West Virginia State Tax

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NONRESIDENT WAGE INCOME ASSIGNED TO WEST VIRGINIA

This publication is intended to help you become more familiar with West Virginia personal income tax laws and your rights and responsibilities under the laws. Nothing in this publication supersedes, alters or otherwise changes any provisions of the tax law, administrative rules, court decisions or administrative notices.

GENERAL INFORMATION

- For nonresidents, income from wages is assigned to West Virginia to the extent that the work of the employee is performed in West Virginia.

WHAT PAYMENTS ARE AFFECTED?

- This rule does not apply to payments received on the sale of stock purchased through statutory stock options or payments from qualified deferred compensation plans. Qualified deferred compensation plans include regular defined benefit pensions, 401(k), IRA, and 457 plans. Either these payments are not “wages”, or the payments are prohibited from state taxation by federal law when paid to nonresidents.

- A nonresident’s income from wages for work performed in West Virginia can include income from: (1) severance pay; (2) equity-based awards; and (3) other non-statutory deferred compensation. When these payments are assigned to West Virginia, they are subject to West Virginia personal income tax and are subject to withholding tax.

SEVERANCE PAY

- Severance pay is assigned to West Virginia to the extent that work connected with the employment from which the payment is received was performed in West Virginia.

EXAMPLES:

1. Employee is a West Virginia resident and works his entire career in West Virginia. His employer downsizes and offers Employee a severance package based upon the number of years worked. Severance payments are to be made over a three-year period. Employee changes his residency to Florida before the first severance payment is issued on January 1 of the following year. Because work connected with the employment from which the severance pay was received was performed in West Virginia, the full amount of each severance payment is assigned to West Virginia and is subject to West Virginia personal income tax.

2. Employee’s employment contract entitles her to severance payments if she is terminated without cause or pursuant to a change of control in the company. Employee works for 10 years in West Virginia while a resident of Ohio. During this time, Employee is exempt from West Virginia personal income tax due to the income tax reciprocity agreement West Virginia has with Ohio. The employer terminates Employee without cause and severance is paid pursuant to the employment contract over three years. Employee changes her residency to Florida before the first severance check is issued. Because work connected with the employment from which the severance pay was received was performed in West Virginia, the full amount of each severance payment is assigned to West Virginia. The reciprocity exclusion does not apply because Employee does not live in a reciprocity state when the severance payments are received

If Employee had worked under the contract for nine years in West Virginia and one year in Florida, then 90 percent of each severance payment would be assigned to West Virginia, representing the percentage of time work connected with the employment from which the severance pay was received was performed in West Virginia.

EQUITY BASED AWARDS

- Each of the following examples assumes the stock options do not have a readily ascertainable fair market value at grant date.

EXAMPLES:

1. Employee works in West Virginia and is a West Virginia resident. In Year 1, Employee is granted non-statutory, vested stock options. After receiving the options, Employee continues to work for two years in West Virginia. In Year 3,

Employee changes her residency to Florida where she works for the same employer. In Year 5, Employee exercises the options, recognizing $50,000 of income from wages. Because the options were both granted and vested while working in West Virginia, $50,000 is assigned to West Virginia and is subject to West Virginia personal income tax.

2. Employee is a resident of Kentucky. When hired in Kentucky, Employee is granted non-statutory stock options that vest after five years. During Year 2, Employee is assigned to spend six months in West Virginia overseeing the building of a new plant and then returns to his home in Kentucky. In Year 5, Employee retires. At the time of retirement, the options vest and are exercised by Employee. As a result of exercising the options, Employee recognizes $90,000 of income from wages. Because the time worked in West Virginia between the option grant and vesting dates is six months out of five years, $9,000 (6/60 x $90,000) is assigned to West Virginia and is subject to West Virginia personal income tax.

3. Employee is a resident of West Virginia. When hired in West Virginia, Employee is granted non-statutory stock options for 1,200 shares that vest ratably over four years; 300 shares vest in each of Years 1, 2, 3, and 4. Employee remains employed in West Virginia during Years 1 and 2 and then changes her residency to Washington where she is employed during Years 3 and 4. Employee exercises all 1,200 shares at the end of Year 6 while a resident of Washington.

Six hundred shares vested prior to Employee leaving West Virginia, 100 percent of income from wages recognized from the exercise of these shares is assigned to West Virginia. Because the time worked in West Virginia between the option grant and vesting dates for the 300 shares that vested in Year 3 is two out of three years, 66.67 percent (2/3rds) of income from wages recognized from the exercise of these shares is assigned to West Virginia. Finally, because the time worked in West Virginia between the option grant and vesting dates for the 300 shares that vested in Year 4 is two out of four years, 50 percent (2/4ths) of income from wages recognized from the exercise of these shares is assigned to West Virginia. In sum, 79.17 percent ([600+200+150]/1,200) of the income from wages recognized upon exercise will be assigned to West Virginia and subject to West Virginia personal income tax.

OTHER NON-STATUTORY DEFERRED COMPENSATION

- *Other non-statutory deferred compensation is assigned to West Virginia in the ratio of days worked in West Virginia during the "allocation period" to the total number of days worked for the employer during the "allocation period." The allocation period is the period of time during which the employee accrued the right to the deferred compensation.*

EXAMPLES:

1. Employer maintains a supplemental retirement plan (SERP) that provides income that does not meet the criteria necessary to be preempted under federal law from state taxation when paid to a nonresident (title four of the United States Code, section 114; codified in West Virginia Code § 11-21-12(c)(12).

Employee is a resident of California and works for the employer for two years in California. Employee then changes her residency to West Virginia where she works for 11 years. Upon terminating employment, Employee changes her residency to another state. Employee is entitled under the SERP to a monthly payment of $4,000 for five years. Because Employee accrued the right to the deferred compensation throughout Employee's 13 years of service, the allocation period is 13 years. Because the time worked in West Virginia during the allocation period is 11 out of 13 years, 85 percent or $3,385 of each monthly payment (11/13 x $4,000) is assigned to West Virginia and is subject to West Virginia personal income tax.

2. Employee defers compensation earned annually in excess of $1,000,000. In Year 1, Employee worked in West Virginia for 365 out of 365 days, deferring $500,000. In Year 2, a leap year, Employee worked in West Virginia for 210 days and worked in New York for 156 days, deferring $750,000. In Year 3, Employee worked in New York for 331 days and then retired, deferring $1,250,000. While a resident of New York, Employee receives all deferred compensation within a five-year period. Because Employee accrued the right to the deferred compensation on an annual basis, each year is a distinct allocation period. For Year 1, $500,000 is assigned to West Virginia because Employee worked in West Virginia for 365 out of 365 days. For Year 2, $430,328 (210/366 x $750,000) is assigned to West Virginia because Employee worked in West Virginia for 210 out of 366 days. For Year 3, none of the $1,250,000 deferred in that year is assigned to West

Virginia because Employee did not work in West Virginia during that year.

Because $930,328 of the $2,500,000 deferred compensation is assigned to West Virginia, a corresponding 37.21 percent ($930,328/ $2,500,000) of each payment received by Employee is subject to West Virginia withholding tax and personal income tax. Any earnings on the deferred compensation that constitute wages are also assigned to West Virginia in the same manner.

3. Employee is a Texas resident and resides in Texas for five years. During Year 6, Employee accepts a two-year assignment in West Virginia overseeing the development and installation of new computer software at a branch office. As an incentive, Employee is offered a $50,000 bonus for remaining in West Virginia for the duration of the two-year assignment. In Year 8, Employee returns to Texas and three months later receives the $50,000 bonus. Because Employee worked in West Virginia for the entire 24 months during which the right to the $50,000 bonus accrued, $50,000 is assigned to West Virginia and is subject to West Virginia personal income tax.

If in addition to the requirements above, the Employee was required to be employed by the company at the time of payment to receive the bonus, then the percentage of time Employee worked in West Virginia while accruing the right to the deferred compensation would be 24 out of 27 months. As such, $44,444 (24/27 x $50,000) would be assigned to West Virginia and subject to West Virginia personal income tax.

4. An employer maintains a qualified pension plan that provides income that meets the criteria necessary to be preempted under federal law from state taxation when paid to a nonresident (title four of the United States Code, section 114; codified in West Virginia Code §11-21-12(c)(12). In addition, the employer maintains a supplemental retirement plan (SERP) that provides income that also meets the federal law preemption criteria. Employee is a resident of West Virginia and works in West Virginia accruing benefits under the employer's qualified pension plan and SERP. Employee retires and becomes a resident of Arizona, thereafter, receiving a combined payment of $4,000 per month for five years under the qualified pension plan and SERP. Because the payments qualify as income that meets the criteria necessary to be preempted under federal law from state taxation when paid to a nonresident, the payments are not assigned to West Virginia and are not subject to West Virginia personal income tax.

GUARANTEED PAYMENTS TO PARTNERS

- Guaranteed payments to current partners should be treated like distributive share for West Virginia personal income tax purposes, whether the partner is a resident or nonresident partner. Withholding is required on guaranteed payments to nonresident partners unless they are included in a composite return.

- While for federal income tax purposes guaranteed payments to retired partners are also treated as distributive share, when those payments are retirement income paid to a nonresident retired partner, West Virginia is prohibited from taxing any portion of the retirement income when it is properly classified under 4 U.S.C. § 114(b)(1)(I).

ASSISTANCE AND ADDITIONAL INFORMATION

- For assistance or additional information, you may call a Taxpayer Service Representative at:

  1-800-WVA-TAXS
  (1-800-982-8297)

  Or visit our website at:

  www.tax.wv.gov

  File and pay taxes online at:

  https://mytaxes.wvtax.gov

  Email questions to:

  taxhelp@wv.gov