

Regulation section 18662-6 is amended to read:

§ 18662-6. ~~Withholding Agent~~Nonresident Withholding, Entertainers, Athletes and Speakers.

~~The term "withholding agent" means the person, including corporations, partnerships, fiduciaries and state officers, agencies or subdivisions, charged by the law or by the Franchise Tax Board's order or regulation with the duty to withhold any tax, interest or penalties from payments to the taxpayer and to pay such amounts over to the Franchise Tax Board.~~

~~Withholding agents will be required to reimburse the Franchise Tax Board for all taxes, penalties or interest which have been due from taxpayers and have not been withheld as required, unless the delinquent withholding agent can establish that such failure to withhold was due to reasonable cause, or unless the amounts which were not withheld as required shall have been paid to the Franchise Tax Board prior to the day on which such reimbursement is demanded by the Franchise Tax Board. See Reg. 18662-6 for provisions for collecting liability incurred by a withholding agent who has incurred such liability for failure to withhold amounts due from a taxpayer upon notice and demand.~~

(a) Payments Subject to Withholding.

(1) General.

(A) Compensation for Personal Services. Payments to nonresident actors, singers, performers, entertainers, wrestlers, boxers, etc., for performances in California, are subject to withholding. Compensation for personal services includes payments to independent contractors, such as leaders, managers, owners of bands, orchestras, dance teams, circuses, and similar groups of artists, entertainers or performers pursuant to contracts under which such leaders, managers or owners agree to furnish the services of their bands, orchestras, teams, circuses, or other groups within this State when payment for such performance, etc., is made to an agent or business entity instead of being made directly to the performer. Withholding is required when making payments to nonresident entertainers, including, but not limited to actors, singers, bands, orchestras, plays, dance teams, wrestlers, boxers, and speakers. This includes payments to agents, owners, or business entities for performances, or for the service of performers, athletes, speakers, and similar types of amusement or sporting activity carried on in this State. The Franchise Tax Board generally receives performance information from the withholding agent before performances occur, but withholding is required even if the venue or performer is not contacted by the Franchise Tax Board.

(B) Withholding Required Even if Contract States No Withholding. Withholding agents are required to withhold tax even when the nonresident entertainer's contract states that there shall be no withholding from

compensation. California law requires the withholding agent to withhold, and the withholding agent is legally responsible for the withholding amount.

(C) Payments Made to Reimburse Expenses. If the reimbursement is separately accounted for and is not subject to federal Form 1099 information reporting, withholding agents are not required to withhold on payments to reimburse a nonresident entertainer for expenses relating to services performed in California. When the reimbursed expenses do not meet these requirements, the withholding agent should withhold on the total payment.

(2) Payments Made to Agents or Promoters. Withholding is required if the compensation paid to nonresident entertainers is made to their California agents or promoters. If the withholding agent receives a Notice to Withhold Tax at Source, withholding is required even though the payment is not made directly to the nonresident entertainer. Withholding is required even if the agent or promoter meets one of the exceptions listed above. Since the entertainer performed the service, the entertainer is required to report their compensation for the performance and is entitled to the withholding credit in proportion to the performer's share of the income withheld upon. If compensation is earned by the entertainer and paid to the agent, the withholding agent must provide the name and taxpayer identification number (i.e., SSN, FEIN, or Corp number) on a Notice to Withhold Tax at Source for the performing entity and not the agent and/or promoter.

(3) Supporting Acts Paid by Headliner. If withholding agents receive a Notice to Withhold Tax at Source for a supporting act, but the supporting act is paid directly by the headliner, they should provide the Franchise Tax Board with the necessary information to allow the Franchise Tax Board to notify the headliner. The Franchise Tax Board will send the headliner a Notice to Withhold Tax at Source to withhold on amounts paid to the supporting act and will send the withholding agents a written withdrawal of the original notice.

(4) Sound and Lights. Withholding is required on payments made for sound and light services if payable to a nonresident.

(b) Request for Reduced Withholding Amount. Withholding is required on the total (gross) payment, unless an exemption or reduced withholding amount is authorized. Entertainment industry taxpayers can request a reduced withholding amount by filing a written request (Notification of Performance Withholding for Nonresident Entertainers) at least 10 business days prior to the nonresident's performance or California activity date. The Franchise Tax Board will then determine, based on the information and documentation submitted, if withholding at the statutory 7% rate on the entire payment from the performance or activity will result in over-withholding. If so, the Franchise Tax Board may authorize deductions from the gross amount to compute a withholding base that more accurately represents the nonresident entertainer's estimated tax liability when the 7% withholding rate is applied. If the Franchise Tax Board authorizes a

reduced amount, the Franchise Tax Board will then notify the withholding agent of the withholding required for the specific performance by sending the withholding agent a Notice to Withhold Tax at Source. If the withholding agent does not notify the Franchise Tax Board of the performance and/or the Franchise Tax Board does not notify the withholding agent of a waiver or reduced withholding rate, the withholding agent must withhold 7% from payments made to nonresident entertainers. (See Regulation section 18662-4.)

(c) Exceptions. Withholding is not required if the entertainer (not the agent) meets one of the exceptions listed in Regulation section 18662-4:

- (1) The entertainer is a California resident.
- (2) The entertainer is a business entity (corporation, partnership or limited liability company) that is qualified to do business in California or has a permanent place of business in California.
- (3) The entertainer is an organization that has current tax-exempt status under either California or federal law.
- (4) The total payments of California source income to the entertainer are equal to or less than \$1,500 for the calendar year.
- (5) The services provided by the entertainer are not performed in California.
- (6) The entertainer or the withholding agent receives a withholding waiver from the Franchise Tax Board .

(d) Venues That Are Not Promoters. A lessor of a venue receiving a Notice to Withhold Tax at Source from the Franchise Tax Board for a performance they are not promoting should contact the Franchise Tax Board and provide the necessary information to allow the Franchise Tax Board to notify the correct promoter who the withholding agent will be. The Franchise Tax Board will send the correct promoter a Notice to Withhold Tax at Source for the performance and will send the venue/lessor a written withdrawal of the original notice.

(e) Canceled Performances. If a withholding agent receives a Notice to Withhold Tax at Source when no payment is made to the nonresident entertainer because the performance was canceled, the withholding agent should write "Canceled" on the Notice to Withhold Tax at Source, and return all copies of the form to the Franchise Tax Board, with an explanation that withholding was not done because the performance was canceled and no payment was made. The Franchise Tax Board may request additional information to validate the canceled performance.

(f) Athletes.

- (1) Duty Days. A "duty day" is defined as "any day services are performed under the contract from the beginning of an official preseason activity until the last game played". The "duty days" in California are then divided by the total "duty days" to create a ratio, which is in turn multiplied by the total compensation. The result is deemed to be the California source income.

(2) Performance and Signing Bonuses. Performance bonuses should be included in the income to be allocated within and without California if any of the conditions to receive the bonus were met or partially met while performing services in California. The signing bonus issue is dealt with on a case-by-case basis with an examination of the wording of the contract. If services must be performed to receive or keep the signing bonuses and if any of those services are performed or partially performed in California, then the signing bonus should be included in the compensation to be allocated within and without California.

Note: Authority cited: Section 19503, Revenue and Taxation Code.
Reference cited: Section 18662, Revenue and Taxation Code.