

**CALIFORNIA LAWYERS ASSOCIATION
TAXATION SECTION
2021 WASHINGTON D.C. DELEGATION**

**US COMPOSITE INCOME TAX REPORTING
FOR NON-RESIDENT INTERNATIONAL BUSINESS TRAVELERS**

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EXECUTIVE SUMMARY

International employees who are United States (US) non-residents routinely travel to the US on business trips. These international business travelers (IBTs) often are not eligible for a US Social Security number (SSN) because they do not have a visa type that permits them to apply. While many companies actively track the business travel of their international employees and can identify when employer tax withholding and reporting responsibilities exist, they do not have an effective mechanism to remit taxes with respect to these employee populations since they are unable to remit the taxes through payroll without a valid SSN for these employees.

This paper proposes that the Internal Revenue allow a US affiliate employer to file a composite return on behalf of specific non-resident employees of a related entity group. The proposed solution would be similar to many existing state statutes that allow corporations and partnerships to file composite tax returns on behalf of non-residents directors/shareholders and partners.

In addition, the process for applying for an Individual Tax Identification Number (ITIN) is so onerous, it is not practical for business travelers to the United States to obtain them for the purpose of filing US tax returns for limited business travel. This proposed change would allow employers to allow IBTs who are not eligible for an SSN to be included on a composite return without an SSN or an ITIN. Alternatively, the proposed change would allow employers to apply for a U.S. Payroll Reporting Identification Number that could be used to remit payroll withholding and report payroll taxes for IBTs who are not eligible for an SSN.

DISCUSSION

I. INTRODUCTION

International employees who are US non-residents routinely travel into the US on business trips. These international business travelers (IBTs) are often not working in the US long enough to be placed on a short-term assignment but many companies still actively track these employees' business travel and can identify when employer tax withholding and reporting responsibilities exist. Although companies wish to comply with the tax reporting requirements for their IBTs, they currently do not have an effective mechanism to satisfy all the compliance requirements.

To operate payroll, employers must report their employees' US SSNs. IBTs from outside the US are often not eligible to apply for an SSN, even in situations when they are legitimately present in the US for work, because they do not have a visa type that permits application for an SSN.

Some states, like California and New York, allow Individual Tax Identification Numbers (ITINs) to be used for state employment tax and income tax payroll reporting purposes. However, ITINs cannot be used for federal employment tax and income tax reporting. Therefore, employers cannot remit US taxes to the IRS via payroll, as required.

IBTs traveling to and working in the US may also have a US income tax filing requirement to report income earned for services performed within the US.⁵ If the IBT is a resident of a country that has an income tax treaty with the US, the IBT may be eligible for treaty benefits; however, they must obtain an SSN or an ITIN to claim such benefits.⁶

II. THE PROBLEMS ADDRESSED

Because employers cannot pay tax withholding for an IBT via payroll, and it is often considered too burdensome for non-US employees to file individual income tax returns, many employers and employees struggle to comply. A very limited number of non-US employees file US income tax returns to report ordinary business travel to the US. Collection of US tax from employers and/or non-US employees would require significant IRS effort via payroll and individual audits of foreign companies and foreign nationals.

No formal estimates of the uncollected tax revenue have been prepared, but it is certain that non-compliance in this area is widespread. The gap between tax revenue owed and the amount collected is significant.

III. CHALLENGE FOR EMPLOYERS

Employers are highly motivated to operate a compliant payroll system but cannot make payroll deposits for employment taxes and incomes that may be due for their IBTs

⁵ I.R.C. § 871(b)(1)

⁶ Treas. Reg. § 301.6114-1(a)(1)

to the US via their existing payroll processes. Employers may support their IBT employees in filing a federal individual tax return to obtain an ITIN and pay the tax. Nonetheless, this approach presents the following challenges for employers:

A. Withholding Obligation

Even if employees obtain an ITIN and file a federal tax return, it does not relieve their employers from the withholding obligation as ITINs are not permissible for payroll reporting.⁷

B. Burden of Compliance

Employers seek to remove or significantly reduce the time and effort burden on their employees to file and report US source income on US income tax returns for incidental business travel.

C. Tax Preparation Costs

There is a high cost for employers to pay tax service providers to prepare tax returns on behalf of the IBT employees.

D. Late-Filed Personal Income Tax Returns

Even where employers encourage individual compliance, employees cannot be fully compliant. Penalties and interest would result as no payroll withholding would have been possible and no estimated tax payments made until the ITIN is received, and the employee will have had to wait until the IRS issues the ITIN before filing the US return.⁸

E. Tracking Travel and Gathering Compensation Data

There is an inherent complexity in tracking an IBT's travel to the US. Even when an employer tracks an IBT's travel, employers must gather and analyze each IBT's compensation data to comply. This involves the manual process of contacting each IBT's foreign employer's payroll department and can be especially burdensome when there are a large population of IBTs with different foreign employers.

IV. DESIRED OBJECTIVE AND PROPOSED SOLUTION TO BE USED FOR INTERNATIONAL TRAVELERS WITHOUT AN SSN OR ITIN

The objective of this proposal is to create a mechanism that allows a US affiliate employer to file a composite income tax return for non-resident international inbound employees of a related entity group in lieu of the employee having to file an individual income tax return. The proposed solution is modeled after existing state laws and regulations for other types of composite returns.

⁷ I.R.C. § 3402(a)(1)

⁸ I.R.C. §§ 6601, 6651, 6654

V. BENEFITS FOR THE DEPARTMENT OF THE TREASURY AND EMPLOYERS

Changing the process or law to allow a US affiliate employer to file composite returns for IBTs could: (1) increase the IRS collection of withholding and final liability while reducing its audit effort and expense and (2) reduce the risk, cost and administrative effort for employers while increasing overall tax compliance.

VI. PROPOSED PROVISIONS

The proposal would include the following provisions:

A. Filing composite returns on behalf of IBTs.

Similar to many existing state laws which allow composite reporting for non-residents, the proposed law allows a US company to file a composite return (the “Return”) to report US income tax on behalf of an IBT employed by a related legal entity.

B. Filing requirements and obligations.

The proposed law limits the employer's Return filing requirements to a single annual Return along with quarterly tax remittances containing provisional employee names. The annual Return in turn would fulfill the actual employer’s legal withholding and reporting obligations without requiring the actual employer to apply for a US EIN.

Under the proposed process or law, IBTs are required to opt-in to be included on a Return before it is filed. The Return fulfills the IBT’s personal income tax filing obligation unless the IBT later becomes a US resident alien or has an unrelated US income tax filing or foreign asset reporting obligation. If the IBT later files a US individual income tax return for the year, the proposed law allows taxes remitted on behalf of the IBT for that year to be credited against the IBT’s personal income tax liability.

C. Taxpayer Identification or Proposed US Payroll Identification Number

The proposed law would allow IBTs who are not eligible for an SSN to be included on the Return, and provide that employers are not required to report an SSN or an ITIN for an IBT included on the Return.

Alternatively, the proposed change would allow for a composite filing using the US Payroll Reporting Identification Number. US employers would be able to apply for a US Payroll Identification Number on behalf of their foreign affiliate employees that could be used to remit payroll withholding and report payroll taxes for all IBTs who are not eligible for an SSN. The US Payroll Reporting Identification Number could be obtained on a composite basis and in advance of any payroll withholding and reporting obligations on behalf of the IBTs. When the IBT files a US non-resident income tax return for the year, allow taxes remitted on behalf of the IBT for that year to be credited against the IBT’s personal income tax liability based on the US Payroll Reporting Identification Number.

VII. APPLICABLE STATUTES AND PROPOSED REVISIONS

To implement the proposed solution a number of key issues under current law will need to be addressed and some existing rules need to be revised.

A. Employer payroll tax return obligations

Under existing laws, employers cannot issue a Form W-2 for IBTs without providing the IBT's SSN; however, many IBTs are not eligible to obtain a US social security number.⁹

Under current law, foreign employers are required to withhold and report wages, and remit income taxes related to IBTs.¹⁰ When the employer files payroll tax returns with the IRS, the employer is required to include the SSN of each employee included on the return or be liable for a penalty for omitting consequential information.¹¹
¹²

This proposal would allow remittance of income taxes to the IRS and allow US companies to fulfill filing requirements on behalf of non-resident employees of a related entity group by filing a composite payroll tax return. Under this proposal, SSNs would not be required for IBTs included on composite returns.

B. Personal Income Tax returns for IBTs

Existing laws for filing federal income tax returns require non-residents with US source income to file an individual income tax return on Form 1040NR.¹³ To file these individual tax returns, IBT's must have a valid SSN or ITIN; however, some IBTs are not eligible to obtain an SSN and obtaining an ITIN can be difficult and especially burdensome for reporting incidental business travel, which may only result in a treaty based tax return. In lieu of non-resident IBTs filing an individual federal income tax return, the proposal is to amend the process or the Internal Revenue Code to allow employers to file a composite return for their participating IBTs and those of affiliated entities. IBTs included on such composite returns would not be required to provide an SSN or ITIN.

VIII. SIMILAR STATE LAWS

California may be a particularly challenging location for companies with international business travelers, because California taxes nonresidents on compensation for services performed in California and does not follow tax treaties between the United States and foreign countries for individual income tax relief.¹⁴

⁹ I.R.C. § 6051(a)(2)

¹⁰ I.R.C. § 3401(d)

¹¹ Treas. Reg. §31.6011(b)-2(c)

¹² I.R.C. § 6721(a)

¹³ I.R.C. § 871(b)(1)

¹⁴ See CAL. REV. & TAX CODE § 17951; CAL. CODE OF REGS., TIT. 18, §§ 17951-1, 17951-

To ease the tax compliance and administrative burden for companies and employees, on September 18, 2020, California Assembly Bill 2660 (A.B. 2660) was signed into law. The new provisions of the California law allow companies the **option** of filing a group return for their foreign employees who travel to California for work and incur a personal income tax liability.¹⁵

For taxable years beginning on or after January 1, 2021, and before January 1, 2026, A.B. 2660 amends California Revenue and Taxation Code (CRTC) Section 18624 to “prohibit the Franchise Tax Board from requiring a nonresident alien, as defined, to provide a SSN or ITIN when filing a state tax return, statement, or other document if the nonresident alien is not eligible for or has not been issued a SSN or ITIN.”¹⁶

Additionally, A.B. 2660 adds new CRTC Section 18537, pursuant to which the FTB “shall provide for the filing of a group return by a taxpayer, or an entity authorized by the taxpayer to file on its behalf, for one or more electing nonresident aliens who receive taxable income...for services that take place in this state.”¹⁷

Furthermore, the “taxpayer, or an entity authorized by the taxpayer to file on its behalf, as the agent for the electing nonresident aliens, shall make the payments of tax, additions to tax, interest, and penalties otherwise required to be paid by, or imposed on, the electing nonresident aliens.”¹⁸ Amounts paid on behalf of the electing nonresident aliens are excluded from the nonresident alien’s gross income.¹⁹

CONCLUSION

The tax law requires employers to pay employment and income taxes for non-resident IBT’s, yet the law does not provide an effective mechanism for foreign employers to comply with these requirements. The proposed process or legislation would enable employers to file composite returns in lieu of W-2 reporting obligations and the income tax return filing obligations of their non-resident IBTs.

2, 17951-5; *Container Corp. v. Franchise Tax Bd.*, 463 US 159, 196-197 (1983); *Appeal of M.T. de Mey van Streefkerk*, 85-SBE-135, Nov. 6, 1985; FTB Publication 1031 (2019) at 10; FTB Publication 1001 (2019) at 4; FTB Residency and Sourcing Technical Manual, § 3720.

¹⁵ A.B. 2660, 2019-2020 REG. SESS. (CAL. 2020)

¹⁶ See A.B. 2660, 2019-2020 REG. SESS. (CAL. 2020), LEGISLATIVE COUNSEL’S DIGEST; see A.B. 2660 §§ 2 and 3 (adding Cal. Rev. & Tax Code § 18537 and amending Cal. Rev. & Tax Code § 18624 to add new subsections (f) and (g)).

¹⁷ See A.B. 2660 § 2 (new Cal. Rev. & Tax Code § 18537(a)).

¹⁸ See A.B. 2660 § 2 (new Cal. Rev. & Tax Code § 18537(c)).

¹⁹ See A.B. 2660 § 1 (new Cal. Rev. & Tax Code § 17132.1(a)).