crew members to operate the vessels and to perform various tasks aboard the vessels including research activities (collectively, the "crew"). The crew includes Hawaii residents and nonresidents.

The crew performs services while aboard the vessels during the entire period of the voyage. Services are performed while in port, in Hawaiian waters, in other states' waters, in waters of U.S. territories or possessions, in foreign waters or in international waters.

Research Organization charges its clients for the services it performs in arranging the itineraries and assembling the officers and crew members for these ocean voyages as well as for the actual services performed by its employees. Payments made to crew member employees are made out of Research Organization's main office located in Honolulu, Hawaii.

LAW AND ANALYSIS

The general rule is that employers in Hawaii are required to withhold income tax on all payments of compensation to employees. HRS § 235-61(b) states:

Every employer, as defined herein, making payment of wages, as herein defined, to employees, shall deduct and withhold from such wages an amount of tax determined as provided in this section.

Both Hawaii and federal statutes contain exceptions to this general rule for employers of certain merchant vessel crew members. The Hawaii exception is found at Hawaii Administrative Rules ("HAR") § 18-235-61-03(b)(2)(L):

(2) Additionally, the director finds withholding from the following payments to be unduly onerous or impracticable of enforcement. Therefore, an employer shall not withhold from the following payments.

...

(L) Remuneration for services performed by an officer or member of the crew aboard a vessel engaged in foreign, interstate, intercoastal, coastwide, or noncontiguous trade, including an officer or member of the crew of an airplane traveling between points in the State and points outside the State. An officer or member of a crew on a vessel in the coastwide trade between ports within the State, however, may reach a voluntary agreement with the employer to have tax withheld. Although not subject to withholding, remuneration of services performed by officers and crew members shall be reported on the recipient's respective state income tax return subject to section 235-7(a)(8), HRS.

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The federal exception is found at 46 U.S.C. § 11108(a):

Withholding. Wages due or accruing to a master or seaman on a vessel in the foreign, coastwise, intercoastal, interstate, or noncontiguous trade or an individual employed on a fishing vessel or any fish processing vessel may not be withheld under the tax laws of a State or a political subdivision of a State. However, this section does not prohibit withholding wages of a seaman on a vessel in the coastwise trade between ports in the same State if the withholding is under a voluntary agreement between the seaman and the employer of the seaman.

The statutes require that employers not withhold Hawaii income taxes from remuneration for services performed by crew members of vessels engaged in foreign, interstate, intercoastal, coastwise, coastwise or noncontiguous trade unless there is a voluntary agreement between the employer and crew member in the coastwise or coastwise trade between ports in the state to have the taxes withheld.

Research Organization represents that, based on planned itineraries, the vessels are engaged in foreign, interstate, intercoastal, coastwise or noncontiguous trade. Based upon these representations, federal and state law require that Research Organization not withhold Hawaii income tax from wages paid to crew members of its research vessels unless the employee crew member requests such a withholding be made.

CONCLUSION

Hawaii income taxes should not be withheld for all crew members, both Hawaii resident and nonresident, performing services aboard Research Organization's vessels that travel between and among its home port in Honolulu and other ports in the state of Hawaii, the U.S. mainland, U.S. territories and possessions, and foreign countries. However, a voluntary agreement to withhold may be entered into by Research Organization and the crew members of the vessels in coastwise trade between ports in the state.

This ruling only applies to Hawaii state income tax withholding obligations of Research Organization based upon its representations. The actual individual Hawaii state income tax liability for each employee is the responsibility of that individual employee and is not addressed in this opinion. This ruling also does not apply to the withholding obligations of any other taxpayer.

The conclusions reached in this letter are based on our understanding of the facts that Research Organization has represented. If it is later determined that our understanding of these facts is not correct, the facts are incomplete, or the facts later change in any material respect, the conclusion in this letter will be modified accordingly. This ruling also may be subject to change due to future amendments to laws, rules, or official Department positions.

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If you have any further questions regarding this matter, please call me at 808-587-5334. Additional information on Hawaii's taxes is available at the Department's website at **www.state.hi.us/tax**.

Sincerely,

s/ Jacob L. Herlitz

Jacob L. Herlitz
Administrative Rules Specialist