

Part III – Administrative, Procedural, and Miscellaneous

Interim Guidance on the Application of Section 3402(t) to Payment Card Transactions

Notice 2010-91

This notice provides interim guidance on the application of § 3402(t) of the Internal Revenue Code to payments made by credit, debit, stored value, and other payment cards. Commenters on the proposed regulations [73 FR 74082 (Dec. 5, 2008)] raised significant implementation concerns regarding the contracting, processing, and systems changes necessary to apply § 3402(t) withholding and related reporting to payment card transactions. The Treasury Department and the IRS anticipate that the final regulations will reserve for future guidance the issue of applying § 3402(t) to payment card transactions. Consistent with this anticipated reservation of the issue, this notice provides that the withholding requirements under § 3402(t) and the related reporting requirements will not apply to payments made by payment card until further guidance is issued; and will not apply for any calendar year beginning earlier than at least 18 months from the date such guidance is finalized (and thus will not apply for the 2012 calendar year). Finally, this notice requests comments on all aspects of the potential application of § 3402(t) to payment card transactions, and in particular on approaches that will help implement these requirements.

BACKGROUND

Section 3402(t) was added by § 511 of the Tax Increase Prevention and Reconciliation Act of 2005, Pub. L. No. 109-222, 120 Stat. 345 (TIPRA), which was enacted on May 17, 2006. Section 3402(t)(1) provides that the Government of the United States, every State, every political subdivision thereof, and every instrumentality of the foregoing (including multi-State agencies) making any payment to any person providing any property or services (including any payment made in connection with a government voucher or certificate program which functions as a payment for property or services) shall deduct and withhold from such payment a tax in an amount equal to 3% of such payment. There are many exceptions to the § 3402(t) withholding requirements, including the exception provided by § 3402(t)(2)(G) for payment made by a political subdivision of a State (or an instrumentality of a political subdivision of a State) which makes less than \$100,000,000 of payments for property or services annually (other than payments otherwise exempt from § 3402(t) withholding, such as payroll payments). TIPRA originally provided that § 3402(t) applies to payments made after December 31, 2010.

Notice 2008-38, 2008-13 IRB 683, published on March 31, 2008, invited public comments on guidance under § 3402(t). Notice 2008-38 requested specific comments on the application of § 3402(t) to payment cards. Proposed regulations under §§ 3402(t), 3406, 6011, 6051, 6071, and 6302 were published on December 5, 2008 (73 FR 74082, 2009-4 IRB 362). Subsequently, § 1511 of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, amended the effective date of § 3402(t) withholding, so that it applies only to payments made after December 31,

2011. The Treasury Department and the IRS are currently developing final regulations under § 3402(t).

On July 30, 2008, following the enactment of § 3402(t), § 6050W was enacted as part of the Housing Assistance Tax Act of 2008, Div. C of the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654. Section 6050W requires merchant acquiring entities that make payment to merchants and other participating payees in settlement of reportable payment card transactions to report the gross amount of these transactions for each payee for each calendar year. This reporting requirement applies to payment card transactions for calendar years beginning after December 31, 2010. Final regulations under § 6050W were published on August 16, 2010 (75 FR 49821, 2010-43 IRB 484).

Under proposed § 31.3402(t)-3(e), payments subject to withholding under § 3402(t) include payments made by payment card. Numerous commenters indicated that applying § 3402(t) withholding and related reporting requirements to payment card transactions would be difficult to administer and noted that these transactions will already be reported under § 6050W. This notice responds to the concerns raised and the need for taxpayers to begin the implementation process to comply with the requirements of § 3402(t).

GUIDANCE

The withholding requirements of § 3402(t) and the related reporting requirements will not apply to any payment made by payment card for any calendar year beginning earlier than at least 18 months from the date further guidance is finalized for § 3402(t)

withholding on payments by payment card (and thus will not apply for the 2012 calendar year).

This guidance does not apply to any payment made using a convenience check. Convenience checks are accepted and processed through the banking system in the same manner as traditional checks.

For purposes of this notice, the following definitions apply:

(1) Payment card transaction means any transaction in which a payment card, or any account number or other indicia associated with a payment card, is accepted as payment;

(2) Payment card means any card, including any stored value card, issued pursuant to an agreement or arrangement that provides for—

(A) One or more issuers of such cards;

(B) A network of persons unrelated to each other, and to the issuer, who agree to accept such cards as payment; and

(C) Standards and mechanisms for settling the transactions between the merchant acquiring entities and the persons who agree to accept the cards as payment;

(3) Stored value card means any card with a prepaid value, including any gift card;

(4) Convenience check means a check issued in connection with a payment card account;

(5) Merchant acquiring entity means the bank or other organization that has the contractual obligation to make payment to participating payees in settlement of payment card transactions; and

(6) Participating payee means a person who agrees to accept payment cards as payment.

REQUEST FOR COMMENTS

Comments are requested on all aspects of the potential application of the withholding requirements under § 3402(t) and the related reporting requirements to payment card transactions. Comments must be submitted by March 28, 2011. All materials submitted will be available for public inspection and copying. Comments should be submitted to Internal Revenue Service, CC:PA:LPD:RU (Notice 2010-91), Room 5203, PO Box 7604, Ben Franklin Station, Washington, DC 20224. Submissions may also be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to the Courier's Desk, 1111 Constitution Avenue, NW, Washington, DC 20224, Attn: CC:PA:LPD:RU (Notice 2010-91), Room 5203. Submissions may also be sent electronically via the internet to the following email address:

Notice.comments@irsounsel.treas.gov. Include the notice number (Notice 2010-91) in the subject line.

DRAFTING INFORMATION

The principal author of this notice is A. G. Kelley of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities) though other Treasury Department and IRS officials participated in its development. For further information on the submission of comments or the comments submitted, please contact

Richard Hurst at (202) 622-7180 (not a toll-free number). For further information on all other provisions of this notice, please contact A. G. Kelley at (202) 622-6040 (not a toll-free number).