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Director, Office of Payer Compliance CP:CO:SC:P

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Followup Questions on Backup Withholding

This is in response to your June 14, 1995, memorandum regarding backup withholding.

Your memorandum asks whether Policy Statement P-2-4 applies to backup withholding. Policy Statement P-2-4 states that penalties and interest will not be asserted against agencies or instrumentalities of the United States. The statement also ~~states that Federal agency compliance with the tax laws is required and will be monitored and enforced by Service personnel.~~

Backup withholding is not treated as a penalty or as interest under the Code. Section 3406(h)(10) of the Code provides that payments subject to withholding under section 3406 shall be 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 (relating to income tax withheld on wages). Therefore, Policy Statement P-2-4 does not apply to backup withholding.

Your memorandum also presents the following scenario, which was provided by a participant at the meeting of the Federal Agency Payer Compliance Task Force:

A payer, who in this case is a race track, receives a TIN from a payee. However, they do not issue a Form W-2G to the payee for his gambling winnings or file a form with the IRS. This is done intentionally to encourage the payee to continue gambling at the establishment. If backup withholding does not apply because the payee provided a TIN to the payer, the payer would only be assessed a minimal penalty vs. the large assessment possible for backup withholding. It would be to the payer's advantage not to provide a W-2G. Can backup withholding be applied in this situation?

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to the payor in the manner required, (B) the Secretary notifies the payor that the TIN furnished by the payee is incorrect, (C) there has been a notified payee underreporting described in section (c), or (D) there has been a payee certification failure described in section (d).

If the payee furnishes the payor of a reportable payment with a TIN that is not obviously incorrect then backup withholding is not required unless one of the other conditions stated in section 3406(a) is present.

Section 35a.9999-3 of the Temporary Employment Tax Regulations, Q & A-19, states that, until further regulations are issued, gambling winnings of \$600 or more are reportable only if the payout is based on betting odds of 300 to 1, or higher. A-19 states that the applicability of the odds requirement to information reporting and backup withholding is being studied by the Service and is subject to change in further regulations. At this time we do not anticipate that the 300 to 1 rule will be changed in further regulations.

Winnings from gambling are subject to withholding under section 3402(q). Proceeds of more than \$5,000 from a wagering transaction in a parimutual pool with respect to horse races, dog races, or jai alai are subject to gambling withholding if the amount of the proceeds from the wager is at least 300 times as large as the amount wagered.

If we assume in the scenario presented that the proceeds from the wager were not \$5,000 or were not 300 times the amount of the wager, then gambling withholding is not required under section 3402(q). If the proceeds from the wager were not \$600 or more or were not 300 times the amount of the wager, then information reporting and backup withholding are also not required pursuant to Q & A-19.

If the gambling winnings are \$600 or more and the 300 to 1 requirement is satisfied then Form W-2G is required. Backup withholding would not be required if the winner furnished a correct TIN to the race track.

It should be noted that section 6721(e), in the case of a failure to file a correct information return, and section 6722(c), in the case of a failure to furnish a correct payee statement, impose greater penalties in the case of intentional disregard of the requirements to file or furnish correct information returns or payee statements, respectively. In the case of intentional disregard, the penalty imposed by section 6721(a) and section 6722(a) shall be \$100, or if greater, 10 percent of the aggregate amount of the items required to be shown

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on the information return or payee statement. Furthermore, the \$250,000 limitation provided by section 6721(a)(1) and the \$100,000 limitation provided by section 6722(a) will not apply.

If you have any questions regarding this memorandum, please contact John McGreevy at (202) 622-7506.

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