

**Office of Chief Counsel
Internal Revenue Service**

Memorandum

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date: February 23, 2005

to: Area Counsel
(CC:LM:Financial Services)

from: Associate Chief Counsel
(International)

subject: Withholding Agent Audits

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUE

Whether, under section 5.02(2) of Revenue Procedure 2004-59, 2004-42 I.R.B. 678, a withholding agent participating in the section 1441 Voluntary Compliance Program (VCP) is liable for interest under section 6601 on an amount that it failed to withhold, with respect to a payment, on the due date for filing Form 1042 when (i) it did not receive documentation relating to the payment by the due date for filing Form 1042, (ii) it did not withhold and pay tax at 30 percent under section 1441 by that date, and (iii) it later received documentation establishing either that no tax was imposed on the payment or that a reduced rate of tax was imposed on the payment.

CONCLUSION

Section 5.02(2) of Rev. Proc. 2004-59 is subject to the rules of section 6601. Under section 6601, interest is imposed on any unpaid amount of tax from the last date prescribed for payment to the date on which payment is received. In the absence of an underpayment, section 6601 has no operational effect. If subsequently received documentation established that, in fact, no tax was imposed on the due date of Form 1042, interest cannot be imposed under section 6601. The same conclusion would apply to the extent of any reduction in the statutory 30 percent rate under section 1441 that subsequently received documentation established.

FACTS

LMSB:FS is administering the section 1441 VCP, established under Rev. Proc. 2004-59, 2004-42 I.R.B. 678. The section 1441 VCP is available to certain withholding agents with respect to the withholding, payment and reporting of certain taxes due on payments to foreign persons.

The question has arisen whether, under section 5.02(2) of Rev. Proc. 2004-59, a withholding agent is liable for interest under section 6601 on the amount that it failed to withhold, with respect to a payment, on the due date for filing Form 1042 when (i) it did not receive documentation relating to the payment by the due date for filing Form 1042, (ii) it did not withhold and pay tax at 30 percent under section 1441 by that date, and (iii) it later received documentation establishing either that no tax was imposed on the payment or that a reduced rate of tax was imposed on the payment.

LAW AND ANALYSIS

Revenue Procedure 2004-59 implements the section 1441 VCP. Section 5.02(2) of Rev. Proc. 2004-59 provides that interest on the withholding agent's underpayments will be due from the last date prescribed for the payment of taxes (determined without regard to the Section 1441 VCP or any extension of time for payment) to the date on which payment is received.

The regulations with regard to the liability for interest in the event of failure to obtain documentation timely, provide for the imposition of interest as the result of such failure to the extent of the liability for interest under section 6601. Section 1.1441-1(b)(7).

Section 5.02(2) follows the rules for imposition of interest contained in section 6601. Section 6601(a) provides that if any amount of tax imposed by this title (whether required to be shown on a return, or to be paid by stamp or by some other method) is not paid on or before the last date prescribed for payment, interest on such amount at the underpayment rate established under section 6621 shall be paid for the period from such last date to the date paid. The regulations with regard to the liability for interest in the event of failure to obtain documentation timely, provide for the imposition of interest as the result of such failure to the extent of the liability for interest under section 6601. Section 1.1441-1(b)(7).

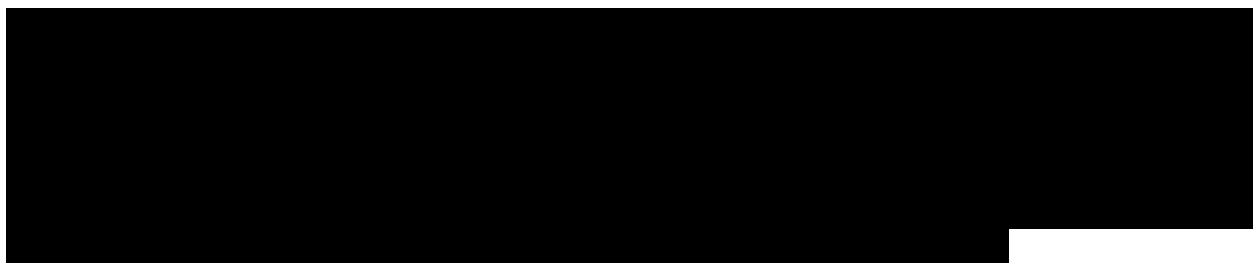
Under §1.1461-1(a)(1) of the Income Tax Regulations, the last date prescribed for a withholding agent's payment of withholding tax is the due date for filing of Form 1042.

Section 5.02(1) of Rev. Proc. 2004-59 provides that the IRS normally will 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.

Pursuant to section 5.02(1) of Rev. Proc. 2004-59, the subsequently received documentation may establish that no withholding tax properly was imposed on the payment. Thus, on the due date for filing the Form 1042, no tax would remain unpaid upon which an interest charge could be imposed under section 6601. Following section 6601, section 5.02(2) requires the imposition of interest only on an underpayment of tax. Since, in these circumstances, there is no underpayment, no interest charge can be applied under the section 1441 VCP. The same conclusion would apply to the extent of any reduction in the statutory 30 percent rate under section 1441 that was established in the subsequently received documentation.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS





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Please call (202) 622-3840 if you have any further questions.

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