

Office of Chief Counsel
Internal Revenue Service
Memorandum

Number: **201248022**

Release Date: 11/30/2012

CC:PA:02:CWGorham

POSTN-132553-12

UICL: 3406.00-00, 3406.01-01, 3406.01-00, 6721.00-00, 6041.10-00

date: September 28, 2012

to: James McCabe
Indian Tribal Government Specialist
(Tax Exempt & Government Entities)

from: Blaise G. Dusenberry
Senior Technical Reviewer
(Procedure & Administration)

subject: Notice 972 (CG) and Backup Withholding for Incorrect TINs on Form W-2G

This Chief Counsel Advice responds to your requests for assistance dated June 27, 2012 and July 19, 2012. This advice may not be used or cited as precedent.

ISSUES

When the Service notifies a gaming establishment that there is a mismatch in the name and taxpayer identification number (TIN) reported on a Form W-2G, *Certain Gambling Winnings*, that reports a slot machine winning of \$1,200 or more:

1. Is the gaming establishment subject to the backup withholding requirements of section 3406?
2. Is the gaming establishment required to provide backup withholding notices upon receipt of a Notice 972 (CG), *A Penalty is Proposed for Your 2xxx Information Returns – Action Required*, from the Service?

CONCLUSIONS

1. Only if the payee provided the gaming establishment with a TIN that does not contain the proper number of digits would the gaming establishment be subject to

the backup withholding requirements of section 3406 when there is a name/TIN mismatch on a Form W-2G reporting slot machine winnings.

2. The gaming establishment should not be expected to provide backup withholding notices pursuant to Notice 972 (CG) as it currently reads,

FACTS

Your inquiries are not case specific. Accordingly, we present a factual scenario that highlights your question:

For the 2006 taxable year, the taxpayer, a gaming establishment, prepared and filed numerous Forms W-2G pursuant to Treas. Reg. § 7.6041-1. The Service examined the Forms W-2G and determined that a certain number of them contained incorrect TINs (that were not inconsequential errors). In 2008, the Service issued a Notice 972 (CG), *A Penalty is Proposed for Your 2xxx Information Returns – Action Required*. In discussions and correspondence with the Service, the gaming establishment was asked to provide copies of backup withholding notices prepared and sent to patrons for which there was a name/TIN mismatch pursuant to Regulation sections 31.3406-5(c), (d), (e) and (f). The gaming establishment did not provide copies of the notices and filed a protest.

LAW AND ANALYSIS

Issue 1: Regulation section 7.6041-1 requires information reporting for payments of slot machine winnings. If a gaming establishment pays \$1,200 or more of slot machine winnings to a patron, the gaming establishment must follow a specific procedure to issue a Form W-2G, Certain Gambling Winnings, to make an information return of the reportable winnings. Specifically, when a patron wins \$1,200 or more from slot machine play, the gaming establishment must stop play and prepare a Form W-2G containing: (1) the name, address, and employer identification number of the gaming establishment, (2) the name, address and TIN of the patron, (3) a general description of two types of identification (e.g., driver's license, social security card, voter registration card) furnished to the gaming establishment by the patron for verification of the patron's name, address and TIN, (4) the date and amount of the payment, and (5) the type of wagering transaction and identification number of the slot machine.

Section 3402(q) generally requires every person making a payment of gaming winnings to withhold tax on the payment of such winnings at the third lowest rate of tax under section 1(c). Slot machine winnings, however, are exempted from this regular withholding requirement. I.R.C. § 3402(q)(5).

Section 3406 governs backup withholding. A payor must deduct and withhold tax on a “reportable payment” made to a payee at the time the payor makes a payment to the payee or to the account of the payee, if a condition for backup withholding exists. I.R.C. § 3406(a); Treas. Reg. § 31.3406(a)-4(a)(1). One of the conditions upon which a requirement of backup withholding will be imposed is when the Secretary notifies a payor that the TIN furnished by a payee is incorrect. I.R.C. § 3406(a)(1)(B). Backup withholding applies to reportable payments of interest or dividends, and payments for which returns are required under sections 6041, 6041A(a), 6045, 6050A, 6050N, and 6050W. I.R.C. § 3406(b).

If the Service notifies a payor of a name/TIN mismatch and the payor is required to backup withhold, the payor must send a copy of the notice or an acceptable substitute to the payee within 15 business days of receiving the notice from the Service. The payor must also backup withhold on all payments made with respect to the account after the close of the 30th business day after the date the payor receives the notice and on or before the close of the 30th calendar day after the day the payor receives certification from the payee of the correct TIN. Treas. Reg. § 31.3406(d)-5(d)(1), (2) & (e)(1). If the Service provides an account number in the notice of the name/TIN mismatch, the payor only has to identify the account or accounts associated with that number. If no account number is provided on the notice, the payor must identify, using reasonable care, all accounts of the payee having the same name/TIN combination provided in the notice. Treas. Reg. § 31.3406(d)-5(c)(3).

To prevent or halt backup withholding, the payee can provide a Form W-9, *Request for Taxpayer Identification Number and Certification*, signed under penalties of perjury, to the payor. Treas. Reg. § 31.3406(d)-5(f). If, however, the payor receives two name/TIN mismatch notices for the same account within three calendar years, regardless of whether a Form W-9 has been secured, the payor must disregard any future Form W-9s provided by the payee, until the payor receives notification of a correct name/TIN combination from the Social Security Administration (or the Internal Revenue Service). The payor must also send notice to the payee within 15 business days after receiving the second notice from the Service, initiate backup withholding, and maintain sufficient records to determine whether the payor has received the name/TIN mismatch notices. Treas. Reg. § 31.3406(d)-5(g).

Regulations section 7.6041-1 imposes the information reporting requirement for slot machine winnings of \$1,200 or more. Section 3402(q)(5) exempts slot machine winnings from withholding. Accordingly, slot machine winnings can be subject to the backup withholding rules under section 3406. Regulation section 31.3406(g)-2(d) directs that gaming winnings that are subject to withholding under section 3402(q) are not subject to the backup withholding rules of section 3406. The section further directs that “if the reportable gambling winning is not required to be withheld upon under section 3402(q), withholding under section 3406 applies to the gambling winning if, and only if, the payee does not furnish a taxpayer identification number to the payor.” Failure to furnish a TIN includes a situation where the payee fails to provide a TIN at all,

but also includes a situation where the payee provides a TIN that does not contain the proper number of digits. I.R.C. § 3406(h)(1). Accordingly, where a name/TIN mismatch arises for a Form W-2G reporting a slot machine winning, only if the payee failed to provide a TIN with the proper number of digits would the gaming establishment be subject to backup withholding.

Issue 2: Notice 972 (CG), *A Penalty is Proposed for Your 2xxx Information Returns – Action Required*, notifies payors that the Service intends to impose a penalty under section 6721 for failure to file certain information returns. The notice explains the penalty, provides a list of information returns for which there are missing or incorrect TINs, and directs payors how to respond if they agree, partially agree or completely disagree. Notice 972 (CG) does not state that the payor is subject to backup withholding or advise the payor to send backup withholding notices to payees.

More specifically, Notice 972 (CG) refers payors to Publication 1586, Reasonable Cause Regulations and Requirements, which provides information necessary for a payor to avoid penalties for information returns that are filed with incorrect or missing TINs, describes the actions that payors must take or should have taken to solicit a TIN, and explains the requirements for reasonable cause under section 6724(a). Publication 1586 does not direct payors to backup withhold or to send backup withholding notices to payees upon receipt of a Notice 972 (CG). Publication 1586 only directs payors to backup withhold after receipt of a CP2100 or CP2100A, Notice of Possible Payee Name/TIN Discrepancy. Specifically, the publication reads: “A solicitation may be required if a payer receives a backup withholding notice based on an incorrect payee TIN (CP2100 or CP2100A). If such a notice is received, the solicitation must be made pursuant to the backup withholding rules. See Publication 1281, Backup Withholding on Missing and Incorrect Name/TINs”.

Accordingly, because slot machine winnings reportable on a Form W-2G are largely exempted from backup withholding on a regulatory basis, as noted in the discussion of Issue 1 above, and because neither the Notice 972 (CG) nor the publication referenced therein direct payors to engage in backup withholding, it is not reasonable for payors to be expected to engage in backup withholding, and to provide copies of backup withholding notices after receipt of a Notice 972 (CG).

In the event of the inclusion of incorrect information on an information return, such as a name/TIN mismatch, a taxpayer is subject to a penalty of \$100 for each return with a failure. I.R.C. § 6721. The penalty for all failures for a particular calendar year may not exceed \$1,500,000. I.R.C. § 6721(a). For purposes of section 6721, a statement of payments made to another person required to be filed under section 6041, such as a

Form W-2G, *Certain Gambling Winnings*, is an information return. See I.R.C. § 6724(d); Treas. Reg. § 301.6721-1(g).

Section 6724(a) provides that a penalty under section 6721 may not be imposed if the failure is due to reasonable cause and not to willful neglect. A filer has reasonable cause if (1) either there are significant mitigating factors with respect to failure, or the failure arose from events beyond the filer's control, and (2) that the filer acted in a responsible manner. Treas. Reg. § 301.6724-1(a)(2). Significant mitigating factors include, but are not limited to, the fact that a filer has a history of compliance and whether the filer has incurred penalties in the past. Treas. Reg. § 301.6724-1(b). Events beyond the filer's control may include unavailability of relevant business records and a payee providing incorrect information upon which the filer relied in good faith. Treas. Reg. §§ 301.6724-1(c). Acting in a responsible manner generally means that the filer exercised reasonable care and undertook significant steps to avoid or mitigate the failure. Treas. Reg. § 301.6724-1(d). Where a filer seeks a waiver for reasonable cause on the basis that the actions of the payee or any other person caused the filer to include incorrect information on an information return, the filer will be deemed to have acted in a responsible manner if the filer makes an initial and annual solicitation upon the payee pursuant to regulation section 301.6724-1(f). Treas. Reg. § 301.6724-1(d)(2).

To avoid future confusion, the Service should avoid requesting copies of backup withholding notices upon issuing a Notice 972 (CG) in its current form. When a name/TIN mismatch arises in the context of a Form W-2G for reportable slot machine winnings, the Service should only ask for copies of backup withholding notices in cases where the TIN does not contain the proper number of digits, and only then after issuing a proper notice.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

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.