



American Payroll Association

Government Relations • Washington, DC

Mr. John Tuzynski
Chief, Employment Tax Operations
Internal Revenue Service
5000 Ellin Road
SE:S:SP:ET NCFB C9-202
Lanham, MD 20706

July 30, 2013

Re: Proposed Special Administrative Procedure for Employers Affected by Supreme Court's Decision Declaring DOMA Unconstitutional

Dear Mr. Tuzynski:

The American Payroll Association is writing to request the adoption of an optional special administrative procedure for employers that must correct overpayments of withheld income and FICA taxes made due to the Supreme Court's decision in *U.S. v. Windsor* finding Section 3 of the Defense of Marriage Act unconstitutional.

Earlier this year, the Internal Revenue Service adopted a special administrative procedure for employers after section 203 of the American Taxpayer Relief Act of 2012 (ATRA) retroactively increased the monthly transit benefit exclusion under IRC §132(f) to January 1, 2012. *See* IRS Notice 2013-8. We believe similar relief is warranted now, and should be put into effect as soon as possible, to reduce filing and reporting burdens for employers.

APA members believe that the enactment of a special administrative procedure will reduce filing and reporting burdens for employers and the IRS, reduce confusion between employers and employees, and provide a clear method for employers to follow in recovering tax overpayments for themselves and their employees.

The unconstitutionality of Section 3 of DOMA has far-reaching tax implications for married same-sex couples. Many tax benefits that were previously available only to a husband and wife of opposite sexes have now been made available to married same-sex couples, such as the opportunity for a same-sex spouse to obtain tax-free employer-provided health coverage.

The responsibility for tracking and reporting these benefits often falls to payroll professionals. Form 941, *Employer's Quarterly Federal Tax Return*, is submitted to report federal income, social security and Medicare taxes withheld from each employee and paid by the employer. If an employer makes a mistake by taxing a benefit that should be exempt from income and FICA taxes, it needs to go back and make a correction. To make corrections for employment tax

overpayments, an employer uses the “X” form that corresponds to the return being corrected, or in this case the Form 941-X, *Adjusted Employer’s Quarterly Federal Tax Return or Claim for Refund*. A separate “X” form must be filed for each return period that needs correction. Withheld income tax corrections can be made only for the current tax year, but FICA tax corrections can be made for previous years.

Employers that originally treated the value of spousal benefits for same-sex spouses as includible in gross income and wages and subject to withheld income and FICA taxes would normally be required to file Form 941-X for each quarter to correct it.

We are requesting that the IRS provide a special administrative procedure, similar to the one provided for excess transit benefits earlier this year, for employers that treated health coverage and any other related benefits for an employee’s same-sex spouse as includible in the employee’s gross income and wages, and withheld income and FICA taxes. Employers in this situation should be able to report all corrections for 2013 on the third or fourth quarter Form 941 for 2013. Thus, employers would not be required to file Form 941-X to make employment tax corrections for the previous quarters in 2013.

We also request that the IRS expand the special administrative procedure to permit employers that must make adjustments to previous year filings to do that on one Form 941-X for each year.

We appreciate the Service’s prompt and efficient efforts to find as many ways as possible to facilitate an understandable and workable filing procedure for employers. We believe that enacting this special procedure will go a long way toward promoting an easier and more efficient method for employees and employers to comply with reporting and withholding requirements.

Sincerely,

Becky Harshberger, CPP
Karen Salemi, FLMI, CPP
Co-chairs, APA IRS Issues Subcommittee

Brian O’Laughlin, Esq.
APA Senior Manager of Government Relations
and Multinational Certification