

Part III

Administrative, Procedural, and Miscellaneous

26 CFR 1.1441-7: Offer to resolve issues arising from certain tax, withholding, and reporting obligations of U.S. withholding agents with respect to payments to foreign persons

Rev. Proc. 2004-59

Offer to resolve issues arising from certain tax, withholding, and reporting obligations of U.S. withholding agents with respect to payments to foreign persons.

TABLE OF CONTENTS

SECTION 1 GENERAL

- .01 Background.
- .02 Applicable law.
- .03 Summary of the Section 1441 VCP.
- .04 No effect on or applicability to other obligations.

SECTION 2 ELIGIBLE WITHHOLDING AGENTS

- .01 Eligible withholding agents.
- .02 Withholding agents currently under examination.

SECTION 3 TAX, WITHHOLDING, AND REPORTING OBLIGATIONS SUBJECT TO THE SECTION 1441 VCP

- .01 Disclosures and representations of withholding agent.
- .02 Failures subject to the Section 1441 VCP.

SECTION 4 SUBMISSION PROCEDURES

- .01 In general.
- .02 Required information.
- .03 Required documents.
- .04 Signatures.
- .05 Power of attorney requirements.
- .06 Penalty of perjury statement.
- .07 Marked letter and marked envelope
- .08 Mailing address.

SECTION 5 PROCESSING OF SECTION 1441 VCP REQUESTS

- .01 Inadequate or incomplete submission or request for additional information.
- .02 Determining tax liability.
- .03 Review of withholding agent's corrective procedures.

- .04 Other tax liabilities or issues.
- .05 Verification.
- .06 Acknowledgment letter.
- .07 Failure to reach resolution.
- .08 Applicability of sections 6103 and 6110.
- .09 Conferences.

SECTION 6 EFFECTIVE DATE AND SUNSET DATE

SECTION 7 PAPERWORK REDUCTION ACT

SECTION 8 CONTACT INFORMATION

SECTION 1 GENERAL

.01 Background. This revenue procedure describes the Section 1441 Voluntary Compliance Program (the "Section 1441 VCP"), which is available to certain withholding agents with respect to the withholding, payment, and reporting of certain taxes due on payments to foreign persons. "Payments" includes both actual and deemed payments.

In Treasury Decision 8734 (1997-2 C.B. 109 [62 F.R. 533871]), the Treasury Department and the Internal Revenue Service (the "IRS") issued comprehensive regulations (the "final regulations") under chapter 3 (sections 1441-1464) and subpart G of Subchapter A of chapter 61 (sections 6041-6050S) of the Internal Revenue Code. The final regulations were amended by T.D. 8804 (1991-1 C.B. 793 [63 F.R. 72183]), T.D. 8856 (2000-1 C.B. 298 [64 F.R. 73408]), T.D. 8881 (2000-1 C.B. 1158 [65 F.R. 32152]), and T.D. 9023 (2002-2 C.B. 955 [67 F.R. 70310]). The final regulations generally were effective January 1, 2001. In addition, in Notice 2001-4 (2001-1 C.B. 267), Notice 2001-11 (2001-1 C.B. 464), and Notice 2001-43 (2001-2 C.B. 72), the IRS and Treasury provided clarification and guidance regarding certain aspects of the final regulations.

Financial institutions have commented that they have expended significant effort to implement the final regulations. This effort has involved ongoing documentation of account holders and major systems and procedural changes. As part of this effort, financial institutions have been identifying tax deficiencies and failures in their systems and have come forward to the IRS to disclose and resolve issues arising from the effort to implement the final regulations. To provide consistent treatment with respect to withholding agents, this revenue procedure formalizes a program for disclosure and resolution of these implementation issues.

The IRS is initiating the Section 1441 VCP as a temporary program. See section 6 of this revenue procedure for the effective date and sunset date of the program. See section 2 of this revenue procedure for the withholding agents that are eligible to participate in the program. See section 3 of this revenue procedure for the tax, withholding, and reporting obligations covered by the Section 1441 VCP.

.02 Applicable law. The objective of the Section 1441 VCP is to enhance voluntary compliance among certain withholding agents making payments of U.S.-source dividends, interest, rents, royalties, and other fixed or determinable, annual or periodical income ("FDAP income") to foreign persons. Generally, FDAP income received by a foreign person from sources within the United States is subject to tax under section 871(a) or 881(a) of the Internal Revenue Code (the "Code"). The tax is imposed on the gross amount of income, generally at a 30-percent rate. Section 1441 of the Code requires any person who pays to a foreign person income subject to tax under section 871(a) or 881(a) to deduct and withhold the 30-percent tax from the gross amount paid. The rate of tax, and therefore the withholding obligation, may be reduced or eliminated under other provisions of the Code or under an applicable income tax treaty. A withholding agent is required to determine the status of the persons to whom it makes payments by obtaining documentation from them and may withhold at a reduced rate on payments to foreign persons only if the foreign person has furnished the required documentation. See § 1.1441-1 et seq. of the Income Tax Regulations. See also IRS Publication 515, Withholding of Tax on Nonresident Aliens and Foreign Corporations.

.03 Summary of the Section 1441 VCP. The Section 1441 VCP applies only to tax and reporting obligations that relate to Forms 1042 and 1042-S. It does not apply to tax and reporting obligations that relate to Forms 945 and 1099 except to the extent that correction of a failure to document U.S. persons or misclassification of U.S. and foreign persons requires filing or correction of those forms. The Section 1441 VCP does not provide substantive determinations about a payment (such as the amount, timing, character, or source of such a payment) concerning whether or to what extent it was an amount subject to withholding. A withholding agent that requests consideration under the Section 1441 VCP agrees to (1) identify those areas in which it is not in compliance with tax, withholding, and reporting obligations on payments to foreign persons; (2) pay any tax, interest, and penalties (all as determined by the IRS) due to satisfy its outstanding tax, withholding, and reporting obligations; and (3) institute corrective procedures that will ensure compliance in the future with the withholding agent's tax, withholding, and reporting obligations. The IRS will not impose penalties for identified underpayments or deficiencies if such underpayments or deficiencies are due to reasonable cause. See section 5.02(3) of this revenue procedure. The IRS will provide the withholding agent with a written acknowledgment, as described in section 5.06 of this revenue procedure, if the IRS finds the withholding agent's proposed procedures and policies relating to tax, withholding, and reporting obligations applicable to payments to foreign persons are acceptable.

.04 No effect on or applicability to other obligations. Subject to the limitations described below, the Section 1441 VCP applies to tax, withholding, and reporting obligations under sections 1441, 1442, 1443, and 1461 and related tax, withholding, and reporting obligations under sections 3406 and 6041 through 6050N that arise from adjustments under sections 1441, 1442, 1443, and 1461. The Section 1441 VCP does not apply to and does not affect any other tax or reporting obligation. In addition, the

Section 1441 VCP does not apply to and does not affect any other obligations of the taxpayer or the IRS that are not within the scope of this revenue procedure.

SECTION 2 ELIGIBLE WITHHOLDING AGENTS

.01 Eligible withholding agents. Except as provided in section 2.02, a withholding agent is eligible for the Section 1441 VCP (an "eligible withholding agent") if it is a withholding agent, as defined in § 1.1441-7(a)(1) of the Income Tax Regulations, that is not a "qualified intermediary," a "withholding foreign partnership," a "withholding foreign trust," or an "eligible organization" as defined in section 2.01 of Rev. Proc. 2001-20, 2001-1 C.B. 738.

.02 Withholding agents currently under examination. A withholding agent is not eligible for the Section 1441 VCP if the withholding agent is under examination with respect to Form 1042 on the date of the publication of this revenue procedure, or if it comes under examination prior to submitting the information required by section 4 of this revenue procedure. For this purpose, an examination is treated as commencing on the date the withholding agent receives notification from the IRS of an impending examination or of an impending referral for examination. This program also is not available to any withholding agent that has a case pending in Appeals or in litigation on issues involving tax, withholding, or reporting obligations described in section 3 of this revenue procedure.

SECTION 3 TAX, WITHHOLDING, AND REPORTING OBLIGATIONS SUBJECT TO THE SECTION 1441 VCP

.01 Disclosures and representations of withholding agent. The Section 1441 VCP allows a withholding agent to come forward voluntarily to disclose withholding deficiencies and reporting errors. The Section 1441 VCP does not provide substantive determinations about a payment (such as the amount, timing, character, or source of such a payment) concerning whether or to what extent it was an amount subject to withholding. The Section 1441 VCP will proceed based on the withholding agent's disclosures and representations regarding, for example, the amount, timing, character, and source of payments, and the U.S. or foreign status of a beneficial owner. The issuance of an acknowledgment letter, as described in section 5.06 of this revenue procedure, is not a determination of the validity of those disclosures and representations, which remain subject to subsequent examination.

.02 Failures subject to the Section 1441 VCP. The failures for which an eligible withholding agent may make a submission under the Section 1441 VCP are:

(1) Failure to withhold or pay the correct amount of tax on dividends, interest, or other income that would properly be taken into account on Form 1042 and that is paid to foreign persons (sections 1441, 1442, and 1443);

(2) Failure to withhold or pay the correct amount of backup withholding tax as the result of failure to document U.S. persons or misclassification of U.S. and foreign persons (section 3406); and

(3) Failure to correctly report information under section 1461 or, in the case of failures described in (2) above, sections 6041-6050N.

SECTION 4 SUBMISSION PROCEDURES

.01 In general. In general, a withholding agent submits a request under the Section 1441 VCP through a letter to the IRS at the address in section 4.08 of this revenue procedure. The submission must contain the information and documentation described in sections 4.02 and 4.03 of this revenue procedure. The IRS will not accept anonymous submissions under the Section 1441 VCP.

.02 Required information. The request for consideration under the Section 1441 VCP must contain the following information:

(1) The name, address, and taxpayer identification number of the withholding agent.

(2) A description of the current procedures that the withholding agent uses to determine tax, withholding, and reporting obligations regarding payments to foreign persons.

(3) A description of the failures in the withholding agent's tax, withholding, and reporting procedures for payments to foreign persons, how and why the failures occurred, and the years affected by such failures.

(4) The number of persons affected by such failures and how the number was determined.

(5) A calculation of the total amount of taxes the withholding agent failed to withhold, pay, and/or report, not including interest and penalties, for tax periods open for assessment or collection under the provisions of section 6501 of the Code. This calculation should take into account properly substantiated adjustments under section 1463 of the Code. The withholding agent must agree to report and remit all of its additional tax, interest, and penalties (all as determined by the IRS), at the completion of the IRS review. See section 5 of this revenue procedure. (However, regarding the reasonable-cause exception to penalties, see section 5.02(3) of this revenue procedure.) In certain cases involving large liabilities or underpayments, the IRS will consider the withholding agent's proposal for payment of the liability or underpayment in more than one installment, or will consider the withholding agent's posting of a cash bond under the procedures outlined in Rev. Proc. 84-58, 1984-2 C.B. 501. See section 5.02(4) of this revenue procedure.

(6) A detailed description of the corrective procedures the withholding agent has implemented or will implement to ensure that payments to foreign persons will be subject to the correct amount of withholding and that withheld amounts will be paid over and reported to the IRS on the proper forms in a timely manner.

(7) A statement signed by the withholding agent or its authorized representative acknowledging and agreeing that the withholding agent's participation in the section 1441 VCP will not constitute an audit of the withholding agent.

.03 Required documents. The submission must be accompanied by the following documentation:

(1) A statement that the withholding agent is an eligible withholding agent.

(2) Copies of workpapers or schedules that clearly explain the withholding agent's calculation of its correct tax liability regarding payments to foreign persons (see section 4.02(5) of this revenue procedure). The workpapers or schedules should also show to which specific tax returns and tax periods the liability relates.

(3) Copies of the original Forms 1042 and 945, if any, as filed that relate to the above calculations.

.04 Signatures. The submission must be signed by the withholding agent or the withholding agent's authorized representative.

.05 Power of attorney requirements. To sign the submission or to appear before the IRS in connection with the submission, a representative must comply with the requirements of section 9 of Rev. Proc. 2004-1, 2004-1 I.R.B. 1.

.06 Penalty of perjury statement. The following declaration must accompany a Section 1441 VCP submission and any factual information submitted after the original submission or any change in the submission at a later time: "Under penalties of perjury, I declare that I have examined this submission, including accompanying documents, and to the best of my knowledge and belief, the facts presented in support of the Section 1441 VCP request are true, correct, and complete." The declaration must be signed by the withholding agent, not the withholding agent's representative (described in section 4.05 above).

.07 Marked letter and marked envelope. The letter which transmits the submission to the IRS must be marked "Section 1441 VCP" in the upper right-hand corner of the letter, and the envelope containing the submission must be marked "Section 1441 VCP" in the lower left-hand corner of the envelope.

.08 Mailing address. The submission must be mailed to the address shown below. The IRS may issue an announcement later which contains other addresses for the mailing of Section 1441 VCP submissions.

Internal Revenue Service
290 Broadway
LMSB 12th Floor
New York, NY 10007
ATTN: Section 1441 VCP Coordinator

SECTION 5 PROCESSING OF SECTION 1441 VCP REQUESTS

.01 Inadequate or incomplete submission or request for additional information. If the submission fails to comply with the provisions of this revenue procedure, or if the IRS requires additional information, the IRS representative assigned to the case will contact the withholding agent or its authorized representative and explain what is needed to complete the submission. The withholding agent will have 90 business days from the date of this contact to provide the requested information. Any request for an extension of the 90-day time period must be made prior to expiration of the period and must be approved by the Section 1441 VCP Coordinator or his or her designated representative. If the requested information is not received within 90 business days (plus any extension, if granted), the matter will be closed, and the IRS may consider the case for examination.

.02 Determining tax liability. Once the IRS accepts the submission under the Section 1441 VCP, the IRS will analyze the withholding agent's calculation of its tax liability regarding payments to foreign persons and will analyze the accompanying workpapers, schedules, and returns that support such calculation. The IRS generally will apply the following approach to determine a withholding agent's liability for tax, interest, and penalties:

(1) The IRS will normally allow reduced rates of withholding in the computation of any adjustments to taxes and withholding of taxes on payments to foreign persons if the withholding agent has properly documented the foreign persons and if the documentation relates to the time of payment.

(2) Interest on the withholding agent's underpayments will be due from the last date prescribed for payment of the taxes (determined without regard to the Section 1441 VCP or any extension of time for payment) to the date on which payment is received.

(3) The IRS will not assert any penalties on the withholding agent's liability if the withholding agent's failure to withhold, pay, and report is due to reasonable cause.

(4) In certain cases involving large liabilities, the IRS will consider the withholding agent's proposal for payment of the liability in more than one installment. See Internal Revenue Manual (IRM) Handbook 4.20.4, Examination Collectibility Handbook. Applicants may also wish to avail themselves of the procedures for making a deposit in the nature of a cash bond as contained in Rev. Proc. 84-58, 1984-2 C.B. 501.

.03 Review of withholding agent's corrective procedures. The withholding agent must demonstrate to the satisfaction of the IRS that it has implemented (or that it has plans for implementing) the corrective procedures described in its submission under section 4.02(6). The IRS will review the corrective procedures to assure itself that these procedures are reasonably likely to bring the withholding agent into compliance on a prospective basis. The IRS will discuss with the withholding agent the effectiveness of its corrective procedures. The IRS reserves the right to require modifications to the corrective procedures or to require additional corrective procedures before it will issue an acknowledgment letter, as described in section 5.06 below. Where the IRS believes that the corrective procedures are not adequate to ensure compliance with the relevant tax, withholding, and reporting requirements, the IRS will not issue such an acknowledgment letter.

.04 Other tax liabilities or issues. If while considering the request the IRS discovers an unrelated tax liability that properly could have been the subject of the Section 1441 VCP submission but was not properly identified in the submission, that issue will remain outside the scope of the Section 1441 VCP.

.05 Verification. As part of the processing of the Section 1441 VCP submission, the IRS reserves the right to verify that corrections have been made to the withholding agent's tax, withholding, and reporting procedures with respect to payments to foreign persons. Verification of such corrections does not constitute an examination of the books and records of the withholding agent. If the IRS determines that the withholding agent has not implemented or does not plan to implement the proper corrections and procedures, the case may be considered for examination. More generally, the IRS does not contemplate opening examinations on issues properly within the scope of a Section 1441 VCP submission but reserves the right to do so. If the IRS decides to examine the withholding agent, the examination will be commenced and completed as soon as possible.

.06 Acknowledgment letter. If, at the conclusion of its review, the IRS is satisfied that the withholding agent has instituted policies and procedures that ensure that the correct amounts of taxes on payments to foreign persons will be withheld, paid, and reported to the IRS on the proper forms in a timely manner, and has paid its outstanding liabilities as determined under section 5.02 of this revenue procedure (or has entered into an arrangement for such payment as described in section 5.02(4)), then the IRS will issue to the withholding agent an acknowledgment letter. The letter shall indicate that, based upon the IRS review, the withholding agent is at that time in substantial compliance with its tax, withholding, and reporting obligations with respect to payments to foreign persons. However, the Section 1441 VCP does not provide substantive determinations about a payment (such as the amount, timing, character, or source of such a payment) concerning whether or to what extent it was an amount subject to withholding, and an acknowledgment letter shall expressly state that the substantial-compliance acknowledgment does not apply to whether or to what extent payments are amounts subject to withholding. After the withholding agent has received an

acknowledgment letter at the completion of the Section 1441 VCP process, and provided that the withholding agent in fact complies with the agreed upon withholding, payment, and reporting procedures, the information submitted by the withholding agent to the IRS under the Section 1441 VCP will not be used as the basis to initiate an examination of the withholding agent concerning issues within the scope of the acknowledgment letter for prior tax years that were the subject of the Section 1441 VCP submission.

.07 Failure to reach resolution. If resolution cannot be reached because sufficient information is not timely provided to the IRS or because agreement cannot be reached on corrective procedures, the IRS may consider the case for examination.

.08 Applicability of sections 6103 and 6110. The information received or generated by the IRS under the Section 1441 VCP is subject to the confidentiality requirements of section 6103 of the Code. The acknowledgment letter is not a written determination letter within the meaning of section 6110.

.09 Conferences. If the IRS declines to issue an acknowledgment letter because the parties cannot agree upon the amount of tax, interest, and penalties due, or upon the required corrective procedures, the withholding agent may request a conference. The IRS, in its discretion, may grant or deny the conference request. The conference may be held either in person or by telephone. If a conference request is granted, an IRS representative will contact the withholding agent.

SECTION 6 EFFECTIVE DATE AND SUNSET DATE

The Section 1441 VCP is effective on September 29, 2004. It will be available for submissions made on or before December 31, 2005.

SECTION 7 PAPERWORK REDUCTION ACT

The collections of information contained in this revenue procedure have been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. § 3507) under control number 1545-1901.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

The collections of information contained in this revenue procedure are in section 4.02 and section 4.03(2). This information will enable the IRS to determine whether a withholding agent qualifies for the Section 1441 VCP. The collections of information are voluntary. The likely respondents are financial institutions and other businesses.

The estimated total annual reporting burden is 200,000 hours.

The estimated average annual burden per respondent is 400 hours. The estimated number of respondents is 500.

The estimated annual frequency of responses is on occasion.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. § 6103.

SECTION 8 CONTACT INFORMATION

For further information regarding the Section 1441 VCP contact the Section 1441 VCP Coordinator at (212) 298-2288 (not a toll free number).