Part III - Administrative, Procedural, and Miscellaneous

Application of Windsor Decision and Rev. Rul. 2013-17 to Employment Taxes and Special Administrative Procedures for Employers to Make Adjustments or Claims for Refund or Credit

Notice 2013-61

PURPOSE

This notice provides guidance for employers and employees to make claims for refund or adjustments (referred to in this notice as corrections) of overpayments of Federal Insurance Contributions Act (FICA) taxes and Federal income tax withholding (employment taxes) with respect to certain benefits provided to same-sex spouses and remuneration paid to same-sex spouses resulting from the United States Supreme Court decision in United States v. Windsor, 570 U.S. ___, 133 S.Ct. 2675 (2013) and the holdings of Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

To reduce filing and reporting burdens associated with the optional retroactive application of the holdings of Rev. Rul. 2013-17, the Internal Revenue Service (IRS) is providing special administrative procedures for employers to correct overpayments of employment taxes for 2013 and prior years with respect to certain same-sex spouse benefits and certain remuneration paid to same-sex spouses, including overpayments

that result from a taxpayer's retroactive application of the holdings of Rev. Rul. 2013-17. With respect to these overpayments for 2013, this notice provides two alternative special administrative procedures. Under the first alternative, employers may use the fourth quarter 2013 Form 941, Employer's QUARTERLY Federal Tax Return, to correct these overpayments of employment taxes for the first three quarters of 2013. Under the second alternative, employers may file one Form 941-X, Adjusted Employer's QUARTERLY Federal Tax Return or Claim for Refund, for the fourth quarter of 2013 to correct these overpayments of FICA taxes for all quarters of 2013.

With respect to these overpayments of FICA taxes for years before 2013, employers can make a claim or adjustment for all four calendar quarters of a calendar year on one Form 941-X filed for the fourth quarter of such year if the period of limitations on refunds under section 6511 of the Internal Revenue Code (Code) has not expired and, in the case of adjustments, the period of limitations will not expire within 90 days of filing the adjusted return. Under normal procedures, employers are required to file a Form 941-X for each calendar quarter for which a refund claim or adjustment is made.

The special administrative procedures provided in this notice are optional. Employers that prefer to use the regular procedures for correcting employment tax overpayments related to same-sex spouse benefits and remuneration paid to same-sex spouses, instead of the special administrative procedures, may do so.

BACKGROUND

Effect of Windsor and Revenue Ruling 2013-17

A number of income tax and employment tax provisions provide for exclusions from gross income and wages, respectively, for certain benefits provided to the spouse of an employee. In addition, services performed by an individual in the employ of the individual's spouse that are not in the course of the employer's trade or business or that are domestic services in the employer's private home are excepted from FICA tax under section 3121(b)(3)(B).[1] Until the recent decision of the Supreme Court in Windsor, the IRS interpreted section 3 of the Defense of Marriage Act (DOMA) as prohibiting it from recognizing same-sex marriages for purposes of these provisions. Section 3 of DOMA provided that:

> In determining the meaning of any Act of Congress, or of any ruling, regulation or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7.

As a result, employers withheld and paid employment taxes with respect to certain benefits provided to the same-sex spouse of an employee because the marriage was not recognized for purposes of the Code, and the benefits were not treated as excludable from gross income or wages for Federal income or employment tax purposes, respectively. Employers may also have withheld and paid employment taxes

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[1] The Railroad Retirement Tax Act (RRTA) and the Federal Unemployment Tax Act (FUTA) also provide exceptions that can apply for same-sex spouse benefits and remuneration paid to same-sex spouses. RRTA taxes are generally paid on Form CT-1, Employer's Annual Railroad Retirement Tax Act Return, and FUTA taxes are paid on Form 940, Employer's Annual Federal Unemployment (FUTA) Tax Return, which are both annual returns. No special administrative procedures are needed to correct overpayments of taxes on same-sex spouse benefits and remuneration paid to same-sex spouses reported on those returns. However, some RRTA taxes are paid on Form CT-2, Employee Representative's Quarterly Railroad Tax Return, which is a quarterly return, and the special administrative procedures in this notice can be used with respect to overpayments of RRTA tax on same-sex spouse benefits reported on Form CT-2.

on amounts paid for services performed by an individual in the employ of the individual's same-sex spouse without applying the employment tax exceptions for certain remuneration paid to spouses.

In Windsor, the Court held that section 3 of DOMA is unconstitutional because it violates the principles of equal protection, and on August 29, 2013, the IRS announced the publication of Rev. Rul. 2013-17, which held:

1. for Federal tax purposes, the terms "spouse," "husband and wife," "husband," and "wife" include an individual married to a person of the same sex if the individuals are lawfully married under state law, and the term "marriage" includes such a marriage between individuals of the same sex;

2. for Federal tax purposes, the IRS adopts a general rule recognizing a marriage of same-sex individuals that was validly entered into in a state whose laws authorize the marriage of two individuals of the same sex even if the married couple is domiciled in a state that does not recognize the validity of same-sex marriages; and

3. for Federal tax purposes, the terms "spouse," "husband and wife," "husband," and "wife" do not include individuals (whether of the opposite sex or the same sex) who have entered into a registered domestic partnership, civil union, or other similar formal relationship recognized under state law that is not denominated as a marriage under the laws of that state, and the term "marriage" does not include such formal relationships.

Rev. Rul. 2013-17 provides that its holdings will be applied prospectively as of September 16, 2013, which is the date of publication of the ruling in the Internal Revenue Bulletin. Except as otherwise provided in Rev. Rul. 2013-17, taxpayers also may rely on Rev. Rul. 2013-17 for the purpose of filing original returns, amended

returns, adjusted returns, or claims for credit or refund for any overpayment of tax resulting from these holdings, provided the applicable limitations period for filing such claim under section 6511 has not expired. Rev. Rul. 2013-17 also provides that if an affected taxpayer files an original return, amended return, adjusted return, or claim for credit or refund in reliance on Rev. Rul. 2013-17, all items required to be reported on the return or claim that are affected by the marital status of the taxpayer must be adjusted to be consistent with the marital status reported on the return or claim.

Rev. Rul. 2013-17 also provides that taxpayers may rely (subject to the conditions in the preceding paragraph regarding the applicable limitations period and consistency within the return or claim) on Rev. Rul. 2013-17 retroactively with respect to any employee benefit plan or arrangement or any benefit provided thereunder only for purposes of filing original returns, amended returns, adjusted returns, or claims for credit or refund of an overpayment of tax concerning employment tax and income tax with respect to employer-provided health coverage benefits or fringe benefits that were provided by the employer and are excludable from income under sections 106, 117(d), 119, 129, or 132 based on an individual's marital status. For purposes of the preceding sentence, if an employee made a pre-tax salary-reduction election for health coverage under a section 125 cafeteria plan sponsored by an employer and also elected to provide health coverage for a same-sex spouse on an after-tax basis under a group health plan sponsored by that employer, an affected taxpayer may treat the amounts that were paid by the employee for the coverage of the same-sex spouse on an after-tax basis as pre-tax salary reduction amounts.

Employers may also rely (subject to the previously noted conditions regarding the applicable limitations period and the consistency requirement) on the holdings in Rev. Rul. 2013-17 for purposes of recognizing same-sex spouses as spouses in applying exceptions from the definition of "employment" for employment tax purposes.

General Procedures for Corrections of Overpayments of Employment Taxes

Generally, corrections of overpayments of FICA tax are made after an error has been ascertained using the adjustment process under section 6413 or using the refund claim process under section 6402. An error is ascertained when the employer has sufficient knowledge of the error to be able to correct it.

Under section 31.6413(a)-1(a) and section 31.6413(a)-2(b) of the Employment Tax Regulations, before making an adjustment of an overpayment of FICA tax with respect to an employee, an employer generally must repay or reimburse the employee in the amount of the overcollection prior to the expiration of the period of limitations on credit or refund, and, for FICA tax overcollected in a prior year, must also secure the employee's written statement confirming that the employee has not made any previous claims (or the claims were rejected) and will not make any future claims for refund or credit of the amount of the overcollected FICA tax. An employer repays the employee by direct payment to the employee; an employer reimburses an employee by applying the amount of the overcollection against the employee FICA tax which attaches to wages paid by the employer to the employee. Section 31.6413(a)-2(c)(2) provides that employers cannot adjust overpayments of withheld income tax after the end of the calendar year, except in the case of administrative errors. (An administrative error occurs if the amount the employer entered on Form 941 is not the amount the employer

actually withheld.) Section 31.6413(a)-2(d)(2) provides that no adjustment in respect of an overpayment may be made if the overpayment relates to a return period for which the period of limitations on credit or refund of such overpayment will expire within 90 days of filing the adjusted return.

Section 31.6402(a)-2 provides rules under which a refund claim for an overpayment of FICA tax may be made. Pursuant to § 31.6402(a)-2(a), no refund or credit for FICA employer tax will be allowed unless the employer has first repaid or reimbursed its employee for the employee FICA tax or has secured the employee's consent to the allowance of the claim for refund and includes a claim for the refund of such employee tax. However, this requirement does not apply to the extent that the employee FICA taxes were not withheld from the employee or, after the employer makes reasonable efforts to repay or reimburse the employee or secure the employee's consent, the employer cannot locate the employee or the employee will not provide consent. Under section 6414 and § 31.6414-1, no refund to the employer is allowed for the overpayment of withheld income tax which the employer deducted or withheld from an employee.

To make employment tax corrections for overpayments (that is, to make adjustments or to claim refunds), an employer uses the "X" form that corresponds to the return being corrected. Thus, an employer corrects overreported taxes on a previously filed Form 941 by filing Form 941-X. Generally, a separate X form must be filed for each taxable period.

In determining whether there has been an overpayment of employment taxes and the amount of any refund, credit, or adjustment, employers are required to take into

account the applicable wage base under the social security tax portion of the FICA tax, and the tax rates in effect for the particular year.

Section 31.6051-1(c) requires an employer adjusting a return filed for a prior year, or claiming a refund or credit of FICA taxes for a prior year, to file Forms W-2c, Corrected Wage and Tax Statement, for such year. Section 31.6051-1(c) provides that the employer must file Forms W-2c correcting Forms W-2, Wage and Tax Statement, if an amount of employee social security or Medicare tax shown on the Form W-2 is incorrect and is adjusted or refunded; the amount of social security wages or Medicare wages shown on the Form W-2 is incorrect; the amount shown in Box 1, Wages, tips, other compensation, is incorrect; or the amount of income tax actually withheld from the employee is incorrectly reported in Box 2, Federal income tax withheld.

SPECIAL ADMINISTRATIVE PROCEDURES FOR EMPLOYMENT TAX ADJUSTMENTS AND CLAIMS FOR REFUND

To reduce administrative burden, this notice provides special administrative procedures for adjustments and claims for refunds or credits for overpayments of employment taxes attributable to same-sex spouse benefits, including overpayments that result from a taxpayer's retroactive application of the holdings in Rev. Rul. 2013-17. For purposes of this notice, "same-sex spouse benefits" refers to the benefits specified in Rev. Rul. 2013-17 for which amended income tax returns and adjusted employment tax returns or claims for refund or credit may be filed. These benefits are same-sex spouse employer-provided health coverage and fringe benefits that were provided by an employer to a same-sex spouse and are excludable from income under section 106, 117(d), 119, 129, or 132 based on an individual's marital status. For purposes of the

preceding sentence, if an employee made a pre-tax salary-reduction election for health coverage under a section 125 cafeteria plan sponsored by an employer and also elected to provide health coverage for a same-sex spouse on an after-tax basis under a group health plan sponsored by that employer, an affected taxpayer may treat the amounts that were paid by the employee for the coverage of the same-sex spouse on an after-tax basis as pre-tax salary reductions amounts. Thus, for purposes of this notice, employment taxes paid on after-tax amounts that were used to purchase health coverage for an employee's same-sex spouse under the circumstances described in the preceding sentence are treated as overpayments of employment taxes.

In addition, for purposes of this notice, "same-sex spouse benefits" includes remuneration for services that is excepted from the definition of employment for FICA purposes under the holdings in Rev. Rul. 2013-17 because the services are within the exception of section 3121(b)(3)(B).

Employment Tax Returns for Third Quarter 2013 (July, August, September)

If an employer withholds employment taxes with respect to same-sex spouse benefits paid to or on behalf of an employee in the third quarter of 2013, ascertains the amount withheld on such benefits, and repays or reimburses the employee for the amount of such taxes before filing the third quarter 2013 Form 941, the employer will not report the wages and withholding on the third quarter 2013 Form 941. If the employer does not repay or reimburse the employee for the amount of the overcollection before filing the third quarter 2013 Form 941, the employer must report the amount of the overcollection on that return and can use one of the special

administrative procedures for 2013 described below to make an adjustment or claim a refund for the overpayment.

Special Administrative Procedures for Adjustments for 2013 on Fourth Quarter 2013 Form 941 or Fourth Quarter 2013 Form 941-X

The IRS is providing two alternative special administrative procedures for employers that treated the value of same-sex spouse benefits as wages on Forms 941 for the first three quarters of 2013 and that seek to correct overpayments of employment taxes attributable to the benefits.[2]

(1) Under the first alternative, an employer must repay or reimburse its employees for the amount of the overcollected FICA tax and the overcollected income tax withholding with respect to the same-sex spouse benefits for the first three quarters of 2013 on or before December 31, 2013. After repaying or reimbursing the employees, the employer, in reporting amounts on its fourth quarter 2013 Form 941, may reduce the fourth quarter wages, tips, and other compensation reported on line 2, taxable social security wages reported on line 5a (subject to the wage base limitation discussed below), and taxable Medicare wages and tips reported on line 5c, by the amount of the same-sex spouse benefits treated as wages for the first three quarters of 2013. Also, the income tax withheld from wages, tips, and other compensation reported on line 3 of Form 941 should be reduced by the amount of income tax withholding with respect to

[2] The same procedures are available to filers of Form 941-SS, Employer's QUARTERLY Federal Tax Return (American Samoa, Guam, the Commonwealth of Northern Mariana Islands, and the U.S. Virgin Islands), Form 941-PR, Planilla para la Declaración Federal TRIMESTRAL del Patrono, and Form CT-2, Employee Representative's Quarterly Railroad Tax Return (different lines are applicable on Form CT-2). The special procedures are not needed for filers of Form CT-1, Employer's Annual Railroad Retirement Tax Return, and Form 940, Employer's Annual Federal Unemployment (FUTA) Tax Return, which are annual returns.

the same-sex spouse benefits that has been repaid or reimbursed to the employees by the end of the calendar year. In addition, if the value of any same-sex spouse benefits were included in taxable wages subject to Additional Medicare Tax withholding on line 5d, the amount of taxable wages subject to Additional Medicare Tax withholding on the fourth quarter 2013 Form 941 should be reduced. By taking advantage of this special administrative procedure, the employer will not have to file separate Forms 941-X to correct each of the first three quarters of 2013.

Under this special administrative procedure, the employer may only correct the employer share of FICA tax that corresponds to the employee share of FICA tax that has been repaid or reimbursed to the employees on or before December 31, 2013.

For the repayment or reimbursement of overwithheld social security tax and the corresponding reduction for taxable social security wages reported on Form 941, line 5a, the employer must take into account that adjustments of social security tax are limited to the tax paid on that portion of the value of the same-sex spouse benefits that, when added to other social security wages and tips for the year, does not exceed the social security wage base for 2013 ($113,700). Accordingly, if for a particular employee the value of same-sex spouse benefits was included in social security wages and, after the exclusion of the value of the same-sex spouse benefits from wages for 2013, the remaining social security wages of the employee are equal to or greater than $113,700, then no refund, credit, or adjustment of social security tax can be made for 2013 for that employee.

To ensure that use of this special administrative procedure for the 2013 fourth quarter Form 941 does not result in a mismatch between total taxes reported on line 10

(total taxes after adjustments) and total liability for the quarter reported on line 16 for a monthly schedule depositor or on Schedule B (Form 941) for a semiweekly schedule depositor, the employer should use the following procedures.

If the employer repays or reimburses the employee share of FICA taxes or income tax withholding to employees before the fourth quarter (*i.e.*, before October 1, 2013), the repayment or reimbursement and the corresponding reduction of the employer portion of FICA tax should be reflected by reductions in the amount reported by a monthly schedule depositor on line 16 (Tax liability: Month 1 (October)) or by a semiweekly schedule depositor on Schedule B (Form 941), Day 1 (October 1) of the Tax liability for Month 1. Negative numbers must not be entered on Line 16 or Schedule B (Form 941). If the amount of the adjustment for repayments and reimbursements exceeds the liability of the quarter reported for Month 1 or Day 1, the employer should apply the amount of the remaining adjustment to reduce liabilities in calendar order until the amount of the remaining adjustment is completely used. For example, if the employer's tax liability for October on line 16 would be negative (due to the adjustment for repayments and reimbursements made before or during the fourth quarter), the employer should not enter a negative amount for the month. Instead, the employer should enter zero for October and subtract the negative amount from the tax liability for November.

If the employer repays or reimburses the employee share of FICA taxes or income tax withholding to employees during the fourth quarter (*i.e.*, after September 30, 2013 and on or before December 31, 2013), the repayment or reimbursement and the corresponding reduction of the employer portion of FICA tax should be reflected by

reductions in the amount reported on line 16 of the fourth quarter Form 941 or Schedule B (Form 941) on the date of the repayment or reimbursement or on the next date after the date of the repayment or reimbursement such that it will not reduce any amount on line 16 or Schedule B (Form 941) below zero.

(2) Under the second alternative, an employer that does not repay or reimburse employees for the amount of withheld FICA and income taxes with respect to same-sex spouse benefits provided in 2013 on or before December 31, 2013, and thus, files the 2013 fourth quarter Form 941 without making the adjustment, may correct overpayments of FICA taxes with respect to same-sex spouse benefits paid in 2013 using Form 941-X. Under this option, an employer may file one Form 941-X for the fourth quarter of 2013 to make adjustments or claim refunds or credits of overpayments of FICA taxes with respect to same-sex spouse benefits paid in all quarters of 2013, provided the employer has satisfied the usual requirements for filing Form 941-X, including repaying or reimbursing the overcollected employee FICA tax to employees (or, for refund claims, securing consents from employees), and obtaining the required written statements from employees. The employer should write "WINDSOR" in dark, bold letters across the top margin of page 1 of Form 941-X. Only corrections made under this special administrative procedure may be shown on this Form 941-X.

An employer may not make an adjustment for an overpayment of income tax withholding for a prior calendar year unless the overpayment is attributable to an administrative error. An employer may not claim a refund or credit for an overpayment of income tax withholding if the tax was deducted and withheld from the employee. Accordingly, this second special administrative procedure for 2013 cannot be used with

regard to income tax withheld from employees with respect to same-sex spouse benefits in 2013 because an employer can use this Form 941-X procedure only if the employer did not repay or reimburse employees for the amount of withheld taxes with respect to same-sex spouse benefits provided in 2013 on or before December 31, 2013. In such case, employees will receive credit for the income tax withheld for purposes of determining any entitlement to a refund of income tax paid with respect to same-sex spouse benefits provided in 2013 when they file Form 1040, U.S. Individual Income Tax Return.

Special Administrative Procedure for Adjustments or Claims for Refund for Years Before 2013

The IRS is also providing a special administrative procedure for employers to make adjustments or claims for refund or credit of overpayments of FICA taxes paid with respect to same-sex spouse benefits for any year before 2013 for which the applicable period of limitations on credit or refund has not expired. Under this procedure, the employer must take into account the applicable social security wage base in determining the overpayment of FICA taxes for the prior year being corrected. Under this procedure, the employer may file one Form 941-X for the fourth quarter of the prior year. This fourth quarter Form 941-X would include the adjustments or refunds for all overpayments of employment taxes with respect to same-sex spouse benefits provided during such prior year, including overpayments reflected in the Forms 941 for the first three quarters of the year. The employer should write "WINDSOR" in dark, bold letters across the top margin of page 1 of Form 941-X. Only corrections made under this special administrative procedure may be shown on this Form 941-X.

Although the employer may file for all four quarters of a prior year on the fourth quarter Form 941-X, this special administrative procedure is subject to the usual requirements that apply in the case of corrections of overpayments for prior years, including the filing of Forms W-2c, repaying or reimbursing employees for the overwithheld taxes, and obtaining the required written statements (and consents if applicable) from employees.

An employer may not make an adjustment for an overpayment of income tax withholding for a prior calendar year unless the overpayment is attributable to an administrative error. An employer may not claim a refund or credit for an overpayment of income tax withholding if the tax was deducted and withheld from the employee. Accordingly, this special administrative procedure for prior years cannot be used with regard to income tax withheld from employees with respect to same-sex spouse benefits in prior years. Employees may receive refunds of income tax paid with respect to same-sex spouse benefits in prior years by filing Form 1040X, Amended U.S. Individual Income Tax Return. As indicated above, an employer filing a claim for refund or credit or making adjustments for prior years must file Forms W-2c for the prior years. Forms W-2c will assist employees in claiming a refund of income tax.

DRAFTING INFORMATION

The principal author of this notice is Alfred G. Kelley of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt & Government Entities). For further information regarding this notice, contact Mr. Kelley at (202) 622-6040 (not a toll-free call).