

NOTICE OF INTENT

Department of Revenue Policy Services Division

Income: Withholding Tax (LAC 61:I.1511)

Under authority of R.S. 47:112, R.S. 47:164, and R.S. 47:1511, and in accordance with the provisions of the Administrative Procedure Act, R.S. 49:950 et seq., the Department of Revenue, Policy Services Division, proposes to adopt LAC 61:I.1511 to address withholding of income tax at the source.

R.S. 47:164(D) provides that the collector may require persons having control, receipt, custody, disposal, or payment of amounts paid or payable to any person to deduct and withhold income tax payable from such person and to report and pay the tax to the collector. This proposed regulation will specify the persons who must withhold income tax, the rules that apply to such persons, and certain payments for which withholding at the source is required.

Title 61

REVENUE AND TAXATION

Part I. Taxes Collected and Administered

by the Secretary of Revenue

Chapter 15. Income: Withholding Tax

§1511. Withholding Tax at the Source

A. General Rules of Withholding

1. Requirement to Withhold Payments. Beginning with the calendar year 2008, a withholding agent must withhold and deposit tax at the applicable rate on the payment of an amount subject to withholding made to a payee.

2. Withholding Agent. For purposes of this Section, the term "withholding agent" means any person engaged in a trade or business or any activity entered into for profit that has the control, receipt, custody, disposal, or payment of an item of income subject to withholding. Any person who meets the definition of a withholding agent is required to deposit any tax withheld under R.S. 47:164 and this Section and to file withholding tax returns, except as provided in this Section. When more than one person qualifies as a withholding agent with respect to a single payment, only one tax is required to be withheld and deposited.

3. Failure to Withhold. If a withholding agent fails to withhold and deposit any tax as required under this Section, the secretary may seek payment of the tax from any person that is a withholding agent with respect to the amount required to be withheld. A withholding agent is not excused from the withholding requirement if another withholding agent fails to withhold and deposit the amount due.

4. Penalties for Failure to Withhold. A withholding agent is personally liable for the amounts required to be withheld under R.S. 47:164 and this Section. A withholding agent failing to properly withhold, remit, and file shall be subject to interest and penalties including those provided in R.S. 47:1601, 47:1602, 47:1604, 47:1604.1, and 47:1604.2.

5. Withholding Tax Return, Receipts for Payees, and Annual Reconciliation

a. A withholding agent must file with the secretary a calendar quarterly return in a form prescribed by the secretary together with the amount of tax withheld. Returns and payments are due on or before the last day of the month following the close of the reporting period.

b. A withholding agent must furnish to the payee, in duplicate, prior to January 31 of the succeeding year, a written receipt in a form prescribed by the secretary. The receipt must set forth the name, address, and Louisiana account number of the payee and the withholding agent, the type of income subject to withholding, the amount of the income, and the amount of tax that has been withheld.

c. On or before the first business day following February 27 for the preceding calendar year, a withholding agent must file with the secretary an annual reconciliation return, in a form prescribed by the secretary, to which must be attached copies of the receipts required by this Paragraph to be furnished to the payees.

6. Withholding Agent not Liable to Payee. A withholding agent is indemnified against the claims and demands of any person for the amount of any tax it deducts and withholds in accordance with this Section and the provisions of R.S. 47:112 and R.S. 47:164. A withholding agent that withholds based on a reasonable belief that withholding is required is treated for purposes of this Paragraph as having withheld tax in accordance with the provisions of R.S. 47:112 and R.S. 47:164. This Paragraph does not apply to relieve a withholding agent from tax liability for failure to withhold.

7. Examples. The following examples illustrate the rules of this Paragraph:

Example 1. Tenant leases an office building located in this state from lessor for use in tenant's business. The terms of the lease require tenant to pay monthly rental of \$20,000 to lessor. Lessor, a nonresident of this state, hires manager to collect all rents received from tenants of the office building. Tenant and manager are withholding agents with respect to the rental payments paid for tenant's use of the office building. Only one withholding amount of \$400 (2 percent of \$20,000) is required on each \$20,000 rental payment. If tenant and manager fail to withhold and deposit tax on the rental payments, the Department of Revenue may seek payment from either tenant or manager.

Example 2. Lessee is an individual who leases an apartment from Lessor, a nonresident of this state, for lessee's personal use. Under the terms of the lease, lessee is required to pay \$600 per month in rentals to lessor. Because the rental payment is not made in connection with the conduct of a trade or business or an activity entered into for profit by lessee, lessee is not a withholding agent. Thus, lessee is not required to withhold any amount when lessee makes monthly rental payments.

B. Certain Payments for Which Withholding at the Source is Required

1. Non-Employee Compensation

a. A withholding agent must withhold and deposit income tax on payments of non-employee compensation paid to resident or nonresident persons or entities. Income tax must be withheld at the rate of 2 percent on payments to licensed contractors for construction, repair, or improvements to real property and at the rate of 4.2 percent on all other non-employee compensation.

b. For purposes of this Section, the term *non-employee compensation* means any amounts required by the United States Internal Revenue Service to be reported as non-employee compensation on federal form 1099-MISC subject to the following modification in Subparagraph c of this Paragraph.

c. Payments to a corporation will be considered non-employee compensation if the same payment made to a

natural person would be considered non-employee compensation.

d. The first \$1,000 of the total payments to a payee during a calendar year shall be exempt from withholding under this Section.

2. Rents. A withholding agent must withhold and deposit income tax at a rate of 2 percent on payments to nonresident persons or entities of rents from immovable or corporeal movable property located in the state. A nonresident entity is any entity that does not have an office or other fixed place of business in the state. A withholding agent may rely on a written statement received from the payee that the payee is a resident unless the withholding agent has actual knowledge or reason to know that the statement is incorrect. A withholding agent is considered to have reason to know that a payee's statement of residence is incorrect if its knowledge of relevant facts or statements contained in the statement or other documentation is such that a reasonably prudent person in the position of the withholding agent would question the claim of resident status made.

3. Natural Resource Royalties. A withholding agent must withhold and deposit income tax at a rate of 4.2 percent on payments of natural resource royalties to nonresident persons or entities of royalties from property located in the state. A nonresident entity is any entity that does not have an office or other fixed place of business in the state. A withholding agent may rely on a written statement received from the payee that the payee is a resident unless the withholding agent has actual knowledge or reason to know that the statement is incorrect. A withholding agent is considered to have reason to know that a payee's statement of residence is incorrect if its knowledge of relevant facts or statements contained in the statement or other documentation is such that a reasonably prudent person in the position of the withholding agent would question the claim of resident status made.

4. Rights to Use Intellectual Property, Intangibles, or Trademarks in the State. A withholding agent must withhold and deposit income tax at a rate of 4.2 percent on payments of royalties or similar revenues to resident or nonresident persons or entities for the right to use in the state patents, trademarks, tradenames, copyrights, secret processes, and similar intangibles.

a. For purposes of this Section, the term *withholding agent* includes persons that license the right to perform songs and musical works created and owned by songwriters, composers, lyricists, and music publishers or collects royalties on behalf of others including but not limited to the performing rights societies of the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music Incorporated (BMI), and the Society of European Stage Authors and Composers (SESAC).

b. These withholding agents must withhold and deposit income tax on the gross amount to be distributed to owners of intangibles as a result of licensing these rights in Louisiana. However, these withholding agents may credit any amount of tax previously withheld on payments made to them.

C. Requirements for Payees

1. Payee. For purposes of this Section the term *payee* means any person entitled to receive any item of income subject to withholding.

2. Payee's Obligation to Provide Information to Withholding Agent. Prior to the receipt of any payment of income subject to withholding under this Section, a payee must furnish to a withholding agent the payee's full and correct name, address, and Louisiana Account Number.

D. Tax-Exempt Organizations

1. Exemption from Withholding Where Payee is a Tax Exempt Organization. No withholding is required under R.S. 47:164(D) and this Section on amounts paid to an organization for which the Internal Revenue Service has issued a favorable determination letter that the organization is exempt from tax or an organization described in R.S. 47:287.501(B).

2. Organization's Claim of Exemption from Withholding. For an organization to claim an exemption from withholding based on its status as an organization exempt from federal income tax or an organization described in R.S. 47:287.501(B), it must furnish the withholding agent a statement described in Paragraph 4 of this Subsection.

3. Reliance on Organization's Claim of Exemption. A withholding agent may rely on a claim of exemption under this Subsection only if, prior to the payment, the withholding agent can reliably associate the payment with a valid statement described in Paragraph 4 of this Subsection.

4. Claim of Exemption from Tax. A statement under this Paragraph is valid only if it includes the federal taxpayer identifying number of the organization whose name appears on the statement and it certifies that the Internal Revenue Service has issued a favorable determination letter that the organization is exempt from tax and the date of the Internal Revenue Service Letter or certifies that the organization is an entity described in R.S. 47:287.501(B).

E. Amount Withheld Treated as Tax Paid by the Payee

1. Payee as the Taxpayer. The payee is the person ultimately liable for income tax on payments subject to withholding. Where a withholding agent has failed to withhold or has failed to withhold the entire amount of tax due on amounts subject to withholding, the payee must file a Louisiana income tax return and pay all income tax due for the taxable year of the payee in which the payment is includable in the payee's income under the payee's method of accounting.

2. Over Withholding. If any withholding agent withholds more income tax than the amount of Louisiana income tax for which the payee is liable, the payee may seek a refund of tax by filing a Louisiana income tax return for the taxable year in which there has been over withholding.

F. Payments subject to withholding under other provisions of Louisiana law or other applications of R.S. 47:164 are not subject to withholding under this Section.

G. Exception from Requirement to Withhold for Small Businesses.

1. Withholding not Required for Businesses with Less than \$1,000,000 from All Sources in Annual Gross Receipts. A trade or business that has less than \$1,000,000 from all sources in gross receipts for the prior taxable year and is not party to uncompleted contracts under which it is entitled to receive \$1,000,000 or more over the lives of the contracts is not required to withhold under this Section.

a. Gross receipts does not include salaries or wages earned by an employee.

b. *Prior Taxable Year*—the taxable year ending in the prior calendar year.

2. Aggregation of Gross Receipts from Activities of Related Persons. For purposes of determining whether a business has less than \$1,000,000 in gross receipts for the prior taxable year, gross receipts include gross receipts of a person and all entities which are controlled entities with respect to such person.

3. Controlled Entity. For purposes of this Subsection, the term *controlled entity* means with respect to any person:

a. a corporation more than 50 percent of the value of the outstanding stock of which is owned (directly or indirectly) by or for such person;

b. a partnership more than 50 percent of the capital interest or profits interest in which is owned (directly or indirectly) by or for such person;

c. two or more corporations in which the same persons own (directly or indirectly) more than 50 percent of the value of the stock of such corporations;

d. two or more partnerships in which the same persons own (directly or indirectly) more than 50 percent of the capital interest or profits interest in such partnerships;

e. a corporation and a partnership if the same persons own (directly or indirectly) more than 50 percent of the value of the stock of the corporation and (directly or indirectly) more than 50 percent of the capital interest or profits interest in the partnership; and

f. a trust and a beneficiary of the trust.

4. Partnership. For purposes of this Subsection, the term "partnership" includes any entity classified as a partnership or disregarded as a separate entity from its owner for income tax purposes.

5. Constructive Ownership of Stock or Interests in a Partnership. For purposes of determining whether an entity is a controlled entity, the following rules shall apply.

a. From Partnerships and Estates. Stock or a partnership interest owned (directly or indirectly) by or for a partnership or estate shall be considered as owned proportionately by its partners or beneficiaries.

b. From Trusts

i. Stock or a partnership interest owned (directly or indirectly) by or for a trust (other than an employee's trust described in Section 401(a) of the Internal Revenue Code and exempt from tax under section 501(a) of the Internal Revenue Code) shall be considered as owned by its beneficiaries in proportion to the actuarial interest of such beneficiaries in such trust.

ii. Stock or a partnership interest owned (directly or indirectly) by or for any portion of a trust of which a person is considered the owner under Subpart E of Part I of Subchapter J of the Internal Revenue Code (relating to grantors and others treated as substantial owners) shall be considered as owned by such person.

c. From Corporations. Stock or a partnership interest owned (directly or indirectly) by or for any corporation shall be considered as owned by the corporation's shareholders in that proportion which the value of the stock which such person so owns bears to the value of all the stock in the corporation.

d. To Partnerships and Estates. Stock or a partnership interest owned (directly or indirectly) by or for a partner or beneficiary of an estate shall be considered as owned by the partnership or estate.

e. To Trusts

i. Stock or a partnership interest owned (directly or indirectly) by or for a beneficiary of a trust (other than an

employee's trust described in Section 401(a) of the Internal Revenue Code and exempt from tax under Section 501(a) of the Internal Revenue Code) shall be considered as owned by the trust unless such beneficiary's interest in the trust is a remote contingent interest. For purposes of this clause, a contingent interest of a beneficiary shall be considered remote if, under the maximum exercise of discretion by the trustee in favor of the beneficiary, the value of such interest, computed actuarially, is 5 percent or less of the value of trust property.

ii. Stock or a partnership interest owned (directly or indirectly) by or for a person who is considered the owner of any portion of a trust under Subpart E of Part I of Subchapter J of the Internal Revenue Code (relating to grantors and others treated as substantial owners) shall be considered as owned by the trust.

f. To Corporations. Stock or a partnership interest owned (directly or indirectly) by or for any person owning stock in a corporation shall be considered as owned by the corporation.

g. Spouse. An individual shall be considered as owning stock or a partnership interest owned (directly or indirectly) by the individual's spouse (other than a spouse who is legally separated from the individual under a decree of divorce or separate maintenance).

h. Operating Rules

i. In General. Except as provided in this Subparagraph, stock or a partnership interest constructively owned by a person by reason of Subparagraphs a, b, c, d, e, f, or g, shall, for purposes of applying Subparagraphs a, b, c, d, e, f, or g, be considered as actually owned by such person.

ii. Partnerships, Estates, Trusts, and Corporations. Stock or a partnership interest constructively owned by a partnership, estate, trust, or corporation by reason of the application of Subparagraphs d, e, or f shall not be considered as owned by it for purposes of applying Subparagraphs a, b, or c in order to make another the constructive owner of such stock or partnership interest.

i. Example. The following example illustrates the application of Subparagraph h.

Example. Individual A owns all of the interests in LLC #1. LLC #1 owns a house held by the LLC for rental. During the taxable year, LLC #1 collects \$240,000 in gross rent from renting the house. LLC #1 pays Company X \$3,000 for tree removal services. A also owns all of the interests in LLC #2. LLC #2 owns three condominiums and collects \$360,000 in gross rent from leasing the condominiums during the taxable year. A's spouse owns all of the interests in LLC #3. LLC #3 owns an apartment building and collects \$500,000 in gross rent from the apartment building during the taxable year. Under Subparagraph g, A is deemed to own all of the interests in LLC #3 that are owned by A's spouse. Under Subparagraph d., LLC #1 is considered as owning all of the interests owned directly and indirectly by A in LLC #2 and LLC #3. Thus, for purposes of determining whether LLC #1 must withhold tax on the \$3,000 of payments to Company X, LLC #1 is treated as having gross receipts of \$1,100,000 (\$240,000 of LLC #1's gross receipts + \$360,000 of LLC #2's gross receipts + \$500,000 of LLC #3's gross receipts). Accordingly, LLC #1 must withhold tax of \$60 (2 percent of \$3,000) on the \$3,000 paid by LLC #1.

AUTHORITY NOTE: Promulgated in accordance with R.S. 47:112, R.S. 47:164, and R.S. 47:1511.

HISTORICAL NOTE: Promulgated by the Department of Revenue, Policy Services Division, LR 33:

Family Impact Statement

The proposed adoption of LAC 61:I.1511, regarding withholding of income tax at the source, should not have any known or foreseeable impact on any family as defined by R.S. 49:972(D) or on family formation, stability and autonomy. The implementation of this proposed Rule will have no known or foreseeable effect on:

1. the stability of the family;
2. the authority and rights of parents regarding the education and supervision of their children;
3. the functioning of the family;
4. family earnings and family budgets;
5. the behavior and personal responsibility of children;
6. the ability of the family or a local government to perform this function.

Any interested person may submit written data, views, arguments or comments regarding this proposed Rule to Michael D. Pearson, Senior Policy Consultant, Policy Services Division, Office of Legal Affairs by mail to P.O. Box 44098, Baton Rouge, LA 70804-4098. All comments must be submitted no later than 4:30 p.m., Tuesday, April 24, 2007. A public hearing will be held on Wednesday, April 25, 2007, at 1:30 p.m. in the Calcasieu Room located on the second floor of the LaSalle Building, 617 North Third Street, Baton Rouge, LA 70802.

Cynthia Bridges
Secretary

This proposed regulation should have no effect on competition or employment in either the public or private sectors.

Cynthia Bridges
Secretary
0703#044

Robert E. Hosse
Legislative Fiscal Officer
Legislative Fiscal Office

**FISCAL AND ECONOMIC IMPACT STATEMENT
FOR ADMINISTRATIVE RULES
RULE TITLE: **Income: Withholding Tax****

I. ESTIMATED IMPLEMENTATION COSTS (SAVINGS) TO STATE OR LOCAL GOVERNMENT UNITS (Summary)

This proposed regulation will specify the persons who must withhold income tax, the rules that apply to such persons, and certain payments for which withholding at the source is required. The implementation cost is approximately \$31,720 in FY 07/08 and \$51,440 in FY 08/09 for system modification.

The implementation of this proposed regulation will have no impact upon any local governmental units.

II. ESTIMATED EFFECT ON REVENUE COLLECTIONS OF STATE OR LOCAL GOVERNMENTAL UNITS (Summary)

This proposed regulation will increase compliance with the individual and corporate income tax statutes. The regulation will also help avoid attacks on the state's ability to collect taxes on royalties and other payments for use of intangible assets in the state. The changes will result in an indeterminable increase in tax revenues. It is effective beginning with the calendar year 2008.

There will no effect on revenue collections of local governmental units.

III. ESTIMATED COSTS AND/OR ECONOMIC BENEFITS TO DIRECTLY AFFECTED PERSONS OR NONGOVERNMENTAL GROUPS (Summary)

Beginning with the calendar year 2008, individuals or businesses with more than a million dollars per year in gross receipts, meeting the definition of withholding agent, will be affected. The costs would be those to extend a wage withholding system to cover these non-wage payments. Reporting and payments to the Department are required to be made electronically.

IV. ESTIMATED EFFECT ON COMPETITION AND EMPLOYMENT (Summary)