

**Office of Chief Counsel
Internal Revenue Service
memorandum**

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to: Associate Area Counsel (Manhattan, Group 2)
(Large & Mid-Size Business)
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from: Nancy L. Rose
Senior Counsel
(Procedure & Administration)

subject: Form W-9 Retention Issues

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

LEGEND

taxpayer =
Date X =
business =
records =
Date Y =

ISSUE

Can the Service assert backup withholding liabilities based on failure to obtain certification on Forms W-9, where the taxpayer does not have the Forms W-9 or any evidence of ever having received them, and the required three-year retention period for the certificates has passed?

CONCLUSION

The Service may assert backup withholding liabilities based on failure to obtain certification on Forms W-9, even if the three-year period for retaining those forms has passed.

FACTS

Under the facts you provided, and as presented in the taxpayer correspondence to the examining agent dated Date X, we understand that the taxpayer is a business that discovered through a review of its records in Date Y that it did not have Forms W-9 with respect to some of its accountholders. The taxpayer believes that with respect to some accountholders, Forms W-9 were originally obtained but no longer retained; as to others, the forms were never obtained. The taxpayer made reportable payments, as defined in section 3406 of the Internal Revenue Code, to these accountholders. Our understanding is that these were payments of interest, dividends, and/or amounts subject to broker reporting (reportable under sections 6049, 6042, and 6045, respectively). The taxpayer did not backup withhold on the reportable payments made to accountholders for which there are no Forms W-9 on file.

Further, according to the taxpayer's submission, the taxpayer failed to issue Forms 1099 to many of the accountholders for which it had not obtained or retained Forms W-9.

After these discoveries, the taxpayer voluntarily disclosed the failures to the Service and began remediation efforts and a review to ensure future compliance. The taxpayer, while acknowledging the failures in past compliance, requested that the Service not assert backup withholding liabilities due to its Form W-9 failures, arguing that (1) it had most of the taxpayer identification numbers of its accountholders; (2) it believes most of the TINs were obtained from Forms W-9 that were since lost or destroyed; (3) Form W-9 need only be retained for three years; (4) in some cases it did not need to obtain a Form W-9 for the account; and (5) with respect to failure to issue Forms 1099, the Service was not harmed and did not incur lost revenue because substantially all of the payees are sophisticated, compliant taxpayers, such as entities, that would not rely on Forms 1099 to determine their income.

The taxpayer's submission does not contain any specifics such as the number of accounts involved, the percentage of its total accounts at issue, the years in which those accounts were opened, or information about the types of "sophisticated" payees

involved. The representations made in the submission are general statements and arguments not supported by specific facts, such as specific evidence that the accountholders in issue paid their full tax due.

LAW AND ANALYSIS

Under section 3406(a)(1), a payor must backup withhold on certain reportable payments if

- (A) the payee fails to furnish his TIN to the payor in the manner required,
- (B) the IRS notifies the payor that the TIN furnished by the payee is incorrect,
- (C) there has been a notified payee underreporting (with respect to interest and dividends); or
- (D) there has been a payee certification failure (the payee failed to certify that he is not subject to withholding under (C)).

A payee will be subject to backup withholding for failure to furnish his TIN under (A) above if he does not provide the TIN under penalties of perjury, with respect to payments of interest, dividends and amounts subject to broker reporting. The payee must certify that the TIN furnished is the payee's correct TIN. Certification is made on Form W-9 or an acceptable substitute. See section 3406(e)(1); Treas. Reg. §§ 31.3406(d)-1(b)(3), 31.3406(d)-1(c)(2), 31.3406(h)-3(a)(1)(i).

A payee of interest or dividends is also required under (D) above to certify that he is not subject to backup withholding for notified payee underreporting. See section 3406(d)(1); Treas. Reg. § 31.3406(d)-2(a). Such certification is also made on Form W-9. See Treas. Reg. § 31.3406(h)-3(a)(1)(ii).

Note that the above requirements refer to accounts that are post-1983 accounts. With respect to pre-1984 accounts, no certification is required, and the payor need not furnish a signed Form W-9. See section 3406(d)(3); Treas. Reg. §§ 31.3406(d)-1(b)(1) and 31.3406(d)-2(b)(1).

With respect to post-1983 accounts, the taxpayer's failure to obtain Forms W-9 means that reportable interest, dividend, or broker payments to those accounts are subject to backup withholding, regardless of whether the payees' TINs were in fact received or whether those TINs are correct.

The payor's obligation to backup withhold on payments to a payee due to the payee's failure to furnish a TIN in the manner required applies to all payments during the period in which the TIN has not been furnished in the manner required. See section

3406(e)(1); Treas. Reg. § 31.3406(e)-1(b). The payor only stops backup withholding after he receives the payee's TIN in the manner required.

If the backup withholding is required due to payee certification failure under section 3406(a)(1)(D), the payor must backup withhold on any reportable interest or dividend payment made during the period that the certification has not been furnished. See section 3406(e); Treas. Reg. § 31.3406(e)-1(e). The payor stops backup withholding after the required certification is received.

Thus, if a payor does not obtain a Form W-9 for accounts that require certification on Form W-9 pursuant to section 3406(a)(1)(A) or (D), the payor must continue backup withholding on reportable payments until such certification is received from the payee.

If a payee failed to furnish the required certification, the Service can assess backup withholding liabilities on all payments until the certification is furnished (unless barred by the statute of limitations). Under section 3403, a payor is liable for the amount that should have been withheld. The payor may avoid this liability by proving that the payee paid the tax required to be withheld pursuant to section 3402(d).

The taxpayer admitted that it did not obtain Forms W-9 for some of its accounts. The taxpayer also asserts that, in some cases, it may have obtained Forms W-9 but no longer retains the forms. The taxpayer points to Treas. Reg. § 31.3406(h)-3(g), which provides that Forms W-9 need only be retained by the taxpayer for three years from the date the account is opened, as support for the argument that after three years the Service can no longer assess backup withholding liabilities for failure to obtain Forms W-9.

While the rationale for the three-year retention rule for certificates is not entirely clear, it appears to be an attempt to lessen the burden on payors with respect to record retention only, and does not impact the backup withholding obligation. Therefore, if Form W-9 was furnished but more than three years have passed and the taxpayer no longer retains the form, the taxpayer may avoid backup withholding liabilities by showing that the form was in fact received.

The taxpayer's reliance on the three-year retention rule is misplaced with respect to accounts for which it never received Forms W-9. The retention rule applies to forms that were received but are no longer retained. If the form was never received – which the taxpayer admits is the case with respect to certain of its accounts – the retention period is inapplicable.

The taxpayer also argues that while it did not file Forms 1099 for all payees as required, these failures should not be penalized because there is no real harm to the government. The taxpayer states that many of the accountholders are sophisticated taxpayers, in some cases entities, who are on the accrual basis and would not rely on a Form 1099 to determine their income. The taxpayer asserts that these accountholders are tax-

compliant and would have filed and paid their required income tax regardless of failing to receive the Forms 1099.

Penalties under sections 6721 and 6722 may be assessed for failure to file and furnish correct information returns, unless the taxpayer demonstrates reasonable cause for the failures pursuant to section 6724 and the regulations thereunder. Information return penalties are based on the filer's failures and not the recipient's sophistication or tax compliance.

Because the taxpayer's submission is general and lacks specific information as to the number of accounts for which the taxpayer failed to obtain Forms W-9 or failed to file Forms 1099, or as to the precise identity of the sophisticated entity accountholders, our discussion of the issues is likewise general.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

[REDACTED]

We believe that the taxpayer's arguments that the regulations prohibit backup withholding assessments based on failure to obtain Forms W-9 after the three-year retention period has passed, and that there is little or no harm to the government due to the failure to backup withhold or file Forms 1099, are not persuasive.

With respect to accounts more than three years old for which the taxpayer did receive Forms W-9, but no longer retains them, the taxpayer may avoid backup withholding liabilities by showing that the form was in fact received. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call (202) 622-4940 if you have any further questions.