

Notice of Proposed Rulemaking and Notice of Public Hearing

Reporting of Gross Proceeds Payments to Attorneys

REG-105312-98

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations relating to the reporting of payments of gross proceeds to attorneys. The regulations reflect changes to the law made by the Taxpayer Relief Act of 1997. The regulations will affect attorneys who receive payments of gross proceeds on behalf of their clients, and certain payors (defendants in lawsuits and their insurance companies and agents) that in the course of their trades or businesses make payments to these attorneys. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written and electronic comments must be received by August 19, 1999. Outlines of topics to be discussed at the public hearing scheduled for September 22, 1999, at 10 a.m., must be received by September 1, 1999.

ADDRESSES: Send submissions to: CC:DOM:CORP:R (REG-105312-98), Room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: CC:DOM:CORP:R (REG-105312-98), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the "Tax Regs" option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at http://www.irs.ustreas.gov/tax_regs/regslst.html. The public hearing will be held in the IRS Auditorium, 7th Floor, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, A. Katharine Jacob Kiss at (202) 622-4920; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Michael Slaughter at (202) 622-7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the **Office of Management and Budget**, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the **Internal Revenue Service**, Attn: IRS Reports Clearance Officer, OP:FS:FP, Washington, DC 20224. Comments on the collection of information should be received by July 20, 1999. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the **Internal Revenue Service**, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information (see below);

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

The collection of information in this proposed regulation is in §1.6045-5(a). This information is required by the IRS to implement section 1021 of the Taxpayer

Relief Act of 1997. This information will be used to verify compliance with section 6045 and to determine that the taxable amount of these payments has been computed correctly. The collection of information is mandatory. The likely respondents are businesses and other for profit institutions.

Respondent taxpayers (payors) provide the information by completing one Form 1099-MISC, Miscellaneous Income, for each attorney who has received one or more payments of gross proceeds from the payor during the calendar year. The burden for this requirement is reflected in the burden estimate for Form 1099-MISC. The estimated burden of information collection for the 1999 Form 1099-MISC is 14 minutes per return.

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 OMB control number assigned by the Office of Management and Budget.

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.

Background

This document contains proposed amendments to the Income Tax Regulations (26 CFR Part 1) under section 6045 of the Internal Revenue Code. A new reporting requirement, section 6045(f), was added to the Code by section 1021 of the Taxpayer Relief Act of 1997 (1997 Act) (Public Law 105-34, 111 Stat. 922). Section 6045(f) provides for information reporting for payments of gross proceeds made in the course of a trade or business to attorneys in connection with legal services (whether or not the services are performed for the payor). No information return is required under section 6045(f) for the portion of any payment that is required to be reported under section 6041(a) (or that would be required except for the \$600 limitation) or under section 6051 (employee compensation). The 1997 Act also provides that the general

exception for reporting to corporations in §1.6041-3(c) does not apply to corporations providing legal services.

Explanation of Provisions

The proposed regulations take into account comments made by, among others, insurance companies and other payors, the American Bar Association, and the members of the Commissioner's Information Reporting Program Advisory Committee (IRPAC). The operation of section 6045(f) was the subject of a paper presented at the IRPAC meeting held in Washington, DC., on October 28 and 29, 1997, and comments were also received at that meeting.

The proposed regulations clarify that there is no threshold amount below which reporting under section 6045(f) is not required. Additionally, payments made to corporations engaged in providing legal services are reportable.

Several commentators asked whether reporting under section 6045(f) relieves the payor of all other reporting obligations by shifting the reporting obligations to the attorney. The proposed regulations do not adopt this approach. Section 6045 imposes an additional reporting requirement on payors and does not relieve them of any other pre-existing or concurrently existing reporting requirement. The exception in section 6045(f)(2)(B) is limited to situations in which the amount of the attorney fee is already reportable to the attorney as income or wages. The legislative history clearly supports this determination. See, H.R. Conf. Rep. No. 220, 105th Cong., 1st Sess. 546 (1997) and Joint Committee on Taxation Staff, *General Explanation of Tax Legislation Enacted in 1997*, 105th Cong., 1st Sess. 214-15 (1997).

Several commentators stated that in certain situations, a gross proceeds payment is delivered to the attorney, but the attorney is not listed as a payee on the check. In some instances this results from the operation of local law; in other instances, attorneys request that their names not appear on the check. The proposed regulations provide that when a payment is delivered to an attorney, even if that attorney is not listed as a payee, the payor is required to file an information return under section 6045(f).

Wherever possible, however, the proposed regulations provide exceptions to the reporting requirement. For example, the proposed regulations provide for a rule of administrative convenience if multiple attorneys are listed as payees. Generally, in those situations, the payor is only required to report on the attorney who receives the payment. The IRS and Treasury Department continue to welcome comments on whether additional exceptions to the reporting requirement are appropriate.

Many commentators suggested that Form 1099-B is not the best form for reporting under section 6045(f). The proposed regulations provide that the information return is made on Form 1099-MISC.

Several commentators asked the IRS to define legal services. Some commentators requested a narrow definition that would exclude any services that did not require that the provider be an attorney, e.g., property or financial management services. However, those commentators also stated that the attorney would most likely be collecting a fee for rendering those services. The IRS and Treasury Department have proposed a broad definition of legal services that includes any services performed by or under the supervision of an attorney.

One commentator asked whether the attorney's TIN must be certified. The proposed regulations provide that, consistent with the general rule under sections 6045 and 6041, the attorney's TIN need not be certified.

The proposed regulations clarify that payments of gross proceeds are subject to backup withholding if the attorney does not provide a TIN. This is consistent with the legislative history that provides:

Third, attorneys are required to promptly supply their TINs to persons required to file these information reports, pursuant to section 6109. Failure to do so could result in the attorney being subject to penalty under section 6723 and the payments being subject to backup withholding under section 3406.

H.R. Conf. Rep. No. 220, at 546 (1997).

Finally, all of the examples in the proposed regulations follow the generally well-established principle of tax law that the income portion of a plaintiff's settlement is not reportable net of the attorneys

fees. But, *cf.*, Rev. Rul. 80-364, 1980-2 C.B. 294 (Situation 3 holding that the attorney's fees portion of the settlement is a reimbursement for expenses incurred by the union to enforce the collective bargaining agreement and not includible in the gross income of the individual employees), and *Davis v. Commissioner*, T.C.M. 1998-248 (following *Cotnam v. Commissioner*, 263 F.2d 119 (5th Cir. 1959) for determinations under Alabama law).

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. Chapter 5) does not apply to these regulations.

It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the facts that: (1) the time required to prepare and file a Form 1099-MISC is minimal (currently estimated at 14 minutes per form); and (2) it is not anticipated that, as a result of these regulations, small entities will have to prepare and file more than a few, at most, forms per year. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any electronic or written comments (a signed original and eight (8) copies) that are submitted timely to the IRS. The IRS and Treasury Department request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for September 22, 1999, beginning at 10 a.m. in the IRS Auditorium of the Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, visitors must enter at the 10th Street entrance, located between Constitution and Pennsylvania Avenues, NW. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 15 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the "FOR FURTHER INFORMATION CONTACT" section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing.

Persons who wish to present oral comments at the hearing must submit written comments and an outline of the topics to be discussed and the time to be devoted to each topic (signed original and 8 copies) by September 1, 1999. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these proposed regulations is A. Katharine Jacob Kiss, Office of Assistant Chief Counsel (Income Tax and Accounting). However, other personnel from the IRS and Treasury Department participated in their development.

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Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:
Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.6041-3, effective on January 1, 2000, is amended by revising

the first sentence of paragraph (q)(1) to read as follows:

§1.6041-3 Payments for which no return of information is required under section 6041.

* * * * *

(q) * * *

(1) A corporation described in §1.6049-4(c)(1)(ii)(A), except a corporation engaged in providing legal services, and except a corporation engaged in providing medical and health care services or engaged in the billing and collecting of payments in respect to the providing of medical and health care services. * * *

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Par. 3. Section 1.6041-3, currently in effect as of May 21, 1999, is amended by revising the introductory text of paragraph (c) to read as follows:

§1.6041-3 Payments for which no return of information is required under section 6041.

* * * * *

(c) Payments to a corporation, except payments made after December 31, 1997, to a corporation engaged in providing legal services, and except payments made after December 31, 1970, to a corporation engaged in providing medical and health care services or engaged in the billing and collecting of payments in respect to the providing of medical and health care services, other than payments to—

* * * * *

Par. 4. Section 1.6045-5 is added to read as follows:

§1.6045-5 Information reporting on payments to attorneys.

(a) *Requirement of reporting*—(1) *In general.* A person engaged in a trade or business that makes a payment in the course of that trade or business to an attorney in connection with legal services (whether or not the services were performed for the payor) must, except as provided in paragraph (c) of this section, file an information return on Form 1099-MISC, "Miscellaneous Income", with the Internal Revenue Service for the calendar

year in which the payment is made. For the time and place of filing Form 1099-MISC, see §1.6041-6. The requirements of this paragraph (a)(1) apply whether or not—

(i) Payments to the attorney aggregate less than \$600 for the calendar year;

(ii) A portion of a payment is kept by the attorney as compensation for legal services rendered; or

(iii) Other information returns are required with respect to some or all of a payment under other applicable provisions of the Internal Revenue Code and the regulations thereunder.

(2) *Information required.* The information return required under paragraph (a)(1) of this section must include the following information:

(i) The name, address, and taxpayer identification number (TIN) (as defined in section 7701(a)) of the person making the payment.

(ii) The name, address, and TIN of the attorney to whom the payment was made.

(iii) The aggregate amount of payments for the calendar year.

(iv) Any other information required by Form 1099-MISC and its instructions.

(3) *Requirement to furnish statement.* A person required to file an information return under paragraph (a)(1) of this section must furnish to the attorney a written statement of the information required to be shown on the return. This requirement may be met by furnishing a copy of the return to the attorney. The written statement must be furnished to the attorney on or before January 31 of the year following the year in which the payment was made.

(b) *Special rules*—(1) *Check delivered to non-payee attorney.* If a check is delivered to an attorney who is not a payee, an information return must be filed under paragraph (a)(1) of this section with respect to the attorney if, under the circumstances, it is reasonable for the payor to believe that the attorney is receiving the check in connection with legal services.

(2) *Joint or multiple payees*—(i) *Check delivered to attorney.* If more than one attorney is listed as a payee on a check, an information return must be filed under paragraph (a)(1) of this section with respect to the attorney who received the check.

(ii) *Check delivered to non-attorney.* If a check has attorney and non-attorney payees and the check is delivered to a non-attorney, an information return must be filed under paragraph (a)(1) of this section with respect to the first listed attorney.

(3) *Attorney required to report payments made to the other attorneys.* An attorney with respect to whom an information return is filed under paragraph (b)(1) or (2) of this section must file information returns, as required under this section, for payments the attorney makes to any other attorneys.

(c) *Exceptions.* A return of information is not required under paragraph (a)(1) of this section with respect to the following payments:

(1) Payments of wages or other compensation paid to an attorney by the attorney's employer.

(2) Payments of compensation or profits paid or distributed to its individual partner by a partnership engaged in providing legal services.

(3) Payments of dividends or corporate earnings and profits paid to its shareholder by a corporation engaged in providing legal services.

(4) Payments of income to an attorney of a fixed or determinable amount required to be reported (or payments that would be required to be reported were it not for failing to meet the dollar amount limitation contained in section 6041(a)) pursuant to section 6041(a) and §1.6041-1(a).

(5) Payments of the balance of the gross proceeds made to an attorney if a payment described in paragraph (c)(4) of this section is made.

(6) Payments made to a foreign attorney, if the foreign attorney can clearly demonstrate that the attorney is not subject to U.S. tax.

(d) *Definitions.* The following definitions apply for purposes of this section:

(1) *Attorney* means a person engaged in the practice of law, whether as a sole proprietor, partnership, corporation, or joint venture.

(2) *Legal services* means all services performed by, or under the supervision of, an attorney.

(e) *Attorney to furnish TIN.* A payor that is required to make an information return under this section must solicit a TIN

from the attorney at or before the time the payor pays gross proceeds to the attorney. Any attorney whose TIN is solicited must furnish the TIN to the payor, but is not required to certify that the TIN is correct. Except as otherwise provided under section 3406, if the attorney does not furnish the attorney's TIN, the payment is subject to backup withholding.

(f) *Examples.* The provisions of this section are illustrated by the following examples:

Example 1. A, a plaintiff in a suit for lost wages against T, is represented by attorney B. A settles her suit for \$300,000. Payment is made by a check payable jointly to A and B. T does not know the amount of the attorney fee. B retains \$100,000 and disburses the remaining \$200,000 net proceeds to A.

T must file a Form W-2 for \$300,000 with respect to A under section 6051. T must also file a Form 1099-MISC with respect to B for \$300,000 (see paragraph (a)(1)(iii) of this section).

Example 2. The facts are the same as in *Example 1*, except that T knows that the attorney fee is one-third of the settlement amount, or \$100,000. T must file a Form W-2 for \$300,000 with respect to A under section 6051. T must also file a Form 1099-MISC with respect to B for \$100,000 under section 6041. T is not required to file an information return with respect to B for \$200,000 (the balance of the gross proceeds) because of the exception provided in paragraph (c)(5) of this section.

Example 3. C, a plaintiff in a suit for physical personal injury against V, is represented by attorney D. C settles his suit for damages that are excludable from C's gross income under section 104(a)(2). The settlement check is payable jointly to C and D. V does not know the amount of the attorney fee. V must file a return of information with respect to D under paragraph (a)(1) of this section. V is not required to file a return of information with respect to C under section 6041 because the settlement amount is excludable from C's income under section 104(a)(2).

Example 4. W, a defendant in a suit for wrongful injury, knows that D, the plaintiff, has been represented by attorney E throughout the proceeding. State O, where the suit is brought, mandates that certain benefits and settlement awards be made payable to the claimant only. W makes a check payable solely to D and delivers the payment to E's office. W has made a payment to an attorney (see paragraph (b)(1) of this section) and must file a return of information under paragraph (a) of this section.

Example 5. X, a defendant in a suit for lost wages, reasonably believes that F, the plaintiff, has been represented by attorney G throughout the proceeding as evidenced by filings and correspondence signed by G. X makes a check for damages payable solely to F and delivers it to G's office. X has made a payment to an attorney (see paragraph (b)(1) of this section) and must file a return of information under paragraph (a) of this section.

Example 6. Y, a defendant in a suit, makes a payment of the gross proceeds of the amount awarded under the suit to the plaintiff's attorneys, H, I, and J.

H, I, and J are not related parties. The payment is delivered to J's office. J deposits the monies into her trust account and pays H and I their respective shares. Y must file a return of information with respect to J (see paragraph (b)(2)(i) of this section). J must file a return of information with respect to H and I (see paragraph (b)(3) of this section).

(g) *Cross reference to penalties.* See the following sections regarding penalties for failure to comply with the requirements of section 6045(f) and this section:

(1) Section 6721 for failure to file a correct information return.

(2) Section 6722 for failure to furnish a correct payee statement.

(3) Section 6723 for failure to comply with other information reporting requirements (including the requirement to furnish a TIN).

(4) Section 7203 for willful failure to supply information (including a taxpayer identification number).

(h) *Effective date.* The rules in this section apply to payments made after December 31, 1999.

Robert E. Wenzel,
Deputy Commissioner of
Internal Revenue.