



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR: ASSOCIATE AREA COUNSEL, FINANCIAL SERVICES
CC:LM:F:MAN

FROM: George J. Blaine
Deputy Assistant Chief Counsel
Administrative Provisions and Judicial Practice
CC:PA:APJP

SUBJECT: Electronic Storage of Forms W-8 and W-9

This Chief Counsel Advice responds to your memorandum dated January 18, 2002. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

LEGEND

Taxpayer =

ISSUE

Whether a payor can satisfy the section 6001 "books and records" requirement by imaging its paper Forms W-8 and W-9 and storing the images in an electronic storage system.

^{1/} As used in this memorandum, the term "payor" means a withholding agent within the meaning of section 1.1441-7(a) of the Income Tax Regulations or a payor within the meaning of section 3406(h)(4) of the Code.

CONCLUSION

Yes, provided such forms are imaged to and maintained in an electronic storage system in accordance with Revenue Procedure 97-22, 1997-1 C.B. 652.

FACTS

Taxpayer is a broker-dealer registered with the Securities and Exchange Commission. Taxpayer solicits and collects Forms W-8 and/or W-9 from customers when it opens a new account, and in other situations. Taxpayer is a payor or a withholding agent for payments on its accounts. Taxpayer accepts completed paper Forms W-8 and W-9 in the format authorized by the Service (including a substitute form as authorized by the Instructions to the Form W-8 or Form W-9). In some instances, Taxpayer may receive Forms W-8 and W-9 electronically pursuant to Announcement 98-27, Announcement 2001-91, and section 1.1441-1(e)(4)(iv) of the Income Tax Regulations

Taxpayer wishes to store its Forms W-8 and W-9 electronically to avoid the expense of maintaining paper files. Taxpayer proposes to image the paper Forms W-8 and W-9 to an electronic system, to store such images on that system, and to destroy the original paper forms. We understand that other, similarly situated taxpayers would like to adopt the same practice with regard to electronic imaging and storage of Forms W-8 and W-9.

LAW AND ANALYSIS

Form W-8

Section 1441(a) of the Code provides, in part, that withholding agents will deduct and withhold tax on items of income paid from United States sources to nonresident aliens. Payees submit forms in the W-8 series (collectively referred to in this memorandum as "Form W-8") to claim exemptions from withholding under section 1441 or to affect the amount of withholding.

Section 1.1441-1(e)(4)(iv) of the Income Tax Regulations (regulations) provides that, under certain circumstances, a withholding agent may receive Form W-8 electronically.

Section 1.1441-7(a) of the regulations generally defines the term "withholding agent" as any person, U.S. or foreign, that has the control, receipt, custody, disposal or payment of an item of income of a foreign person subject to withholding.

Form W-9

Section 3406(a)(1) of the Code provides that under certain circumstances, payors must deduct and withhold tax from any reportable payment to a payee.

Section 3406(b)(1) of the Code defines the term “reportable payment” to mean any reportable interest or dividend payment and any other reportable payment. Section 3406(b)(3) defines the term “other reportable payment” to include distributions reportable under sections 6041, 6041A, 6045, 6050A and 6050N.

Section 3406(d)(1) of the Code generally imposes backup withholding on payments of interest and dividends on new accounts and instruments unless the taxpayer certifies under penalty of perjury that the taxpayer is not subject to backup withholding. Taxpayers complete Form W-9, “Request for Taxpayer Identification Number and Certification,” to certify the accuracy of their TINs and to confirm that they are not subject to backup withholding.

Section 3406(h)(4) of the Code provides that the term “payor” means, with respect to any reportable payment, a person required to file an information return described in section 3406(b)(2) or (3) (including interest payments reportable under section 6049 and dividend payments reportable under section 6042).

Section 3406(h)(5)(A) of the Code provides that, in general, the term “broker” has the same meaning as under section 6045(c)(1). Section 6045(c)(1) provides that the term “broker” includes a dealer, a barter exchange and any other person who (for a consideration) regularly acts as a middleman regarding property or services.

Forms W-8 and W-9 as “books and records” under Rev. Proc. 97-22

Section 6001 of the Code provides that every person liable for any tax imposed by the Code, or for the collection thereof, must keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary may from time to time prescribe.

Section 1.6001-1(a) of the regulations provides that, except for farmers and wage-earners, any person subject to income tax, or any person required to file a return of information with respect to income, must keep such books or records, including inventories, as are sufficient to establish the matters required to be shown by that person in any return of such tax or information.

Section 1.6001-1(a) of the regulations states that filers of information returns must keep sufficient “records” to support the entries on those returns. Because completed Forms W-8 and W-9 do support a number of entries on information returns, the forms should be considered records for purposes of section 6001 of the Code and section 1.6001-1(a) of the regulations. Therefore, Revenue Procedure 97-22 applies to the electronic imaging and storage of such completed forms. That revenue procedure contains the requirements for maintaining “books and records” in electronic form.

Compliance with Rev. Proc. 97-22

To maintain Forms W-8 and W-9 in an electronic storage system, the Taxpayer must comply with Rev. Proc. 97-22. 2/ Among other things, Taxpayer's electronic storage system must include an indexing system within the meaning of section 4.02 of the revenue procedure and must feature an adequate quality assurance program. In addition to the general requirements of Rev. Proc. 97-22 and section 1.6001-1(e) of the regulations, Taxpayer must image the completed paper Forms W-8 and W-9 in such a way that the signature on the form (if any) will be clearly legible when the form is viewed on a video display terminal and when the form is printed in hardcopy. See Section 4.01(3), Rev. Proc. 97-22. Lastly, if Taxpayer receives Form W-8 or Form W-9 electronically pursuant to Announcement 98-27, Announcement 2001-91, and section 1.1441-1(e)(4)(iv) of the regulations, it must maintain the forms in accordance with Rev. Proc. 97-22.

If Taxpayer complies with the provisions of section 7 of Rev. Proc. 97-22, Taxpayer may destroy the original paper Forms W-8 and W-9 after it has:

1. conducted testing of its electronic storage system establishing that hardcopy records are being reproduced in compliance with all the provisions of Rev. Proc. 97-22; and
2. instituted procedures that ensure its continued compliance with all the provisions of Rev. Proc. 97-22.

We note that section 9 of Rev. Proc. 97-22 describes a number of consequences if a taxpayer fails to comply with the revenue procedure. Specifically, the Service may issue a Notice of Inadequate Records under section 1.6001-1(d) of the regulations if a taxpayer's books and records are available only in electronic form and the taxpayer's electronic storage system fails to meet the requirements of Rev.

2/ We note that Rev. Proc. 97-22 specifically addresses the type of system Taxpayer proposes to use (i.e., a system that images hardcopy books and records).

Proc. 97-22. Section 9 of Rev. Proc. 97-22 further notes that other penalties, including the section 6662(a) accuracy-related civil penalty, may apply.

This field service advice relates only to electronic imaging and storage of Forms W-8 and W-9. Other documents may be subject to different rules and restrictions with respect to electronic storage, and with respect to destruction of paper originals.

Payors other than Taxpayer with facts equivalent to those stated in this memorandum should be accorded the same treatment as Taxpayer under Rev. Proc. 97-22.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views. Please call if you have any further questions.