



# letters to the editor

## Withholding on Awards and Settlements Redux

To the Editor:

I am writing concerning the excellent article by Raby and Raby, "What Awards and Settlements Require Withholding," *Tax Notes*, Dec. 28, 1998, p. 1653. Raby and Raby correctly point out that many of these unfortunate situations truly place the payor "between a rock and a hard place." I wish to raise only a couple of points.

First, when a brouhaha over withholding erupts, it is not the norm for the Internal Revenue Service to be involved. In the first case that Raby and Raby describe, the recent case of *Richard Newhouse v. McCormack & Co.*, 82 AFTR2d para. 98-5388, Doc 98-30499 (10 pages) (8th Cir. 1998), the Rabys point out that the IRS did not stand idly by but instead filed an *amicus* brief supporting withholding. Normally, though, the IRS does not join in tax disputes between private parties — even where the IRS stands to get most of the money at stake.

Unfortunately, there have been many cases in which an already defeated employer (defeated in court and ready to pay either a judgment or ready consensually to pay a settlement to a former employee) finds itself whipsawed, not knowing whether withholding is proper. Other than giving advice that withholding will almost always be necessary, the government is usually little help. This is why I think the Rabys' conclusion to their article is absolutely correct. Employers should insist on some kind of opinion from reputable counsel about what they are doing.

Frequently, when the question is to withhold or not to withhold, the decision is made in the context of emotionally charged litigation, where there is a tremendous rush to close a case. Very often, issues such as withholding (and tax characterization issues in general) are not considered until the nth hour, where there is tremendous momentum to get the case finished. Particularly where a vehement plaintiff insists on no withholding (and perhaps other tax concessions as well) in a settlement document, the defendant employer should seek independent advice, as the Rabys point out, to insure that penalties for failure to withhold will not be assessable.

The other point I wish to note is that there are a number of cases in which the IRS is not a party (see my comment above about the IRS's willingness to help an employer in this quandary). One of the cases discussed by the Rabys, *Lisec v. United Airlines*, has come to be viewed as a classic case, since it states that with-

holding is not appropriate where the person is no longer an employee. This is at odds with IRS regulations. Nevertheless, I have seen national employers that, when settling cases in California, mention *Lisec v. United Airlines* and its mandate that they not withhold on amounts on which they would withhold in other states. I do not know whether the Service is aware that *Lisec* has been given such importance by practitioners.

Ultimately, I agree with the Rabys that the best advice is to get advice, and to get it in writing. Whether one is the payor and worried about withholding liabilities (and/or failure to file information return liabilities) or the plaintiff, tax advice at the culmination of a case is invaluable.

Very truly yours,

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