

AMERICAN PAYROLL ASSOCIATION

December 17, 2018

Mr. Mark A. Bond
Office of Associate Chief Counsel
Procedures and Administration
Internal Revenue Service
CC:PA:LPD:PR (REG-118826-16)
Room 7604, Ben Franklin Station
Washington, DC 20044
www.regulations.gov

Re: Comments on the Notice of Proposed Rulemaking – De Minimis Error Safe Harbor
Exceptions to Penalties for Failure to File Correct Information Returns or Furnish
Correct Payee Statements (REG-118826-16); 83 *Fed. Reg.* 52726 (October 17, 2018)

Dear Mr. Bond:

Thank you for the opportunity to comment on the Notice of Proposed Rulemaking – De Minimis Error Safe Harbor Exceptions to Penalties for Failure to File Correct Information Returns or Furnish Correct Payee Statements, published in the *Federal Register* on October 17, 2018.

ABOUT APA

Established in 1982, APA is a professional organization serving the interests of more than 21,000 payroll professionals nationwide. Members work for employers that manage payroll internally, for payroll service providers, and payroll software vendors.

APA's primary mission is to educate members about best practices and the laws and regulations that impact payroll operations, including tax withholding, information return filing, and payments. Our advocacy goals center on reduced administrative burden for government, businesses, and individual workers. With 70.1 percent of tax collections coming from employment taxes (*2017 IRS Data Book*), the IRS's implementation of tax policy is extremely important to APA and its members.

COMMENTS

Definition of Tax Withholding

The proposed definition of “tax withheld” appears to exclude Social Security and Medicare taxes under the Federal Insurance Contributions Act (FICA; 26 U.S.C. §§ 3101-3128). APA recommends that the IRS add FICA taxes to the definition as found under 26 U.S.C. §§ 3101 (Rate of tax) and 3102 (Reduction of tax from wages).

In proposed 26 C.F.R. § 301.6722-1(d)(2), published at 83 *Fed. Reg.* 52741, the term “tax withheld” is defined to include “any amount required to be shown on an information return or payee statement ... withheld under section 3402, as well as any such amount that is creditable under sections 27, 31, 33, or 1474.” Section 3402 addresses federal income tax withholding from wages. The other sections address tax credits such as the foreign tax credit, credit for withheld income tax, credit for excess Social Security taxes for an employee with two or more employers, credit for backup withholding, credit for taxes withheld from payments to nonresident aliens and foreign corporations, and credit for taxes withheld in relation to foreign financial accounts.

The detail provided in the proposed definition seems to imply an all-inclusive list of covered taxes as opposed to examples of tax withholding. The “Explanation of Provisions” at 83 *Fed. Reg.* 52732 states, “This is not an exclusive definition but is intended to ensure that all amounts giving rise to dollar-for-dollar reduction in tax ... are included as tax withheld.” Therefore, APA believes that the IRS did not intend to exclude FICA taxes from the definition. APA requests that the IRS add to the rule the language on exclusivity found in the explanation and, to avoid confusion, specifically list FICA taxes under 26 U.S.C. § 3101 as a “tax withheld.”

Solutions to APA’s Recommendations on IRS Notice 2017-09

APA is pleased that the IRS gave full consideration to its comments on IRS Notice 2017-09 published at 2017-4 I.R.B. 542 (January 23, 2017), De Minimis Error Safe Harbor to the I.R.C. §§ 6721 and 6722 Penalties, submitted on March 7, 2017. In particular, the IRS corrected the following:

- The language in the “Background: PATH Act Amendments” section at 83 *Fed. Reg.* 52727 states that the de minimis error applies to “any single amount in error.” This clarifies that the error is not based on batch processing.

- Significant detail was provided on “special rule” exceptions. In particular, at 83 *Fed. Reg.* 52733, the IRS identified that the 30-day rule for furnishing a corrected payee statement and filing a corrected information return does not apply to Form W-2c as an example of a special rule that offers employers more time to comply.
- The IRS eliminated the language in section 3.03 of the Notice regarding the payee request to “file a corrected information return or furnish a corrected payee statement” (emphasis added) instead of using the word “and” (see discussion at 83 *Fed. Reg.* 52730).
- The proposed rule provides detailed procedures for employers to follow if they decide to implement the de minimis error safe harbor rule exceptions.
- Many examples were added on how the de minimis error safe harbor exceptions rule would apply.

Again, thank you for the opportunity to comment on the proposed rule for de minimis error safe harbor exceptions. If you have any questions or if APA can be of further assistance to you, please contact Alice Jacobsohn at 202-248-3901 or ajacobsohn@americanpayroll.org.

Sincerely,

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