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DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR DISTRICT COUNSEL
MANHATTAN DISTRICT

FROM: ASSOCIATE CHIEF COUNSEL
(EMPLOYEE BENEFITS & EXEMPT ORGANIZATIONS)
CC:EBO

SUBJECT: CLAIM FOR REFUND OF FICA TAXES

This Field Service Advice responds to your memorandum dated August 13, 1999. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

LEGEND

Employer =

ISSUE

What is the required form, if any, for the employee's written statement pursuant to § 31.6402(a)-2(a)(2)(ii) of the Employment Tax Regulations?

CONCLUSIONS

Neither § 31.6402(a)-2(a)(2)(ii) nor revenue rulings or procedures contain any requirements that the written statement from the employee be in any specified form. However, to satisfy the requirements for the written statement under § 31.6402(a)-2(a)(2)(ii), the certifications comprising the written statement must be clearly set forth and in close proximity to the employee's signature. In addition, the written statement must be verified by a written declaration that it was executed under the penalties of perjury.

FACTS

The Employer filed several protective Forms 843, Claim for Refund and Request for Abatement, for both the employer's and employees' shares of tax under the Federal Insurance Contributions Act (FICA). The claims involve both current and former employees of the Employer. The Employer furnished a corrected Form W-2, Wage and Tax Statement, to each employee in accordance with the Forms 843. Forms W-2c, Statement of Corrected Income and Tax Amounts, were filed with the Social Security Administration (SSA). The Employer wants to repay an employee's share of FICA tax to the employee before the Employer receives a refund of FICA tax for the employer's and employee's shares from the Internal Revenue Service.

The Employer has made two alternative proposals to comply with § 31.6402(a)-2(a)(2)(ii). The Employer's first proposal is a mailer which includes a proposed refund check with an attached check endorsement stipulation. The check endorsement stipulation would state the following:

My endorsement on the attached check serves as a certification that I am entitled to this refund based on adjustment to my FICA (Social Security/Medicare) wages. I further certify (a) that I have not previously claimed this refund or credit with the Internal Revenue Service, or if so, such claim was rejected, (b) that I will not claim refund or credit of such amount in the future, (c) that I had no income that was subject to self-employment tax in the year(s) in issue, and (d) that I did not receive a refund of FICA taxes from another employer which I would not have received had my salary not been subject to tax.

Under penalties of perjury, I declare that I have examined this check, and this check endorsement stipulation, and, to the best of my knowledge and belief, I am entitled to this refund.

The Employer's second proposal is an endorsement to be placed on the back of the check. Due to space limitations on the check, the proposed endorsement states:

Changed FICA wages entitle me to this refund, which I have not received before and will not claim again. I had no self-employment FICA taxable income and received no FICA refund because of FICA taxed wages from other employers.

Under both proposals, the mailing would be sent to the employee's last known address, by regular mail. It is assumed that, under both proposals, an employee would be informed to return the check with their explanation if they did not believe they were entitled to all of the refund. The Employer's counsel has determined that the above proposals would not affect the negotiability of the check. The canceled check would serve as the employee's receipt for repayment.

LAW AND ANALYSIS

There are two separate tax systems under which social security and medicare taxes are collected. One system consists of the matching taxes imposed on employees and their employers under FICA; the other system consists of taxes imposed on self-employed individuals under the Self-Employment Contributions Act (SECA). See §§ 3101, 3111, and 1401 of the Internal Revenue Code.

Section 6413(a) provides that if more than the correct amount of employer FICA tax under § 3111 or employee FICA tax under § 3101 is paid on any payment of remuneration, proper adjustments, of both the tax and the amount to be deducted shall be made, without interest, as prescribed by regulations.

Section 6413(b) provides that if more than the correct amount of employer or employee FICA tax is paid on any payment of remuneration, and the overpayment cannot be adjusted under § 6413(a), the amount of the overpayment shall be refunded as prescribed by regulations. Section 31.6413(b)-1 refers to §§ 31.6402(a)-1 and 2 for provisions relating to refunds of employer and employee FICA tax.

Section 31.6413(a)-1(b)(1)(i) provides that when the employer ascertains that it has paid more than the correct amount of employee tax under § 3101 after the return reporting the payment has been filed, the employer shall repay or reimburse the employee the amount thereof if the error is ascertained within the period of limitation for credit or refund.

Section 31.6402(a)-2(a)(2)(i) provides that every claim filed by an employer for refund or credit of employee tax under § 3101 collected from an employee shall include a statement that the employer has either (1) repaid the tax to such employee or (2) secured a written consent of such employee to the allowance of the refund or credit. The employer shall retain, as part of the employer's records, the written receipt of the employee showing the date and amount of the repayment or the written consent of the employee, whichever is used to support the claim.

Section 31.6402(a)-2(a)(2)(ii) provides that every claim filed by an employer for refund or credit of employee tax under § 3101 collected from an employee in a calendar year prior to the year in which the credit or refund is claimed also shall include a statement that the employer has obtained from the employee a written statement (a) that the employee has not claimed refund or credit of the amount of the overcollection, or if so, such claim has been rejected, and (b) that the employee will not claim refund or credit of such amount. The employer shall retain the employee's written statement as part of the employer's records.

Pursuant to the decisions in Atlantic Department Stores, Inc. v. United States, 557 F. 2d 957 (2d Cir. 1977) and Entenmann's Bakery, Inc. v. United States, 465 F. Supp. 1118 (E.D. N.Y. 1979), an employer is obligated to first adjust the employee's share of overpaid FICA tax for both current and former employees and then claim a credit or refund from the Service.

Repaying an employee (or, alternatively, securing an employee consent) and filing a refund claim under § 31.6402(a)-2 based on the repayment (or consent) is not an "adjustment" as that term is used in § 6413(a) and the applicable regulations.

However, Rev. Rul. 81-310, 1981-2 C.B. 241, holds that when the employer notifies its employees of the overpaid employee FICA tax, and requests their consents to its filing a refund claim on their behalf, it has made reasonable efforts to protect their interests. Thus, for purposes of the principle recognized in Atlantic Department Stores, Rev. Rul. 81-310 holds that the employer's request for employee consents should be treated as fulfilling its duty to "adjust" employee overcollection. If, after the employer's reasonable effort to secure consents, the employees do not furnish them, the employer may claim a refund of overpaid employer FICA tax.

An employer who notifies its employees of the overpaid employee FICA tax and repays the employee share of FICA to its employees clearly has made reasonable efforts to protect their interests. Thus, for purposes of the principle recognized in Atlantic Department Stores, the employer's repayment, to both current and former employees, of each employee's share of overpaid FICA tax should be treated as fulfilling its duty to "adjust" employee overcollection.

Thus, in the case of an employer that has repaid the employee's share of FICA tax for a prior calendar year, the employer must obtain the employee's written receipt pursuant to § 31.6402(a)-2(a)(2)(i) and must also obtain the employee's written statement pursuant to § 31.6402(a)-2(a)(2)(ii) to support the employer's claim for employee FICA tax. The receipt and the statement must be retained as part of employer's records. If, after the employer's reasonable effort to make repayments, the employees do not furnish the required statements, the employer may claim a refund of overpaid employer FICA tax.

To satisfy the requirements for the written statement under § 31.6402(a)-2(a)(2)(ii), these certifications comprising the written statement must be clearly set forth and must be in close proximity to the employee's signature. Section 6065 explicitly requires that statements be verified by a written declaration that they were executed under the penalties of perjury. Thus, the employee must certify, under penalties of perjury, that the employee examined the statement, and, to the best of the employee's knowledge and belief, the employee was entitled to the refund.

In order to affirmatively state, under § 31.6402(a)-2(a)(2)(ii), that the employee has not claimed refund or credit of the amount of the overcollection, or if so, such claim has been rejected, the employee must determine whether the employee claimed excess FICA tax because the employee received wages subject to FICA tax from two or more employers during the calendar year.

If an employee received wages subject to FICA tax from two or more employers during a calendar year, the total wages received by the employee during the year could have exceeded the contribution and benefit base for that year, as determined under section 230 of the Social Security Act. In that event, the employee may have claimed a credit for or refund of any amount of FICA tax deducted from the employee's wages to the extent the taxes were on wages in excess of the applicable contribution and benefit base. See § 6413(c)(1) and § 31.6413(c)-1.

This special refund may have been claimed by the employee on his or her Form 1040, U.S. Individual Income Tax Return, for the calendar year or on Form 843. For example, if an employee had more than one employer for 1996 and total wages were over \$62,700, the applicable contribution and benefit base for 1996, too much social security tax may have been withheld. The employee may have taken a credit on line 56 of the employee's Form 1040 for the amount withheld in excess of the maximum employee share of social security tax for 1996.

The court in Atlantic Department Stores found that the existing statutes and regulations clearly imply an obligation on the part of the employer to claim a refund or credit on behalf of those employees with respect to whom the employer can reasonably adjust its overpayment. Only in situations in which, for some reason, it is impractical for the employer to effect an adjustment directly with the employees should employees file claims themselves for the overpayment of employee FICA tax. Such a situation may exist for those employees who were also self-employed.

Section 1402(b) provides that self-employment income does not include amounts above a certain maximum and also provides that the maximum is to be reduced by the amount of the wages subject to FICA tax paid to the individual for the taxable year.

If the employee was also self-employed, the FICA wages may have been used to reduce self-employment income on Schedule SE (Form 1040), Self-Employment Tax, for purposes of calculating SECA tax. Thus, the employee may have paid a reduced tax liability under SECA.

If § 6521 applies, the employees will not be entitled to a full refund of overpaid FICA taxes if they have any SECA tax liability. Section 6521 provides that in the case of employee FICA tax and SECA tax, if an amount is erroneously treated as wages for FICA tax purposes and if the correction of that error would require

assessment of SECA tax and refund of the FICA tax, and if at the same time correction is authorized as to the FICA tax the assessment of SECA tax is barred by the statute of limitations on assessment, then if the authorized correction is made, the amount of the refund or credit of FICA tax shall be reduced by the amount of the SECA tax that would be required if it were not barred by the statute of limitations.

Section 301.6402-2 of the Regulations on Procedure and Administration sets forth the requirements for filing a claim for refund. It states, in part, that the claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. The effect of § 6521 is to eliminate any refund due of overpaid FICA taxes to the extent of the SECA tax liability. See § 301.6521-1(e), which provides an example of the application of § 6521 in which the employee FICA tax refund otherwise allowable is eliminated.

Since the Employer does not have sufficient facts to apprise the Commissioner of the impact of possible SECA taxes for these employees and the possible application of § 6521, it is reasonable for these employees to submit claims for refund on their own behalf because only the employees have the required information concerning self-employment income necessary for the Service to prove an overpayment exists.

An employee, who was also self-employed, should file Form 843 to claim a refund of the employee's share of FICA tax and Form 1040X, Amended U.S. Individual Income Tax Return and Schedule SE to correct the SECA tax liability and the employee's earnings record with SSA. If an employee is not entitled to a FICA tax refund due to the application of § 6521, an employee should contact SSA to ensure that SSA credits the employee's earnings record with the self-employment income. Because the Employer has already reported reduced FICA wages on Form W-2c, SSA will have reduced FICA wages on the employee's earnings record accordingly.

Pursuant to § 31.6402(a)-2(b)(2), the employer should provide the employee with a statement setting forth that (a) the statement is being made in support of a claim against the United States to be filed by the employee for refund of employee tax paid by such employer, (b) the employer has not reimbursed the employee in any manner for the overcollection, and (c) credit or refund of such overpayment has not been claimed by the employer or authorized by the employee to be claimed by the employer.

The question arises whether either, or both, of the proposals made by the Employer satisfy the requirements under § 31.6402(a)-2(a)(2)(ii) for the employee's written statement. The employer must obtain from the employee a written statement (a)

that the employee has not claimed refund or credit of the amount of the overcollection, or if so, such claim has been rejected, and (b) that the employee will not claim refund or credit of such amount.

The Employer's first proposal would not meet the requirements for the written statement under § 31.6402(a)-2(a)(2)(ii). The Employer would have only a signature on a canceled check. A strong possibility exists that the employee may have endorsed the check without reading the statement. Thus, it is imperative that the certifications and signature appear in one document.

The Employer's second proposal also would not meet the requirements for the written statement under § 31.6402(a)-2(a)(2)(ii). The abbreviated language on the back of the check, abbreviated due to space limitations on the check, does not contain all of the required language. For example, the proposed language on the back of the check only refers to claims for refund and would not indicate whether the employee had claimed a credit of the amount of the overcollection. It is especially important that the statement reference credits because the employee may not be entitled to the full refund. In addition, the statement would not be verified by a written declaration that it was executed under the penalties of perjury.

Any right which the employer has to obtain a refund on behalf of an employee derives from the employee's right to such refund. To satisfy the employer's obligation to claim a refund of overpaid FICA tax for employees, the Employer must determine the amount of employee FICA tax each employee is entitled to receive. Thus, it is assumed that an employee will be informed to return the check with their explanation if they were not entitled to the full refund. The employer will then file a claim for refund for the amount of employee FICA tax the employee is entitled to receive, after repaying the tax to such employee and securing a revised written statement.

It is unclear under the proposals whether the Employer intended to make adjustments for employees who responded affirmatively that either the employee received wages subject to FICA tax from two or more employers during a calendar year or the employee was self-employed in any of the years in issue.

It is not impractical, however, for the Employer to effect an adjustment for a year in which the employee was also employed by another employer. Thus, if an employee responds affirmatively that the employee received wages subject to FICA tax from two or more employers during a calendar year, the Employer should inquire whether the employee claimed a credit for or refund of any amount of FICA tax deducted from the employee's wages to the extent the taxes were on wages in excess of the applicable contribution and benefit base and reduce the claim for employee FICA tax accordingly. To assist the employee in determining whether the employee is entitled to the full refund, the Employer may provide information in the mailer highlighting that the employee may have claimed excess FICA tax because

the employee received wages subject to FICA tax from two or more employers during the calendar year.

While it may be impractical for the Employer to effect an adjustment for a year in which the employee was also self-employed, it is not impractical for the Employer to effect adjustments for other tax years for that employee. Thus, if an employee responds affirmatively that the employee was self-employed in one year, the employee statement should be revised to cover the tax years in which the employee was not also self-employed. The Employer will then claim both employee and employer FICA tax for the years in which the employee was not also self-employed.

For a tax year in which the employee was also self-employed, the Employer should provide a statement in support of the employee's claim pursuant to § 31.6402(a)-2(b)(2). Those employees should also be instructed to file individual claims for refund for tax years in which they were also self-employed. These reasonable efforts should be taken to protect the employees interests.

While, neither § 31.6402(a)-2(a)(2)(ii) nor revenue rulings or procedures contain any requirements that the written statement from the employee be in any specified form, the alternative proposals advanced by the Employer are deficient.

Please call (202) 622-6040, if you have any further questions.

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