

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:PA:02:NLRose
POSTN-104379-19

date: May 24, 2019

to: Alice L. Ronk
Attorney-Advisor to the Director
Headquarters Examination
(Small Business/Self Employed)

from: Meghan Howard
Senior Technical Reviewer, Branch 1
(Procedure & Administration)

subject: Consistent EIN Filing

Issue

Whether the Service has the authority to require taxpayers that file Forms 945 to use the same EIN when filing related information returns.

Background

According to a draft memorandum from the Backup Withholding Team, SBSE Examination, Headquarters, to the Acting Director, SBSE Examination Headquarters Operation provided to our office, as well as subsequent telephone conversations, payors are sometimes reporting and remitting backup withholding on Form 945 using one EIN, but then filing information returns (Forms 1099 and W-2G) under a different EIN, such as a parent or related entity's EIN. [REDACTED]

[REDACTED]

Analysis

Section 6011(a) provides the general rule that any person made liable for any tax, or with respect to the collection thereof, ***shall make a return or statement according to the forms*** and regulations prescribed by the Secretary. Section 6011(a) further provides that every person required to make a return or statement ***shall include the information required by such forms*** or regulations.

Section 6011(b) authorizes the Secretary ***to require such information with respect to persons subject to taxes as is necessary or helpful in securing proper identification of such persons.***

Section 6109(a)(1) provides generally that when required by regulations, any person required to make a return, statement, or other document ***shall include such identifying number as may be prescribed for securing proper identification of such person.***

Section 6109(c) provides that the Secretary is authorized to require such information ***as may be necessary to assign an identifying number to any person.***

Section 301.6109-1(a)(1)(ii)(C) provides that any person other than an individual (such as corporations, partnerships, nonprofit associations, trusts, estates, and similar nonindividual persons) that is required to furnish a taxpayer identifying number ***must use an EIN.***

The payor of a non-payroll payment is the person required to deduct and withhold on such payment. See sections 3402(q)(1), 3402(r)(1), 3405(a)(1), 3406(a)(1). Treas. Reg. § 31.6011(a)-4(b) provides that any person required to withhold tax from nonpayroll payments must file Form 945. The withholding should be deposited under the payor's name/EIN and reported on Form 945 associated with that same name/EIN. The same person is the payor for purposes of information reporting and thus should file information returns using the same name/EIN.

[REDACTED]

The broad language contained in sections 6011(b) and 6109(a) indicates that Congress has vested in the Secretary or his delegate discretionary authority to require the use of whatever identifying number is deemed necessary or helpful for the proper identification of a taxpayer, employer, employee, or other person. See Rev. Rul. 73-526, 1973-2 C.B. 404. Accordingly, we conclude that under the authority of Code sections 6011 and 6109, the Service already has the statutory authority to require taxpayers to use the same EIN on Form 945 and related information returns.

The Service can implement this requirement through form instructions and other administrative guidance. However, as a practical matter, you may wish to work with outside stakeholders to determine the source of the problem, including whether a single business entity is using multiple EINs or a related entity is filing the employment tax returns.

Currently, the issue of which EIN to use is discussed in the General Instructions for Certain Information Returns and the Instructions for Form 945. The General Instructions for Certain Information Returns provide that that filer's name and TIN

should be consistent with the name and TIN used on the filer's other tax returns. These instructions also address special situations such as nominee/middleman reporting and predecessor/successor entities. The Form 945 instructions provide that the filer's EIN should match the one issued to them by the Service.

We note that the forms and instructions for reporting of wages and employment taxes, on Forms W-2/W-3 and 941, the instructions are more detailed as to how to resolve discrepancies due to other EINs used by the taxpayer this year. See, e.g., the Form W-3 instructions for box h (Other EIN used this year). The Service may wish to consider using similar detailed instructions in connection with Form 1096, which is the transmittal return for Forms 1099 and other information returns.

[REDACTED]

Conclusion

The Service has ample authority under the Internal Revenue Code and regulations to impose the requirement that the same EIN be used on both the Form 945 and the information returns furnished to payees that report the federal income tax withholding reported on the Form 945. No legislative change is necessary to effectuate this requirement.