

830 CMR: DEPARTMENT OF REVENUE

830 CMR 62B.00: WITHHOLDING AND ESTIMATED TAXES

830 CMR 62B.2.2 is deleted and replaced with the following:

830 CMR 62B.2.2: *Pass-Through Entity Withholding*

(1) *Statement of Purpose, Applicable Tax Years, Outline of Topics.*

(a) *Purpose.* Pass-through entity withholding is a payment of personal income tax under M.G.L. c. 62 or corporate excise under M.G.L. c. 63 on behalf of members of a pass-through entity. The obligation to withhold is separate from the member's or pass-through entity's obligation to file a tax return. Pass-through entities must withhold as to all members unless either the pass-through entity or the member is exempt.

(b) *Applicable Tax Years.* Withholding is required on a member's distributive share amounts allocated on or after January 1, 2009 that are attributed to a tax year beginning on or after January 1, 2009.

(c) 830 CMR 62B.2.2 is organized as follows:

1. Statement of Purpose, Applicable Tax Years, Outline of Topics
2. Definitions
3. Pass-Through Entities Required to Withhold; Members Subject to Withholding
4. Income Subject to Withholding; Quarterly Payment
5. Tiered Structures
6. Credit for Tax Paid; Members' Estimated Payment Obligation
7. Joint and Several Liability
8. Annual Schedule, Withholding Registration, Payment, Reporting
9. Penalties

(2) *Definitions.*

Commissioner, the Commissioner of Revenue.

Department, the Department of Revenue.

Distributive Share, income, gain, loss, deduction, or credit from a pass-through entity for a taxable year allocated to a member taxable under M.G.L. c. 62 or c. 63.

Investment Partnership, a partnership, including a limited liability company with any member treated as a partner under Massachusetts tax law, that meets the following three criteria: (a) substantially all of the partnership's assets consist of investment securities, deposits at banks or other financial institutions, or office equipment and office space reasonably necessary to carry on the activities of an investment partnership; (b) substantially all of the partnership's income is from interest, dividends and capital gains; and (c) the partnership is not engaged in a trade or business in Massachusetts.

Massachusetts-Source Income, Massachusetts gross income derived from or effectively connected with: (a) any trade or business, including any employment, carried on by a pass-through entity in Massachusetts, whether or not the entity is actively engaged in a trade or business or employment in Massachusetts in the year in which the income is received; (b) the participation in any lottery or wagering transaction in Massachusetts; or (c) the ownership of any interest in real or tangible personal property located in Massachusetts. Pass-through entities with income from sources both within Massachusetts and elsewhere must allocate and apportion the income according to 830 CMR 62.5A.1(6) to determine the amount of Massachusetts-source income.

Member, a member of a pass-through entity, including a shareholder of an S corporation; a partner in a partnership, including a limited partner in a limited partnership and a partner in a limited liability partnership; a member of a limited liability company treated as a partner under Massachusetts tax law; and a beneficiary of an estate.

Nonresident, any natural person, estate, or trust that is not a resident or domiciliary of Massachusetts; any pass-through entity without a usual place of business in Massachusetts; or any corporation that is not required to file or does not file a tax return in Massachusetts with regard to distributive share derived from a pass-through entity that is subject to the provisions of 830 CMR 62B.2.2.

Pass-through entity, an entity whose income, loss, deductions and credits flow through to members for Massachusetts tax purposes, including a general partnership, limited partnership, limited liability partnership, or limited liability company with a member treated as a partner under Massachusetts tax law, an S corporation, an estate not taxed at the entity level, and a trust not taxed at the entity level, including a grantor-type trust.

Publicly Traded Partnership, an entity defined as a publicly traded partnership by Section 7704(b) of the Internal Revenue Code that is treated as a partnership for the taxable year under the Internal Revenue Code.

Qualified Securities Partnership, a limited partnership that is engaged exclusively in buying, selling, dealing in or holding securities on its own behalf, and not as a broker, as described in M.G.L. c. 62, § 17(b) or 830 CMR 63.39.1(8)(b).

Tiered Structure, a pass-through entity that has a pass-through entity as a member. As between two entities, the pass-through entity that is a member is the upper-tier entity, and the entity of which it is a member is the lower-tier entity. A tiered pass-through entity arrangement may have two or more tiers; in such cases, a single entity can be both a lower-tier and an upper-tier entity.

(3) *Pass-Through Entities Required to Withhold; Members Subject to Withholding.*

- a. **(a) General Rule.** A pass-through entity that maintains an office or engages in business in Massachusetts must deduct and withhold Massachusetts tax from the member's pro-rata share of the pass-through entity's Massachusetts-source income, unless: (1) the pass-through entity is exempt from this requirement under 830 CMR 62B.2.2(3)(b); or (2) the member is exempt from this requirement under 830 CMR 62B.2.2(3)(c).
- b. **(b) Exempt Pass-through Entities.** The following pass-through entities are not required to participate in pass-through entity withholding:

1. An Investment Partnership or a partnership that only invests in Investment Partnerships and has no Massachusetts-source income from other sources;
2. A trust or estate that is already required to withhold on nonresident members, if it has any, under M.G.L. c. 62, § 10(g);
3. An upper-tier pass-through entity in a tiered structure that can demonstrate that a lower-tier pass-through entity has previously withheld and made estimated payments of all of the Massachusetts tax on Massachusetts-source income derived by the upper-tier pass-through entity that would otherwise be subject to withholding by the upper-tier entity. (See tiered structures at 830 CMR 62B.2.2(5).)
4. A Publicly Traded Partnership; and
5. An entity that is prohibited under federal or state law from withholding tax from distributions to members as otherwise required under 830 CMR 62B.2.2, such as certain for-profit entities that provide low-income housing which are funded by or through MassHousing or the United States Department of Housing and Urban Development; the exemption applies only for years in which distributions are prohibited under federal or state law. Contractual restrictions on distributions, such as loan covenants or organizational documents, do not qualify an entity for this exemption.

(c) *Exempt Members.* Generally, withholding is not required for members that fit into one of the categories below. For a member to be treated as exempt, the pass-through entity must: obtain, on or before the later of the last day of the fourth month of the entity's taxable year, or within thirty days of the member joining the entity, certification by the member claiming to be exempt from withholding on a form approved by the Commissioner; retain the certification according to the Commissioner's record retention rules; and produce the certification upon request. The exemption certificate remains in effect until revoked by the member. If the member's status changes during the tax year, the entity must obtain a new certification within 30 days of the date the member's status changes. If an entity does not collect the certification from its members because it does not anticipate that it will realize Massachusetts-source income, it must collect the certifications within 30 days of the date the entity could reasonably foresee that it would realize Massachusetts-source income.

1. *Federally Tax-exempt.* With respect to members that are exempt from federal income tax under Internal Revenue Code § 501, withholding is not required as to nonresident members' distributive shares to the extent that such income is exempt from Massachusetts tax under M.G.L. c. 62 or c. 63, as certified to the pass-through entity by the member.
2. *Massachusetts Residents.* Generally, withholding is not required as to a member who certifies that the member is a Massachusetts resident that is an individual, estate, or trust.

3. *Corporations Otherwise Subject to Tax under c. 63; Pass-Through Entities Doing Business in Massachusetts.* Generally, withholding is not required as to members that are corporations that have income, other than their pass-through entity income, that is subject to tax under M.G.L. c. 63 and that are filing a Massachusetts corporate excise return; or as to members that are pass-through entities that must file a return pursuant to M.G.L. c. 62 in Massachusetts. Corporations and pass-through entities claiming to be exempt must certify to their filing of a Massachusetts return.
 4. *Participating M.G.L. c. 62 Nonresidents.* Generally, withholding is not required as to nonresident members taxable under M.G.L. c. 62 who establish that they are compliant with Massachusetts tax laws by:
 - a. participating in a composite return prepared by the pass-through entity under the rules explained in 830 CMR 62.5A.1(11); or
 - b. filing a certification with the pass-through entity, stating that they agree to file tax returns, make quarterly estimated tax payments, and accept personal jurisdiction in Massachusetts state courts for the determination and collection of taxes, including estimated tax payments, and related interest, penalties, and fees imposed with respect to the income of the pass-through entity. Members that file this certification may nonetheless agree to have the entity withhold on their behalf at any time during the taxable year.
 5. *Upper-tier Pass-through Entities Comprising Only Exempt Members.* Generally, withholding is not required as to upper-tier pass-through entities that certify that all of their members are exempt from withholding under 830 CMR 62B.2.2(3)(c)1. through 4.
 6. *Nonresident Limited Partners of Qualified Securities Partnerships.* Generally, withholding is not required with respect to an individual nonresident limited partner of a Qualified Securities Partnership, to the extent the partner's distributive share from the Qualified Securities Partnership is not subject to tax in Massachusetts. Also, withholding is generally not required with respect to a corporate nonresident limited partner of a Qualified Securities Partnership to the extent the partner's distributive share from the Qualified Securities Partnership is not subject to the corporate excise in Massachusetts.
 7. *Other Exempt Entities.* The Commissioner may identify additional exempt entities on the pass-through entity exemption certificate, which will be updated periodically.
- (d) *Backup Withholding.* Notwithstanding the exemptions from withholding under 830 CMR 62B.2.2(3)(c), if the Commissioner notifies a pass-through entity that any resident or nonresident member has not met the member's obligation to file and pay timely, the pass-through entity must withhold and make tax payments on behalf of that member. Backup withholding, if required, shall be for a period of five tax years following the Commissioner's notification to the pass-through entity, unless the Commissioner agrees in writing to a shorter period.

(4) *Income Subject to Withholding; Quarterly Payment.*

- (a) *Amount of Tax to be Withheld.* The tax withheld under 830 CMR 62B.2.2 shall be calculated based on Massachusetts taxable amounts of distributive share allocated to a member subject to withholding. The amount subject to withholding by a pass-through entity is calculated based on the entity's Massachusetts-source income.
- (b) *Payments of Tax Withheld.* The pass-through entity must make a required annual payment on behalf of each member subject to withholding calculated by multiplying the withholding rate by the lesser of 80% of the member's distributive share for the taxable year, or 100% of the member's prior year distributive share. The pass-through entity shall make four installment payments on the required annual payment on behalf of each subject member for the taxable year. The amount of each installment shall be 25% of the required annual payment. Each installment shall be paid on or before the last day of the month following the close of the quarter of the entity's taxable year.
- (c) *Withholding Rate.* The taxable amount of distributive share shall be multiplied by the following tax rates:
 - 1. if the member is an individual, estate, or trust, the tax rate imposed on Part B taxable income under M.G.L. c. 62, § 4(b); or
 - 2. if the member is a corporation, the applicable rate under M.G.L. c. 63; or
 - 3. if a lower-tier pass-through entity is withholding directly as to the members of an upper-tier pass-through entity as permitted under 830 CMR 62B.2.2(5), the rate imposed on Part B taxable income under M.G.L. c. 62, § 4(b) for taxpayers that are taxable under c. 62 or the appropriate rate under M.G.L. c. 63, for taxpayers that are taxable under c. 63, as the case may be; or
 - 4. if the member is a pass-through entity, the tax rate on individuals imposed on Part B taxable income under M.G.L. c. 62, § 4(b); or
 - 5. if no exemption certificate has been filed and the entity has no information about the member, the entity should withhold at the personal income tax rate imposed on Part B taxable income under M.G.L. c. 62, § 4(b).

(5) *Tiered Structures.*

- (a) Unless exempted, each pass-through entity shall withhold applicable tax, as determined under 830 CMR 62B.2.2, on behalf of its members subject to withholding, including members that are pass-through entities. To prevent multiple withholding on the same income, an upper-tier pass-through entity that recognizes distributive share income may subtract amounts withheld by a lower-tier entity from amounts required to be withheld.
- (b) An upper-tier entity recognizing distributive share income that has been withheld upon must separately report to each of its members the member's proportionate distributive share of amounts withheld by the lower-tier entity. Any member of an upper-tier entity

that is itself a pass-through entity must likewise report proportionate distributive share withheld to each of its members.

- (c) Upon written application and with the approval of the Commissioner, a lower-tier entity may meet its withholding obligation for an upper-tier entity by directly withholding from the distributive share income of the members subject to withholding of the upper-tier entity. If approval is granted, the lower-tier entity is required to report the amounts withheld directly to the members, as well as to the upper-tier entity.
- (6) *Credit for Tax Paid; Members' Estimated Payment Obligation.*
- (a) *Credit for Tax Paid.* Amounts withheld and paid to the Commissioner by a pass-through entity on behalf of a member shall be considered to be the payment of the tax imposed on the member for distributive share income derived by the member from the pass-through entity for the pass-through entity's taxable year ending within or with the taxable year of the member, and shall be credited against the member's tax liability for the member's taxable year.
 - (b) *Members' Estimated Payment Obligation.* Notwithstanding this regulation, 830 CMR 62B.2.2, members shall be responsible for payment of estimated taxes on all of their income, including income from pass-through entities, under M.G.L. c. 62B, § 13 and M.G.L. c. 63B, § 2. Amounts previously withheld and paid to the Commissioner by the pass-through entity on behalf of a member, applicable to the entity's taxable year ending within or with the taxpayer's tax year, may be allowed as a credit, as of the date of receipt by the Department, on the member's estimated tax obligation.
 - (c) *Interest and Penalties on Underpayment of Estimated Tax.* Withholding by the pass-through entity may not be sufficient to satisfy members' estimated payment obligation on their pass-through entity income because of differences in timing and amount of required payments between 830 CMR 62B.2.2, and M.G.L. c. 62B, §13 or M.G.L. c. 63B, § 2, as applicable. Interest and penalties at the rates established under M.G.L. c. 62C, §§ 32 and 33 will be imposed on the amount of any underpayment as calculated under M.G.L. c. 62B, § 14(a) and (b) or M.G.L. c. 63B, § 3, as applicable.

Example (6)(c)1. Pass-Through Entity and Member both use the calendar year as their taxable year. Member is a corporation. Pass-Through Entity allocates Member's distributive share of \$100,000 of taxable Massachusetts-source income to Member in year 1 and the same amount in year 2. For year 2, Member seeks to be within the estimated payment safe harbor by paying 100% of its prior year corporate excise. To avoid interest and penalties, Member must make an estimated payment in an amount totaling 40% x year 1 corporate excise on or before March 15. Pass-Through Entity, relying on its safe harbor of paying 100% of Member's prior year corporate excise, must withhold and pay, on behalf of Member, an amount totaling 25% x corporate excise tax rate x \$100,000 on or before April 30th. Member may reduce its June 15 estimated tax payment by the amount paid by Pass-Through Entity on April 30.

Example (6)(c)2. Pass-Through Entity and Member both use the calendar year as their taxable year. Member is an individual. Pass-Through Entity makes its first installment payment on behalf of Member for the taxable year on April 30. Member's first estimated payment is due April 15th. Member must make her first estimated

payment on April 15, and may take a credit on her June 15th estimated payment for the amount paid by Pass-Through Entity on her behalf on April 30th.

Example (6)(c)3. Same facts as Example (6)(c)2, except that Pass-Through Entity makes its first installment payment on behalf of Member for the taxable year on April 15th. Member's estimated payment obligation with regard to her income from Pass-Through Entity has been met.

- (7) *Joint and Several Liability.* A pass-through entity required to withhold, shall be jointly and severally liable with each member subject to withholding for taxes, together with related interest and penalties, imposed on the member by Massachusetts with respect to the income of the pass-through entity. A pass-through entity that reasonably relies, in good faith, on an exemption certificate presented by a member pursuant to 830 CMR 62B.2.2(3)(c) shall not be liable for failure to withhold. Notwithstanding the stated exception, joint liability will exist in any instance in which the member directly or indirectly owns more than a 50% interest in the pass-through entity.
- (8) *Withholding Registration, Payment, Reporting.* A pass-through entity that is not exempt under 830 CMR 62B.2.2(3)(b) shall withhold with respect to members, other than those that are exempt from withholding pursuant to 830 CMR 62B.2.2(3)(c), that have been allocated Massachusetts taxable amounts of distributive share during the taxable year, using electronic media and the format designated by the Commissioner. If withholding is required for any member, a pass-through entity shall:
 - (a) register for Massachusetts withholding on amounts paid, credited or allocated to a member;
 - (b) report and pay over to the Commissioner the amount of taxes withheld during each quarter of the entity's taxable year on or before the last day of the month following the close of the quarter;
 - (c) file an annual withholding return with the Commissioner, on or before the last day of the third month of the year following the taxable year, showing the total amount withheld for the taxable year (if no tax was withheld, report zero tax withheld) and any other information the Commissioner requires; and
 - (d) furnish to each member subject to pass-through entity withholding a statement of amounts withheld and paid to the Commissioner during the taxable year on the member's behalf. If the pass-through entity is treated as a partnership, this information should be included on the partner's Massachusetts information schedule. Other types of pass-through entities should use a form approved by the Commissioner.
- (9) *Penalties.* Any pass-through entity required to withhold that fails to meet its withholding obligation shall be subject to all applicable penalties for failure to adequately withhold under M.G.L. c. 62B and M.G.L. c. 62C. A pass-through entity that has not properly allocated distributive share to its members, as required for partnerships and entities treated as partnerships under M.G.L. c. 62, § 17, as required for S corporations under M.G.L. c. 62, § 17A, or as required under other applicable authority, may be liable for additional penalties.

REGULATORY AUTHORITY

830 CMR 62B.2.2: M.G.L. c. 62B; M.G.L. c. 14, § 6 (1); M.G.L. c. 62C, § 3.

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