

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

CC:TEGEDC:LPAzmon
POSTS-110509-20

date: April 27, 2020

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

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

subject: Effect of Section 3402(d) on Preparation of Section 6020(b) returns for backup withholding

Attached please find advice I received from the Chief, Employment Tax Branch 2 regarding the effect of IRC § 3402(d) on the preparation of IRC § 6020(b) returns for backup withholding. Please let me know if you have any additional questions regarding this matter.

Please call (516) 688-1734 if you have any further questions.

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

Attachment (1)

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

CC:EEE:EOET:ET2:AGKelley
POSTS-102341-20

date: April 20, 2020

to: Linda P. Azmon, Special Counsel, Deputy Chief Counsel (Operations), Division Counsel
(Tax Exempt and Government Entities)

from: Lynne Camillo, Chief, Employment Tax Branch 2, Office of the Associate Chief Counsel
(Employee Benefits, Exempt Organizations, and Employment Taxes) CC:EEE:EOET:ET2

subject: Effect of section 3402(d) on Preparation of Section 6020(b) returns for backup withholding

This memorandum responds to your request for advice regarding the proper computation of the tax liability for failing to backup withhold on a substitute for return prepared under the authority of section 6020(b).

Facts



Background

Section 3402, which falls under Chapter 24, Collection of Income Tax at Source, Subchapter A, Withholding From Wages, generally requires employers to withhold and pay over a tax on wages. If an employer fails to deduct and withhold the tax, the IRS can collect that tax from the employer. I.R.C. §. 3403. On the other hand, if the tax is paid by the employee who received the wages, the tax will not be collected from the employer. I.R.C. § 3402(d). But in no case is the employer relieved from liability for any

penalties or additions to the tax otherwise applicable in respect of such failure to deduct and withhold. *Id.*

Employers are liable for paying the tax required to be withheld under Chapter 24 and are not be liable to any person for the amount of any such payment. I.R.C. § 3403.

Every employer required under section 3402 to deduct and withhold the tax from the wages of an employee is liable for paying that tax regardless of whether the employer collects it from the employee. Treas. Reg. § 31.3403-1. If, for example, the employer deducts less than the correct amount of tax, or if the employer fails to deduct any part of the tax, the employer is nevertheless liable for the correct amount of the tax. The regulations, however, then say, “See, however, §31.3402(d)-1.”

Treas. Reg. §31.3402(d)-1 provides:

If the employer in violation of the provisions of section 3402 fails to deduct and withhold the tax, and thereafter the income tax against which the tax under section 3402 may be credited is paid, the tax under section 3402 shall not be collected from the employer. Such payment does not, however, operate to relieve the employer from liability for penalties or additions to the tax applicable in respect of such failure to deduct and withhold. The employer will not be relieved of liability for payment of the tax required to be withheld unless he can show that the tax against which the tax under section 3402 may be credited has been paid.

Section 3406, Backup Withholding, imposes backup withholding on reportable transactions. Under section 3406(h)(10), Coordination with other sections, payments subject to withholding under section 3406 are “treated as if they were wages paid by an employer to an employee (and amounts deducted and withheld under [section 3406] shall be treated as if deducted and withheld under section 3402).”

As noted above, section 3402(d) permits relief from the liability otherwise imposed by section 3402 if the employee who received the wages included the wages on which tax should have been withheld on the employee’s income tax return and paid the tax due on the return. In order to request relief under section 3402(d), persons otherwise liable for withholding tax under Chapter 24 submit Form 4670, Request for Relief of Payment of Certain Withholding Taxes, which includes: the employer identification number, the name and the address of the person requesting relief; the tax return on which the withholding is reported (for withholding under section 3406, Form 945, Annual Return of Withheld Income Taxes); the tax year; the number of Forms 4669 the requestor employer is attaching to the Form 4670; and an authorized signature.

Persons submitting a Form 4670 include with it the Forms 4669 from each payee for each year for which relief is requested. Those persons filing a Form 4670 for payments subject to backup withholding are also directed to attach a copy of the examination report. If the tax for which relief is requested has been paid by the taxpayer payor, the taxpayer payor must also complete the appropriate adjusted return or claim form

(Form 945-X in the case of backup withholding).

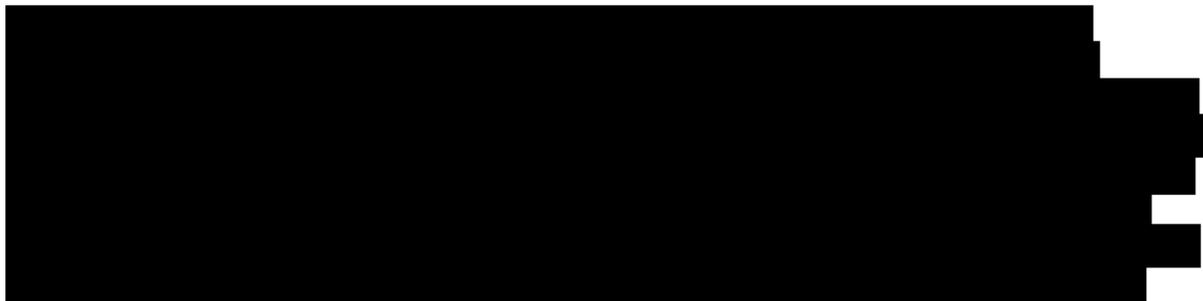
The Form 4670 Instructions for “Where to File” provide that if Form 4670 is related to an examination that is still ongoing or has ended in the past 30 days, the taxpayer should submit Form 4670 with required attachments to the IRS Examiner with whom the taxpayer is working. The Instructions provide that if Form 4670 is related to an examination that concluded more than 30 days ago, or is not related to an examination, the taxpayer should submit Form 4670 with required attachments to the appropriate address listed in the Form 4670 Instructions.

As noted previously, Forms 4669, Statement of Payments Received, are attached to the Form 4670. The Form 4669 has a section to be completed by the payor and a section to be completed by the payee. The section to be completed by the payor, Part I, includes the name, address, and taxpayer identification number of the payee, the name, address, and taxpayer identification number of the payor, and the calendar year in which the payor made the payments, and the amount of those payments that were subject to withholding. Line 6b specifically reports the amount of payments subject to backup withholding.

Part II of Form 4669 is to be completed by the payee, and includes the name and address shown on the payee’s tax return and a statement that the payments in Part I were included on the payee’s income tax return and that the taxes due on those payments have been paid in full as shown on the return. The payee must enter the specific line or schedule of the income tax return on which the payments were included. The payee must sign the form under the following statement: “Under penalties of perjury, I declare that I have examined this form and, to the best of my knowledge and belief, it is true, correct, and complete.” There is no signature line on Form 4669 for the payor; that information appears only on the companion Form 4670.

Section 6020(b)(1) provides that if any person fails to make any return required by any internal revenue law or regulations made thereunder at the time prescribed therefor, or makes, willfully or otherwise, a false or fraudulent return, the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise. Any return so made and subscribed by the Secretary shall be prima facie good and sufficient for all legal purposes. I.R.C. § 6020(b)(2).

Issue and Discussion



[REDACTED]

Our position is that there is no requirement that the section 6020(b) return computations of liability take into consideration the amount of tax shown as paid on the Forms 4669 [REDACTED]. The 6020(b) return is based on the return that the employer *should have filed*, which would include these payments and the amount of withholding on these payments. This best protects the government's interest. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] When the Service exercises the authority to make a return for the taxpayer, when the taxpayer fails to do so, that substitute return is treated as the return filed by the taxpayer for purposes of determining the amount of the addition to tax under section 6651(a)(2) and (3). See I.R.C. § 6020(b)(1); Treas. Reg. § 301.6020-1(b)(3).

Section 3402(d) relieves liability only for the income tax withholding. The payor is not relieved "from liability for any penalties or additions to the tax otherwise applicable in respect of such failure to deduct and withhold." I.R.C. § 3402(d). [REDACTED]

[REDACTED] The penalties are determined on the amount of the liability that should have been shown on the payor's return. If the amount of the additions to tax under section 6651(a)(2) and (3) were calculated based on the liability in a 6020(b) return that had taken into consideration the Forms 4669, the penalty determinations in the 6020(b) return would be incorrect and inconsistent with section 3402(d).

We also note that the Form 945 itself, which the 6020(b) return replaces here, does not have a place for reducing the liability for tax in accordance with section 3402(d), if applicable. [REDACTED]

[REDACTED]

[REDACTED]

Unlike penalties, which are asserted on the understatement of tax, interest is calculated on the amount of tax that is due and unpaid as of the due date of the return. See I.R.C. § 6601.

Conclusion

For the reasons above, we conclude that there is no requirement that the IRS consider Forms 4669 in preparing a section 6020(b) return [REDACTED]. However, the Forms 4669 and related documents must be considered to the extent appropriate in collecting any liability for income tax withholding shown on the section 6020(b) return. GCM 37437, 1978 WL 43437, solely concerns whether the IRS has discretion to adopt a certain procedure with respect to section 3402(d) and does not reach the issue that you asked about.

If you have any questions, please contact us.