



DEPARTMENT OF THE TREASURY

Treasury Decision 9645

Rules Relating to Additional Medicare Tax

T.D. 9645; 2013 IRB LEXIS 643

November 26, 2013

[*1]

APPLICABLE SECTIONS:

26 CFR Parts 1 and 31

REFERENCE: RIN 1545-BK54

TEXT:

AGENCY:

Internal Revenue Service (IRS), Treasury.

ACTION:

Final regulations.

SUMMARY:

This document contains final regulations relating to Additional Hospital Insurance Tax on income above threshold amounts ("Additional Medicare Tax"), as added by the Affordable Care Act. Specifically, these final regulations provide guidance for employers and individuals relating to the implementation of Additional Medicare Tax, including the requirement to withhold Additional Medicare Tax on certain wages and compensation, the requirement to file a return reporting Additional Medicare Tax, the employer process for adjusting underpayments and overpayments of Additional Medicare Tax, and the employer and individual processes for filing a claim for refund for an overpayment of Additional Medicare Tax.

DATES:

Effective date: These regulations are effective on November 29, 2013.

Applicability date: For dates of applicability, see §§1.1401-1 (e), 31.3101-2 (d), 31.3102-1 (f), 31.3102-4 (d), 31.3202-1 (h), 31.6011 (a)-1 (h), 31.6011 (a)-2 (e), 31.6205-1 (e), 31.6402 (a)-2 (c), 31.6413 (a)-1 (c), and 31.6413 (a)-2 (e).

FOR FUTURE INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION

Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3507 (d)) under control number 1545-2097. The collection of information in these regulations is in §§31.6011 (a)-1, 31.6011 (a)-2, 31.6205-1, 31.6402 (a)-2, 31.6413 (a)-1, and 31.6413 (a)-2. This information is required by the IRS to verify compliance with return requirements under section 6011, employment tax adjustments under sections 6205 and 6413, and claims for refund of overpayments under section 6402. This information will be used to determine whether the amount of tax has been reported and calculated correctly. The likely respondents are employers and individuals.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid 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 [*3] of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

These final regulations are issued in connection with the Additional Hospital Insurance Tax on income above threshold amounts ("Additional Medicare Tax"), as added by section 9015 of the Patient Protection and Affordable Care Act (PPACA), Public Law 111-148 (124 Stat. 119 (2010)), and as amended by section 10906 of the PPACA and section 1402 (b) of the Health Care and Education Reconciliation Act of 2010, Public Law 111-152 (124 Stat. 1029 (2010)) (collectively, the "Affordable Care Act"). The final regulations include amendments to §1.1401-1 of the *Income Tax Regulations*, and §§31.3101-2, 31.3102-1, 31.3102-4, 31.3202-1, 31.6011 (a)-1, 31.6011 (a)-2, 31.6205-1, 31.6402 (a)-2, 31.6413 (a)-1, and 31.6413 (a)-2 of the *Employment Tax Regulations*. The final regulations provide guidance for employers and individuals relating to the implementation of Additional Medicare Tax, including the requirement to withhold Additional Medicare Tax on certain wages and compensation, the requirement to file a return reporting Additional Medicare Tax, the employer process [*4] for adjusting underpayments and overpayments of Additional Medicare Tax, and the employer and individual processes for filing a claim for refund of Additional Medicare Tax.

A notice of proposed rulemaking (REG-130074-11) was published in the *Federal Register* (77 FR 72268) on December 5, 2012. A public hearing was scheduled for April 4, 2013. The IRS did not receive any requests to testify at the public hearing, and therefore the public hearing was cancelled. Comments responding to the proposed regulations were received. All comments were considered and are available for public inspection and copying at <http://www.regulations.gov> or upon request. After consideration of all the comments, the proposed regulations are adopted as amended by this Treasury decision. The public comments and revisions are discussed in this preamble.

Summary of Comments and Explanation of Revisions

The IRS received five comments in response to the proposed regulations. One commenter expressed concern that the 2013 Old Age, Survivors and Disability Insurance (OASDI) tax rate for employees of 6.2 percent was applied to wages for services performed in the last two weeks of 2012, when the OASDI tax rate for employees [*5] was 4.2 percent. This comment is outside the scope of these regulations.

Another commenter requested that the comment period for the proposed regulations be extended by 60 days. The Administrative Procedure Act does not set a time frame for a comment period on regulations. However, Executive Order (E.O.) 12866 provides that generally a comment period should be no less than 60 days. The public was given 90 days to comment on the proposed regulations, which exceeds the period required by E.O. 12866. The IRS received only five comments during the 90-day comment period, no comments were received after the 90-day comment period expired, and there is no indication that more comments would have been received if the comment period had been extended. Therefore, an extension of the comment period beyond the 90 days provided in the proposed regulations was not warranted.

One commenter noted that because Additional Medicare Tax will involve new recordkeeping and withholding procedures for employers and certain employees, there may be inadvertent errors involved with implementing the tax, especially in the first year of implementation. Therefore, the commenter requested that the IRS grant employers [*6] flexibility in correcting overpayments and underpayments of Additional Medicare Tax by allowing additional time to

correct errors, allowing corrections for a certain period without penalty, and granting an exemption from penalties for de minimis errors.

No such changes were made in these final regulations. The regulations under §§31.6205-1 (a) and 31.6413 (a)-2 already allow employers flexibility in making interest-free adjustments of underpayments and overpayments and, to the extent an employer discovers an error in withholding, paying, or reporting Additional Medicare Tax, the regulations provide procedures for correcting that error on an adjusted employer return generally without imposition of interest. Further, under sections 6651 and 6656, penalties for failure to pay or deposit Additional Medicare Tax do not apply to the extent the failure is due to reasonable cause and not willful neglect.

To correct an overpayment of income tax or Additional Medicare Tax, an employer may make an adjustment only if it repays or reimburses the employee prior to the end of the calendar year in which the wages or compensation was paid. Similarly, to correct an underpayment of income tax or Additional [*7] Medicare Tax, an employer may make an interest-free adjustment only if the error is ascertained within the calendar year in which the wages or compensation was paid. Because employees will report Additional Medicare Tax on Form 1040, "U.S. Individual Tax Return," allowing employers time beyond the end of the calendar year in which the error was made to correct overpayments and underpayments would create complexity and confusion for individuals filing individual income tax returns and would adversely affect tax administration. Accordingly, these final regulations do not include additional procedures specifically for correcting Additional Medicare Tax errors, but rather generally rely on existing procedures for correcting income tax withholding errors.

One commenter questioned how employers should treat repayment by an employee of wage payments received by the employee in a prior year for Additional Medicare Tax purposes (for example, sign on bonuses paid to employees that are subject to repayment if certain conditions are not satisfied). Employers cannot make an adjustment or file a claim for refund for Additional Medicare Tax withholding when there is a repayment of wages received by [*8] an employee in a prior year because the employee determines liability for Additional Medicare Tax on the employee's income tax return for the prior year; however, the employee may be able to file an amended return claiming a refund of the Additional Medicare Tax.

More specifically, under current employment tax adjustment procedures, if the repayment occurs within the period of limitations for refund, the employer can repay or reimburse the social security and Medicare taxes withheld from the wage payment to the employee and file a refund claim, or make an interest-free adjustment, for the social security and Medicare tax overwithholding. However, under §31.6413 (a)-1 (a) (2) (ii) of these regulations, an employer may adjust overpaid Additional Medicare Tax withheld from employees only in the calendar year in which the wages or compensation are paid, and only if the employer repays or reimburses the employee the amount of the overcollection prior to the end of the calendar year. Further, under §31.6402 (a)-2 (a) (1) (iii) of these regulations, employers may claim a refund of overpaid Additional Medicare Tax only if the employer did not deduct or withhold the overpaid Additional Medicare [*9] Tax from the employee's wages or compensation. Accordingly, these regulations at §31.6402 (a)-2 (b) (3) (ii) provide that, in the case of an overpayment of Additional Medicare Tax for a year for which an individual has filed Form 1040, a claim for refund should be made by the individual on Form 1040X, "Amended U.S. Individual Income Tax Return." Since a wage repayment reduces the wages subject to Additional Medicare Tax for the period during which the wages were originally paid, the employee is entitled to file an amended return (on Form 1040X) to recover Additional Medicare Tax with respect to the repaid wages. 1

Finally, one commenter expressed concern about the impact of the regulations on the small business and individual community. The commenter disagreed with the conclusion in the proposed regulations that no regulatory assessment was required under E.O. 12866 because the rulemaking is not a significant regulatory action. The commenter also disagreed with the conclusion in the proposed regulations that a regulatory flexibility analysis was not required under the Regulatory Flexibility Act (5 U.S.C. 601) (RFA) because the collection of information contained in the proposed regulations [*10] will not have a significant economic impact on a substantial number of small entities.

Section 3 (a) (4) (B) of E.O. 12866 requires agencies to prepare a regulatory assessment for "significant regulatory actions" as defined in section 3 (f) of E.O. 12866. As part of its definition of significant regulatory actions, section 3 (f) includes economically significant regulations, that is, regulatory actions that are likely to have an annual effect on the economy of \$100 million or more. The commenter contends that the skills equivalent to a junior associate accountant would be needed to comply with the regulations. The commentator contends that, assuming a junior associate reasonably bills for services at the rate of \$100 per hour, and using the estimated annual reporting or recordkeeping burden for these regulations of 1,900,000 hours, the estimated annual effect on the economy is \$190 million.

The Treasury Department and the IRS do not agree with the commenter's assertion that all individuals and entities subject to these regulations will require the services of an accountant. Many employers utilize payroll service providers that are equipped to comply with these regulations and that will [*11] include Additional Medicare Tax as part of the payroll services they provide. Other employers and individuals will be able to comply with these regulations without assistance by following the instructions that accompany tax forms and by utilizing other information provided by the IRS. Therefore, neither the proposed regulations, nor these final regulations, are significant regulatory actions within the meaning of E.O. 12866, and a regulatory assessment is not required.

The RFA requires agencies to prepare a regulatory flexibility analysis addressing the impact of proposed or final regulations on small entities. The proposed regulations certified that a regulatory flexibility analysis is not required because the collection of information contained in the regulations will not have a significant economic impact on a substantial number of small entities. The commenter challenged this certification.

A "collection of information" is defined in the RFA as a requirement that a small entity report information to the Federal Government, or maintain specified records, regardless of whether the information in those records is reported to the Federal Government. The regulations contain a collection [*12] of information requirement.

The RFA does not define "substantial number." In general, for purposes of the RFA, regulations with a broad effect on business are presumed to have an impact on a substantial number of small entities. Since these regulations have a broad effect on business, these regulations will have an impact on a substantial number of small entities.

The RFA also does not define "significant economic impact." As stated in connection with the discussion of E.O. 12866, the commenter assumed a billing rate of \$100 per hour, and multiplied that rate by the estimated aggregate annual PRA reporting or recordkeeping burden for these regulations of 1,900,000 hours, to estimate the annual effect on the economy to be \$190 million. Based on this calculation, the commenter concluded that the collection of information had a significant economic impact on a substantial number of small entities.

The commenter's approach is not an appropriate measure of the economic impact of these regulations on small entities. The 1,900,000 hours estimated to be the aggregate annual PRA burden for these regulations represents an estimated 1,900,000 respondents with an estimated average annual burden per [*13] respondent of 1 hour. The number of respondents comprises *all* respondents affected by these regulations, including individuals as well as entities. It is not an estimated number of affected entities only. The IRS estimates that approximately 325,000 entities report Medicare wages to one or more individuals in excess of the \$200,000 Additional Medicare Tax withholding threshold. Thus, approximately 325,000 entities, encompassing both large and small entities, are affected by these regulations. Therefore, the reporting or recordkeeping burden of these regulations on small entities is estimated to be significantly less than 1,900,000 hours. The commenter's use of this number to assess the annual economic impact of these regulations on small entities is incorrect.

In addition, to the extent that there is a significant economic impact, the economic impact principally results directly from the underlying statutes. For example, the statute imposing Additional Medicare Tax requires the employer to withhold the tax from wages paid to the employee. Other provisions of the Internal Revenue Code (Code) require the employer to report and pay the correct amount of withheld tax to the government. [*14] Similarly, the collection of information required with regard to interest-free adjustments and claims for refund apply existing statutory rules to Additional Medicare Tax. The regulations implement the underlying statutes and provide guidance for employers and individuals relating to the requirement to file a return reporting Additional Medicare Tax, the employer process for making adjustments of underpayments and overpayments of Additional Medicare Tax, and the employer and individual processes for filing a claim for refund for an overpayment of Additional Medicare Tax. As a result, the estimated annual PRA burden per taxpayer for these regulations is very low. Consequently, the economic impact of these regulations is not expected to be significant, and neither the proposed regulations nor these final regulations will have a significant economic impact on a substantial number of small entities within the meaning of the RFA. Therefore a regulatory flexibility analysis is not required.

The proposed regulations provided that if the employer deducts less than the correct amount of Additional Medicare Tax, it is nevertheless liable for the correct amount of tax that it was required to withhold, [*15] unless and until the employee pays the tax. Consistent with *section 3102 (f) (3) of the Code*, the proposed regulations also provided that if an employee subsequently pays the tax that the employer failed to deduct, the tax will not be collected from the employer. These final regulations further provide that an employer is not relieved of its liability for payment of any Additional Medicare Tax required to be withheld unless it can show that the tax has been paid by the employee. *Section*

3102 (f) (3) contains language similar to *section 3402 (d) of the Code*, and this provision of the final regulations is consistent with the approach used in the regulations under *section 3402 (d)*. Employers will use Form 4669, "Statement of Payments Received," and Form 4670, "Request for Relief from Payment of Income Tax Withholding," the same forms used for requesting federal income tax withholding relief, to request relief from paying Additional Medicare Tax that has already been paid by the employee.

The final regulations also amend the proposed regulations to comply with formatting requirements of the Office of the Federal Register.

Special Analyses

It has been determined that this Treasury decision [*16] is not a significant regulatory action as defined in E.O. 12866, and supplemented by E.O. 13653. The regulations implement the underlying statutes and the economic impact is principally a result of the underlying statutes, rather than the regulations. 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.

Sections 603 and 604 of the RFA (5 U.S.C. chapter 6) generally require agencies to prepare a regulatory flexibility analysis addressing the impact of proposed and final regulations, respectively, on small entities. Section 605 (b) of the RFA, however, provides that sections 603 and 604 shall not apply if the head of the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. For the reasons discussed in the Summary of Comments section of the preamble, as well as the reasons set forth in the succeeding paragraphs, it is hereby certified that the collection of information requirements contained in these regulations will not have a significant economic impact on a substantial number of [*17] small entities.

The regulations under sections 6205, 6402, and 6413 affect all taxpayers that file employment tax returns or claims for refund of employment taxes. Many small entities fall into this category. Therefore, it has been determined that these regulations will affect a substantial number of small entities. It also has been determined, however, that the economic impact on entities affected by these regulations will not be significant.

As stated above, the regulations implement the underlying statutes and the economic impact is principally a result of the underlying statutes, rather than the regulations. The regulations require taxpayers that file employment tax returns and that make interest-free adjustments to the returns for underpayments or overpayments of Additional Medicare Tax, or that file claims for refund of an overpayment of Additional Medicare Tax, to provide an explanation setting forth the basis for the correction or the claim in detail, designating the return period in which the error was ascertained and the return period being corrected, and setting forth such other information as may be required by the instructions to the form. In addition, for adjustments of [*18] overpayments of Additional Medicare Tax, employers must obtain and retain the written receipt of the employee showing the date and amount of the repayment to the employee or retain evidence of reimbursement. The requirement to collect this information is not newly imposed by these regulations. The regulations merely apply procedures from existing regulations, with appropriate modifications, to corrections of Additional Medicare Tax.

It is estimated that the annual PRA burden per taxpayer to comply with the collection of information requirements in these regulations is one hour. This minimal burden does not constitute a significant economic impact. Accordingly, a regulatory flexibility analysis is not required.

Pursuant to *section 7805 (f) of the Code*, the proposed regulations preceding these regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of the regulations is Andrew Holubeck of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and the Treasury Department participated [*19] in their development.

List of Subjects

26 CFR Part 1

Income Taxes, Reporting and recordkeeping requirements.

26 CFR Part 31

Employment taxes, Income taxes, Penalties, Pensions, Railroad retirement, Reporting and recordkeeping requirements, Social Security, Unemployment compensation.

Adoption of Amendments to the Regulations

Accordingly, *26 CFR parts 1 and 31* are 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 1.1401-1* is amended by revising paragraph (b) and adding paragraphs (d) and (e) to read as follows:

§1.1401-1 Tax on self-employment income.

* * *

(b) The rates of tax on self-employment income are as follows (these regulations do not reflect off-Code revisions to the following rates):

(1) For Old-age, Survivors, and Disability Insurance:

Taxable year	Percent
Beginning after December 31, 1983 and before January 1, 1988	11.40
Beginning after December 31, 1987 and before January 1, 1990	12.12
Beginning after December 31, 1989	12.40

(2) (i) For Hospital Insurance:

Taxable year	Percent
Beginning after December 31, 1983 and before January 1, 1985	2.60
Beginning after December 31, 1984 and before January 1, 1986	2.70
Beginning after December 31, 1985	2.90

(ii) [*20] For Additional Medicare Tax:

Taxable year	Percent
Beginning after December 31, 2012	0.9

* * *

(d) Special rules regarding Additional Medicare Tax. (1) General rule. An individual is liable for Additional Medicare Tax to the extent that his or her self-employment income exceeds the following threshold amounts.

Filing Status	Threshold
Married individual filing a joint return	\$250,000
Married individual filing a separate return	\$125,000
Any other case	\$200,000

Note: These threshold amounts are specified under section 1401 (b) (2) (A).

(2) Coordination with Federal Insurance Contributions Act. (i) General rule. Under section 1401 (b) (2) (B), the applicable threshold specified under section 1401 (b) (2) (A) is reduced (but not below zero) by the amount of wages (as defined in section 3121 (a)) taken into account in determining Additional Medicare Tax under section 3101 (b) (2) with respect to the taxpayer. This rule does not apply to Railroad Retirement Tax Act (RRTA) compensation (as defined in section 3231 (e)).

(ii) Examples. The rules provided in paragraph (d) (2) (i) of this section are illustrated by the following examples:

Example 1. A, a single filer, has \$130,000 in self-employment income and [*21] \$0 in wages. A is not liable to pay Additional Medicare Tax.

Example 2. B, a single filer, has \$220,000 in self-employment income and \$0 in wages. B is liable to pay Additional Medicare Tax on \$20,000 (\$220,000 in self-employment income minus the threshold of \$200,000).

Example 3. C, a single filer, has \$145,000 in self-employment income and \$130,000 in wages. C's wages are not in excess of \$200,000 so C's employer did not withhold Additional Medicare Tax. However, the \$130,000 of wages reduces the self-employment income threshold to \$70,000 (\$200,000 threshold minus the \$130,000 of wages). C is liable to pay Additional Medicare Tax on \$75,000 of self-employment income (\$145,000 in self-employment income minus the reduced threshold of \$70,000).

Example 4. E, who is married and files a joint return, has \$140,000 in self-employment income. F, E's spouse, has \$130,000 in wages. F's wages are not in excess of \$200,000 so F's employer did not withhold Additional Medicare Tax. However, the \$130,000 of F's wages reduces E's self-employment income threshold to \$120,000 (\$250,000 threshold minus the \$130,000 of wages). E and F are liable to pay Additional Medicare Tax on \$20,000 of E's self-employment [*22] income (\$140,000 in self-employment income minus the reduced threshold of \$120,000).

Example 5. D, who is married and files married filing separately, has \$150,000 in self-employment income and \$200,000 in wages. D's wages are not in excess of \$200,000 so D's employer did not withhold Additional Medicare Tax. However, the \$200,000 of wages reduces the self-employment income threshold to \$0 (\$125,000 threshold minus the \$200,000 of wages). D is liable to pay Additional Medicare Tax on \$75,000 of wages (\$200,000 in wages minus the \$125,000 threshold for a married filing separately return) and on \$150,000 of self-employment income (\$150,000 in self-employment income minus the reduced threshold of \$0).

(e) Effective/applicability date. Paragraphs (b) and (d) of this section apply to quarters beginning on or after November 29, 2013.

PART 31--EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT THE SOURCE

Par. 3. The authority citation for part 31 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 4. Revise §31.3101-2 to read as follows:

§31.3101-2 Rates and computation of employee tax.

(a) Old-Age, Survivors, and Disability Insurance. The rates of employee tax for Old-Age, Survivors, [*23] and Disability Insurance (OASDI) with respect to wages received in calendar years after 1983 are as follows (these regulations do not reflect off-Code revisions to the following rates):

Calendar year	Percent
1984, 1985, 1986, or 1987	5.7
1988 or 1989	6.06
1990 and subsequent years	6.2

(b) (1) Hospital Insurance. The rates of employee tax for Hospital Insurance (HI) with respect to wages received in calendar years after 1973 are as follows:

Calendar year	Percent
1974, 1975, 1976, or 1977	0.90
1978	1.00
1979 or 1980	1.05
1981, 1982, 1983, or 1984	1.30
1985	1.35
1986 and subsequent years	1.45

(2) Additional Medicare Tax. (i) The rate of Additional Medicare Tax with respect to wages received in taxable years beginning after December 31, 2012, is as follows:

Taxable year	Percent
Beginning after December 31, 2012	0.9

(ii) Individuals are liable for Additional Medicare Tax with respect to wages received in taxable years beginning after December 31, 2012, which are in excess of:

Filing Status	Threshold
Married individual filing a joint return	\$250,000
Married individual filing a separate return	\$125,000
Any other case	\$200,000

(c) Computation of employee tax. The employee tax is computed by applying to the wages received by the employee the rates in effect at the time such wages are received. [*24]

Example. In 1989, A performed services for X which constituted employment (see §31.3121 (b)-2). In 1990 A receives from X \$1,000 as remuneration for such services. The tax is payable at the 6.2 percent OASDI rate and the 1.45 percent HI rate in effect for the calendar year 1990 (the year in which the wages are received) and not at the 6.06 percent OASDI rate and the 1.45 percent HI rate which were in effect for the calendar year 1989 (the year in which the services were performed).

(d) Effective/applicability date. Paragraphs (a) (b), and (c) of this section apply to quarters beginning on or after November 29, 2013.

Par. 5. Section 31.3102-1 is amended by adding a sentence at the end of paragraph (a) and adding paragraph (f) to read as follows:

§31.3102-1 Collection of, and liability for, employee tax; in general.

(a) *** For special rules relating to Additional Medicare Tax imposed under section 3101 (b) (2), see §31.3102-4.

* * *

(f) Effective/applicability date. Paragraph (a) of this section applies to quarters beginning on or after November 29, 2013.

Par. 6. Section 31.3102-4 is added to read as follows:

§31.3102-4 Special [*25] rules regarding Additional Medicare Tax.

(a) Collection of tax from employee. An employer is required to collect from each of its employees the tax imposed by section 3101 (b) (2) (Additional Medicare Tax) with respect to wages for employment performed for the employer by the employee only to the extent the employer pays wages to the employee in excess of \$200,000 in a calendar year. This rule applies regardless of the employee's filing status or other income. Thus, the employer disregards any amount of wages or Railroad Retirement Tax Act (RRTA) compensation paid to the employee's spouse. The employer also disregards any RRTA compensation paid by the employer to the employee or any wages or RRTA compensation paid to the employee by another employer.

Example. H, who is married and files a joint return, receives \$100,000 in wages from his employer for the calendar year. I, H's spouse, receives \$300,000 in wages from her employer for the same calendar year. H's wages are not in excess of \$200,000, so H's employer does not withhold Additional Medicare Tax. I's employer is required to collect Additional Medicare Tax only with respect to wages it pays which are in excess of the \$200,000 threshold [*26] (that is, \$100,000) for the calendar year.

(b) Collection of amounts not withheld. To the extent the employer does not collect Additional Medicare Tax imposed on the employee by section 3101 (b) (2), the employee is liable to pay the tax.

Example. J, who is married and files a joint return, receives \$190,000 in wages from his employer for the calendar year. K, J's spouse, receives \$150,000 in wages from her employer for the same calendar year. Neither J's nor K's wages are in excess of \$200,000, so neither J's nor K's employers are required to withhold Additional Medicare Tax. J and K are liable to pay Additional Medicare Tax on \$90,000 (\$340,000 minus the \$250,000 threshold for a joint return).

(c) Employer's liability for tax. If the employer deducts less than the correct amount of Additional Medicare Tax, or if it fails to deduct any part of Additional Medicare Tax, it is nevertheless liable for the correct amount of tax that it was required to withhold, unless and until the employee pays the tax. If an employee subsequently pays the tax that the employer failed to deduct, the tax will not be collected from the employer. The employer will not be relieved of its liability for payment [*27] of the tax required to be withheld unless it can show that the tax under section 3101 (b) (2) has been paid. The employer, however, will remain subject to any applicable penalties or additions to tax resulting from the failure to withhold as required.

(d) Effective/applicability date. This section applies to quarters beginning on or after November 29, 2013.

Par. 7. Section 31.3202-1 is amended by adding paragraphs (g) and (h) to read as follows:

§31.3202-1 Collection of, and liability for, employee tax.

* * *

(g) Special rules regarding Additional Medicare Tax. (1) An employer is required to collect from each of its employees the portion of the tax imposed by section 3201 (a) (as calculated under section 3101 (b) (2)) (Additional Medicare Tax) with respect to compensation for employment performed for the employer by the employee only to the extent the employer pays compensation to the employee in excess of \$200,000 in a calendar year. This rule applies regardless of the employee's filing status or other income. Thus, the employer disregards any amount of compensation or Federal Insurance Contributions Act (FICA) wages paid to the employee's spouse. The employer also disregards any FICA [*28] wages paid by the employer to the employee or any compensation or FICA wages paid to the employee by another employer.

Example. A, who is married and files a joint return, receives \$100,000 in compensation from her employer for the calendar year. B, A's spouse, receives \$300,000 in compensation from his employer for the same calendar year. A's compensation is not in excess of \$200,000, so A's employer does not withhold Additional Medicare Tax. B's employer is required to collect Additional Medicare Tax only with respect to compensation it pays to B that is in excess of the \$200,000 threshold (that is, \$100,000) for the calendar year.

(2) To the extent the employer does not collect Additional Medicare Tax imposed on the employee by section 3201 (a) (as calculated under section 3101 (b) (2)), the employee is liable to pay the tax.

Example. C, who is married and files a joint return, receives \$190,000 in compensation from her employer for the calendar year. D, C's spouse, receives \$150,000 in compensation from his employer for the same calendar year. Neither C's nor D's compensation is in excess of \$200,000, so neither C's nor D's employers are required to withhold Additional Medicare Tax. [*29] C and D are liable to pay Additional Medicare Tax on \$90,000 (\$340,000 minus the \$250,000 threshold for a joint return).

(3) If the employer deducts less than the correct amount of Additional Medicare Tax, or if it fails to deduct any part of Additional Medicare Tax, it is nevertheless liable for the correct amount of tax that it was required to withhold, unless and until the employee pays the tax. If an employee subsequently pays the tax that the employer failed to deduct, the tax will not be collected from the employer. The employer will not be relieved of its liability for payment of the tax required to be withheld unless it can show that the tax under section 3201 (a) (as calculated under section 3101 (b) (2)) has been paid. The employer, however, will remain subject to any applicable penalties or additions to tax resulting from the failure to withhold as required.

(h) Effective/applicability date. Paragraph (g) of this section applies to quarters beginning on or after November 29, 2013.

Par. 8. *Section 31.6011 (a)-1* is amended by:

1. Designating paragraph (g) as paragraph (h) and adding a sentence to the end.
2. Adding new paragraph (g).

The additions read as follows:

§31.6011 (a)-1 Returns [*30] under Federal Insurance Contributions Act.

* * *

(g) Returns by employees in respect of Additional Medicare Tax. An employee who is paid wages, as defined in sections 3121 (a), subject to the tax under section 3101 (b) (2) (Additional Medicare Tax), must make a return for the taxable year in respect of such tax. The return shall be made on Form 1040, "U.S. Individual Income Tax Return." The form to be used by residents of the U.S. Virgin Islands, Guam, American Samoa, or the Northern Mariana Islands is Form 1040-SS, "U.S. Self-Employment Tax Return (Including Additional Child Tax Credit for Bona Fide Residents of Puerto Rico)." The form to be used by residents of Puerto Rico is either Form 1040-SS or Form 1040-PR, "Planilla para la Declaración de la Contribución Federal sobre el Trabajo por Cuenta Propia (Incluyendo el Crédito Tributario Adicional por Hijos para Residentes Bona Fide de Puerto Rico)."

(h) * * * Paragraph (g) of this section applies to taxable years beginning on or after November 29, 2013.

Par. 9. *Section 31.6011 (a)-2* is amended by adding paragraphs (d) and (e) to read as follows:

§31.6011 (a)-2 Returns under Railroad Retirement Tax Act.

* * *

(d) Returns by employees and [*31] employee representatives in respect of Additional Medicare Tax. An employee or employee representative who is paid compensation, as defined in section 3231 (e), subject to the tax under sections 3201 (a) (as calculated under section 3101 (b) (2)) or section 3211 (a) (as calculated under section 3101 (b) (2)) (Additional Medicare Tax), must make a return for the taxable year in respect of such tax. The return shall be made on Form 1040, "U.S. Individual Income Tax Return." The form to be used by residents of the U.S. Virgin Islands, Guam, American Samoa, or the Northern Mariana Islands is Form 1040-SS, "U.S. Self-Employment Tax Return (Including Additional Child Tax Credit for Bona Fide Residents of Puerto Rico)." The form to be used by residents of Puerto Rico is either Form 1040-SS or Form 1040-PR, "Planilla para la Declaración de la Contribución Federal sobre el Trabajo por Cuenta Propia (Incluyendo el Crédito Tributario Adicional por Hijos para Residentes Bona Fide de Puerto Rico)."

(e) Effective/applicability date. Paragraph (d) of this section applies to taxable years beginning on or after November 29, 2013.

Par. 10. *Section 31.6205-1* is amended by:

1. Revising the first sentence [*32] in paragraph (b) (2) (i).
2. Adding a sentence after the first sentence in paragraphs (b) (2) (ii) and (iii).
3. Adding two sentences after the sixth sentence in paragraph (b) (3).
4. Adding paragraphs (b) (4) and (e).
5. Revising paragraph (d) (1).

The revisions and additions read as follows:

§31.6205-1 Adjustments of underpayments.

* * *

(b) * * *

(2) * * * (i) If an employer files a return on which FICA tax or RRTA tax is required to be reported, and reports on the return less than the correct amount of employee or employer FICA or RRTA tax with respect to a payment of wages or compensation, and if the employer ascertains the error after filing the return, the employer shall correct the error through an interest-free adjustment as provided in this section, except as provided in paragraph (b) (4) of this section for Additional Medicare Tax. * * *

(ii) * * * However, if the employer also reported less than the correct amount of Additional Medicare Tax, the employer shall correct the underwithheld and underpaid Additional Medicare Tax in accordance with paragraph (b) (4) of this section. * * *

(iii) * * * However, if the employer also reported less than the correct amount of Additional Medicare Tax, [*33] the employer shall correct the underwithheld and underpaid Additional Medicare Tax in accordance with paragraph (b) (4) of this section. * * *

(3) * * * However, an adjustment of Additional Medicare Tax required to be withheld under section 3101 (b) (2) or section 3201 (a) may only be reported pursuant to this section if the error is ascertained within the same calendar year that the wages or compensation were paid to the employee, or if section 3509 applies to determine the amount of the underpayment, or if the adjustment is reported on a Form 2504 or Form 2504-WC. See paragraph (b) (4) of this section.
* * *

(4) Additional Medicare Tax. If an employer files a return on which FICA tax or RRTA tax is required to be reported, and reports on the return less than the correct amount of Additional Medicare Tax required to be withheld with respect to a payment of wages or compensation, and if the employer ascertains the error after filing the return, the employer shall correct the error through an interest-free adjustment as provided in this section. An adjustment of Additional Medicare Tax may only be reported pursuant to this paragraph (b) (4) if the error is ascertained within the same [*34] calendar year that the wages or compensation were paid to the employee, unless the underpayment is attributable to an administrative error (that is, an error involving the inaccurate reporting of the amount actually withheld), section 3509 applies to determine the amount of the underpayment, or the adjustment is reported on a Form 2504 or Form 2504-WC. The employer shall adjust the underpayment of Additional Medicare Tax by reporting the additional amount due on an adjusted return for the return period in which the wages or compensation were paid, accompanied by a detailed explanation of the amount being reported on the adjusted return and any other information as may be required by this section and by the instructions relating to the adjusted return. The reporting of the underpayment on an adjusted return constitutes an adjustment within the meaning of this section only if the adjusted return is filed within the period of limitations for assessment for the return period being corrected, and by the due date for filing the return for the return period in which the error is ascertained. For purposes of the preceding sentence, the due date for filing the adjusted return is determined [*35] by reference to the return being corrected, without regard to the employer's current filing requirements. For example, an employer with a current annual filing requirement who is correcting an error on a previously filed quarterly return must file the adjusted return by the due date for filing a quarterly return for the quarter in which the error is ascertained. The amount of the underpayment adjusted in accordance with this section must be paid to the IRS by the time the adjusted return is filed. If an adjustment is reported pursuant to this section, but the amount of the adjustment is not paid when due, interest accrues from that date (see section 6601).

* * *

(d) * * *

(1) * * * If an employer collects less than the correct amount of employee FICA or RRTA tax from an employee with respect to a payment of wages or compensation, the employer must collect the amount of the undercollection by deducting the amount from remuneration of the employee, if any, paid after the employer ascertains the error. If an employer collects less than the correct amount of Additional Medicare Tax required to be withheld under section 3101 (b) (2) or section 3201 (a), the employer must collect the amount [*36] of the undercollection on or before the last day of the calendar year by deducting the amount from remuneration of the employee, if any, paid after the employer ascertains the error. Such deductions may be made even though the remuneration, for any reason, does not constitute wages or compensation. The correct amount of employee tax must be reported and paid, as provided in paragraph (b) of this section, whether or not the undercollection is corrected by a deduction made as prescribed in this paragraph (d) (1), and even if the deduction is made after the return on which the employee tax must be reported is due. If such a deduction is not made, the obligation of the employee to the employer with respect to the undercollection is a matter for settlement between the employee and the employer. If an employer makes an erroneous collection of employee tax from two or more of its employees, a separate settlement must be made with respect to each employee. An overcollection of employee tax from one employee may not be used to offset an undercollection of such tax from another employee. For provisions relating to the employer's liability for the tax, whether or not it collects the tax from [*37] the employee, see §§31.3102-1 (d), 31.3102-4 (c), and 31.3202-1. This paragraph (d) (1) does not apply if section 3509 applies to determine the employer's liability.

* * *

(e) Effective/applicability date. Paragraphs (b) and (d) of this section apply to adjusted returns filed on or after November 29, 2013. Par. 11. *Section 31.6402 (a)-2* is amended by:

1. Revising paragraph (a) (1) (i) and the first sentence in paragraph (a) (1) (ii).
2. Redesignating paragraphs (a) (1) (iii) through (vi), as paragraphs (a) (1) (iv) through (vii), respectively.
3. Revising newly-redesignated paragraphs (a) (1) (iv) and (a) (1) (v).
4. Adding new paragraph (a) (1) (iii).
5. Revising paragraph (b).
6. Adding paragraph (c).

The revisions and additions read as follows:

§31.6402 (a)-2 Credit or refund of tax under Federal Insurance Contributions Act or Railroad Retirement Tax Act.

(a) * * *

(1) * * *

(i) Except as provided in paragraph (a) (1) (iii) of this section, any person may file a claim for credit or refund for an overpayment (except to the extent that the overpayment must be credited pursuant to §31.3503-1) if the person paid to the Internal Revenue Service (IRS) more than the correct amount of employee Federal Insurance [*38] Contributions Act (FICA) tax under section 3101 or employer FICA tax under section 3111, employee Railroad Retirement Tax Act (RRTA) tax under section 3201, employee representative RRTA tax under section 3211, or employer RRTA tax under section 3221, or interest, addition to the tax, additional amount, or penalty with respect to any such tax.

(ii) Except as provided in paragraph (a) (1) (iii) of this section, the claim for credit or refund must be made in the manner and subject to the conditions stated in this section. * * *

(iii) Additional Medicare Tax. No refund or credit to the employer will be allowed for the amount of any overpayment of Additional Medicare Tax imposed under section 3101 (b) (2) or section 3201 (a) (as calculated under section 3101 (b) (2)), which the employer deducted or withheld from an employee.

(iv) For adjustments without interest of overpayments of FICA or RRTA taxes, including Additional Medicare Tax, see §31.6413 (a)-2. (v) For corrections of FICA and RRTA tax paid under the wrong chapter, see §31.6205-1 (b) (2) (ii) and (b) (2) (iii) and §31.3503-1.

* * *

(b) Claim by employee-- (1) In general. Except as provided in (b) (3) of this section, if more than the [*39] correct amount of employee tax under section 3101 or section 3201 is collected by an employer from an employee and paid to the IRS, the employee may file a claim for refund of the overpayment if--

(i) The employee does not receive repayment or reimbursement in any manner from the employer and does not authorize the employer to file a claim and receive refund or credit,

(ii) The overcollection cannot be corrected under §31.3503-1, and

(iii) In the case of overpaid employee social security tax due to having received wages or compensation from multiple employers, the employee has not taken the overcollection into account in claiming a credit against, or refund of, his or her income tax, or if so, such claim has been rejected. See §31.6413 (c)-1. (2) Statements supporting employee's claim. (i) Except as provided in (b) (3) of this section, each employee who makes a claim under paragraph (b) (1) of this section shall submit with such claim a statement setting forth (a) the extent, if any, to which the employer has repaid or reimbursed the employee in any manner for the overcollection, and (b) the amount, if any, of credit or refund of such overpayment claimed by the employer or authorized [*40] by the employee to be claimed by the

employer. The employee shall obtain such statement, if possible, from the employer, who should include in such statement the fact that it is made in support of a claim against the United States to be filed by the employee for refund of employee tax paid by such employer to the IRS. If the employer's statement is not submitted with the claim, the employee shall make the statement to the best of his or her knowledge and belief, and shall include therein an explanation of his or her inability to obtain the statement from the employer. (ii) Except as provided in paragraph (b) (3) of this section, each individual who makes a claim under paragraph (b) (1) of this section also shall submit with such claim a statement setting forth whether the individual has taken the amount of the overcollection into account in claiming a credit against, or refund of, his or her income tax, and the amount, if any, so claimed (see §31.6413 (c)-1).

(3) Additional Medicare Tax. (i) If more than the correct amount of Additional Medicare Tax under section 3101 (b) (2) or section 3201 (a) (as calculated under section 3101 (b) (2)), is collected by an employer from an employee [*41] and paid to the IRS, the employee may file a claim for refund of the overpayment and receive a refund or credit if the overcollection cannot be corrected under §31.3503-1 and if the employee has not received repayment or reimbursement from the employer in the context of an interest-free adjustment. The claim for refund shall be made on Form 1040, "U.S. Individual Income Tax Return," by taking the overcollection into account in claiming a credit against, or refund of, tax. The form to be used by residents of the U.S. Virgin Islands, Guam, American Samoa, or the Northern Mariana Islands is Form 1040-SS, "U.S. Self-Employment Tax Return (Including Additional Child Tax Credit for Bona Fide Residents of Puerto Rico)." The form to be used by residents of Puerto Rico is either Form 1040-SS or Form 1040-PR, "Planilla para la Declaración de la Contribución Federal sobre el Trabajo por Cuenta Propia (Incluyendo el Crédito Tributario Adicional por Hijos para Residentes Bona Fide de Puerto Rico)." The employee may not authorize the employer to claim the credit or refund for the employee. See §31.6402 (a)-2 (a) (1) (iii).

(ii) In the case of an overpayment of Additional Medicare Tax under section 3101 (b) (2) [*42] or section 3201 (a) for a taxable year of an individual for which a Form 1040 (or other applicable return in the Form 1040 series) has been filed, a claim for refund shall be made by the individual on Form 1040X, "Amended U.S. Individual Income Tax Return."

(c) Effective/applicability date. This section applies to claims for refund filed on or after November 29, 2013.

Par. 12. Section 31.6413 (a)-1 is amended by:

1. Revising the first sentence in paragraph (a) (2) (i).
2. Redesignating paragraphs (a) (2) (ii) through (vii) as paragraphs (a) (2) (iii) through (viii), respectively.
3. Revising newly-designated paragraph (a) (2) (viii).
3. Adding paragraph (a) (2) (ii).
4. Adding a sentence after the first sentence in newly-redesignated paragraph (a) (2) (iv).
5. Adding a sentence at the end of newly-redesignated paragraph (a) (2) (v).
6. Adding paragraph (c).

The revisions and additions read as follows:

§31.6413 (a)-1 Repayment or reimbursement by employer of tax erroneously collected from employee.

(a) * * *

(2) * * * (i) Except as provided in paragraph (a) (2) (ii) of this section, if an employer files a return for a return period on which FICA tax or RRTA tax is reported, collects from an employee and [*43] pays to the IRS more than the correct amount of the employee FICA or RRTA tax, and if the employer ascertains the error after filing the return and within the applicable period of limitations on credit or refund, the employer shall repay or reimburse the employee in the amount of the overcollection prior to the expiration of such limitations period. * * *

(ii) If an employer files a return for a return period on which Additional Medicare Tax under section 3101 (b) (2) or section 3201 (a) is reported, collects from an employee and pays to the IRS more than the correct amount of Additional Medicare Tax required to be withheld from wages or compensation, and if the employer ascertains the error after filing the return but before the end of the calendar year in which the wages or compensation were paid, the employer shall repay or reimburse the employee in the amount of the overcollection prior to the end of the calendar year. However, this paragraph does not apply to the extent that, after reasonable efforts, the employer cannot locate the employee.

* * *

(iv) * * * However, for purposes of overcollected Additional Medicare Tax under section 3101 (b) (2) or section 3201 (a), the employer [*44] shall reimburse the employee by applying the amount of the overcollection against the employee FICA or RRTA tax which attaches to wages or compensation paid by the employer to the employee in the calendar year in which the overcollection is made. * * *

(v) * * * This paragraph (a) (2) (v) does not apply for purposes of overcollected Additional Medicare Tax under section 3101 (b) (2) or section 3201 (a) which must be repaid or reimbursed to the employee in the calendar year in which the overcollection is made.

* * *

(viii) For corrections of FICA and RRTA tax paid under the wrong chapter, see §31.6205-1 (b) (2) (ii) and (iii) and §31.3503-1.

* * *

(c) Effective/applicability date. Paragraph (a) of this section applies to adjusted returns filed on or after November 29, 2013. Par. 13. *Section 31.6413 (a)-2* is amended by:

1. Adding a sentence after the first sentence in paragraph (a) (1).
2. Adding a sentence after the second sentence in paragraph (b) (2) (i).
3. Adding paragraph (e).

The additions read as follows:

§31.6413 (a)-2 Adjustments of overpayments.

(a) * * *

(1) * * * However, this section only applies to overcollected or overpaid Additional Medicare Tax under section 3101 (b) (2) or section 3201 (a) [*45] if the employer has repaid or reimbursed the amount of the overcollection of such tax to the employee in the year in which the overcollection was made. * * *

* * *

(b) * * *

(2) * * *

(i) * * * However, for purposes of Additional Medicare Tax under section 3101 (b) (2) or section 3201 (a), if the amount of the overcollection is not repaid or reimbursed to the employee under §31.6413 (a)-1 (a) (2) (ii), there is no

overpayment to be adjusted under this section and the employer may only adjust an overpayment of such tax attributable to an administrative error, that is, an error involving the inaccurate reporting of the amount withheld, pursuant to this section. * * *

* * *

(e) Effective/applicability date. Paragraphs (a) and (b) of this section apply to adjusted returns filed on or after November 29, 2013.

John Dalrymple

Deputy Commissioner for Services and Enforcement.

Approved: November 18, 2013

Mark J. Mazur

Assistant Secretary of the Treasury.

FOOTNOTES:

1

In this situation, Additional Medicare Tax is treated differently than federal income tax. For federal income tax purposes, wages paid in a year are considered income to the employee in that year, even when the wages are repaid by the employee to the employer in a subsequent year. If an employee repays wages to an employer in a year following the year in which the wages were originally paid, the employee cannot reduce the federal income tax for the prior year (i.e., the employee cannot file an amended income tax return for the prior year using Form 1040X). Instead, depending on the circumstances, the employee may be entitled to a deduction for the repaid wages (or in some cases, if the requirements of section 1341 are satisfied, a reduction of tax) on his or her income tax return for the year of repayment. By contrast, the Additional Medicare Tax is part of FICA and, similar to social security tax and Medicare tax, the repayment of wages reduces the employee's liability for Additional Medicare Tax for the prior year.