



American Payroll Association

Government Relations • Washington, DC

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Forms and Publications
Internal Revenue Service
Joseph.M.Guillen@irs.gov

Re: Recommendations on the Internal Revenue Service's Form 1042-S and Instructions, Foreign Person's U.S. Source Income Subject to Withholding

Dear IRS:

The following are recommendations of the American Payroll Association (APA) regarding IRS Form 1042-S and related instructions as they apply to reporting of payments and amounts withheld under Internal Revenue Code Chapter 3 and Chapter 4, the Foreign Account Tax Compliance Act (FATCA).

ABOUT THE APA

Established in 1982, the APA is a nonprofit professional association serving the interests of more than 20,000 payroll professionals and their employers in the United States. The APA's primary mission is to educate members and the payroll industry about the best practices associated with paying America's workers while complying with all applicable federal, state, and local laws. The APA's Government Relations Task Force (GRTF) works with legislative and executive branches at the federal and state levels to assist employers with understanding their legal obligations with significant emphasis on minimizing the administrative burden on government, employers, and individual workers. The GRTF maintains a close relationship with the IRS to ensure that APA's members receive the latest information about federal tax law changes and the IRS receives meaningful feedback on its programs, regulations, guidance, and tax forms.

GENERAL COMMENT

1. The IRS usually publishes draft forms and instructions within six months of tax filing deadlines and final versions 30 days or more after drafts are published. In addition, draft forms are often published separately from draft instructions. Employers require more time to reconfigure data entry to accommodate final version changes. Draft forms cannot be accurately reviewed without associated instructions. The draft 2017 Form 1042-S was published on August 22, 2016. At the time of preparing these comments, the draft 2017 Form 1042-S instructions were not yet published.

APA recommends that publication of drafts occur nine months or more before filing deadlines and that publishing of draft forms and instructions occur at the same time. APA prefers that the IRS include a comment-period deadline, even if the date is a soft deadline in terms of when a final version will be published or in absence of a legal requirement for setting a deadline.

SUBSTITUTE FORMS

2. On page 4, column 1 of the April 25, 2016, final instructions, the title for Publication 1179 needs to be updated. The reference is "General Rules and Specifications for Substitute Forms 1096, 1098, 1099, 5498, W-2G, and 1042-S." The title listed on the latest edition of Publication 1179 (June 27, 2016) is "General Rules and Specifications for Substitute Forms 1096, 1098, 1099, 5498, and Certain Other Information Returns."
3. On page 4, column 1 of the instructions, "A substitute form furnished to a recipient must include a statement that the information on the form is being furnished to the Internal Revenue Service." However, the draft 2017 official IRS version of the Form 1042-S does not contain this statement on either the forms or the explanation pages. The 2016 instructions only contain a reference to a statement about recipient information provided to the IRS in the "interest on deposits paid to certain nonresident aliens" (see page 7, column 3). This is extremely confusing. Why would substitute forms be required to contain any statement that the official Form 1042-S does not include? If the statement is required on a substitute form only, is the requirement just for reporting interest income or for all substitute Forms 1042-S? In addition, where on the substitute form should the statement be placed? The IRS also should clarify whether or not this statement must appear on paper copy A of Form 1042-S for withholding agents submitting their IRS copies on paper because the language in the instructions for the recipient copies (copies B, C, and D) say the recipient copies, but "must contain the exact same information as the copy filed with the IRS."

On page 35 of Revenue Procedure 2016-15 (Publication 1179, June 27, 2016), section 5.2.1, there is a reference to an OMB requirement that each IRS form and instructions must include whether or not the information must be furnished to the IRS. If the official IRS copy of Form 1042-S does not include this statement, but such a statement is technically required, then the IRS should ensure that the statement is on all versions. This will create consistency across all publications, instructions, and forms.

TAXPAYER IDENTIFICATION NUMBER

4. The use of truncated taxpayer identification numbers is unclear. On page 15 of Publication 1179, a description is provided about the format for truncating social security numbers and taxpayer identification numbers. However, words such as "where permitted" are the only reference to whether truncating is allowed without a reference on where to find further information. Publication 1179 does state that truncating is not allowed on Copy A filed with the IRS. The only references to truncation in the instructions for Form 1042-S are under electronic reporting on page 3, column 3

and under substitute forms on page 4, column 1. Please note that clarification on the use of truncated taxpayer identification numbers also was recommended in the Information Reporting Program Advisory Committee's annual report of October 26, 2016, in Item Q of the International Reporting and Withholding Subgroup Report.

TAX PAID BY WITHHOLDING AGENT (BOX 9)

5. The Form 1042-S instructions do not provide meaningful information on when to use Box 9, Tax paid by withholding agent. Some examples as well as specific citations would be helpful. How does the information in Box 9 impact other boxes on the form? Should the paper and electronic versions be marked "under-withheld" if a tax was not actually withheld from a payment (i.e., nothing is reported in Box 7), but the withholding agent paid the tax under its own liability and completed Box 9 accordingly?

In general, absent an intentional gross up, a payment that is subject to withholding includes a portion for required tax withholding from the gross and a net amount paid to the payee. The IRS receives the withheld amount. For example, with a \$1,000 payment subject to 30 percent withholding, an amount of \$700 goes to the payee and \$300 is withheld and paid to the IRS. The \$300 amount is reported in Box 7a, Federal tax withheld, and in Box 10, Total withholding credit. Presumably, Box 9 was put in place for payers who did not withhold or gross up and want to assume the flat 30 percent liability as their own, making payments to the IRS potentially untimely. If this is correct, the payee cannot claim the Box 9 amount as a withholding credit because the amount was not actually withheld. However, the IRS has never explained what happens in this situation – the IRS has received the 30 percent payment, but the taxpayer will in many circumstances still have to pay more because they do not have a withholding credit to claim. This could result in the IRS receiving the taxes twice.

On the printed form, Box 9 amounts are not included in the Box 10 total withholding credit amounts nor are they included in the electronic submission. The dilemma for the withholding agent is that if the record is marked under-withheld, but the withholding agent has already given the IRS the \$300, the IRS may seek penalties for under-withholding.

In addition, because of confusion, entries for Box 9 may be double-entered in Box 7a when withholding actually occurred or Box 7a may be left blank and a withheld amount entered incorrectly in Box 9 instead.

LIMITATIONS ON BENEFITS (BOX 13J)

6. More than 15 countries (nine that still fall under the former treaty with the USSR) do not include a limitation on benefits (LOB) article in their tax treaty with the United States. However, a code is not provided for this situation (i.e. "not applicable" or "no LOB article in treaty)." The term "other" cannot be used here because the term in Box 11 appears designed to capture LOB provisions that

are different than those specifically described through other codes, but still appear as an LOB in the text of the treaty. This is supported by Form W-8BEN-E in which the term "other" in item 14b specifically requests that the payee "specify Article and paragraph" when selecting the "other" option. The IRS should provide instructions on how to address a situation in which an entity is claiming a treaty benefit, but an LOB article is not included.

7. The IRS also should clarify the need for LOB Code 01, Individual, in the Form 1042-S instructions and any other forms and instructions in which LOB code issues are described. According to current final forms and instructions, the LOB code is potentially only applicable to entity-level beneficial owners, not individuals. While there are 11 LOB codes on Form 1042-S, Form W-8BEN-E contains 10 LOB-related options in Part III, line 14b, none of which are for individuals. If the IRS intends to retain LOB Code 01 in Form 1042-S, APA recommends that the agency offer guidance with examples.

CHAPTERS 3 AND 4 STATUS CODES (BOXES 12B, 12C, 13F, 13G, 15B, 15C, 16D, AND 16E)

8. Additional guidance in the Form 1042-S instructions for status codes is needed because the codes in Form W-8BEN-E do not always align with the codes for Form 1042-S. For example, the instructions for Form 1042-S are unclear about the definition of foreign partnership for purposes of withholding, and Form W-8BEN-E does not offer clarity. Form W-8IMY may identify the appropriate status, but this form is not referenced in the Form 1042-S instructions. In addition, neither the 2016 Form 1042-S instructions nor the draft 2017 Form 1042-S contain a label for foreign partnership.

TRANSLATIONS FOR PRIOR YEARS – FILING CORRECTED FORMS

9. APA members have difficulty filing corrected past forms when the current codes do not match past codes. Software systems require a translation scheme. Without a statute of limitations or regulatory equivalent on correcting forms, filing corrected forms could go back 10 years or more. The IRS should provide guidance on what to do for filing corrected forms. Publication 1187 says that when filing Form 1042-S electronically, filers must use the most current formats and codes; logically, however, printed recipient copies and paper filing with the IRS would use codes in effect for the tax year associated with the form in question. APA recommends that the IRS resolve these discrepancies.

UNIQUE FORM IDENTIFIER

10. The draft 2017 Form 1042-S contains a field for "Unique Form Identifier." The final instructions for the 2016 Form 1042-S says that this identifier is coming for the 2017 form, but details were not provided. APA recommends that in the 2017 Form 1042-S instructions, when published, the IRS clarify whether the identifier should be the same as an original when subsequently amended if issued to the same person for the same income type, or whether each new iteration of Form 1042-S issued to the same person should include a distinct identifier. The IRS should offer specific examples

of assignment of unique form identifiers for originals and amended forms. Understanding how the IRS will use the unique form identifier may likewise be helpful.

EFFECTIVE DATES

11. APA recommends that the IRS standardize messaging on effective dates for new requirements. For example, on page 1 of the 2016 Form 1042-S instructions a number of different references are made to effective dates that are confusing. This should be corrected in the 2017 instructions. For example, sometimes the instructions provide a specific date (e.g., on or after January 1, 2016) and in other places the instructions are more general (e.g., beginning in 2016 or beginning in 2017).

Thank you for the opportunity to comment on Form 1042-S. We appreciate APA's ongoing relationship with the IRS and our ability to work together for success.

Sincerely,

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