

NOTE: This handout is intended only for purposes of facilitating discussion at the interested parties meeting on July 11, 2016.

Regulation Section 18662-6 is amended to read:

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

(a) Payments Subject to Withholding.

(1) General. Payments to nonresident independent contractors for services performed in California by entertainers, athletes, and speakers are subject to withholding.

(A) The Phrase "Entertainers, Athletes, and Speakers." The phrase "entertainers, athletes, and speakers" (also referred to as "entertainers") includes, but is not limited to:

1. Actors;
2. Bands;
3. Boxers;
4. Dance teams;
5. Orchestras;
6. Performers;
7. Singers;
8. Speakers;
9. Sports entertainers and athletes;
10. Wrestlers;
11. Stage crews;
12. Lighting crews;
13. Promoters; and
14. Talent agents

(B) Withholding Required Even if Contract States No Withholding. Withholding agents are required to withhold tax on payments even when the nonresident entertainer's contract states that there shall be no withholding from compensation. California law requires the withholding agent to withhold tax on payments, 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 Performer's Entertainer's Agents or Promoters.

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(A) In general, withholding In General. Withholding is required on California source income paid to the nonresident entertainer whether or not the Franchise Tax Board contacts the withholding agent. In addition, if the withholding agent receives written notification from the Franchise Tax Board to withhold tax at source, withholding is required according to that written notice on all payments made directly or indirectly to the nonresident entertainer. Withholding is required even if the ~~performer's entertainer's~~ agent or promoter meets one of the exceptions listed in Regulation section 18662-4, subsection (c), unless the promoter is a California corporation or qualified to do business in California, set forth in FTB Form 590, Withholding Exemption Certificate, or any successor form designated by the Franchise Tax Board on its website at www.ftb.ca.gov ("FTB Form 590"), because the eExceptions apply to the entertainer as the person who directly performed the service. Because the entertainer performed the service, the entertainer is required to report his or her compensation for the performance and is entitled to the withholding credit in proportion to the ~~performer's~~entertainer's share of the income withheld upon by the entertainment venue. The required information specified in FTB Form 590, Withholding Exemption Certificate, or any successor form designated by the Franchise Tax Board on its website at www.ftb.ca.gov ("FTB Form 590"), is set forth in subsection (g), below.

Example: If compensation is earned by the nonresident entertainer but the entertainment venue pays the compensation directly to the ~~performer's~~entertainer's agent or promoter, the entertainment venue as the withholding agent must withhold and remit tax on the gross payments and provide the Franchise Tax Board with an information return, on FTB Form 592, Resident and Nonresident Withholding Statement, or any successor form designated by the Franchise Tax Board on its website at www.ftb.ca.gov ("FTB Form 592"), which credits the withholding amount to the nonresident ~~performer's~~entertainer. The required information specified in FTB Form 592 is set forth in subsection (h), below. The entertainment venue should not file an information return, on FTB Form 592, which credits the withholding amount to the ~~performer's~~entertainer's agent or promoter.

(B) California Corporations. If the entertainer's agent or promoter is incorporated in California or qualified to do business in California with the Office of the Secretary of State, the entertainment venue is not required to withhold if the entertainer's agent or promoter certifies to an exemption on FTB Form 590, or the venue verifies the entertainer's agent or promoter is a California corporation or qualified to do business in this state by contacting the Office of the Secretary of State (SOS). The entertainment venue may rely on a printout from the SOS's website showing the entertainer's agent's or promoter's entity number, the corporation has a permanent place of business in California (e.g., the "jurisdiction" field shows "California" or the "entity city, state, zip" field shows "CA" for the state), and the corporation is in good standing ("e.g., the "status" field shows "active"). The SOS website printout—which must be printed within 30 days prior to making a payment—protects the withholding

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agent from penalties for failure to withhold, unless the withholding agent has actual knowledge that the information received from the SOS, is false. The entertainer's agent or promoter, as the withholding agent, must withhold and remit the withholding on the gross payments made to the nonresident entertainer, unless the nonresident entertainer meets one of the exceptions listed in Regulation section 18662-4, subsection (c), set forth in FTB Form 590.

Example: An entertainment venue signs a contract with an entertainer's agent who is incorporated in California, and pays the compensation directly to the entertainer's agent. The entertainer's agent certifies to an exemption on FTB Form 590. The entertainment venue does not withhold on the entertainer's agent. The entertainer's agent as the withholding agent must withhold and remit tax on the gross payments made to the nonresident entertainer and provide the Franchise Tax Board with an information return, on FTB Form 592, which credits the withholding amount to the nonresident entertainer. The required information specified in FTB Form 592 is set forth in subsection (h), below.

(3) Sound and Lights. Withholding is required on payment for sound and light services paid to a nonresident.

(b) Request for Waiver or Reduced Withholding Amount. Withholding is required on the total (gross) payment paid by the withholding agent, unless an exemption on FTB Form 590, waiver on FTB Form 588, Nonresident Withholding Waiver Request, or any successor form designated by the Franchise Tax Board on its website at www.ftb.ca.gov ("FTB Form 588"), or reduced withholding amount on FTB Form 589, Nonresident Reduced Withholding Request, or any successor form designated by the Franchise Tax Board on its website at www.ftb.ca.gov ("FTB Form 589"), is authorized. The required information specified in FTB Form 588 and FTB Form 589 is set forth in subsection (i) and subsection (j), respectively, below. ~~Payees can request a waiver~~ A waiver is requested by filing FTB Form 588 at least 21 business days prior to the nonresident's performance or California activity date, or reduced withholding amount by filing FTB Form 589 at least 10 business days for online filing or 21 business days for paper filing 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 percent rate on the entire payment from the performance or activity will result in over-withholding. If so, the Franchise Tax Board, at its sole discretion, may grant the waiver pursuant to FTB Form 588 or authorize pursuant to FTB Form 589 deductions from the gross amount to compute a withholding base that more accurately represents the nonresident entertainer's estimated tax liability when the 7 percent withholding rate is applied. The reduced amount of the total amount of expenses (FTB Form 589, Part IV (Withholding Computation), line 12) cannot exceed 50 percent of the gross California source payment (FTB Form 589, Part IV (Withholding Computation), line 1). If the Franchise Tax Board grants a waiver pursuant to FTB Form 588 or authorizes a reduced withholding amount pursuant to FTB Form 589, the Franchise Tax Board will then notify the withholding agent of the withholding required for the specific performance by sending the withholding agent a waiver determination notice or

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reduced withholding approval letter. If the withholding agent does not notify the Franchise Tax Board of the performance or the Franchise Tax Board does not notify the withholding agent of an approved waiver or reduced withholding rate, the withholding agent must withhold 7 percent from payments made to nonresident entertainers. (See Regulation section 18662-4.)

(c) Exceptions. Withholding is optional if the entertainer (not the entertainer's agent) meets one of the following exclusions or exceptions:

- (1) California Resident. The entertainer is a California resident.
- (2) California Business Entity. Payment is made to a business entity that is qualified to do business in California or has a permanent place of business in California for the entertainer's services.
- (3) Tax Exempt Organization. Payment is made to a tax exempt organization under either California or federal law for the entertainer's services.
- (4) Total Payments Equal to or Less Than \$1,500. The total payments of California source income to the entertainer are equal to or less than \$1,500 for the calendar year.
- (5) Services Performed Outside of California. The services provided by the entertainer are performed outside of California.
- (6) Withholding Waiver Received. The entertainer or the withholding agent receives a withholding waiver from the Franchise Tax Board.

(d) Entertainment Venues Having Similar Names. An owner or lessor of an entertainment venue that mistakenly receives a reduced withholding approval letter or other correspondence from the Franchise Tax Board for a performance he or she is not engaged in must contact the Franchise Tax Board and provide the necessary information to allow the Franchise Tax Board to notify the correct withholding agent.

(e) Canceled Performances. If a withholding agent receives a reduced withholding approval letter when no payment is made to the nonresident entertainer because the performance was canceled, the withholding agent should write "Canceled" on the reduced withholding approval letter and return it 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) Additional Rules for Athletes.

- (1) Duty Days. A duty day is any day during which 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 California source income.
- (2) Performance and Signing Bonuses. Performance bonuses are included in the income to be allocated within and without California if any of the conditions to receive

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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 is included in the compensation to be allocated within and without California.

(g) FTB Form 590, Withholding Exemption Certificate. See Regulation section 18662-4, subsection (h).

(h) FTB Form 592, Resident and Nonresident Withholding Statement. See Regulation section 18662-4, subsection (i).

(i) FTB Form 588, Nonresident Withholding Waiver Request. See Regulation section 18662-4, subsection ~~(k)~~(l).

(j) FTB Form 589, Nonresident Reduced Withholding Request. See Regulation section 18662-4, subsection ~~(l)~~(m).

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

Reference: Sections 18662 and 18815, Revenue and Taxation Code.