

DEPARTMENT OF FINANCE
DIVISION OF REVENUE

Statutory Authority: 30 Delaware Code, Sections 563 and 1151 (30 **Del.C.** §§563 and 1151)

FINAL

Regulation 1151-1 Personal Income Tax Withholding Exemption Certificates

Title Of Regulation

Regulation 1151-1 Personal Income Tax Withholding Exemption Certificates

Order Adopting and Promulgating Amendments to Regulations

AND NOW, this 3rd day of October, 2007, Patrick T. Carter, as Director (the "Director") of the Division of Revenue in the Department of Finance in accordance with 30 **Delaware Code** §§563 and 1151 and 29 **Delaware Code** §10118(b), for the reasons stated below enters this ORDER adopting and promulgating the amendments to its existing regulation, captioned "Personal Income Tax Withholding Exemption Certificates," as set forth in the Division of Revenue's Tax Ruling 83-3 (February 9, 1983), which modified Tax Ruling 80-4 (December 15, 1980). The final regulation will be captioned "Regulation 1151-1 Personal Income Tax Withholding Exemption Certificates".

Nature of Proceedings; Synopsis of the Subject and Substance of the Proposed Amendments to the Regulation

In accordance with procedures set forth in 29 **Del.C.** Ch. 11, Subch. III and 29 **Del.C.** Ch. 101, the Director proposed to adopt amendments to the existing regulation, which provides generally that employers must submit copies of withholding exemption certificates (currently submitted to employers by employees on Internal Revenue Service Form W-4 or an approved substitute form) that either (i) claim more than 14 withholding exemptions for purposes of the Delaware personal income tax, or (ii) claim exemption from withholding of Delaware personal income tax where the employer reasonably expects that the employee's wages will exceed \$100 per week. In such circumstances, under the existing regulation, pending receipt of a notice from the Division of Revenue with respect to a copy of any withholding exemption certificate, the employer must withhold on the basis of the number of exemptions claimed in the certificate. If the Division of Revenue finds that the certificate submitted contains materially incorrect statements, or, after seeking verification from the employee, determines that it lacks sufficient information to find that the withholding exemption certificate is correct, and if the Division notifies the employer of these findings, the employer must thereafter withhold from the employee's wages as if the employee were a single person claiming no withholding exemptions. The employer is required to notify the employee of the action taken by the Division of Revenue and request that the employee file another withholding exemption certificate. The Director of Revenue has proposed to supersede the existing regulation, which was originally published in Tax Ruling 83-3 and Tax Ruling 80-4, on and after the effective date of the regulation being promulgated here. The purpose of the amendment of the existing regulation is to conform the Division of Revenue's procedures with respect to withholding exemption certificates to the procedures used by the Internal Revenue Service.

The Director published the proposed amendments to the existing regulation in the September 1, 2007 issue of the *Delaware Register of Regulations*, 11 DE Reg. 271-274 (September 1, 2007). This is the order of the Director adopting the proposed amendments to the existing regulation.

Summary of Evidence and Information Submitted

The Director received no written comments in response to the publication of the proposed amendments to the existing regulation.

Findings of Fact and Conclusions

1. The new regulation conforms the administrative practice of the Division of Revenue with respect to withholding exemption certificates to the current administrative practice of the Internal Revenue Service, as set forth in Temporary Treasury Regulation §31.3402(f)(2)-1T, 26 CFR §31.3402(f)(2)-1T. The new regulation relieves employers of the burden of automatically having to submit for review by the Division of Revenue copies of an employee's withholding exemption certificate, if an employee (i) claims more than 14 withholding exemptions, or (ii) claims exemption from withholding of Delaware personal income tax where the employer reasonably expects that the employee's wages will exceed \$100 per week. Instead, under the new regulation, an employer must submit copies of the employee's withholding exemption certificate only when directed to do so in a written notice from the Division of Revenue or as directed in general published guidance issued by the Division of Revenue.

2. The new regulation also enables the Division of Revenue to notify the employer in writing that an employee is not entitled to claim either (i) a complete exemption from withholding, or (ii) more than the maximum number of withholding exemptions specified in the notice to the employer. The Division of Revenue may issue such a notice to an employer even if the employer has not previously submitted to the Division of Revenue a copy of the withholding exemption certificate of the employee in question. After receipt of this notice and after the effective date of the notice, the employer must generally withhold from the employee's wages based on the number of withholding exemptions specified in the notice. The new regulation provides that the Division of Revenue may issue a notice to an employer only if it has determined that (i) the employee's current withholding exemption certificate contains a materially incorrect statement or (ii) after requesting the employee to verify the statements on the withholding exemption certificate, the Division of Revenue lacks sufficient information to determine if the certificate is correct. The new regulation also sets forth actions that the employer and the Division of Revenue must take to notify the employee of the proposed action and actions that the employee may take to avoid the effect of the notice.

3. The Director has determined that the needs of the State of Delaware and of the employers withholding Delaware personal income tax will be better served by conforming the practice of the Division of Revenue to that of the Internal Revenue Service in connection with withholding exemption certificates.

4. The Director has statutory authority to promulgate regulations pursuant to 30 **Del.C.** §§563 and 1151.

DECISION AND ORDER CONCERNING AMENDMENTS TO THE REGULATION

NOW THEREFORE, under the statutory authority and for the reasons set forth above, the Director **ORDERS** that the amendments to the existing regulation be, and that they hereby are, adopted and promulgated as set forth below. The effective date of this Order is ten days from the date of its publication in the *Delaware Register of Regulations*, in accordance with 29 **Del.C.** §10118(g).

Patrick T. Carter, Director, Division of Revenue, Department of Finance

1151-1 Personal Income Tax Withholding Exemption Certificates

~~DIVISION OF REVENUE
TAX RULING 83-3~~

~~February 9, 1983~~

~~Personal Income Tax
Withholding Exemption Certificates~~

~~Tax Ruling 80-4, regarding the withholding exemption certificates (W-4) and the notification requirements by employers to the Division of Revenue in instances when employees file 'exempt' status or claim in excess of 9 allowances on their W-4, is hereby modified to provide for notification to the Division of Revenue when the total number of allowances claimed by the employee exceeds 14, which is also a requirement of the Internal Revenue Service. Tax Ruling 80-4, as modified by this ruling, is printed below.~~

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~~For purposes of withholding Delaware income tax, employers, in general, are authorized to withhold Delaware income tax on the basis of the number of exemptions claimed in the Federal W-4 filed by the employee. Effective with respect to withholding exemption certificates received from employees after December 31, 1982, every employer shall submit to the Division of Revenue a copy of any withholding exemption certificate which is received from an employee during the withholding reporting period if:~~

- ~~(1) the total number of exemptions claimed for Delaware personal income tax purposes on the certificate exceeds 14, or~~
- ~~(2) the certificate indicates the employee claims to be exempt from withholding of Delaware income tax and the employer reasonably expects that the employee's wages will exceed \$100 per week.~~

~~Copies of certificates required to be submitted under this ruling shall be submitted to the Division of Revenue at the time for filing the employers' monthly or quarterly withholding return.~~

~~Pending receipt of notice from the Division of Revenue with respect to a copy of any certificate submitted, the employer shall withhold on the basis of the statements in the certificate. If the Division of Revenue finds that the certificate submitted contains materially incorrect statements, or, after seeking verification from the employee, determines that it lacks sufficient information to find that the certificate is correct, and so notifies the employer, the employer shall consider the certificate defective and shall withhold amounts from the employee as if the employee were a single person claiming no withholding exemptions. The employer shall notify the employee of the action taken by the Division of Revenue, and request the employee to file another withholding exemption certificate.~~

a) This Regulation sets forth requirements of the Division of Revenue (the "Division") promulgated pursuant to the authority granted to the Division by 30 Del.C. §§563 and 1151 to ensure that employers withhold the proper amount of Delaware personal income tax from their employees' wages.

i) Submission of certain withholding exemption certificates.

A) An employer must submit to the Division a copy of any currently effective withholding exemption certificate as directed in a written notice to the employer from the Division or as directed in published guidance. A notice to the employer may relate either to one or more named employees, to one or more reasonably segregable units of the employer, or to withholding exemption certificates under certain specified criteria. The notice will designate the Division office where the copies of the withholding exemption certificates must be submitted. Employers may also be required to submit copies of withholding exemption certificates under certain specified criteria when directed to do so by the Division in published guidance. Alternatively, upon notice from the Division, the employer must make withholding exemption certificates received from one or more named employees, from one or more reasonably segregable units of the employer, or from employees who have furnished withholding exemption certificates under certain specified criteria, available for inspection by a Division employee (e.g., a compliance check).

B) After a copy of a withholding exemption certificate has been submitted to the Division under this subsection (a), the employer must withhold tax on the basis of the withholding exemption certificate, unless that certificate must be disregarded based on a notice of the maximum number of withholding exemptions permitted under the provisions of subsection (b) of this section.

b) Notice of maximum number of withholding exemptions permitted.

i) The Division may notify the employer in writing that the employee is not entitled to claim a complete exemption from withholding and the employee is not entitled to claim a total number of withholding exemptions more than the maximum number of withholding exemptions specified by the Division in the written notice. The notice will specify the Division office to be contacted for further information. The notice of maximum number of withholding exemptions permitted may be issued if –

A.) The Division determines that a copy of a withholding exemption certificate submitted under subsection (a) of this section contains a materially incorrect statement or determines, after a request to the employee for verification of the statements on the certificate, that the Division lacks sufficient information to determine if the certificate is correct; or

B.) The Division otherwise determines that the employee is not entitled to claim a complete exemption from withholding and is not entitled to claim more than a specified number of withholding exemptions.

ii) If the Division provides a written notice to the employer under this subsection (b), the

Division will also provide the employer with a written notice for the employee (“employee notice”) that identifies the maximum number of withholding exemptions permitted and the process by which the employee can provide additional information to the Division for purposes of determining the appropriate number of withholding exemptions. The Division will also mail a similar written notice to the employee’s last known address.

iii) If the employee is still employed by the employer, the employer must furnish the employee notice to the employee within 10 business days of receipt. If the employee is no longer employed by the employer, the employer is not required to furnish the employee notice to the employee but the employer must send a written response to the Division office designated in the notice indicating that the employee is no longer employed by the employer.

iv) Except as provided in paragraphs (v) and (vi) of this subsection, the employer must withhold tax on the basis of the maximum number of withholding exemptions specified in the written notice received from the Division. The employer must withhold tax in accordance with the notice as of the date specified in the notice, which shall be no earlier than 45 calendar days after the date of the notice.

v) If a withholding exemption certificate is in effect with respect to the employee before the employer receives a notice from the Division of the maximum number of withholding exemptions permitted under this subsection (b), the employer must continue to withhold tax in accordance with the existing withholding exemption certificate rather than on the basis of the notice, if the existing withholding exemption certificate does not claim complete exemption from withholding and claims a number of withholding exemptions less than the maximum number specified by the Division in the written notice to the employer.

vi) If the employee furnishes a new withholding exemption certificate after the employer receives a notice from the Division of the maximum number of withholding exemptions permitted under this subsection (b), the employer must withhold tax on the basis of that new certificate as currently effective only if the new certificate does not claim complete exemption from withholding and claims a number of withholding exemptions less than the number specified by the Division in the notice to the employer. If any new certificate claims complete exemption from withholding or claims a number of withholding exemptions more than the maximum number specified by the Division in the notice, then the employer must disregard the new certificate and must continue to withhold tax on the basis of the maximum number specified in the notice received from the Division unless the Division by subsequent written notice advises the employer to withhold tax on the basis of that new certificate. If the employee wants to put a new certificate into effect to claim complete exemption from withholding or to claim a number of withholding exemptions more than the maximum number specified by the Division in the notice to the employer, the employee must submit to the Division office designated in the employee notice earlier furnished to the employee under this subsection (b) that new certificate and a written statement to support the claims made by the employee on the new certificate.

c) Definition of employer

i) For purposes of this Regulation, the term “employer” includes any person authorized by the employer to receive withholding exemption certificates, to make withholding computations, or to make payroll distributions.

d) Effective date. This regulation shall become effective ten days after publication of the final regulation in the Register of Regulations.