

Partnership and S corporation (referred to in this FYI collectively as “pass-through entities”) bear certain responsibilities with respect to their nonresident partners and shareholders (referred to in this FYI collectively as “nonresident members”). Specifically, pass-through entities must ensure that their nonresident members pay Colorado income tax on their Colorado-source income. This obligation can be satisfied in one of three ways.

- The pass-through entity can, at the nonresident member’s election, include the nonresident member in a composite return the pass-through entity files (Form 106) and make a composite payment of tax on the nonresident’s behalf.
- The pass-through entity can file with its Form 106 a signed agreement from the nonresident member (Form DR 0107) by which the nonresident member agrees to file their own individual Colorado income tax return to report and pay any tax the nonresident member owes.
- The pass-through entity can withhold and remit the applicable tax on the nonresident member’s behalf (Form DR 0108).

If a nonresident member does not elect to be included in a composite return or to sign an agreement to file their own return, the pass-through entity must withhold and remit the applicable tax on the nonresident member’s behalf using Form DR 0108. The appropriate box in Part III of Form 106 must be checked to indicate which option has been selected for each nonresident member.

The requirements described in this FYI do not apply to any publicly traded partnership, as defined in 26 U.S.C. § 7704(b), whether or not such publicly traded partnership is treated as a corporation for tax purposes.

## NONRESIDENT MEMBERS

The requirements discussed in this FYI apply only to nonresident members. Nonresident members include partners and shareholders that are:

- nonresident individuals;
- nonresident estates; or
- nonresident trusts.

Nonresident members subject to the requirements discussed in this FYI do not include partners and shareholders that are:

- residents individuals;
- resident estates;
- resident trusts;
- partnerships; or
- corporations.

## COMPOSITE RETURNS

By filing a composite return a pass-through entity can report the Colorado-source income and Colorado tax for multiple nonresident members that elect to be included in a composite return. Part II of Form 106 must be completed in order to file a composite return. The aggregate Colorado-source income of all nonresident members included in the composite return must be reported on the applicable line. The total tax is calculated by multiplying the Colorado-source income of all included nonresident members by 4.63%. Any credits allocated to nonresident members included in the composite return can be applied against the tax due.

Neither Form DR 0107 nor Form DR 0108 should be submitted for any nonresident member included in a composite return.

## Election for inclusion

A nonresident member should not be included in a composite return if he or she has other Colorado-source income or if he or she intends to file his or her own separate Colorado income tax return. If a nonresident member has no Colorado-source income other than the income received through the pass-through entity, their inclusion in the composite return satisfies their Colorado filing requirement. Nonresident members may be included in a composite return only if they make an affirmative election to be included. This election is an agreement between the nonresident member and the pass-through entity and can be done in any manner the parties agree upon. A written or signed agreement is not required.

## Estimated tax

There is no independent requirement for pass-through entities to remit estimated tax payments. However, nonresident members are generally required to make estimated income tax payments if their Colorado income tax liability exceeds \$1,000. If a pass-through entity chooses to remit estimated tax payments on behalf of their nonresident members, the requirement to remit such estimated tax payments must be determined with respect to each individual nonresident member included in the composite return. Any estimated tax payments remitted for a composite return should be remitted using Form 106EP.

Failure to remit any required estimated tax payments for a nonresident member included in a composite return will result in an estimated tax penalty. A separate Form 204 must be completed and submitted with the composite return for any nonresident member included in the composite return who incurs an estimated tax penalty. See FYI Income 51 for additional information regarding estimated tax payments and the estimated tax penalty due for failure to remit any required estimated payments.

## Carryforwards and carrybacks

Certain excess income tax deductions (such as net operating losses) and credits can be carried forward or carried back to a prior or subsequent tax year. However, no deductions or credits can be carried forward or carried back on a composite return. Nonresident members must file their own separate income tax returns in order to carry forward or carry back any excess deductions or credits.

## NONRESIDENT PARTNER, SHAREHOLDER OR MEMBER AGREEMENT (FORM DR 0107)

A nonresident member who will file their own individual Colorado income tax return can complete Colorado Nonresident Partner, Shareholder or Member Agreement (Form DR 0107). By completing and signing the form the nonresident member agrees to the following:

- 1) to file their own individual Colorado income tax return to report their Colorado-source income;
- 2) to make timely payment of all Colorado income tax that they owe; and
- 3) to be subject to personal jurisdiction in Colorado for purposes of the collection of income tax along with any related penalties and interest.

A nonresident member who completes Form DR 0107 should provide the completed form to the pass-through entity. A pass-through entity must include with its Colorado return (Form 106) a copy of any Form DR 0107 that it receives from any of its nonresident members and is thereby relieved of any withholding requirements with respect such nonresident members. A pass-through entity that timely files a Form DR 0107 for a nonresident member is relieved of any requirement to either withhold or submit another Form DR 0107 for that nonresident member for subsequent tax years as well.

## NONRESIDENT PARTNER OR SHAREHOLDER WITHHOLDING (FORM DR 0108)

Pass-through entities must withhold and remit Colorado income tax for any nonresident member who neither completes Form DR 0107 nor is included in a composite return. The required withholding is equal to 4.63% of the nonresident member's Colorado-source income. Withholding is required regardless of whether the Colorado-source income is distributed to the nonresident member. Any withholding payment must be remitted on or before the due date, determined without regard to extension, for the tax return for the corresponding tax year.

Withholding is remitted with Statement of Colorado Tax Remittance for Nonresident Partner, Shareholder or Member (Form DR 0108). The amount withheld is credited to the nonresident member's account and can be claimed as a prepayment on the nonresident member's Colorado return. A single check may be used to remit withholding payments for no more than 50 separate nonresident members. When remitting payment for more than 50 nonresident members, a pass-through entity must use multiple checks each remitting withholding payment for no more than 50 nonresident members. A separate Form DR 0108 must be submitted for each nonresident member for whom withholding is remitted.

In the case of tiered partnership structures, withholding is required only for nonresident members, not for any other pass-through entities involved in the partnership structure. A lower tier partnership may elect to withhold and remit taxes on behalf of an upper tier partnership's nonresident members, but it is not obligated to do so. Rather, the upper tier partnership is responsible for ensuring that the proper withholding is made and remitted for its nonresident members. If a lower tier partnership withholds and remits payment for the upper tier partnership's nonresident members, payment must be remitted with a separate Form DR 0108 for each nonresident member who will ultimately claim the withholding on their Colorado individual income tax return.

The department will apply withholding payments in the manner indicated by the accompanying Forms DR 0108. For example, if a payment is remitted with a Form DR 0108 directing its application to the upper tier partnership's

account, it will be so applied, and the department will not subsequently transfer the payment from upper tier partnership account to the accounts of upper tier partnership's individual nonresident members. As a result, no credit will be available on the individual nonresident members' accounts and, if they claim credit for partnership withholding on their individual returns, the credit claim will be denied.

#### ADDITIONAL RESOURCES

- Colorado statutes and regulations
  - § 39-22-601(2.5), C.R.S. (S corporations)
  - § 39-22-601(5), C.R.S. (partnerships)
  - § 39-22-605, C.R.S. and Dept. Rule 39-22-605 (estimated payment requirement for individuals)
  - § 39-22-608, C.R.S. and Dept. Rule 39-22-608 (due date for returns)
  - § 39-22-609, C.R.S. (due date for payment of tax)
- Colorado forms and guidance
  - Form 106 (Income Tax Return for Pass-Through Entities and Composite Filing for Nonresidents)
  - Form DR 0107 (Colorado Nonresident Partner, Shareholder or Member Agreement)
  - Form DR 0108 (Statement of Colorado Tax Remittance for Nonresident Partner, Shareholder or Member)
- Federal laws
  - 26 U.S.C. § 7704 (publicly traded partnerships)

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FYIs provide general information concerning a variety of Colorado tax topics in simple and straightforward language. Although the FYIs represent a good faith effort to provide accurate and complete tax information, the information is not binding on the Colorado Department of Revenue, nor does it replace, alter, or supersede Colorado law and regulations. The Executive Director, who by statute is the only person having the authority to bind the Department, has not formally reviewed and/or approved these FYIs.