

**Office of Chief Counsel  
Internal Revenue Service  
memorandum**

Number: **201615012**

Release Date: 4/8/2016

CC:PA:01:MEHara  
POSTS-128325-15

Third Party Communication: None  
Date of Communication: Not Applicable

UILC: 6723.03-02

date: February 23, 2016

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subject: 1042-S Project – Incorrect TIN Reporting

This memorandum responds to your request for assistance dated September 14, 2015.  
This advice may not be used or cited as precedent.

**ISSUES**

1. Can the Internal Revenue Service (Service) impose penalties for any invalid Taxpayer Identification Numbers (TIN) reported on a Form 1042-S, *Foreign Person's U.S. Source Income Subject to Withholding*, found upon audit?
2. If the Service assesses a penalty, which code section would apply: I.R.C. §§ 6721 and 6722 or I.R.C. § 6724?

**SHORT CONCLUSIONS**

1. No. Penalties should be asserted based on the facts and circumstances in each case, and normally should not be asserted unless the withholding agent knew or should have known that the TINs on the Form W-8BEN, *Certificate of Foreign*

*Status of Beneficial Owner for United States Tax Withholding and Reporting (Individuals)*<sup>1</sup> was incorrect.

2. In appropriate cases, penalties under Section 6721 may be assessed on a withholding agent for filing with the Service a Form 1042-S with an incorrect TIN.

## BACKGROUND

### Facts

A withholding agent secured a withholding certificate, Form W-8BEN, from a beneficial owner that requested a reduced rate of withholding due to a treaty. The withholding agent then filed with the Service a Form 1042-S that included the incorrect TIN provided by the beneficial owner. The withholding agent asserted that since Treas. Reg. § 1.1441-6T(b) does not require a withholding agent to check the validity of the TIN, it is not responsible for the invalid TIN that was provided to it by the beneficial owner and should not be subject to information reporting penalties.

### Withholding Certificates

Form W-8 is filled out by foreign entities (citizens and corporations) in order to claim exempt status from certain tax withholdings. The form is used to declare status as a non-resident alien or foreign national who works outside of the United States. These individuals may receive tax treaty status that affords them certain rights, such as lower withholdings from dividends paid by United States corporations. A withholding agent will typically request a Form W-8BEN for any foreign client.

The withholding agent is responsible for inspecting the withholding certificate to determine its validity. Treasury Regulation § 1.1441-6T(b) require that a TIN be provided on the withholding certificate in order to have a valid treaty claim.<sup>2</sup>

### Taxpayer Identification Numbers

The Service has broad authority to require use of TINs on returns to properly identify filers and those persons and entities identified on information returns. I.R.C. § 6109 provides the Secretary of the Treasury with the authority to prescribe regulations requiring the inclusion of TINs on tax returns, and Treas. Reg. § 301.6109-1(b) establishes the requirement for persons to include their TINs on a tax return "as required by the forms and the accompanying instructions." Treas. Reg. § 301.6109-1(c)

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<sup>1</sup> Throughout this memorandum, a reference to a "Form W-8BEN" "Form W-8" or "withholding certificate" is also a reference to a Form W-8BEN-E, *Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities)*. Forms W-8ECI, *Certificate of Foreign Person's Claim That Income Is Effectively Connected With the Conduct of a Trade or Business in the United States*, and W-8IMY, *Certificate of Foreign Intermediary, Foreign Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding and Reporting*.

<sup>2</sup> Treas. Reg. § 31.3406(j)-1(d) provides that the Service will not use a payor's decision not to participate in the TIN Matching Program as a basis to assert that the payor lacks reasonable cause under I.R.C. § 6724(a) for failure to file a correct information return under I.R.C. § 6721 or to furnish a correct payee statement under I.R.C. § 6722.

establishes the requirement for persons to include the TINs of others on a tax return "as required by the forms and the accompanying instructions." This would include the requirement to provide the TINs of beneficial owners on a Form 1042-S.

### ANALYSIS

1. The Service should not impose penalties on withholding agents in every instance for any invalid TINs reported on Forms 1042-S that are found upon audit. Penalties should be asserted based on the facts and circumstances in each case, and normally should not be asserted unless the withholding agent knew or should have known that the TINs on the Forms W-8BEN were incorrect.

In these cases, the filer secured a withholding certificate from a beneficial owner filed with the Service a Form 1042-S that included an incorrect TIN provided by the beneficial owner. Treas. Reg. § 1.1441-6T(b) provides that absent actual knowledge or reason to know that the claims are incorrect (applying the standards of knowledge in § 1.1441-7(b)), a withholding agent may rely on the claims made on a withholding certificate or on documentary evidence.

Treas. Reg. § 1.1441-6T(b) provides in part:

a beneficial owner withholding certificate described in § 1.1441-1(e)(2)(i) contains information necessary to support the claim for a treaty benefit only if it includes *the beneficial owner's taxpayer identifying number . . . or the beneficial owner provides its foreign tax identifying number issued by its country of residence and such country has with the United States an income tax treaty or information exchange agreement in effect) . . . . For claims for treaty benefits for scholarship and fellowship income, the beneficial owner withholding certificate must contain the beneficial owner's U.S. taxpayer identifying number (not a foreign taxpayer identifying number). . . . Absent actual knowledge or reason to know that the claims are incorrect (applying the standards of knowledge in § 1.1441-7(b)), a withholding agent may rely on the claims made on a withholding certificate or on documentary evidence.* (emphasis added).

Thus, the filer has met the standard of compliant behavior set forth in regulations, and absent any facts that show that the withholding agent knew or should have known that the TINs on the Forms W-8BEN were incorrect or did not meet the standards of knowledge in Treas. Reg. 1.1441-7(b), and information return penalties should not be asserted.

2. In appropriate cases, penalties under Section 6721 may be assessed against a withholding agent for filing a Form 1042-S with an incorrect TIN with the Service.

### Information Return Penalties Under Section 6721

The section 6721 penalty applies to failures to timely file a correct information return with the Service.<sup>3</sup> Section 6724(d)(1) provides definitions for information returns that are subject to the section 6721 penalty, which include "any form, statement, or schedule required to be filed with the Secretary under chapter 4 or with respect to any amount from which tax was required to be deducted and withheld under chapter 3 (or from which tax would be required to be so deducted and withheld but for an exemption under this title or any treaty obligation of the United States)." For this reason, in appropriate cases, such as where the filer had actual knowledge or reason to know that the TIN was incorrect or that claims in the withholding certificate were incorrect, applying the standards of knowledge in Treas. Reg. § 1.1441-7(b), penalties under Section 6721 may be assessed for filing a Form 1042-S with an incorrect TIN with the Service.<sup>4</sup>

### Reasonable Cause

Even when the Service has asserted an information return penalty, it may waive the penalty where the taxpayer demonstrates that failures were due to reasonable cause and is not due to willful neglect.<sup>5</sup>

I.R.C. § 6724(a), entitled REASONABLE CAUSE WAIVER, provides "[n]o penalty shall be imposed under this part with respect to any failure if it is shown that such failure is due to reasonable cause and not to willful neglect."

Treasury regulations define the scope of reasonable cause relief for information return penalties.<sup>6</sup> For example, the penalty is waived for reasonable cause if the failure arose from events beyond the filer's control.<sup>7</sup> Events which are generally considered beyond the filer's control include certain actions of the payee or any other person providing necessary information with respect to the return or payee statement.<sup>8</sup> This includes a failure resulted from incorrect information provided by the payee, or any other person, upon which information the filer relied in good faith.<sup>9</sup> To substantiate reasonable cause,

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<sup>3</sup> Treas. Reg. § 301.6109-1(d)(f) provides that "[f]or penalties for failure to supply taxpayer identifying numbers, see sections 6721 through 6724."

<sup>4</sup> Treas. Reg. § 301.6723-1A(g)(2) provides that no penalty under section 6723 should be imposed if penalties are imposed under sections 6721 or 6722.

<sup>5</sup> Although Rev. Proc. 2003-9, 2003-1 C.B. 516, states in section 2.05 that "[not] including the correct payee TIN on an information return is a failure subject to the §§ 6721 and 6722 penalties," we do not interpret this subsection to mandate that penalties be imposed in every case. Section 2.06 of the revenue procedure recognizes that the filer may establish reasonable cause to avoid information return penalties.

<sup>6</sup> Id Treas. Reg. § 301.6724-1

<sup>7</sup> Treas. Reg. § 301.6724-1(a)(2)(ii).

<sup>8</sup> Treas. Reg. § 301.6724-1(c)(1)(v).

<sup>9</sup> Treas. Reg. § 301.6724-1(c)(6)(ii).

the filer must provide documentary evidence upon request of the Service showing that the failure was attributable to the payee, or any other person.<sup>10</sup>

The filer must also establish that the filer acted in a responsible manner.<sup>11</sup> The regulations provide a safe harbor establishing reasonable cause and due diligence if a payee certified that the TIN provided to the payor was his correct number.<sup>12</sup>

Where the filer relied on the withholding certificate and TIN proffered by the beneficiary, as it is entitled to do under Treas. Reg. § 1.14416T(b), the filer acted in a responsible manner, is generally entitled to reasonable cause relief and information return penalties normally should be waived, unless the withholding agent knew or should have known that the TINs on the Form W-8BEN were incorrect.

Please contact this office at (202) 317-6845 if you have any questions regarding this memorandum.

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<sup>10</sup> Treas. Reg. § 301.6724-1(c)(6).

<sup>11</sup> Treas. Reg. § 301.6724-1(d)(1).

<sup>12</sup> Treas. Reg. § 301.6724-1(g)(2) provides in part:

Q–1. Is a payor subject to a penalty for a failure to provide a correct TIN on an information return with respect to a reportable interest or dividend payment if the payee has certified, under penalties of perjury, that the TIN furnished to the payor is the payee's correct number, the payor provided that number on an information return, and the number is later determined not to be the payee's correct number?

A–1. A payor is not subject to a penalty for failure to provide the payee's correct TIN on an information return, if the payee has certified, under penalties of perjury, that the TIN provided to the payor was his correct number, and the payor included such number on the information return before being notified by the Internal Revenue Service (IRS) (or a broker) that the number is incorrect.