

Office of Chief Counsel
Internal Revenue Service
memorandum

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CC:DOM:IT&A:1
RMWeber - TL-N-8841-97

date: APR 17 1998

to: Assistant District Counsel, Kansas-Missouri District, Kansas City
CC:MSR:KMD:KCY

from: Assistant Chief Counsel (Income Tax and Accounting)
CC:DOM:IT&A

subject: Significant Service Center Advice (Backup Withholding As Applied to "Pure Trust Organizations")

This responds to your request for Significant Advice dated January 16, 1998, in connection with a question posed by the Large Corporation Unit of the Kansas City Service Center.

Disclosure Statement

Unless specifically marked "Acknowledged Significant Advice, May Be Disseminated" above, this memorandum is not to be circulated or disseminated except as provided in CCDM (35)2(13):(4)(d) and (35)2(13)4:(1)(e). This document may contain confidential information subject to the attorney-client and deliberative process privileges. Therefore, this document shall not be disclosed beyond the office or individual(s) who originated the question discussed herein and are working the matter with the requisite "need to know". In no event shall it be disclosed to taxpayers or their representatives.

Issue:

Whether backup withholding is appropriate when a payee describing itself as a "pure trust organization" refuses to provide a taxpayer identification number (TIN) to the payor.

Conclusion:

Based solely on the facts presented, and assuming the dividends described constitute "reportable payments" within the meaning of § 3406(b) of the Internal Revenue Code, backup withholding is appropriate when a payee describing itself as a "pure trust organization" refuses to provide a TIN to the payor.

Facts:

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A payor of dividends requested that a payee provide its TIN. The payor furnished the payee with the appropriate substitute Forms W-9 (Request for Taxpayer Identification Number and Certification) and W-8 (Certificate of Foreign Status).

The payee, describing itself as a "pure trust organization", refused to provide its TIN, specifically an employer identification number (EIN). Instead, the payee certified on the Form W-9 that a TIN was not required. In part, the payee relied on a copy of a letter, dated December 17, 1996, from the Philadelphia Service Center. This letter is not addressed to the payee and responds to an unrelated taxpayer's request for an EIN.

In addition, the Form W-8 as completed by the payee indicated that the payee is a citizen of "America" but also certified "that for DIVIDENDS, I am not a U.S. Citizen or resident". The payee also returned a "Certificate of Foreign Status", apparently drafted by the payee, stating in part that "[t]he United States government is a foreign corporation with respect to the state". The payee lists an address in the United States and presents no facts to support foreign status.

The payor did not honor the payee's Form W-9 or W-8, and instituted backup withholding. The payor then contacted the Kansas City Service Center to determine how to respond to the payee.

Discussion:

For purposes of this advice, we assume that the dividends paid are subject to information reporting under § 6042 and also constitute reportable payments under § 3406(b). We further assume, therefore, that the payor is required to obtain the payee's TIN in order to comply with these information reporting requirements. See § 6109(a)(3) and § 301.6109-1(c) of the Regulations on Procedure and Administration.

Section 3406(a)(1) provides, in pertinent part, that in the case of any reportable payment, if the payee fails to furnish his TIN to the payor in the manner required, then the payor shall deduct and withhold from such payment a tax equal to 31 percent of such payment.

For purposes of backup withholding, TIN means the identifying number assigned to a person under § 6109 (relating to identifying numbers, generally a nine-digit social security number (SSN) for an individual and a nine-digit EIN for a nonindividual, e.g., a corporation, partnership, trust, or

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estate). See § 31.3406(h)-1(b)(1) of the Employment Taxes and Collection of Income Tax at Source Regulations.¹ See also § 301.6109-1(a).

Section 3406(e)(1) provides, in part, that in the case of any failure by a payee to furnish his TIN to a payor in the manner required, backup withholding shall apply to any reportable payment made by such payor during the period during which the TIN has not been furnished. Section 31.3406(d)-1(b)(3) describes the manner in which a payee is required to provide a TIN, i.e., under penalties of perjury and on Form W-9. See also § 31.3406(h)-3.

Section 3406(g) provides as follows:

- (1) Backup withholding will not apply to any payment made to -
 - (A) any organization or governmental unit described in § 6049(b)(4)(B), (C), (D), (E), or (F), or
 - (B) any other person specified in regulations.
- (2) Backup withholding will not apply to any amount for which withholding is otherwise required by this title.
- (3) The Secretary shall prescribe regulations for exemptions from backup withholding during the period during which a person is waiting for receipt of a TIN.

In this case, the payee's assertion that a TIN is not required does not satisfy an exception described in § 3406(g). As a result, the payor is required to institute backup withholding and to continue to backup withhold until the payee furnishes the TIN.

Regarding the Form W-8 and the payee-created "Certificate of Foreign Status", the assertions made therein do not entitle such a payee to claim foreign status. See § 7701(b)(1)(B) (an individual is a nonresident alien if such individual is neither a citizen of the United States nor a resident of the United States). See also §§ 7701(a)(31)(B) and 7701(a)(30)(E) (the term "foreign trust" means any trust other than a trust over which a court within the United States is able to exercise primary supervision over the administration of the trust and one or more

¹ Section 31.3406(h)-1(b)(1) applies to transactions or payments occurring after December 31, 1996. For transactions or payments occurring on or before December 31, 1996, see § 35a.9999-1, Q & A-26.

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United States persons have authority to control all substantial decisions of the trust). We also note that similar assertions and claims of foreign status have consistently been rejected by the courts. See e.g., Jackson v. Commissioner, T.C. Memo. 1991-498, affd. 990 F.2d 1258 (9th Cir. 1993).

If we can provide further assistance, please contact Rose Weber of this office at (202) 622-7903.

JODY J. BREWSTER

BY: ___/s/_____
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