

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

CC:TEGEDC:NELI:LPAzmon
POSTN-106218-19

date: June 11, 2019

to: Barbara Wulf
Program Manager, Small Business/Self Employed

from: Linda P. Azmon
Senior Counsel (Northeast Area Long Island)
(Tax Exempt & Government Entities Division Counsel)

subject: Additional Medicare Tax - 1401(b)(2) and 3101(b)(2) and Deficiency Procedures

Attached please find advice I received from CC:PA regarding a number of issues concerning Additional Medicare Tax on self-employed income and/or wages. Please let me know if you have any additional questions regarding this matter.

Sincerely,

By: _____
Linda P. Azmon
Special Counsel
(Tax Exempt & Government Entities Division
Counsel)

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:PA:07: WRowe
POSTN-106218-19

UICL: 6211.00-00, 6212.00-00, 6213.00-00, 3101.00-00, 1401.00-00

date: June 10, 2019

to: Linda P. Azmon
Special Counsel
(TEGE Division Counsel)

from: Melissa E. Avrutine 
Senior Technician Reviewer (Branch 7)
(Procedure & Administration)

subject: Additional Medicare Tax - I.R.C. §§ 1401(b)(2) and 3101(b)(2) and Deficiency Procedures

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUES

1. Whether the "Additional Medicare Tax" imposed under I.R.C. § 1401(b)(2) on specified amounts of self-employment tax is subject to the deficiency procedures under sections 6211-6213.
2. Whether the "Additional Medicare Tax" imposed under I.R.C. § 3101(b)(2) on specified amounts of wages received with respect to employment is subject to the deficiency procedures under sections 6211-6213.
3. The filing of which form starts the period of limitations for assessment with respect to the "Additional Medicare Tax" imposed under section 3101(b)(2).
4. What form should be used to extend the period of limitations for the "Additional Medicare Tax" imposed under section 3101(b)(2).

CONCLUSIONS

1. Yes. The "Additional Medicare Tax" imposed under I.R.C. § 1401(b)(2) is subject to the deficiency procedures under sections 6211-6213 since it is an income tax

imposed under subtitle A of the Internal Revenue Code.

2. No. The "Additional Medicare Tax" imposed under I.R.C. § 3101(b)(2) is not subject to the deficiency procedures under sections 6211-6213 since it is a tax imposed under subtitle C of the Internal Revenue Code.
3. The filing of the Form 1040, U.S. Individual Income Tax Return, starts the running of the period of limitations for assessment with respect to the "Additional Medicare Tax" imposed under section 3101(b)(2).
4. Form SS-10, Consent to Extend the Time to Assess Employment Taxes, should be used to extend the period of limitations for assessment with respect to the employer's withholding liability pursuant to section 3102. To extend the period of limitations for assessment with respect to the employee's liability for "Additional Medicare Tax" imposed under section 3101(b)(2), the best practice is to use the Form 872, Consent to Extend the Time to Assess Tax.

BACKGROUND

Taxes under the Federal Insurance Contributions Act ("FICA") are composed of the Old-Age, Survivors, and Disability Insurance tax, also referred to as social security tax, and Hospital Insurance tax, also referred to as Medicare tax. Medicare tax is imposed separately on the employer, pursuant to section 3111(b), and the employee, pursuant to section 3101(b)(1), in an amount equal to a percentage of wages. Pursuant to section 3102, the employer is required to collect the employee portion of FICA tax by deducting the amount of the tax from wages, as and when paid, and is liable for payment of the tax required to be collected. Until collected, the employee also is liable for the employee portion of the tax. See Treas. Reg. § 31.3102-1(d).

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, H.R. 3590, 111th Cong. (2010) ("Affordable Care Act"), added section 3101(b)(2) to the Code. Section 3101(b)(2) imposes an additional Medicare tax of 0.9 percent on an individual's FICA wages received in any taxable year beginning after December 31, 2012, which are in excess of certain threshold amounts ("Additional Medicare Tax"). Additional Medicare Tax is distinct from Medicare tax in that Additional Medicare Tax is imposed only on wages that exceed a threshold amount based on the filing status of the individual. Pursuant to section 3101(b)(2), the threshold amount is \$250,000 in the case of a joint return, \$125,000 in the case of a married taxpayer filing a separate return, and \$200,000 in any other case. In addition, Additional Medicare Tax is imposed only on an individual; there is no employer portion of Additional Medicare Tax.

Section 3102(f)(1) provides that an employer must withhold Additional Medicare Tax from wages it pays to an individual in excess of \$200,000 in a calendar year, without regard to any wages received by the individual's spouse.

Section 3102(f)(2) specifies that to the extent Additional Medicare Tax is not withheld by the employer, the employee must pay the tax.

Section 3102(f)(3) provides that if an employer fails to withhold Additional Medicare Tax, and the tax is subsequently paid by the employee, the Service will not collect the tax from the employer. Section 3102(f)(3) specifies, however, that the employer would remain subject to any applicable penalties or additions to tax for failure to withhold Additional Medicare Tax as required.

Additional Medicare Tax applies to Railroad Retirement Act compensation to railroad employees and employee representatives in the same manner as FICA tax. See I.R.C. §§ 3021(a) and 3211(a) (referencing I.R.C. § 3101(b)).¹

Section 1401 imposes social security and Medicare taxes on the self-employment income of every individual at the same combined employer and employee rates applicable under the FICA.

The Affordable Care Act also added section 1401(b)(2) to the Code. Section 1401(b)(2)(A) imposes an additional Medicare tax of 0.9 percent on self-employment income for any taxable year beginning after December 31, 2012, which is in excess of certain threshold amounts. As with Additional Medicare Tax under the FICA, the threshold amounts for an individual to be subject to Additional Medicare Tax under the Self-Employment Contributions Act ("SECA") are determined by the individual's filing status. Like the Additional Medicare Tax under the FICA, the threshold amounts enumerated under section 1401(b)(2)(A), are \$250,000 in the case of a joint return, \$125,000 in the case of a married taxpayer filing a separate return, and \$200,000 in any other case.

Section 1401(b)(2)(B) provides for coordination with Additional Medicare Tax under the FICA and specifies that the threshold amounts under section 1401(b)(2)(A) are reduced (but not below zero) by the amount of wages taken into account in determining Additional Medicare Tax under the FICA.² For this reason, in situations where an individual or a couple filing jointly have both FICA wages and self-employment income in a calendar year that separately do not exceed the appropriate Additional Medicare Tax threshold but combined do exceed the threshold, the taxpayer (or taxpayers) will have Additional Medicare Tax liability on the self-employment income only.

Regulations under sections 1401, 3101, 3102, and 3202 provide additional clarifications concerning Additional Medicare Tax. Regulations under sections 6011 provide

¹ However, see note 2, *infra*.

² There is no such provision for the coordination with Additional Medicare Tax on RRTA compensation, nor is there a provision for coordination between Additional Medicare Tax on FICA wages and Additional Medicare Tax on RRTA compensation. Thus, Additional Medicare Tax is always applied separately to RRTA compensation in situations where individuals or joint filers have compensation subject to RRTA in addition to wages subject to FICA and/or income subject to SECA.

information concerning employee and employee representative reporting of Additional Medicare Tax on their tax returns. Regulations under sections 6205, 6402, and 6413 provide guidance on adjustments for employer underpayment of Additional Medicare Tax and adjustments or refunds of employer overpayments of Additional Medicare Tax.

ANALYSIS

1. The "Additional Medicare Tax" imposed under section 1401(b)(2) is subject to the deficiency procedures.

The Additional Medicare Tax imposed under section 1401(b)(2) is subject to the deficiency procedures under sections 6211-6213 because it is an income tax imposed under subtitle A of the Code. See I.R.C. § 6211(a) (limiting the term "deficiency" to "income, estate, and gift taxes imposed under subtitles A and B and excise taxes imposed by chapters 41, 42, 43, and 44").

Section 6213 provides that when there is a deficiency in tax under section 6211(a), including for the Additional Medicare Tax imposed under section 1401(b)(2), the Service must issue a notice of deficiency prior to assessing the tax. See I.R.C. § 6213(a) ("[N]o assessment of a deficiency in respect of any tax imposed by subtitle A or B, chapter 41, 42, 43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until the expiration of such 90-day or 150-period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final."). Section 6211(a) defines "deficiency" as the amount by which the tax imposed exceeds the amount shown by the taxpayer on the return, plus the amounts previously assessed as a deficiency, over the amount of any rebates. Any assessment of Additional Medicare Tax under section 1401(b)(2) made in contravention of the restrictions on assessment under section 6213 is improper and should be abated.

Taxpayers will have an opportunity to petition to Tax Court the Service's deficiency determinations with respect to the Additional Medicare Tax imposed under section 1401(b)(2). In a deficiency proceeding that is based on the Additional Medicare Tax imposed under section 1401(b)(2), the decision document entered by the court should reflect the amount of the Additional Medicare Tax above the line in the tax deficiency dollar amount. If the Additional Medicare Tax was improperly assessed in contravention of the restrictions on assessment under section 6213 and not previously abated during the pendency of the Tax Court proceeding, we recommend that the decision document include below the line language as follows:

It is stipulated that the Additional Medicare Tax identified in the notice of deficiency in the amount of \$XX.XX for the [XXXX taxable year] was assessed on or about [DATE].

It is further stipulated that the Additional Medicare Tax assessed on or about [DATE] for the [XXXX taxable year] will be abated but that petitioner

remains liable for \$XX.XX of the Additional Medicare Tax imposed under I.R.C. § 1401(b)(2) and that such Additional Medicare Tax will be reassessed and is included as part of the income tax deficiency set forth above in the amount of \$XX.XX.

2. The "Additional Medicare Tax" imposed under sections 3101(b)(2) and 3111(b) is not subject to the deficiency procedures.

The Tax Court is a court of limited jurisdiction and may exercise its jurisdiction only to the extent authorized by Congress. See I.R.C. § 7442. Section 6214(a) grants the Tax Court jurisdiction to redetermine the correct amount of a deficiency and to determine whether any additional amounts or any additions to tax should be assessed.

The Additional Medicare Tax imposed under section 3101(b)(2) is a tax imposed under subtitle C and, therefore, is not subject to the deficiency procedures under sections 6211-6213. See I.R.C. § 6211(a) (limiting the term "deficiency" to "income, estate, and gift taxes imposed under subtitles A and B and excise taxes imposed by chapters 41, 42, 43, and 44").³ Therefore, the Tax Court's deficiency jurisdiction does not extend to the amounts owed under section 3101(b)(2). See Letto v. Commissioner, T.C. Memo. 1996-332 (granting respondent's motion to dismiss for lack of jurisdiction with respect to the tax imposed under section 3101).

Because the Additional Medicare Tax imposed under section 3101(b)(2) is not subject to the deficiency procedures, the Service should not issue a notice of deficiency with respect to these taxes. Rather, the Service should summarily assess the taxes pursuant to its assessment authority under section 6201(a). The timing of such assessments is governed by section 6501 and is not restricted by section 6213(a).

Although the Additional Medicare Tax imposed under section 3101(b)(2) is not subject to deficiency procedures, Tax Court proceedings may involve determinations that affect the amount of Additional Medicare Tax liability. If the resolution of a Tax Court proceeding involves a determination which would reduce the amount of Additional Medicare Tax liability under section 3101(b)(2) but the tax has already been assessed, we recommend that the decision document include below the line language as follows:

It is stipulated that Additional Medicare Tax under I.R.C. § 3101(b)(2) in the amount of \$XX.XX for the [XXXX taxable year] was assessed on or about [DATE].

³ Since this memorandum relates to the individual's liability for Additional Medicare tax, rather than the employer's liability to withhold Additional Medicare Tax, the limited Tax Court jurisdiction under section 7436 related to worker classification determinations is not relevant.

It is further stipulated that petitioner is liable for \$XX.XX of Additional Medicare Tax under I.R.C. § 3101(b)(2) for the [XXXX taxable year] and that \$XX.XX of the Additional Medicare Tax assessed on or about [DATE], plus statutory interest on this amount, shall be abated.

OR

It is further stipulated that petitioner is not liable for the \$XX.XX of Additional Medicare Tax under I.R.C. § 3101(b)(2) for the [XXXX] taxable year and that such Additional Medicare Tax, plus statutory interest on this amount, shall be abated.

If a taxpayer is subject to Additional Medicare Tax liability under both section 1401(b)(2) and section 3101(b)(2) and fails to report the amounts of such tax liability on his or her return, only the Additional Medicare Tax imposed under section 1401(b)(2) should be included in a notice of deficiency since the tax imposed under section 3101(b)(2) is not subject to deficiency procedures.⁴ The Service should summarily assess the Additional Medicare Tax imposed under section 3101(b)(2) since the tax is not subject to the restrictions on assessment under section 6213(a). In such a case, a taxpayer may receive a statutory notice of deficiency for the Additional Medicare Tax imposed under section 1401(b)(2) and a notice of assessment of the Additional Medicare Tax imposed under section 3101(b)(2).

3. The Form 1040 starts the running of the period of limitations for assessment for the "Additional Medicare Tax" imposed under section 3101(b)(2).

Most employers report their liability for the employer share of FICA taxes and for the withholding of the employee share of FICA taxes using Form 941, Employer's QUARTERLY Federal Tax Return.⁵ Typically, an individual's liability for the employee portion of social security tax (section 3101(a)) and Medicare tax (section 3101(b)(1)) is equal to the amount for these taxes that the individual's employer (or employers) is required to withhold from wages paid to the individual under section 3102⁶ because an individual's liability for social security tax and Medicare tax does not depend on the filing status of the individual or other such tax attributes. For this reason, individuals

⁴ Note that, because the threshold amounts under section 1401(b)(2)(A) are reduced (but not below zero) by the amount of wages taken into account in determining Additional Medicare Tax under the FICA, in situations where a taxpayer has both FICA wages and self-employment income, any Additional Medicare Tax determined by the Service will likely be subject to deficiency procedures.

⁵ Certain employers with limited employment tax liability may file Form 944, Employer's ANNUAL Federal Tax Return, in lieu of Form 941. Certain agricultural employers report employment tax liability on Form 943, Employer's Annual Federal Tax Return for Agricultural Employees.

⁶ In some instances, an individual with wages from multiple employers that exceed the social security tax wage base provided in section 3121(a)(1) could have too much social security tax withheld from wages. In such situations the individual may claim a refund for this overwithholding on the individual's tax return. See I.R.C. § 6413(c).

generally do not separately report their social security and Medicare tax liability on their individual tax returns.⁷

Individual liability for Additional Medicare Tax on FICA wages, however, can and often does differ from the amount of Additional Medicare Tax withheld by an employer because individual Additional Medicare Tax liability is calculated based on filing status. Employers are required to withhold Additional Medicare Tax from wages they pay to an individual in excess of \$200,000 in a calendar year, *without regard to the individual's filing status or other income received by the individual or the individual's spouse*. See Treas. Reg. § 31.3102-4(a). The individual's liability for Additional Medicare Tax under FICA, on the other hand, is determined based on total wages received by the individual (and the individual's spouse for joint filers) over a threshold amount that varies based on filing status (\$250,000 for married filing jointly, \$125,000 for married filing separately, and \$200,000 for all other filing statuses). For this reason, while an employer reports its Additional Medicare Tax *withholding* on employee wages on its employment tax return, individual employees report and pay their total Additional Medicare Tax liability on their individual (or jointly filed) tax return (typically, Form 1040, U.S. Individual Income Tax Return) using Form 8959, Additional Medicare Tax. See Treas. Reg. § 31.6011(a)-1(g). Any Additional Medicare Tax withholding that the individual's (or joint filers') employer(s) withheld from wages is credited to the individual on the individual's tax return.

As the section 3101 social security and Medicare taxes and section 3101 Additional Medicare Tax are reported on different returns, the limitations periods may be different for these taxes. The limitations period during which the Service must make assessment generally begins to run with the filing of a valid return for a tax for which a return must be filed. I.R.C. § 6501(a). To determine whether a return is valid for assessment period of limitations purposes, courts generally look to see whether the purported return meets four requirements: the document (1) provides sufficient data to calculate tax liability; (2) purports to be a return; (3) is an honest and reasonable attempt to satisfy the requirements of the tax law; and (4) is executed under penalty of perjury. See Beard v. Commissioner, 82 T.C. 766, 777 (1984), *aff'd per curiam*, 793 F.2d 139 (6th Cir. 1986). "Of crucial importance is whether the return, as filed, included sufficient information to allow the [Service] to compute a taxpayer's liability." Atlantic Land & Improvement Co. v. United States, 790 F.2d 853, 858 (11th Cir. 1986). For social security and Medicare taxes imposed by section 3101(a) and (b)(1) respectively, that return is generally the employer's Form 941 (or other employment tax return as appropriate). Similarly, the employer reports any Additional Medicare Tax withheld on the Form 941, so the limitations period with regard to the employer's liability for that withholding obligation runs with the filing of the Form 941. Because Form 941 does not include information concerning employee filing status, employee wages from other sources, and employee spouse wages, it does not provide sufficient information to allow

⁷ In certain specific situations such as overwithholding due to multiple employers (see preceding footnote), a worker misclassification, or with some employee tips, an individual may report and pay social security tax and Medicare tax on an individual tax return.

the Service to compute a taxpayer's liability for the Additional Medicare Tax imposed by section 3101(b)(2). The individual's Form 1040 (or other individual tax return as appropriate), however, does include this information. Therefore, the filing of an individual's Form 1040 starts the running of the limitations period for the employee's liability for the Additional Medicare Tax.

4. Form SS-10 or Form 872 is used to extend the limitations period for the "Additional Medicare Tax" imposed under section 3101(b)(2).

The limitations period during which the Service must make assessment generally begins to run with the filing of a valid return for a tax for which a return must be filed. I.R.C. 6501(a). This period of limitations for any tax imposed by title 26 can be extended if both the taxpayer and Service consent in writing to its extension before the period of limitations expires (except as to the estate tax). See I.R.C. § 6501(c)(4). Form SS-10, Consent to Extend the Time to Assess Employment Taxes, is used to extend employment taxes, including FICA taxes and employee FICA tax withholding obligations, for the employer. See IRM 25.6.22.6.10(1). Therefore, to extend the statute on the employers' withholding liability for Additional Medicare Tax, employers should use Form SS-10.

Although consents to extend the period of limitations on assessment are not contracts, courts look to contract principles in interpreting their scope. See, e.g., Kronish v. Commissioner, 90 T.C. 684, 693 (1988). Accordingly, it is the objective manifestation of mutual assent, as made evident by the parties' conduct, that determines whether they have made an agreement. Id. Therefore, with regard to the employees' liability for Additional Medicare Tax, employees can use either the Form SS-10 or the Form 872, Consent to Extend the Time to Assess Tax, to extend the statute of limitations on assessment. IRM 25.6.22.6.10.1(3) indicates that an employee can submit the Form SS-10 to extend the statute for FICA taxes, which includes Additional Medicare Tax. When Form SS-10 is used to protect the statute with regard to the employees' liability for Additional Medicare Tax, it should specify that it is extending the period with respect to the *employees' liability* for Additional Medicare Tax. While Form SS-10 can be used to extend the Additional Medicare Tax statute for employees, the best practice in such situations is to use Form 872, as it is a more standard form for an individual to use. This practice is similar to that which is accepted for extending the statute with regard to FICA tax on underreported tips. IRM 25.6.22.6.10.2 ("Form SS-10 is the form to use to extend the statute of limitations with respect FICA tax on underreported tips. However, Form 872 or Form 872-A may be used to extend the statute for assessing additional FICA tax on tips if those forms specify that they relate to FICA tax."). When Form 872 is used to protect the statute with regard to employees' liability for Additional Medicare Tax, it should specify that it is extending the period for Additional Medicare Tax.

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 William M. Rowe at (202) 317-5093 if you have any further questions.