

Part I

Section 6205 —Special rules applicable to certain employment taxes

26 CFR 31.6205-1: Adjustments of underpayments

(Also: 6402, 6413, 6414, 31.6402(a)-1, 31.6402(a)-2, 31.6413(a)-1, 31.6413(a)-2, 31.6414-1)

Rev. Rul. 2009-39

ISSUE

How does an employer correct employment tax reporting errors using the interest-free adjustment and refund claim processes under sections 6205, 6402, 6413, and 6414 of the Internal Revenue Code and the accompanying regulations in the following situations:

(1) an underpayment of Federal Insurance Contributions Act (FICA) tax and income tax withholding (ITW) when the error is not ascertained in the year the wages were paid; (2) an overpayment of ITW when the error is ascertained in the same year the wages were paid; (3) both an overpayment and an underpayment of FICA tax for

the same tax period; (4) an underpayment of FICA tax when the employer's filing requirement has changed; (5) an underpayment of FICA tax and ITW resulting from a failure to file an employment tax return because the employer failed to treat any workers as employees; (6) an overpayment of FICA tax on wages paid to a household employee; (7) an overpayment of FICA tax when the error is ascertained close to the expiration of the period of limitations on credit or refund; (8) an underpayment of FICA tax and ITW ascertained in the course of an employment tax examination; (9) an underpayment of FICA tax and ITW ascertained in the course of the appeals process; (10) an underpayment of FICA tax and ITW resulting from the misclassification of employees ascertained in the course of the appeals process.

LAW, ANALYSIS, AND HOLDINGS

For purposes of this revenue ruling, employment tax means FICA tax (both the social security and Medicare portions) imposed by section 3101 (employee FICA tax) and section 3111 (employer FICA tax), and ITW imposed by section 3402. To the extent other types of withholding are treated as ITW under section 3402(a) (that is, gambling withholding, pension withholding, and backup withholding as set forth in sections 3402(q)(7), 3405(f), and 3406(h)(10), respectively), these other types of withholding are included in the term employment tax.

Sections 6205, 6402, 6413, and 6414 permit interest-free adjustments and claims for refund to correct employment tax reporting errors. Sections 31.6205-1, 31.6402(a)-1, 31.6402(a)-2, 31.6413(a)-1, 31.6413(a)-2, and 31.6414-1, as amended by Treasury Decision 9405 (TD 9405), 2008-32 IRB 293 [73 FR 37371], provide rules for

making interest-free adjustments and claiming refunds of employment tax. Section 31.6302-1, as amended by TD 9405, provides rules relating to deposit obligations with respect to interest-free adjustments of employment tax. TD 9405 is effective on January 1, 2009 and applies to errors ascertained on or after January 1, 2009.

TD 9405 was issued in coordination with “X” forms developed by the Internal Revenue Service (IRS) that employers use to correct employment tax reporting errors ascertained on or after January 1, 2009. The “X” forms correspond with Form 941, “Employer’s QUARTERLY Federal Tax Return”; Form 943, “Employer’s Annual Federal Tax Return for Agricultural Employees”; Form 944, “Employer’s ANNUAL Federal Tax Return”; and Form 945, “Annual Return of Withheld Federal Income Tax.” The new “X” forms (e.g., Form 941-X, “Adjusted Employer’s QUARTERLY Federal Tax Return or Claim for Refund”) are used to claim refunds, make adjustments, and request abatements of employment tax.

This revenue ruling refers to corrections made pursuant to sections 6205 and 6413 of underpayments or overpayments, respectively, resulting from employment tax reporting errors as having been made using the adjustment process. This revenue ruling refers to corrections made pursuant to sections 6402 and 6414 of overpayments resulting from employment tax reporting errors as having been made using the refund claim process.

Underpayments

Pursuant to § 31.6205-1(b), an employer that has underreported and underpaid FICA tax with respect to any payment of wages can correct the error as an interest-free

adjustment if the error is ascertained after the return reporting such tax has been filed. An error is ascertained when the employer has sufficient knowledge of the error to be able to correct it. An interest-free underpayment adjustment is made by reporting the additional amount due on an adjusted return filed by the due date for filing the employment tax return for the return period in which the error was ascertained. The due date for filing the adjusted return is determined by reference to the type of return (e.g., Form 941 or Form 944) being corrected, without regard to the employer's current filing requirements. The amount of the underpayment must be paid to the IRS by the date the adjusted return is filed. Section 31.6205-1(a)(7) provides that agreement forms, such as Form 2504, "Agreement and Collection of Additional Tax and Acceptance of Overassessment (Excise or Employment Tax)," which are used in the context of an examination or appeals process, constitute adjusted returns. If an adjustment is reported but the amount of the adjustment is not paid when due, interest will accrue thereafter.

Section 31.6205-1(c) provides similar rules for correcting underpayments of ITW. However, an interest-free adjustment of ITW may only be made if the error is ascertained within the same calendar year that the wages to the employee were paid, unless: (1) the underpayment is attributable to an administrative error, (2) section 3509 (a relief provision to reduce employment tax liability in certain worker misclassification situations) applies to determine the amount of the underpayment, or (3) the adjustment is reported on a Form 2504, Form 2504-WC, "Agreement to Assessment and Collection of Additional Tax and Acceptance of Overassessment in Worker Classification Cases

(Employment Tax),” or other agreement forms prescribed by the IRS (such as, Form 2504-AD, “Excise or Employment Tax-Offer of Agreement to Assessment and Collection of Additional Tax and Offer of Acceptance of Overassessment,” and Form 2504-S, “Agreement to Assessment and Collection of Additional Tax and Acceptance of Overassessment (Including Section 530 Statement)”).

Section 31.6205-1(a)(2) provides that an interest-free adjustment may not be made to correct an underpayment of any employment tax if the failure to report relates to an issue that was raised in an examination of a prior return period or if the employer knowingly underreported its employment tax liability. In addition, § 31.6205-1(a)(6) provides that an interest-free adjustment generally may not be made after receipt of notice and demand for payment or receipt of a Notice of Determination of Worker Classification (Notice of Determination).

Section 7436 grants the U.S. Tax Court jurisdiction to review determinations by the IRS regarding worker classification, relief under section 530 of the Revenue Act of 1978, and the proper amount of employment tax under those determinations. The Notice of Determination serves as the IRS’s determination for purposes of section 7436, and therefore is a jurisdictional prerequisite for seeking U.S. Tax Court review in worker classification cases. In order to provide a mechanism for taxpayers to make an interest-free adjustment yet receive a Notice of Determination enabling them to petition the U.S. Tax Court, § 31.6205-1(a)(6)(ii) permits an employer, prior to receipt of a Notice of Determination, to make a cash bond deposit in lieu of making a payment to stop the accrual of any interest. The IRS treats a cash bond deposit made prior to receipt of a

Notice of Determination as an interest-free adjustment. Without this rule, an employer would not be able to both make an interest-free adjustment and receive a Notice of Determination enabling it to seek U.S. Tax Court review under section 7436. Moreover, this cash bond deposit is the only way an employer can make an interest-free adjustment other than filing an adjusted return.

Section 31.6205-1(b)(2)(i) provides that an adjusted return reporting an underpayment must be filed within the period of limitations for assessment under section 6501, which is generally 3 years after the due date of the return or the date the return was filed, whichever is later. In computing the period of limitations for assessment, section 6501(b)(2) provides that employment tax returns reporting FICA tax or ITW for any period ending with or within a calendar year filed before April 15 of the succeeding calendar year are deemed filed on April 15 of such succeeding calendar year.

Section 31.6205-1(b)(3) provides that, if an employer fails to file a return for a return period solely because the employer failed to treat any individuals properly as employees for the return period (and, therefore, failed to withhold and pay any employer or employee FICA tax with respect to wages paid to the employees) and if the employer ascertains the error after the due date of the return, the employer shall correct the error as an interest-free adjustment. The regulations also provide the process for correcting this type of error. Section 31.6205-1(c)(3) provides a similar rule for ITW; however, an adjustment of ITW may only be made if (1) the error is ascertained within the same calendar year that the wages to the employee were paid, (2) section 3509 applies to

determine the amount of the underpayment, or (3) the adjustment is reported on a Form 2504, Form 2504-WC, or other prescribed agreement form.

Section 31.6302-1(c)(7) provides that an employer filing an adjusted return under § 31.6205-1 in order to report taxes that were accumulated in a prior return period shall pay the amount of the adjustment by the time it files the adjusted return; the amount paid by the time the employer files the adjusted return will be deemed to have been timely deposited by the employer. Amounts not timely deposited may be subject to the failure to deposit penalty under section 6656.

Overpayments

In general, employers may choose to correct employment tax overpayment errors by either making an interest-free adjustment or filing a claim for refund after an error has been ascertained. An error is ascertained when the employer has sufficient knowledge of the error to be able to correct it.

Under § 31.6413(a)-1(a), an employer has a duty to assure that its employee's rights to recover overcollected taxes are protected by repaying or reimbursing overcollected amounts. Section 31.6413(a)-1(a) provides that before making an adjustment of an overpayment of FICA tax, an employer must repay or reimburse its 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. Section 31.6413(a)-1(b)

provides a similar rule for overcollected ITW; however, the employer is required to repay or reimburse the employee prior to the end of the calendar year in which the wages were paid or an adjustment may not be made to correct the error.

Section 31.6413(a)-2 provides the rules for making interest-free adjustments for overpayments of FICA tax or ITW, after the employer has repaid or reimbursed the employee the amount of any overcollection. An interest-free adjustment is made by filing an adjusted return. The employer is required to certify that it has repaid or reimbursed the employee in the amount of the overcollection. For adjustments of employee FICA tax overcollected in prior years, the employer must also certify that it has secured the required written statement from the employee. However, these requirements do not apply to the extent that the taxes were not withheld from the employee, nor do they apply if after having made reasonable efforts the employer cannot locate the employee or, for prior year FICA tax, the employee did not provide the required written statement. If, after the employer's reasonable efforts to secure the required written statement, the employee does not furnish it, the employer may make an adjustment of the overpaid employer FICA tax.

The employer must file an adjusted return before the expiration of the period of limitations on credit or refund under section 6511. However, § 31.6413(a)-2(d)(2) provides that no overpayment adjustment may be made if the overpayment relates to a return period for which the period of limitations on credit or refund under section 6511 will expire within 90 days of filing the adjusted return. This is referred to as the 90-day rule. The purpose of the 90-day rule is to give the IRS sufficient time to process the

request for an overpayment adjustment. To satisfy the rule, an adjusted return must be filed 90 days before the expiration of the period of limitations on credit or refund under section 6511.

Section 6511(a) provides that a claim for credit or refund must be made within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever is later, or, if no return was filed, within 2 years from the time the tax was paid. In computing the period of limitations, section 6513(c) provides that employment tax returns reporting FICA tax or ITW for any period ending with or within a calendar year filed before April 15 of the succeeding calendar year are deemed filed on April 15 of such succeeding calendar year. Likewise, section 6513(c) provides that FICA tax or ITW paid during any period ending with or within a calendar year before April 15 of the succeeding calendar year is deemed paid on April 15 of the succeeding calendar year.

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), an employer has a duty to assure that its employee's rights to recover overcollected taxes are protected by repaying or reimbursing overcollected amounts. Alternatively, an employer may obtain the employee's consent to the filing of the refund claim, an option not available under the adjustment process. Under *Chicago Milwaukee Corp. v. U.S.*, 40 F.3d 373 (C.A. Fed. 1994), an employer need not repay or reimburse its employees or obtain the employees' consents for the filing of a refund claim prior to filing the claim, in order for the claim to be valid. However, the employer must repay or reimburse its employees or obtain the employees' consents before the IRS can grant the claim.

The regulations require that an employer certify that it has repaid or reimbursed its employee or obtained the employee's consent to the filing of the refund claim. For refund claims for employee FICA tax overcollected in prior years, the employer must also certify that it has obtained 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 overcollection. However, these requirements do not apply to the extent that the taxes were not withheld from the employee, nor do they apply if after having made reasonable efforts the employer cannot locate the employee or the employee will not provide consent, or the employee did not provide the required written statement. If, after the employer's reasonable efforts to obtain the employee's consent or secure the required written statement, the employee does not furnish one or the other of them, the employer may claim a refund of the overpaid employer FICA tax. A claim must be filed before the expiration of the period of limitations on credit or refund under section 6511.

Section 31.6414-1 provides rules under which a claim for credit or refund of an overpayment of ITW can be made. An employer that has overpaid ITW may file a claim for refund of the overpayment only if the amount was not actually withheld from the employee's wages.

As a result of TD 9405 and this revenue ruling, Revenue Ruling 75-464, 1975-2 CB 474, is no longer determinative of when interest-free adjustments are made in the context of an employment tax examination. Accordingly, Rev. Rul. 75-464 is obsolete.

Situations

In each of these situations, except as otherwise noted, (a) the amounts underreported do not relate to an issue that was raised in an examination of a prior period, (b) the employer did not knowingly underreport its employment tax liability, (c) the employer did not receive notice and demand for payment, and (d) the employer did not receive a Notice of Determination.

Situation 1: Employer R timely filed its 2009 fourth quarter Form 941 on January 10, 2010 and timely paid all employment tax reported on the return. On February 9, 2010, Employer R ascertains that it underwithheld and underpaid FICA tax and ITW with respect to its employees' wages in the fourth quarter of 2009.

Employer R must correct the underpayment of FICA tax on a Form 941-X using the adjustment process. Employer R must file Form 941-X by the due date of the return for the return period in which it ascertained the error (*i.e.*, April 30, 2010) and pay the amount owed by the time it files Form 941-X. If Employer R files Form 941-X by April 30, 2010 but does not pay by the time it files, interest will accrue from the date Form 941-X is filed until payment is made. If payment is not made until after receipt of a notice and demand for payment, Employer R is entitled to an interest-free adjustment for the period up to the date the Form 941-X is filed, but interest accrues from the date the Form 941-X is filed until payment is made.

Employer R may not use the interest-free adjustment process outside an employment tax examination to correct the underpayment of ITW, because the error was not ascertained in the same year that the wages were paid to the employees.

Situation 2: Employer S timely filed its 2011 third quarter Form 941 on October 10, 2011 and timely paid all employment tax reported on the return. On December 2, 2011, Employer S ascertains that it overwithheld and overpaid ITW in the third quarter of 2011 and reported the overpayment on its 2011 third quarter Form 941. Employer S repays the overcollected amounts to its affected employees on December 29, 2011. Employer S files Form 941-X on January 6, 2012 to correct the overpayment using the adjustment process.

Because Employer S repaid its employees the amount of the overcollection of ITW in the same year that the wages were paid, Employer S may correct the overpayment of ITW using the adjustment process even though the adjusted return is filed in a year after the wages were paid. Employer S may not use the refund claim process to correct the error because the ITW was actually withheld from the employees' wages. Since Employer S filed Form 941-X on or before January 15, 2015, it is a timely adjustment under the 90-day rule.

Situation 3: Employer T timely filed its 2006 fourth quarter Form 941 on January 19, 2007, and timely paid all employment tax reported on the return. On December 1, 2009, Employer T ascertains that it underpaid FICA tax with respect to wages of Employees A, B, and C and overwithheld and overpaid FICA tax with respect to wages of Employee D on its 2006 fourth quarter Form 941. Employer T reimbursed Employee D in the amount of the overcollection promptly after ascertaining the overpayment.

The underpaid FICA tax with respect to wages of Employees A, B, and C must be corrected on Form 941-X using the adjustment process. To correct the overpaid

FICA tax with respect to wages of Employee D, Employer T may choose between the adjustment and refund claim processes because the error was ascertained on December 1, 2009 (more than 90 days before the expiration of the period of limitations on credit or refund) and because Employer T reimbursed Employee D in the amount of the overcollection. If Employer T obtained Employee D's consent to the filing of a refund claim instead of reimbursing the overcollected FICA tax, Employer T would have to use the refund claim process to correct the overpayment since the consent option is not available for the adjustment process.

In order for Employer T to correct the overpayment using the adjustment process, the adjusted return must be filed on or before January 15, 2010 (*i.e.*, 90 days before the expiration of the period of limitations on credit or refund); otherwise, after January 15, 2010, only the refund claim process will be available to correct the overpayment. To be timely, a refund claim must be filed on or before April 15, 2010 (*i.e.*, the last day of the period of limitations on credit or refund).

If Employer T chooses to correct the overpayment using the adjustment process, it can file one Form 941-X correcting both the underpayment and the overpayment. However, because an overpayment adjustment may be made only if the adjusted return is filed within 90 days of the expiration of the period of limitations on credit or refund, Employer T may correct both the overpayment and underpayment on one Form 941-X only if it files by January 15, 2010. When both an overpayment and underpayment are corrected on the same Form 941-X, the amounts will be combined and may result in either a credit or a balance due.

If Employer T chooses to correct the overpayment using the refund claim process, or it is unable to file Form 941-X by January 15, 2010 (so that it must correct the overpayment using the refund claim process), it must file two separate Forms 941-X; one to correct the overpayment using the refund claim process, and one to correct the underpayment using the adjustment process. A refund claim and an adjustment may not be made on the same Form 941-X. Employer T must file the Form 941-X reporting the underpayment by January 31, 2010 and pay any amount due by the date the Form 941-X is filed. If Employer T files the Form 941-X reporting the underpayment by January 31, 2010 and pays the amount due with that Form 941-X the amount will be deemed to have been timely deposited. If Employer T does not pay the amount due with that Form 941-X, interest will accrue from the date the Form 941-X is filed until the time of payment. The overpayment corrected on the separate Form 941-X using the refund claim process will be refunded, plus any interest that applies, unless Employer T owes other taxes, penalties, or interest. An employer may not designate an overpayment from one Form 941-X to pay an amount due on a separate Form 941-X.

Situation 4: Employer U timely filed its 2007 Form 944 and timely paid all employment tax reported on the return. In February 2010, the IRS notifies Employer U that its filing requirement has changed and it is required to file Form 941, rather than Form 944, for calendar year 2010 and thereafter. On May 23, 2010, Employer U ascertains that it underpaid FICA tax on its 2007 Form 944.

Employer U must correct the underpayment of FICA tax using the adjustment process. Because Employer U is correcting an error on a previously filed Form 944, it

must file a Form 944-X, "Adjusted Employer's ANNUAL Federal Tax Return or Claim for Refund," to make the correction since the "X" form filed must correspond to the return being corrected. Employer U does not consider its current filing requirement (*i.e.*, Form 941) at the time the "X" form is filed to determine the appropriate "X" form to file and the date the "X" form is due. Employer U must file Form 944-X by January 31, 2011, the due date of the return for the return period in which it ascertained the error, and pay the amount owed by the time it files Form 944-X. If Employer U timely files Form 944-X but does not pay by the time it files, interest will accrue from the date Form 944-X is filed until payment is made. If payment is not made until after receipt of notice and demand for payment, Employer U is still entitled to an interest-free adjustment for the period up to the date the Form 944-X is filed, but interest accrues from the date the Form 944-X is filed until payment is made.

Situation 5: On February 6, 2012, Employer V, a sole proprietor, ascertains that he should have treated his bookkeeper as an employee, rather than as an independent contractor, for employment tax purposes. The bookkeeper worked each week for Employer V since March 2011. Because Employer V did not have any other employees, he never filed any Forms 941 and never withheld or paid any employment tax.

Employer V may correct the underpayment of FICA tax for each quarter in 2011 using the adjustment process because he failed to file the returns for 2011 due to his failure to treat any individuals as employees. However, because the error was not ascertained in the same year the wages were paid, Employer V may correct the

underpayment of ITW using the adjustment process for each quarter in 2011 only if section 3509 applies to determine the FICA tax and ITW liability.

To make the adjustment for each quarter in 2011, Employer V must file a Form 941 and a Form 941-X for each quarter in 2011, as provided in the Instructions for Form 941-X. Employer V must file these returns by April 30, 2012 and pay the amount owed by the time he files the returns. If Employer V files by April 30, 2012 but does not pay by the time he files, interest will accrue from the date Form 941-X is filed until payment is made. Because Employer V ascertained the error prior to filing the return for the first quarter of 2012 there is no adjustment to be made for that quarter; however, Employer V must file his 2012 first quarter Form 941 and report and pay the correct amounts of FICA tax and ITW for that quarter and must file Forms 941 for any future quarters in which he pays wages to the bookkeeper or other employees.

Situation 6: Household Employer W timely filed his 2007 Form 1040, "U.S. Individual Income Tax Return," with an attached Schedule H (Form 1040), "Household Employment Taxes," on April 8, 2008, and timely paid all income and employment taxes reported on the return. On April 18, 2009, Household Employer W ascertains that he overwithheld and overpaid FICA tax on wages paid to a household employee on his 2007 return.

Household Employer W can choose between the adjustment and refund claim processes to correct the overpayment on his 2007 return because the error was ascertained more than 90 days before the expiration of the period of limitations on credit or refund. Regardless of the process chosen, Household Employer W must make the

correction by filing Form 1040X, "Amended U.S. Individual Income Tax Return," and attaching a corrected Schedule H (Form 1040), as provided in Publication 926, Household Employer's Tax Guide. If Household Employer W chooses the refund claim process, the Form 1040X with the corrected Schedule H (Form 1040) must be filed by April 15, 2011. However, if Household Employer W chooses the adjustment process, the Form 1040X with the corrected Schedule H must be filed by January 15, 2011 under the 90 day rule.

If Household Employer W chooses the adjustment process, he must repay or reimburse his employee in the amount of the overcollection before filing the Form 1040X with the attached corrected Schedule H (Form 1040). Household Employer W can then adjust his return by indicating on the appropriate line of the Form 1040X that he wants the overpayment applied as a payment of estimated taxes on Form 1040, for the year in which the corrected Schedule H (Form 1040) is filed.

If Household Employer W chooses the refund claim process, he must either repay or reimburse his employee in the amount of the overcollection or obtain the employee's consent to file the claim for refund for the employee tax. Household Employer W can then claim a refund by indicating on the appropriate line of the Form 1040X that he wants the overpayment refunded. The overpayment will be refunded, plus any interest that applies, unless Household Employer W owes other taxes, penalties, or interest.

Situation 7: Employer X timely filed its 2006 Form 943 on January 26, 2007 and timely paid all employment tax reported on the return. On April 5, 2010, Employer X

ascertains that it overpaid FICA tax on wages paid to its employees on its 2006 Form 943. Employer X does not have sufficient time to repay or reimburse its employees or obtain their consents and also timely file a claim for refund.

In order to correct the overpayment, Employer X must file Form 943-X, "Adjusted Employer's Annual Federal Tax Return for Agricultural Employees or Claim for Refund." Employer X may not correct the error using the adjustment process because the error was ascertained too late for the adjusted return to be filed by January 15, 2010, as required under the 90-day rule. To correct the error using the refund claim process, Employer X must file Form 943-X by April 15, 2010 in order for the claim to be timely. Notwithstanding the fact that Employer X has not repaid or reimbursed its employees or obtained its employees' consents, if Employer X files Form 943-X by April 15, 2010, the claim will be considered timely filed. However, before the IRS can grant the claim, Employer X must certify that it has repaid or reimbursed its employees, or obtained their consents, and secured the employees' written statements confirming that the employees have 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.

Situation 8: In 2010, in the course of an employment tax examination, IRS determines that Employer Y underpaid FICA tax and ITW with respect to wages of its employees on its 2008 fourth quarter Form 941. Employer Y signs Form 2504 to agree to the assessment and submits it to the examiner, during the employment tax examination.

The determination by the IRS that Employer Y underpaid FICA tax and ITW on its 2008 fourth quarter Form 941 is treated as an error ascertained at the time Employer Y submits the signed Form 2504. Submitting a signed Form 2504 satisfies the requirement that an adjusted return be filed; therefore, Employer Y is entitled to an interest-free adjustment.

While the error was not ascertained in the same year that the wages were paid to the employees, the interest-free adjustment applies to both the FICA tax and ITW because the adjustment is reported on a signed Form 2504. In order for the adjustment to be entirely interest-free, Employer Y must pay the amount due when it submits the signed Form 2504. Otherwise, interest will accrue from the date Employer Y submits the signed Form 2504. Because an adjusted return (*i.e.*, Form 2504) was filed, even if payment is not made until after receipt of notice and demand, Employer Y is nevertheless entitled to interest-free treatment up to the date Employer Y submits the signed Form 2504; however, interest will accrue from the date the signed Form 2504 is submitted until the date of payment.

Situation 9: The same facts exist as in situation (8), except that Employer Y does not agree with the examiner's determination and exercises its appeal rights. No agreement is reached in Appeals. An Appeals closing letter, dated November 3, 2010, is sent to Employer Y informing Employer Y that it will receive notice and demand for payment of tax and interest owed and that it has the right to contest the Appeals' determination in the U.S. District Court or the U.S. Court of Federal Claims if it files a refund claim and later sues for a refund. The determination by Appeals that Employer Y

underpaid FICA tax and ITW on its 2008 fourth quarter Form 941 is treated as an error ascertained on November 3, 2010, the date of the Appeals closing letter. Because Employer Y does not submit a signed Form 2504, an adjusted return has not been filed. As a result, no interest-free adjustment has been made, and Employer Y owes the amount due plus interest accrued from the due date of the return for which the underpayment was made (*i.e.*, January 31, 2009, the due date of the return for the 2008 fourth quarter Form 941). However, if Employer Y submits a signed Form 2504 by the due date of the return for the return period in which the error was ascertained (*i.e.*, January 31, 2011) and before receipt of notice and demand for payment, Employer Y is entitled to an interest-free adjustment. Submitting a signed Form 2504 will not prevent Employer Y from filing a refund claim to make it possible to contest its liability in the U.S. District Court or the U.S. Court of Federal Claims.

If Employer Y does not submit a signed Form 2504 by January 31, 2011, but pays the amount due prior to receiving notice and demand, Employer Y has not made an interest-free adjustment, and Employer Y will owe interest accrued from the due date of the return for which the underpayment was made (*i.e.*, from January 31, 2009).

Situation 10: In 2011, in the course of an employment tax examination, IRS determines that Employer Z misclassified some of its employees as independent contractors for the first quarter of 2009. Employer Z does not agree with the examiner's determination and exercises its appeal rights. No agreement is reached in Appeals, and Employer Z does not sign Form 2504-WC; however, Employer Z makes a cash

bond deposit to stop the accrual of interest. A Notice of Determination is issued, and Employer Z subsequently files a petition with the U.S. Tax Court.

The error is treated as having been ascertained at the time Employer Z makes the cash bond deposit. Because Employer Z made a cash bond deposit prior to receiving the Notice of Determination, it is entitled to an interest-free adjustment.

EFFECT ON OTHER REVENUE RULING(S)

Rev. Rul. 75-464 is obsolete.

DRAFTING INFORMATION

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The principal author of this revenue ruling is Ligeia M. Donis of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt & Government Entities). For further information regarding this revenue ruling, contact Ligeia M. Donis at (202) 622-0047 (not a toll-free call).