

Filing Forms W-2 and 1042-S Without Payee TIN's

Withholding agents sometimes find it necessary to file information returns such as Forms W-2, 1042-S, 1099, etc. without having secured the Taxpayer Identification Number (TIN) of the payee. In such situations the withholding agent may follow the procedures below.

Treasury Regulation 301.6109-1(C)

(c) Requirement to furnish another's number. Every person required under this title to make a return, statement, or other document must furnish such taxpayer identifying numbers of other U.S. persons and foreign persons that are described in paragraph (b)(2) (i), (ii), or (iii) of this section as required by the forms and the accompanying instructions. If the person making the return, statement, or other document does not know the taxpayer identifying number of the other person, such person must request the other person's number. A request should state that the identifying number is required to be furnished under authority of law. When the person making the return, statement, or other document does not know the number of the other person, and has complied with the request provision of this paragraph, such person must sign an affidavit on the transmittal document forwarding such returns, statements, or other documents to the Internal Revenue Service, so stating. A person required to file a taxpayer identifying number shall correct any errors in such filing when such person's attention has been drawn to them.

The above regulation allows a withholding agent who has solicited the Taxpayer Identification Number (TIN) of an alien, and such alien has neglected or refused to provide such TIN, to avoid the penalty for failing to provide a payee TIN on an information return or on a payee statement (e.g., Forms W-2, 1042-S, 1099, etc.) by attaching an affidavit to the Forms W-2, 1042-S, 1099, etc. when filed (on paper or disk) which lists the names of all aliens from whom the withholding agent solicited TIN's and was not able to secure such TIN's. A TIN must be on a Withholding Certificate if the beneficial owner is claiming any of the following: tax treaty benefits (other than for income from marketable securities), exemption for effectively connected income, exemption for certain annuities, or an exemption based on exempt organization or private foundation. In addition, a TIN must be on a Withholding Certificate from a person claiming to be any of the following: a qualified intermediary, withholding foreign partnership, grantor trust with 5 or fewer grantors, exempt organization, or a U.S. branch of a foreign person treated as a U.S. Person.

Currently, the IRS has not provided a procedure for a withholding agent who files his Forms W-2, 1042-S, 1099, etc. magnetically or electronically to file the affidavit mentioned above. As an alternative, the withholding agent should prepare the affidavit mentioned above, keep the affidavit in its files, and submit it to the IRS only in response to a proposed penalty on the withholding agent for failure to report payee TIN's on any Forms W-2, 1042-S, 1099, etc. As an additional precaution, he may attach a copy of the affidavit to his Form 941, Form 943, Form 945, Form 1042, etc. if he files those returns by paper.

There is no federal law which prevents a withholding agent from legally making a payment to a payee for the sole reason that the payee does not have a TIN. However, sections 6721, 6722, and 6723 of the Internal Revenue Code allow the IRS to impose penalties on withholding agents who fail to report payee TIN's on information returns and payee statements (Forms W-2, 1099, 1042-S, etc.) which report payments made to payees. However, Treasury Regulations found at 301.6724-1 contain "reasonable cause" criteria which a withholding agent can use to establish acceptable reasons for not providing a payee TIN on an information return or a payee statement, and thus avoid the penalties which the IRS might otherwise impose on the withholding agent for not providing payee TIN's on information returns and payee statements.

Treas. Reg. 301.6724-1 provides relief so that the IRS should not be allowed to assess penalties against a withholding agent who has taken every reasonable step to secure a payee TIN from an alien payee who has neglected, refused or otherwise been unable to acquire a TIN. It is the policy of the IRS that a withholding agent should take every reasonable step to secure a payee TIN from an alien payee, but that the IRS does not intend to penalize a withholding agent who has taken such reasonable steps and been ignored by an alien payee who has neglected or refused to apply for a TIN, or otherwise been unable to acquire a TIN. If the IRS has assessed, or has proposed to assess, a penalty against a withholding agent for failure to provide a payee TIN on a Form 1042-S or other information return, the withholding agent should make every effort to study the "reasonable cause" criteria provided at Treas. Reg. 301.6724-1 in order to avoid, or have abated, the penalty for failure to provide a payee TIN on Form 1042-S or other information return. For more information on IRS penalties relating to information returns and payee statements please refer to Publication 1586, Reasonable Cause Regulations and Requirements for Missing and Incorrect Name/TINs.

***Note:** This page contains one or more references to Internal Revenue Code (IRC) sections. A link to the Internal Revenue Code is included for the convenience of those who would like to read the technical reference material. To access the applicable Internal Revenue Code sections visit the [Tax Code, Regulations, and Official Guidance page](http://www.irs.gov/taxpros/article/0,,id=98137,00.html). (<http://www.irs.gov/taxpros/article/0,,id=98137,00.html>)*