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DEPARTMENT OF THE TREASURY

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Internal Revenue Service

26 CFR Part 31

REG-104143-05

RIN 1545-BE32

Application of the Federal Insurance Contributions Act to Payments Made for Certain Services

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed amendments to regulations relating to payments made for service not in the course of the employer's trade or business, for domestic service in a private home of the employer, for agricultural labor, and for service performed as a home worker within the meaning of section 3121(d)(3)(C) of the Internal Revenue Code (Code). These proposed amendments would provide guidance concerning the application of the Federal Insurance Contributions Act (FICA) to these payments. These proposed amendments would affect employers that make these payments and employees that receive these payments. These proposed amendments would provide guidance to assist these taxpayers in complying with the law.

DATES: Written or electronic comments and requests for a public hearing must be received by November 25, 2005.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-104143-05), room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to:

CC:PA:LPD:PR (REG-104143-05), Courier's Desk, Internal Revenue Service, 1111 Constitution

Avenue, NW., Washington, DC, or sent electronically, via the IRS Internet site at www.irs.gov/regs or via the Federal eRulemaking Portal at <http://www.regulations.gov/> (IRS REG-104143-05).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, please contact Paul Carlino of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), (202) 622-0047; concerning submissions of comments or to request a public hearing, please contact LaNita Van Dyke, (202) 622-7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to the Employment Tax Regulations (26 CFR part 31) under sections 3102, 3121(a), 3121(a)(7), 3121(a)(8), 3121(a)(10), and 3121(i) of the Code. The Federal Insurance Contributions Act (FICA) generally imposes tax on each employer and employee. Under section 3111, FICA tax is imposed on the employer in an amount equal to a percentage of the wages paid by that employer. Under section 3101, FICA tax is also imposed on the employee in an amount equal to a percentage of the wages received by the employee with respect to employment. Section 3102 requires the employer to collect the tax imposed under section 3101 by deducting and withholding the amount of the tax from the wages as and when paid. Section 3121(a) defines wages for FICA tax purposes as all remuneration for employment unless otherwise excepted. Sections 3121(a)(7) (relating to domestic service in a private home of the employer and to service not in the course of the employer's trade or business), 3121(a)(8) (relating to agricultural labor) and 3121(a)(10) (relating to service performed as a home worker within the meaning of section 3121(d)(3)(C)) provide exceptions to the definition of wages for FICA tax purposes. Section 3121(i)(1) provides that in the case of

domestic service described in section 3121(a)(7)(B), any payment of cash remuneration for such service which is more or less than a whole-dollar amount, to the extent prescribed by regulations, may be computed to the nearest dollar.

Section 3102(a) provides that an employer may deduct an amount equivalent to the FICA tax imposed by section 3101 from any payment of cash remuneration to which sections 3121(a)(7)(B), 3121(a)(7)(C), 3121(a)(8)(B) and 3121(a)(10) apply, even though at the time of payment the total amount of such remuneration paid to the employee by the employer in the calendar year is less than the dollar threshold amount used to determine whether the remuneration is wages for FICA tax purposes. An employer that chooses to withhold FICA taxes imposed by section 3101 prior to reaching the dollar threshold amount used to determine whether the remuneration is wages for FICA tax purposes must repay the employee the withheld amount if the dollar threshold is not met in the calendar year. If the withheld amount has been deposited, the employer must repay or reimburse the employee the withheld amount in accordance with the rules under §31.6413(a)-1 of the regulations.

Changes to sections 3102(a) and 3121(a)(7)(B) were made by section 2(a)(1) of the Social Security Domestic Employment Reform Act of 1994, (SSDERA), Public Law 103-387 (108 Stat. 4071). The SSDERA also added section 3121(x). Changes to section 3102(a) were made by section 424(b) of the Social Security Protection Act of 2004 (SSPA), Public Law 108-203 (118 Stat. 493, 536). Changes to section 3121(a)(8)(B) were made by section 8017(b) of the Technical and Miscellaneous Revenue Act of 1988 (the 1988 Act), Public Law 100-647 (102 Stat. 3342, 3793) and section 9002(b) of the Omnibus Budget Reconciliation Act of 1987 (the 1987 Act), Public Law 100-203 (101 Stat. 1330, 1330-287). Changes to sections 3102(a), 3121(a)(7)(C) and 3121(a)(10) were made by sections 355(a) and 356(a) of the Social Security

Amendments of 1977 (the 1977 Act), Public Law 95-216 (91 Stat. 1509, 1555). These statutory changes are not reflected in the existing regulations of §§31.3102-1, 31.3121(a)-2, 31.3121(a)(7)-1, 31.3121(a)(8)-1, 31.3121(a)(10)-1, and 31.3121(i)-1. These proposed regulations would amend these existing regulations to reflect the statutory changes.

Domestic Service in a Private Home of the Employer

Section 3121(a)(7)(B) provides an exclusion from wages for FICA tax purposes of certain cash remuneration paid by an employer to an employee for domestic service in a private home of the employer. The SSDERA amended the dollar threshold amount and time period used to determine the exclusion under section 3121(a)(7)(B). The SSDERA also added section 3121(x).

Prior to SSDERA, section 3121(a)(7)(B) provided that cash remuneration paid by an employer in any calendar quarter to an employee for domestic service in a private home of the employer was excluded from wages for FICA tax purposes if the cash remuneration paid in such quarter by the employer to the employee for such service was less than \$50. The SSDERA amended section 3121(a)(7)(B) to provide that cash remuneration paid by an employer in any calendar year to an employee for domestic service in a private home of the employer is excluded from wages for FICA tax purposes if the cash remuneration paid in such year by the employer to the employee for such service is less than the applicable dollar threshold (as defined in section 3121(x)) for such year. SSDERA is effective for cash remuneration paid after December 31, 1993.

The applicable dollar threshold (as defined in section 3121(x)) is \$1,000 for calendar year 1995. The applicable dollar threshold is adjusted annually under the formula described in section 215(a)(1)(B)(ii) of the Social Security Act, Public Law 74-271 (49 Stat. 620). Under section 3121(x), if any amount as adjusted under section 215(a)(1)(B)(ii) is not a multiple of \$100, such

amount is rounded to the next lowest multiple of \$100. For calendar year 2005, the applicable dollar threshold is \$1,400.

Section 3121(i)(1) provides that in the case of domestic service described in section 3121(a)(7)(B), any payment of cash remuneration for such service which is more or less than a whole-dollar amount, to the extent prescribed by regulations, may be computed to the nearest dollar. The amendment to section 3121(a)(7)(B) made by the SSDERA requires changes to the regulations under §31.3121(i)-1.

Agricultural Labor

Section 3121(a)(8)(B) provides an exclusion from wages for FICA tax purposes of certain cash remuneration paid by an employer in any calendar year to an employee for agricultural labor. The 1987 Act and 1988 Act amended section 3121(a)(8)(B) to change the test for determining whether cash remuneration paid by an employer to an employee for such service is wages for FICA tax purposes.

Prior to the 1987 Act, section 3121(a)(8)(B) provided that cash remuneration paid by an employer in any calendar year to an employee for agricultural labor was excluded from wages for FICA tax purposes unless the cash remuneration was \$150 or more, or the employee performed agricultural labor for the employer on 20 or more days during such year for cash remuneration computed on a time basis. The 1987 Act amended section 3121(a)(8)(B) to provide that cash remuneration paid by an employer in any calendar year to an employee for agricultural labor is excluded from wages for FICA tax purposes unless the cash remuneration paid in such year by the employer to the employee for such labor is \$150 or more, or the employer's expenditures for agricultural labor in such year equals or exceeds \$2,500.

The 1988 Act added language to 3121(a)(8)(B) to provide that the test of whether the

employer's expenditures for agricultural labor in any calendar year equal or exceed \$2,500 has no effect in determining whether remuneration paid to an employee in such year constitutes wages under this section if such employee 1) is employed in agriculture as a hand-harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, 2) commutes daily from his permanent residence to the farm on which he is employed, and 3) has been employed in agriculture less than 13 weeks during the preceding calendar year.

Nonetheless, amounts paid to these seasonal workers count towards the \$2,500 test when applying section 3121(a)(8)(B) to other agricultural workers. The 1987 and 1988 Acts are effective for cash remuneration paid after December 31, 1987.

Home Workers

Section 3121(a)(10) provides an exclusion from wages for FICA tax purposes of certain cash remuneration paid by an employer to an employee for service described in section 3121(d)(3)(C) (relating to home workers). The 1977 Act amended the dollar threshold amount and time period used to determine the exclusion under section 3121(a)(10).

Prior to the 1977 Act, section 3121(a)(10) provided that cash remuneration paid by an employer in any calendar quarter to an employee for service described in 3121(d)(3)(C) (relating to home workers) was excluded from wages for FICA tax purposes if the cash remuneration paid in such quarter by the employer to the employee for such service was less than \$50. The 1977 Act amended section 3121(a)(10) to provide that remuneration paid by an employer in any calendar year to an employee for service described in section 3121(d)(3)(C) (relating to home workers) is excluded from wages for FICA tax purposes if the cash remuneration paid in such year by the employer to the employee for such service is less than \$100. The 1977 Act is

effective for cash remuneration paid after December 31, 1977.

Service Not in the Course of the Employer's Trade or Business

Section 3121(a)(7)(C) provides an exclusion from wages for FICA tax purposes of certain cash remuneration paid by an employer to an employee for service not in the course of the employer's trade or business. The 1977 Act amended the dollar threshold amount and time period used to determine the exclusion under section 3121(a)(7)(C).

Prior to the 1977 Act, section 3121(a)(7)(C) provided that cash remuneration paid by an employer in any calendar quarter to an employee for service not in the course of the employer's trade or business was excluded from wages for FICA tax purposes if the cash remuneration paid in such quarter by the employer to the employee for such service was less than \$50. The 1977 Act amended section 3121(a)(7)(C) to provide that cash remuneration paid by an employer in any calendar year to an employee for service not in the course of the employer's trade or business is excluded from wages for FICA tax purposes if the cash remuneration paid in such year by the employer to the employee for such service is less than \$100. The 1977 Act is effective for cash remuneration paid after December 31, 1977.

Explanation of Provisions

These proposed regulations would amend the existing regulations to reflect current law.

The proposed regulations relating to domestic service in a private home of the employer would amend existing regulations §§31.3102-1, 31.3121(a)-2(c), and 31.3121(a)(7)-1 to reflect changes implemented by the SSDERA and to be applicable as of that date. For cash remuneration paid prior to January 1, 1994 (the effective date of the SSDERA), taxpayers should rely on the regulations applicable at the time such cash remuneration was paid.

The proposed regulations relating to agricultural labor would amend existing regulations

§§31.3102-1, 31.3121(a)-2(c) and 31.3121(a)(8)-1 to reflect changes implemented by the SSPA, the 1987 Act and the 1988 Act and to be applicable as of that date. For cash remuneration paid prior to January 1, 1988 (the effective date of the 1987 Act and the 1988 Act), taxpayers should rely on the regulations applicable at the time such cash remuneration was paid.

The proposed regulations relating to home workers and/or to service not in the course of the employer's trade or business would amend existing regulations §§31.3102-1, 31.3121(a)-2(c), 31.3121(a)(7)-1 and 31.3121(a)(10)-1 to reflect changes implemented by the 1977 Act and to be applicable as of that date. For cash remuneration paid prior to January 1, 1978 (the effective date of the 1977 Act), taxpayers should rely on the regulations applicable at the time such cash remuneration was paid.

The proposed regulations relating to computation to the nearest dollar of cash remuneration for domestic service would amend the existing regulations under §31.3121(i)-1 to reflect changes implemented by the SSDERA and to be applicable as of that date. For cash remuneration paid prior to January 1, 1994 (the effective date of the SSDERA), taxpayers should rely on the regulations applicable at the time such cash remuneration was paid.

Proposed Effective Date

These proposed regulations would be applicable on the date of publication of the Treasury Decision adopting these regulations as final regulations in the **Federal Register**. The regulations relating to domestic service in a private home of the employer would apply to cash remuneration paid on or after January 1, 1994. The regulations relating to agricultural labor would apply to cash remuneration paid on or after January 1, 1988. The regulations relating to home workers and/or service not in the course of the employer's trade or business would apply to cash remuneration paid on or after January 1, 1978. The regulations relating to computation

to the nearest dollar of cash remuneration for domestic service would apply to cash remuneration paid on or after January 1, 1994.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required.

It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury Department specifically request comments on the clarity of proposed regulations and how they can be made easier to understand. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested by any person who timely submits comments. If a public hearing is scheduled, notice of the date, time and place for the hearing will be published in the **Federal Register**.

Drafting Information

The principal authors of these proposed regulations are Paul J. Carlino and Michael A. Swim, Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury Department participated in their

development.

List of Subjects in 26 CFR Part 31

Employment taxes, Income taxes, Penalties, Pensions, Railroad retirement, Reporting and recordkeeping requirements, Social security, Unemployment compensation.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 31 is proposed to be amended as follows:

PART 31--EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT SOURCE

Paragraph 1. The authority citation for part 31 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 31.3102-1 is amended by:

1. Revising paragraph (b).
2. Redesignating paragraph (c) as paragraph (d).
3. Adding new paragraph (c).
4. Adding paragraph (e).

The additions and revision read as follows:

§31.3102-1 Collection of, and liability for, employee tax; in general.

* * * * *

(b) The employer is permitted, but not required, to deduct amounts equivalent to employee tax from payments to an employee of cash remuneration to which the sections referred to in this paragraph (b) are applicable prior to the time that the sum of such payments equals--

(1) \$100 in the calendar year, for service not in the course of the employer's trade or business, to which §31.3121(a)(7)-1 is applicable;

(2) The applicable dollar threshold (as defined in section 3121(x)) in the calendar year, for

domestic service in a private home of the employer, to which §31.3121(a)(7)-1 is applicable;

(3) \$150 in the calendar year, for agricultural labor, to which §31.3121(a)(8)-1(c)(1)(i) is applicable; or

(4) \$100 in the calendar year, for service performed as a home worker, to which §31.3121(a)(10)-1 is applicable.

(c) At such time as the sum of the cash payments in the calendar year for a type of service referred to in paragraph (b)(1), (b)(2), (b)(3) or (b)(4) of this section equals or exceeds the amount specified, the employer is required to collect from the employee any amount of employee tax not previously deducted. If an employer pays cash remuneration to an employee for two or more of the types of service referred to in paragraph (b)(1), (b)(2), (b)(3) or (b)(4) of this section, the provisions of paragraph (b) of this section and this paragraph (c) are to be applied separately to the amount of remuneration attributable to each type of service. For provisions relating to the repayment to an employee, or other disposition, of amounts deducted from an employee's remuneration in excess of the correct amount of employee tax, see §31.6413(a)-1.

* * * * *

(e)(1) The provisions of paragraphs (a) and (d) of this section apply to any payment made on or after January 1, 1955.

(2) The provisions of paragraphs (b) and (c) of this section that apply to any payment made for service not in the course of the employer's trade or business or for service performed as a home worker within the meaning of section 3121(d)(3)(C) apply to any such payment made on or after January 1, 1978. The provisions of paragraphs (b) and (c) of this section that apply to any payment made for domestic service in a private home of the employer apply to any such

payment made on or after January 1, 1994. The provisions of paragraphs (b) and (c) of this section that apply to any payment made for agricultural labor apply to any such payment made on or after January 1, 1988. For rules applicable to any payment for these services made prior to the dates set forth in this paragraph (e)(2), see §31.3102-1 in effect at such time (see 26 CFR part 31 revised as of April 1, 2005).

Par. 3. Section 31.3121(a)-2 is amended by:

1. Revising paragraph (c)(1).
2. Redesignating paragraphs (c)(2) and (c)(3) as paragraphs (c)(3) and (c)(4), respectively.
3. Adding new paragraph (c)(2).
4. Revising newly designated paragraph (c)(3).
5. Adding paragraph (d).

The additions and revisions read as follows:

§31.3121(a)-2 Wages; when paid and received.

* * * * *

(c)(1) The first \$100 of cash remuneration paid, either actually or constructively, by an employer in any calendar year to an employee for--

(i) Service not in the course of the employer's trade or business, to which §31.3121(a)(7)-1 is applicable, shall be deemed to be paid by the employer to the employee at the first moment of time in such calendar year that the sum of such cash payments made within such year is at least \$100; or

(ii) Service performed as a home worker within the meaning of section 3121(d)(3)(C), to which §31.3121(a)(10)-1 is applicable, shall be deemed to be paid by the employer to the employee at the first moment of time in such calendar year that the sum of such cash payments

made within such year is at least \$100.

(2) Cash remuneration paid, either actually or constructively, by an employer in any calendar year to an employee for domestic service in a private home of the employer to which §31.3121(a)(7)-1 is applicable, and before the sum of the payments of such cash remuneration equals or exceeds the applicable dollar threshold (as defined in section 3121(x)) for such year, shall be deemed to be paid by the employer to the employee at the first moment of time in such calendar year that the sum of such cash payments made within such year equals or exceeds the applicable dollar threshold (as defined in section 3121(x)) for such year.

(3) Cash remuneration paid, either actually or constructively, by an employer in any calendar year to an employee for agricultural labor to which §31.3121(a)(8)-1 is applicable, and before either of the events described in paragraphs (c)(3)(i) and (c)(3)(ii) of this section has occurred, shall be deemed to be paid by the employer to the employee at the first moment of time in such calendar year that--

(i) The sum of the payments of such remuneration is \$150 or more; or

(ii) The employer's expenditures for agricultural labor in such calendar year equals or exceeds \$2,500, except that this paragraph (c)(3)(ii) shall not apply in determining when such remuneration is deemed to be paid under this paragraph if such employee—

(A) Is employed as a hand-harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment;

(B) Commutes daily from his permanent residence to the farm on which he is so employed;
and

(C) Has been employed in agriculture less than 13 weeks during the preceding calendar year.

* * * * *

(d)(1) The provisions of paragraphs (a) and (b) of this section apply to any payment of wages made on or after January 1, 1955.

(2) The provisions of paragraph (c) of this section that apply to any payment of wages made for service not in the course of the employer's trade or business or for service performed as a home worker within the meaning of section 3121(d)(3)(C) apply to any such payment made on or after January 1, 1978. The provisions of paragraph (c) of this section that apply to any payment of wages made for domestic service in a private home of the employer apply to any such payment made on or after January 1, 1994. The provisions of paragraph (c) of this section that apply to any payment of wages made for agricultural labor apply to any such payment made on or after January 1, 1988. For rules applicable to any payment of wages for these services made prior to the dates set forth in this paragraph (d)(2), see §31.3121(a)-2 in effect at such time (see 26 CFR part 31 revised as of April 1, 2005).

Par. 4. Section 31.3121(a)(7)-1 is amended by:

1. Revising paragraphs (c)(1) and (c)(2).
2. Adding paragraphs (c)(3), (d) and (e).

The additions and revisions read as follows:

§31.3121(a)(7)-1 Payments for services not in the course of employer's trade or business or for domestic service.

* * * * *

(c) Cash payments. (1) The term wages does not include cash remuneration paid by an employer in any calendar year to an employee for--

(i) Domestic service in a private home of the employer, unless the cash remuneration paid in

such year by the employer to the employee for such service equals or exceeds the applicable dollar threshold (as defined in section 3121(x)) for such year; or

(ii) Service not in the course of the employer's trade or business, unless the cash remuneration paid in such year by the employer to the employee for such service equals or exceeds \$100.

(2) The tests relating to cash remuneration are based on the remuneration paid in a calendar year rather than on the remuneration earned during a calendar year. The following example illustrates this provision:

Example. On March 31, 2004, employer X pays employee A cash remuneration of \$100 for service not in the course of X's trade or business. Such remuneration constitutes wages subject to the taxes even though \$10 thereof represents payment for such service performed by A for X in December 2003.

(3) In determining whether wages have been paid either for domestic service in a private home of the employer or for service not in the course of the employer's trade or business, only cash remuneration for such service shall be taken into account. Cash remuneration includes checks and other monetary media of exchange. Remuneration paid in any other medium, such as lodging, food, clothing, car tokens, transportation passes or tickets, or other goods or commodities, is disregarded in determining whether the cash-remuneration test is met. If an employee receives cash remuneration from an employer in a calendar year for both types of services the pertinent cash-remuneration test is to be applied separately to each type of service. If an employee receives cash remuneration from more than one employer in a calendar year for domestic service in a private home of the employer or for service not in the course of the employer's trade or business, the pertinent cash-remuneration test is to be applied separately to the remuneration received from each employer.

(d) Cross references. (1) For provisions relating to deduction of employee tax or amounts

equivalent to the tax from cash payments for the services described in this section, see §31.3102-1;

(2) For provisions relating to time of payment of wages for such services, see §31.3121(a)-2;

(3) For provisions relating to computations to the nearest dollar of any payment of cash remuneration for domestic service in a private home of the employer, see §31.3121(i)-1.

(e) Effective dates. (1) The provisions of this section apply to any cash payment for service not in the course of the employer's trade or business made on or after January 1, 1978 and for domestic service in a private home of the employer made on or after January 1, 1994.

(2) For rules applicable to any cash payment made prior to the dates set forth in paragraph (e)(1), see §31.3121(a)(7)-1 in effect at such time (see 26 CFR part 31 revised as of April 1, 2005).

Par. 5. Section 31.3121(a)(8)-1 is amended by:

1. Revising paragraphs (c), (d), and (e).
2. Adding paragraph (h).

The addition and revisions read as follows:

§31.3121(a)(8)-1 Payments for agricultural labor.

* * * * *

(c) Cash payments. (1) The term wages does not include cash remuneration paid by an employer in any calendar year to an employee for agricultural labor unless--

(i) The cash remuneration paid in such year by the employer to the employee for such labor is \$150 or more; or

(ii) The employer's expenditures for agricultural labor in such year equal or exceed \$2,500,

except that this paragraph (c)(1)(ii) shall not apply in determining whether remuneration paid to an employee constitutes wages for agricultural labor if such employee--

(A) Is employed as a hand-harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment;

(B) Commutes daily from his permanent residence to the farm on which he is so employed;
and

(C) Has been employed in agriculture less than 13 weeks during the preceding calendar year.

(2) The application of the provisions of paragraph (c)(1) of this section may be illustrated by the following example:

Example. Employer X pays A \$140 in cash for agricultural labor in calendar year 2004. X makes no other payments to A during the year and makes no other payment for agricultural labor to any other employee. Employee A is not employed as a hand-harvest laborer. Neither the \$150-cash-remuneration test nor the \$2,500-employer's-expenditures-for-agricultural-labor test is met. Accordingly, the remuneration paid by X to A is not subject to the taxes. If in 2004 X had paid A \$140 in cash for agricultural labor and had made expenditures of \$2,360 or more to other employees for agricultural labor, the \$140 paid by X to A would have been subject to tax because the \$2,500-employer's-expenditures-for-agricultural-labor test would have been met. Or, if X had paid A \$150 in cash in 2004 and made no other payments to any other employee for agricultural labor, the \$150 paid by X to A would have been subject to tax because the \$150-cash-remuneration test would have been met.

(d) Application of cash-remuneration test. (1) If an employee receives cash remuneration from an employer both for services which constitute agricultural labor and for services which do not constitute agricultural labor, only the amount of such remuneration which is attributable to agricultural labor shall be included in determining whether cash remuneration of \$150 or more has been paid in the calendar year by the employer to the employee for agricultural labor. The following example illustrates this paragraph (d)(1):

Example. Employer X operates a store and also is engaged in farming operations. Employee A, who regularly performs services for X in connection with the operation of the store, works on X's farm when additional help is required for the farm activities. In the calendar year 2004, X pays A \$140 in cash for services performed in agricultural labor, and \$4,000 for services performed in connection with the operation of the store. X has no additional expenditures for agricultural labor in 2004. Since the cash remuneration paid by X to A in the calendar year 2004 for agricultural labor is less than \$150, the \$150-cash-remuneration test is not met. The \$140 paid by X to A in 2004 for agricultural labor does not constitute wages and is not subject to the taxes.

(2) The test relating to cash remuneration of \$150 or more is based on the cash remuneration paid in a calendar year rather than on the remuneration earned during a calendar year. It is immaterial if such cash remuneration is paid in a calendar year other than the year in which the agricultural labor is performed. The following example illustrates this paragraph (d)(2):

Example. Employer X pays cash remuneration of \$150 in the calendar year 2004 to employee A for agricultural labor. Such remuneration constitutes wages even though \$10 of such amount represents payment for agricultural labor performed by A for X in December 2003.

(3) In determining whether \$150 or more has been paid to an employee for agricultural labor, only cash remuneration for such labor shall be taken into account. If an employee receives cash remuneration in any one calendar year from more than one employer for agricultural labor, the cash-remuneration test is to be applied with respect to the remuneration received by the employee from each employer in such calendar year for such labor.

(e) Application of employer's-expenditures-for-agricultural-labor test. (1) If an employer has expenditures in a calendar year for agricultural labor and for non-agricultural labor, only the amount of such expenditures for agricultural labor shall be included in determining whether the employer's expenditures for agricultural labor in such year equal or exceed \$2,500. The following example illustrates this paragraph (e)(1):

Example. Employer X operates a store and also is engaged in farming operations. Employee A, who regularly performs services for X in connection with the operation of the store, works on X's farm when additional help is required for the farm activities. In calendar year 2004, X pays A \$140 in cash for services performed in agricultural labor, and \$4,000 for services

performed in connection with the operation of the store. X has no additional expenditures for agricultural labor in 2004. Since X's expenditures for agricultural labor in 2004 are less than \$2,500, the employer's-expenditures-for-agricultural-labor test is not met. The \$140 paid by X to A in 2004 for agricultural labor does not constitute wages and is not subject to the taxes.

(2) The test relating to an employer's expenditures of \$2,500 or more for agricultural labor is based on the expenditures paid by the employer in a calendar year rather than on the expenses incurred by the employer during a calendar year. It is immaterial if the expenditures are paid in a calendar year other than the year in which the agricultural labor is performed. The following example illustrates this paragraph (e)(2):

Example. Employer X employs A to construct fences on a farm owned by X. The work constitutes agricultural labor and is performed over the course of November and December 2003. A is not employed by X at any other time, however X does have other employees to whom X pays remuneration of \$2,000 for agricultural labor in 2003. X pays A \$140 in cash in November 2003 and \$140 in cash in January 2004, in full payment for the work. The \$140 payment to A made in November is not wages for calendar year 2003 because the \$150-cash-remuneration test is not met and X's total expenditures for agricultural labor for such year are not equal to or in excess of \$2,500. The \$140 payment to A made in January is not wages for 2004 because the \$150 cash-remuneration test is not met. However, if X pays additional remuneration to employees for agricultural labor in 2004 that equals or exceeds \$2,360, the employer's-expenditures-for-agricultural-labor test will be met and the \$140 paid by X to A in 2004 will be considered wages. It is immaterial that the work was performed in 2003.

* * * * *

(h) Effective dates. The provisions of this section apply to any payment for agricultural labor made on or after January 1, 1988. For rules applicable to any payment for agricultural labor made prior to January 1, 1988, see §31.3121(a)(8)-1 in effect at such time (see 26 CFR part 31 revised as of April 1, 2005).

Par. 6. Section 31.3121(a)(10)-1 is revised to read as follows:

§31.3121(a)(10)-1 Payments to certain home workers.

(a) The term wages does not include remuneration paid by an employer in any calendar year to an employee for service performed as a home worker who is an employee by reason of the

provisions of section 3121(d)(3)(C) (see §31.3121(d)-1(d)), unless the cash remuneration paid in such calendar year by the employer to the employee for such services is \$100 or more. The test relating to cash remuneration of \$100 or more is based on remuneration paid in a calendar year rather than on remuneration earned during a calendar year. If cash remuneration of \$100 or more is paid in a particular calendar year, it is immaterial whether such remuneration is in payment for services performed during the year of payment or during any other year.

(b) The application of paragraph (a) of this section may be illustrated by the following example:

Example. A, a home worker, performs services for X, a manufacturer, in 2003 and 2004. In the performance of the home work A is an employee by reason of section 3121(d)(3)(C). In March 2004, A returns to X articles made by A at home from materials received by A from X in 2003. X pays A cash remuneration of \$100 for such work when the finished articles are delivered. The \$100 includes \$10 which represents remuneration for home work performed by A in 2003. The entire \$100 is subject to the taxes. Any additional cash remuneration paid by X to A in 2004 for such services is also subject to the taxes.

(c) In the event an employee receives remuneration in any one calendar year from more than one employer for services performed as a home worker of the character described in paragraph (a) of this section, the regulations in this section are to be applied with respect to the remuneration received by the employee from each employer in such calendar year for such services. This exclusion from wages has no application to remuneration paid for services performed as a home worker who is an employee under section 3121(d)(2) (see §31.3121(d)-1(c)) relating to common law employees.

(d) Cash remuneration includes checks and other monetary media of exchange. Remuneration paid in any other medium, such as clothing, car tokens, transportation passes or tickets, or other goods or commodities, is disregarded in determining whether the \$100 cash-remuneration test is met. If the cash remuneration paid in any calendar year by an employer to

an employee for services performed as a home worker of the character described in paragraph (a) of this section is \$100 or more, then no remuneration, whether in cash or in any medium other than cash, paid by the employer to the employee in such calendar year for such services is excluded from wages under this exception.

(e)(1) For provisions relating to deductions of employee tax or amounts equivalent to the tax from cash payments for services performed as a home worker within the meaning of section 3121(d)(3)(C), see §31.3102-1.

(2) For provisions relating to the time of payment of wages for services performed as a home worker within the meaning of section 3121(d)(3)(C), see §31.3121(a)-2.

(3) For provisions relating to records to be kept with respect to payment of wages for services performed as a home worker within the meaning of section 3121(d)(3)(C), see §31.6001-2.

(f) The provisions of this section apply to any payment for services performed as a home worker within the meaning of section 3121(d)(3)(C) made on or after January 1, 1978. For rules applicable to any payment for services performed as a home worker within the meaning of section 3121(d)(3)(C) made prior to January 1, 1978, see §31.3121(a)(10)-1 in effect at such time (see 26 CFR part 31 revised as of April 1, 2005).

Par. 7. Section 31.3121(i)-1 is amended as follows:

1. Redesignating the undesignated text as paragraph (a).
2. Remove the language “quarter” each place it appears and add “year” in its place in newly designated paragraph (a).
3. Adding new paragraph (b).

The addition reads as follows:

§31.3121(i)-1 Computation to nearest dollar of cash remuneration for domestic service.

* * * * *

(b) The provisions of this section apply to any cash payment for domestic service in a private home of the employer made on or after January 1, 1994. For rules applicable to

any cash payment for domestic service in a private home of the employer made prior to January 1, 1994, see §31.3121(i)-1 in effect at such time (see 26 CFR part 31 revised as of April 1, 2005).

/s/ Mark E. Matthews

Deputy Commissioner for Services and Enforcement.