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TAX INFORMATION RELEASE

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RE: Income Tax Issues Affecting Nonresident Aliens



This Tax Information Release discusses the affect of tax treaties between the United States government and foreign nations on certain aspects of the Hawaii State Income Tax Law and nonresident aliens.

The provisions of tax treaties which discuss nondiscrimination state that individuals who are nationals of a contracting state and who are residents of the other contracting state shall not be discriminated against. Thus, tax treaties do not apply to nonresident aliens. The Washington office of the Internal Revenue Service supports this reading. As with all residency problems, the burden of proof is upon the taxpayer. The preceding discussion, however, does not solve all of the problems which may be raised concerning nonresident aliens and the application of the Hawaii Income Tax Law.

The following discusses the Department of Taxation's treatment of nonresident aliens for the purposes of filing joint Hawaii income tax returns, and the claiming of the standard deduction, itemized deductions, and personal exemptions.

1. FILING JOINT RETURNS

Section 235-93, Hawaii Revised Statutes (HRS), provides, in part, that "A husband and wife, having that status for purposes of the Internal Revenue Code and entitled to make a joint federal return for the taxable year, may make a single return jointly of taxes under this chapter for the taxable year." Internal Revenue Code (IRC) section 6013(a)(1) does not allow the filing of a joint return if either the husband or wife, at any time during the taxable year, is a nonresident alien. Hawaii has adopted the provisions of IRC section 6013(a)(1) in section 18-235-93(a)(2), Hawaii Administrative Rules, and will not allow the filing of a joint return by nonresident aliens.

2. STANDARD DEDUCTION

IRC section 63 is adopted for Hawaii income tax purposes by section 235-2.3, HRS. This adoption is modified by section 235-2.4(a), HRS, regarding the amount of the standard deduction allowed and the allowance of additional standard deduction amounts for taxpayers 65 years of age or older. Our adoption of IRC section 63(c)(6)(B), which does not allow the use of the standard deduction by nonresident aliens, is not modified. Therefore, the standard deduction will not be allowed to nonresident aliens.

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3. ITEMIZED DEDUCTIONS

Section 235-5(c), HRS, places limitations on the deductions which may be taken by persons who are not taxable, for Hawaii purposes, on their entire income. Deductions connected with income taxable under Hawaii's Income Tax Law are allowed, while deductions connected with income not subject to Hawaii's income tax are not allowed. Deductions from adjusted gross income that are not connected with particular property or income, are allowed to the extent of the ratio of the adjusted gross income attributed to this State to the entire gross income from all sources. IRC section 873, which limits the deductions for nonresident aliens, is not operative for Hawaii purposes.

Section 235-5, HRS, applies to nonresident citizens and shall be applied equally to nonresident aliens.

4. PERSONAL EXEMPTIONS

Section 235-54, HRS, provides that the number of personal exemptions an individual may claim is determined by ascertaining the number of personal exemptions that the individual may lawfully claim under the Internal Revenue Code, and adds an additional exemption for the taxpayer or the taxpayer's spouse who is 65 years of age or older within the taxable year. A nonresident is entitled to the same personal exemptions as a resident, i.e., as is allowed under the Internal Revenue Code and the extra exemptions for age.

IRC section 873(b)(3) allows nonresident aliens the ". . . personal exemptions allowed by IRC section 151, except that only one exemption shall be allowed under IRC section 151 unless the taxpayer is a resident of a contiguous country or is a national of the United States." IRC section 873 is not operative for Hawaii purposes. Section 235-2.5(a), HRS, provides that if an inoperative provision of the IRC has not been codified in our tax law, the noncodified provision shall not apply. The reference in section 235-54, HRS, to IRC section 151 is not limited by IRC section 873 for Hawaii purposes. Therefore, a nonresident alien is allowed the same personal exemptions as a nonresident citizen.


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HRS Sections Explained: 235-2.3, 235-2.4, 235-5(c), 235-54, and 235-93
Rule Section Explained: 18-235-93(a)(2)