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§ 31.3406(j)–1 Taxpayer Identification Number (TIN) matching program.

(a) *The matching program.* Under section 3406(i), the Commissioner has the authority to establish Taxpayer Identification Number (TIN) matching programs. The Commissioner may prescribe in a revenue procedure (see § 601.601(d)(2) of this chapter) or other appropriate guidance the scope of and the terms and conditions of participating in any TIN matching program. In general, under a matching program, prior to filing information returns with respect to reportable payments as defined under section 3406(b)(1), a payor of those reportable payments who is entitled to participate in the matching program may contact the Internal Revenue Service (IRS) with respect to the TIN furnished by a payee who has received or is likely to receive a reportable payment. The IRS will inform the payor whether or not a name/TIN combination furnished by the payee matches a name/TIN combination maintained in the data base utilized for the particular matching program.

(b) *Notice of incorrect TIN.* No matching details received by a payor through a matching program will constitute a notice regarding an incorrect name/TIN combination under § 31.3406(d)–5(c) for purposes of imposing backup withholding under section 3406(a)(1)(B).

(c) *Application of section 3406(f).* The provisions of section 3406(f), relating to confidentiality of information, apply to any matching details received by a payor through the matching program. A payor may not take into account any such matching details in determining whether to open or close an account with a payee.

(d) *Reasonable cause.* The IRS will not use either a payor's decision not to participate in an available TIN matching program or the results received by a payor from participation in a TIN matching program implemented under the authority of this section as a basis to assert that the payor lacks reasonable cause under section 6724(a) for the failure to file an information return under section 6721 or to furnish a correct payee statement under section 6722. If the establishment of reasonable cause may be relevant to a substantial number of the participants in a TIN matching program implemented under the authority of this section, the extent to which, if any, a payor may establish reasonable cause by participating in the TIN matching program will be set forth in the guidance establishing the program.

(e) *Definition of account. Account* means any account, instrument, or other relationship with a payor and with respect to which a payor has made or is likely to make a reportable payment as defined in section 3406(b)(1).

(f) *Effective date.* The provisions of this section are effective on and after June 18, 1997.

[T.D. 8721, 62 FR 33009, June 18, 1997]

Subpart F—General Provisions Relating to Employment Taxes (Chapter 25, Internal Revenue Code of 1954)

§ 31.3501(a)–1T Question and answer relating to the time employers must collect and pay the taxes on noncash fringe benefits (Temporary).

The following questions and answers relate to the time employers must collect and pay the taxes imposed by subtitle C on noncash fringe benefits:

Q–1: If a noncash fringe benefit constitutes ''wages'' under section 3121(a), 3306(b), or 3401(a), or constitutes ''compensation'' under section 3231(e), when must an employer collect and pay the taxes imposed by Subtitle C?

A–1: For purposes of an employer's liability to collect and pay the taxes imposed by Subtitle C, an employer may deem such fringe benefit to be paid at any time on or after the date on which it is provided, as long as such date is on or before the last day of the calendar quarter in which such benefit is provided. An employer may consider the benefit to be provided in two or more parts for purposes of the preceding sentence. For example, if a fringe benefit with a fair market value of $1,000 is provided on January 1, 1985, the employer could deem $500 paid on February 28, 1985 and $500 paid on March 31, 1985.

With respect to noncash fringe benefits provided during the first calendar quarter of 1985, a special rule applies. Such benefits may be deemed paid at

any time on or after the date on which they are provided as long as the date they are deemed paid is on or before the last day of the second calendar quarter of 1985.

In addition, for purposes of §31.6302(c)–1(a)(1)(i), the term ''tax'' does not include the employer tax under section 3111 with respect to noncash fringe benefits which are deemed by the employer to be paid on the last day of any calendar quarter. For purposes of the first sentence of §31.6302(c)–2(a)(1), the phrase ''employer tax imposed after December 31, 1983, under section 3221 (a) and (b)'' will not include any such employer tax with respect to noncash fringe benefits which are deemed by the employer to be paid on the last day of the quarter; provided that for purposes of deposits required under §31.6302(c)–1(a)(1)(v), such first sentence applies to such noncash fringe benefits.

Notwithstanding anything in this section to the contrary, if an employer in fact withholds, the amount withheld is subject to the general deposit rules.

The manner in which and the time at which the employer withholds amounts from the wages of an employee to pay the taxes imposed under section 3101, 3201, and/or 3402 will generally be left to be determined by the employer and the employee. Any delay in withholding, however, does not affect the employer's obligation upon the filing of an employment tax return, to pay amounts which would be due under this subtitle if the employer had withheld, with respect to noncash fringe benefits, the amount which would have been required to be withheld if such noncash fringe benefits had been paid in cash on the date the benefits were deemed paid. However, if such amounts are not withheld from the wages of an employee within a reasonable period after payment of the taxes by the employer, payment by the employer may be deemed additional compensation of the employee.

Q–2: Are any fringe benefits excepted from the rules contained in Q/A–1 of this section?

A–2: Yes. The rules contained in Q/A–1 of this section do not apply to the transfer of personal property (both tangible and intangible) of a kind held for investment or to the transfer of real property. Accordingly, an employer is liable for the collection and payment of taxes imposed by this subtitle when such property is transferred. For example, stock transferred in connection with the performance of services is paid, for purposes of this subtitle C, on the date the stock is transferred, i.e., on the date the stock vests pursuant to section 83 (absent a section 83(b) election).

Q–3: What is an example of the application of the rules contained in Q/A–1 of this section with respect to obligations under Chapters 21 and 24 of subtitle C?

A–3: All of employer A's employees received $100 in cash as wages each week from A. In addition, during a calendar quarter, each such employee receives noncash fringe benefits, the fair market value of which is $500. A deems all such noncash fringe beneftis to be paid on the last day of the quarter. As of the end of the quarter, no amount has been withheld from the employee's wages with respect to such noncash fringe benefits, and A has ''undeposited taxes'' (within the meaning of §31.6302(c)–1(a)(1)(i)) of more than $3,000 attributable to amounts actually withheld under section 3102 or section 3402 or due under section 3111 with respect to cash wages of A's employees. The amount which A must deposit within 3 banking days after the end of the quarter will be determined without regard to the noncash fringe benefits deemed paid on the last day of the quarter.

During the month following the quarter, A withholds from its employees with respect to the noncash fringe benefits deemed paid on the last day of the quarter. As A withholds amounts, such amounts become ''taxes'' subject to §31.6302(c)–1(a)(1)(i). If, as of the date of filing of the return for the period which includes the last day of the quarter, A has not deposited all amounts with respect to the quarter which are due under section 3111 or which would have been due had A withheld, under sections 3102 and 3402, with respect to noncash fringe benefits, the amount which would have been required to be withheld had such benefits been paid in cash, A shall pay the balance with its

return. A must make such payment regardless of whether, at the time the return is filed, he has actually withheld all amounts which he would have been required to withhold had such benefits been paid in cash.

Q–4: If an employee is provided with a noncash fringe benefit and separates from service before the benefit is deemed paid by the employer, is the employer liable for the taxes imposed by subtitle C?

A–4: Yes. The employer's liability is unaffected by his ability to collect the tax from the former employer.

Q–5: If an entity other than the employer provides a noncash fringe benefit to an employee, is that entity considered the employer of such employee with respect to such noncash fringe benefit for any purposes of subtitle C?

A–5: The provision of noncash fringe benefits by an entity to an employee of another employer does not make such entity the employer of such employee with respect to such noncash fringe benefit for any purpose of subtitle C, so long as such noncash fringe benefits are incidental to the provision of wages by the employer to such employee. For example, if two unrelated airlines, A and B, enter into a reciprocal agreement where by the parents of employees of both airlines are entitled to free flights on both airlines, the fact that A is providing a noncash fringe benefit to the employees of B generally will not make A the employer of such employees for purposes of subtitle C.

Q–6: Do special rules apply to the provision of taxable noncash fringe benefits by a nonemployer under a reciprocal agreement with the employee's employer?

A–6: If the provision of taxable noncash fringe benefits meets the requirements of Q/A–5 of this section, the nonemployer provider of the benefits is not required to withhold. The employer must take the steps necessary to obtain the relevant information from the provider of the benefits in order to enable the employer to satisfy, in a timely manner, its obligations under subtitle C to collect and pay taxes with respect to the noncash fringe benefits provided by the nonemployer.

Q–7: For purposes of subtitle C, how is the fair market value of an employer-provided automobile or other road vehicle during any time period to be determined?

A–7: The value of the availability of an employer-provided automobile or other road vehicle must be determined under the rules provided in §1.61–2T and §1.132–1T. (For purposes of this section, the terms ''automobile'' and ''road vehicle'' have the meaning given those terms in Q/A–11 of §1.61–2T). For example, assume that an employee adopts the special rule provided in §1.61–2T and that the Annual Lease Value, as defined in §1.61–2T, of an automobile or other road vehicle is $2,100. The automobile or other road vehicle is provided to employee A on January 1, 1985. As of March 31, A had driven the automobile or other road vehicle 1,000 personal miles and 3,000 miles in the course of his employer's business. For the quarter, A would have had wages of $131.25 attributable to his personal use of the automobile or other road vehicle computed by subtracting a $393.75 working condition fringe from $525 ($2,100 divided by 4). See section 132(d) and §1.132–1T. During the second quarter of 1985, A drives the automobile or other road vehicle only 1,000 miles, all of which are personal. In order to calculate the value of the wages provided to A in the second quarter in the form of the availability of the employer-provided automobile or other road vehicle, first A's employer calculates the Annual Lease Value attributable to the first six months of 1985 which is $1,050 ($2,100 divided by 2). Second, A's employer calculates the working condition fringe exclusion which is $630 ($1,050 multiplied by a fraction the numerator of which is A's business mileage (3,000 miles) and the denominator of which is A's total mileage (5,000 miles)). The calculations result in a total inclusion of $420 ($1,050—$630). From the total inclusion of $420, the wages provided in the first quarter, $131.25, are subtracted, leaving $288.75 as the wages includible in the second quarter attributable to the availability to A of the employer-provided automobile or other road vehicle.

Q–8: May an employer treat any part of the Annual Lease Value or Daily Lease Value (as defined in §1.61–2T), or

the fair market value if the special rule of §1.61–2T is not or cannot be used, of an automobile or other road vehicle made available to an employee as includible in the employee's gross income without regard to whether the employee has used the automobile or other road vehicle in the employer's business?

A–8: No, except as otherwise provided in this Q/A–8, an employer may not include any amount in an employee's income with respect to an employer-provided automobile or other road vehicle unless such inclusion is based on:

(a) Records or a statement submitted by an employee that contain the business and total mileage for the period beginning on January 1, 1985, and ending on the last day of the employer's taxable year that began in 1984, or

(b) Records that satisfy the employer's ''adequate contemporaneous record'' requirement under section 274(d)(4) and the regulations thereunder for the employer's taxable years beginning after December 31, 1984.

For example, an employer who is subject to (b) of this Q/A–8 may rely on a statement submitted by the employee indicating for the period the number of miles driven by the employee in the employer's business and the total number of miles driven by the employee unless the employer knows or has reason to know the statement submitted is not based on ''adequate contemporaneous records''. (For purposes of this section, if a road vehicle is available to any person and such availability would be taxable to an employee, miles driven by that person will be considered miles driven by the employee).

Notwithstanding the preceding paragraph of this Q/A–8, an employer may include in an employee's income the value of the availability of an employer-provided road vehicle, calculated without regard to a working condition fringe exclusion based on business mileage if one of the conditions listed in §1.274–6T(f)(1) is satisfied with respect to the relevant period.

In addition, the employer must, before including any amount in an employee's income with respect to an employer-provided road vehicle, take into account other working condition fringe exclusions, such as the security exclusion discussed in §1.132–1T. If proper calculation of an exclusion requires information from the employee and the employee does not respond within a reasonable period of time to a request for that information or produces information which the employer knows or has reason to know is not accurate, the employer may disregard such exclusion in reporting the employee's gross income.

Q–8a: May an employer withhold amounts attributable to noncash fringe benefits on the basis of average wages as permitted under section 3402(h)(1)?

A–8a: In general, yes. In estimating wages under section 3402(h)(1)(A), however, the employer must take into account estimated business use of the benefit (such as an employer-provided road vehicle). In no event, however, may the amount reported by the employer as ''wages'' for any employee for any quarter be based on an estimation. However, the rules in Q/A–1 of this section regarding permissible delays in actual withholding apply.

Q–9: If an employee purchases any property or service from an employer at a discount and the discount is not excludable under section 132 and any applicable regulations thereunder, when is the noncash fringe benefit provided?

A–9: Such property or service is provided at the time that ownership is transferred, in the case of property, or the time service is rendered, in the case of services. This will be true regardless of when the employee pays for such property or service or the date payment is due or the rate of interest charged prior to payment. The time at which ownership of the property is transferred must be determined under general tax principles.

Q–10: What rules apply with respect to the treatment of the payment of any noncash fringe benefit as the payment of supplemental wages under section 3402?

A–10: An employer may treat the payment of any noncash fringe benefit as the payment of supplemental wages. Thus, if noncash fringe benefits are provided and tax has been withheld from the employee's regular wages, the employer may determine the tax to be withheld with respect to such noncash

fringe benefits by using a flat percentage rate of 20 percent, without allowance for exemptions and without reference to any regular payment of wages. For example, assume that during a calendar quarter A receives from his employer a taxable noncash fringe benefit with a fair market value of $1,000. If the requirements specified above are satisfied, A's employer may determine the tax to be withheld with respect to such benefit by using a flat percentage rate of 20 percent. The employer may also determine the tax to be withheld with respect to such benefit by use of the method described in § 31.3402 (g)–1(a)(2).

(Approved by the Office of Management and Budget under control numbers 1545–0074 and 1545–0907)

[T.D. 8004, 50 FR 756, Jan. 7, 1985, as amended by T.D. 8009, 50 FR 7046, Feb. 20, 1985]

§ 31.3502–1 Nondeductibility of taxes in computing taxable income.

For provisions relating to the nondeductibility, in computing taxable income under subtitle A, of the taxes imposed by sections 3101, 3201, and 3211, and of the tax deducted and withheld under chapter 24, see §§ 1.164–2 and 1.275–1 of this chapter (Income Tax Regulations). For provisions relating to the credit allowable to the recipient of the income in respect of the tax deducted and withheld under chapter 24, see § 1.31–1 of this chapter (Income Tax Regulations).

[T.D. 6780, 29 FR 18148, Dec. 22, 1964]

§ 31.3503–1 Tax under chapter 21 or 22 paid under wrong chapter.

If, for any period, an amount is paid as tax—

(a) Under chapter 21 or corresponding provisions of prior law by a person who is not liable for tax for such period under such chapter or prior law, but who is liable for tax for such period under chapter 22 or corresponding provisions of prior law, or

(b) Under chapter 22 or corresponding provisions of prior law by a person who is not liable for tax for such period under such chapter or prior law, but who is liable for tax for such period under chapter 21 or corresponding provisions of prior law,

the amount so paid shall be credited against the tax for which such person is liable and the balance, if any, shall be refunded. Each claim for refund or credit under this section shall be made on Form 843 and in accordance with § 31.6402(a)–2 and the applicable provisions of section 6402(a) and the regulations thereunder in Part 301 of this chapter (Regulations on Procedure and Administration).

§ 31.3504–1 Acts to be performed by agents.

(a) *In general.* In the event wages as defined in chapter 21 or 24 of the Internal Revenue Code of 1954, or compensation as defined in chapter 22 of such Code, of an employee or group of employees, employed by one or more employers, is paid by a fiduciary, agent, or other person, or if such fiduciary, agent, or other person has the control, receipt, custody, or disposal of such wages, or compensation, the district director, or director of a service center, may, subject to such terms and conditions as he deems proper, authorize such fiduciary, agent, or other person to perform such acts as are required of such employer or employers under those provisions of the Internal Revenue Code of 1954 and the regulations thereunder which have application, for purposes of the taxes imposed by such chapter or chapters, in respect of such wages or compensation. If the fiduciary, agent, or other person is authorized by the district director, or director of a service center, to perform such acts, all provisions of law (including penalties) and of the regulations prescribed in pursuance of law applicable to employers in respect of such acts shall be applicable to such fiduciary, agent, or other person. However, each employer for whom such fiduciary, agent, or other person performs such acts shall remain subject to all provisions of law (including penalties) and of the regulations prescribed in pursuance of law applicable to an employer in respect of such acts. Any application for authorization to perform such acts, signed by such fiduciary, agent, or other person, shall be filed with the district director, or director of a service center, with whom the fiduciary,

agent, or other person will, upon approval of such application, file returns in accordance with such authorization.

(b) *Prior authorizations continued.* An authorization in effect under section 1632 of the Internal Revenue Code of 1939 on December 31, 1954, continues in effect under section 3504 and is subject to the provisions of paragraph (a) of this section.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D 7012, 34 FR 7693, May 15, 1969]

§ 31.3505–1 Liability of third parties paying or providing for wages.

(a) *Personal liability in case of direct payment of wages*—(1) *In general.* A lender, surety, or other person—

(i) Who is not an employer for purposes of section 3102 (relating to deduction of tax from wages under the Federal Insurance Contributions Act), section 3202 (relating to deduction of tax from compensation under the Railroad Retirement Tax Act), or section 3402 (relating to deduction of income tax from wages) with respect to an employee or group of employees, and

(ii) Who pays wages on or after January 1, 1967, directly to such employee or group of employees, employed by one or more employers, or to an agent on behalf of such employee or employees,

shall be liable in his own person and estate for payment to the United States of an amount equal to the sum of the taxes required to be deducted and withheld from those wages by the employer under subtitle C of the Code and interest from the due date of the employer's return relating to such taxes for the period in which the wages are paid.

(2) *Example.* The provisions of this paragraph may be illustrated by the following example:

Example. Pursuant to a wage claim of $200, A, a surety company, paid a net amount of $158 to B, an employee of the X Construction Company. This was done in accordance with A's payment bond covering a private construction job on which B was an employee. If X Construction Company fails to make timely payment or deposit of $42.00, the amount of tax required by subtitle C of the Code to be deducted and withheld from, a $200 wage payment to B, A becomes personally liable for $42.00 (*i.e.*, an amount equal to the unpaid taxes), plus interest upon this amount from the due date of X's return.

(b) *Personal liability where funds are supplied*—(1) *In general.* A lender, surety, or other person who—

(i) Advances funds to or for the account of an employer for the specific purpose of paying wages of the employees of that employer, and

(ii) At the time the funds are advanced, has actual notice or knowledge (within the meaning of section 6323(i)(1)) that the employer does not intend to, or will not be able to, make timely payment or deposit of the amounts of tax required by subtitle C of the Code to be deducted and withheld by the employer from those wages,

shall be liable in his own person and estate for payment to the United States of an amount equal to the sum of the taxes which are required by subtitle C of the Code to be deducted and withheld from wages paid on or after January 1, 1967, and which are not paid over to the United States by the employer, and interest from the due date of the employer's return relating to such taxes. However, the liability of the lender, surety, or other person shall not exceed 25 percent of the amount supplied by him for the payment of wages. The preceding sentence and the second sentence of section 3505(b) limit the liability of a lender, surety, or other person arising solely by reason of section 3505, and they do not limit the liability which the lender, surety or other person may incur to the United States as a third-party beneficiary of an agreement between the lender, surety, or other person and the employer. The liability of a lender, surety, or other person does not include penalties imposed on the taxpayer.

(2) *Examples.* The provisions of this paragraph may be illustrated by the following examples:

Example 1. D, a savings and loan association, advances $10,000 to Y for the specific purpose of paying the net wages of Y's employees. D advances those funds with knowledge that Y will not be able to make timely payment of the taxes required to be deducted and withheld from these wages by subtitle C of the Code, Y uses the $10,000 to pay the net wages of his employees but fails to remit withholding taxes under subtitle C in the amount of $2,600. D's liability, under this section, is limited to $2,500, 25 percent of the

amount supplied for the payment of wages to Y's employees.

Example 2. E, a loan company, advances $15,000 to F, a contractor, for the specific purpose of paying $20,000 of net wages due to F's employees. E advances those funds with knowledge that F will not be able to make timely payment of the taxes required to be deducted and withheld from these wages by subtitle C of the Code. F applies $5,000 of its own funds toward payment of these wages. The amount of tax required to be deducted and withheld from the gross wages is $4,500. The limitation applicable to E's liability is $3,750 (25 percent of $15,000). However, because E furnished only a portion of the total net wages, E is liable for $3,375 of the taxes required to be deducted and withheld ($4,500×$15,000/$20,000).

(3) *Ordinary working capital loan.* The provisions of section 3505(b) do not apply in the case of an ordinary working capital loan made to an employer, even though the person supplying the funds knows that part of the funds advanced may be used to make wage payments in the ordinary course of business. Generally, an ordinary working capital loan is a loan which is made to enable the borrower to meet current obligations as they arise. The person supplying the funds is not obligated to determine the specific use of an ordinary working capital loan or the ability of the employer to pay the amounts of tax required by subtitle C of the Code to be deducted and withheld. However, section 3505(b) is applicable where the person supplying the funds has actual notice or knowledge (within the meaning of section 6323(i)(1)) at the time of the advance that the funds, or a portion thereof, are to be used specifically to pay net wages, whether or not the written agreement under which the funds are advanced states a different purpose. Whether or not a lender has actual notice or knowledge that the funds are to be used to pay net wages, or merely that the funds may be so used, depends upon the facts and circumstances of each case. For example, a lender, who has actual notice or knowledge that the withheld taxes will not be paid, will be deemed to have actual notice or knowledge that the funds are to be used specifically to pay net wages where substantially all of the employer's ordinary operating expenses consist of salaries and wages even though fund for other incidental operating expenses may be supplied pursuant to an agreement described as a working capital loan agreement.

(c) *Definition of other person*—(1) *In general.* As used in this section, the term ''other person'' means any person who directly pays the wages or supplies funds for the specific purpose of paying the wages of an employee or group of employees of another employer. It does not include a person acting only as agent of the employer or as agent of the employees.

(2) *Examples.* The provisions of this paragraph may be illustrated by the following examples:

Example 1. Pursuant to an agreement between L, a labor union, and M, an employer, M makes monthly vacation payments (of a sum equal to a certain percentage of the remuneration paid to each union member employed by M during the previous month) to a union administered pool plan under which each employee's rights are fully vested and nonforfeitable from the time the money is paid by M. Vacation allowances are accumulated by the plan and distributed to eligible employees during their vacations. L, acting merely as a conduit with respect to these payments, would incur no liability under section 3505.

Example 2. N, a construction company, maintains a payroll account with the O Bank in which N deposits its own funds. Pursuant to an automated payroll service agreement between N and O, O prepares payroll checks and earnings statements for each of N's employees reflecting the net pay due each such employee. These checks are delivered to N for signature. After the checks are signed, O distributes them directly to N's employees on the regularly scheduled pay day. O, acting only in the capacity of a disbursing agent of N's funds, would incur no liability under section 3505 with respect to these payroll distributions. However, O may incur liability under section 3505 in the capacity of a lender if it supplies the funds for the payment of wages.

(d) *Payment of taxes and interest*—(1) *Procedure for payment.* A lender, surety, or other person may satisfy the personal liability imposed upon him by section 3505 by executing Form 4219 and filing it, accompanied by payment of the amount of tax and interest due the United States, in accordance with the instructions for the form. In the event that the lender, surety, or other

person does not satisfy the liability imposed by section 3505, the United States may collect the liability by appropriate civil proceedings commenced within 10 years after assessment of the tax against the employer.

(2) *Effect of payment*—(i) *In general.* A person paying the amounts of tax required to be deducted and withheld by subtitle C of the Code as a result of section 3505 and this section is not required to pay the employer's portion of the payroll taxes upon those wages, or file an employer's tax return with respect to those wages, or furnish annual wage and tax statements to the employees.

(ii) *Amounts paid by a lender, surety, or other person.* Any amounts paid by the lender, surety, or other person to the United States pursuant to this section shall be credited against the liability of the employer on whose behalf those payments are made and shall also reduce the total liability imposed upon the lender, surety, or other person under section 3505 and this section.

(iii) *Amounts paid by the employer.* Any amounts paid to the United States by an employer and applied to his liability under subtitle C of the Code shall reduce the total liability imposed upon that employer by subtitle C. Such payments will also reduce the liability imposed upon a lender, surety, or other person under section 3505 except that such liability shall not be reduced by any portion of an employer's payment applied against the employer's liability under subtitle C which is in excess of the total liability imposed upon the lender, surety, or other person under section 3505. For example, if a lender supplies $1,000 to an employer for the payment of net wages, upon which $300 withholding tax liability is imposed, a part-payment of $25 by the employer which is applied to this liability would reduce the employer's total liability under subtitle C of the Code by that amount, but the liability imposed upon the lender by section 3505(b) in an amount equal to the withholding tax liability of the employer, which is limited to 25 percent of the amount supplied by him, would remain $250. However, if the employer makes another payment of $200 which is applied to his liability for the withholding taxes, the lender's liability under section 3505 attributable to the withholding taxes is reduced by $175 ($225 less $50 (the amount by which the employer's liability exceeds the lender's liability after application of the limitation)). Thus, after the second payment by the employer, the lender's liability under section 3505(b) is $75 ($250 less $175), plus interest due on the underpayment for the period of underpayment, to a maximum of $250, 25 percent of the funds supplied.

(3) *Extensions of the period for collection.* Prior to the expiration of the 10-year period for collection after assessment against the employer, the lender, surety, or other third party may agree in writing with the district director, service center director, or compliance center director to extend the 10-year period for collection. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. If any timely proceeding in court for the collection of the tax and any applicable interest is commenced, the period during which such tax and interest may be collected shall be extended and shall not expire until the liability for the tax (or a judgment against the lender, surety, or other third party arising from such liability) is satisfied or becomes unenforceable.

(e) *Returns required by employers and statements for employees.* This section does not relieve the employer of the responsibilities imposed upon him to file the returns and supply the receipts and statements required under subchapter A, Chapter 61 of the Code (relating to returns and records).

(f) *Time when liability arises.* The liability under section 3505 and this section of a lender, surety, or other person paying or supplying funds for the payment of wages is incurred on the last day prescribed for the filing of the employer's Federal employment tax return (determined without regard to any extension of time) in respect of such wages.

(g) *Effective date.* These regulations are effective on August 1, 1995.

[T.D. 7430, 41 FR 35175, Aug. 20, 1976, as amended by T.D. 8604, 60 FR 39110, Aug. 1, 1995]

§ 31.3506–1 Companion sitting placement services.

(a) *Definitions*—(1) *Companion sitting placement service.* For purposes of this section, the term ''companion sitting placement service'' means a person (whether or not an individual) engaged in the trade or business of placing sitters with individuals who wish to avail themselves of the sitters' services.

(2) *Sitters.* For purposes of this section, the term ''sitters'' means individuals who furnish personal attendance, companionship, or household care services to children or to individuals who are elderly or disabled.

(b) *General rule.* For purposes of subtitle C of the Internal Revenue Code of 1954 (relating to employment taxes), a companion sitting placement service shall not be treated as the employer of its sitters, and the sitters shall not be treated as the employees of the placement service. However, the rule of the preceding sentence shall apply only if the companion sitting placement service neither pays nor receives (directly or through an agent) the salary or wages of the sitters, but is compensated, if at all, on a fee basis by the sitters or the individuals for whom the sitting is performed.

(c) *Individuals deemed self-employed.* Any individual who, by reason of this section, is deemed not to be the employee of a companion sitting placement service shall be deemed to be self-employed for purposes of the tax on self-employment income (see sections 1401–1403 and the regulations thereunder in Part 1 of this chapter (Income Tax Regulations)).

(d) *Scope of rules.* The rules of this section operate only to remove sitters and companion sitting placement services from the employee-employer relationship when, under §§ 31.3121(d)–1 and 31.3121(d)–2, that relationship would otherwise exist. Thus, if, under §§ 31.3121(d)–1 and 31.3121(d)–2, a sitter is considered to be the employee of the individual for whom the sitting is performed rather than the employee of the companion sitting placement service, this section has no effect upon that employee-employer relationship.

(e) *Examples.* The provisions of this section may be illustrated by the following examples:

Example 1. X is an agency that places babysitters with individuals who desire babysitting services. X furnishes all the sitters with an instruction manual regarding their conduct and appearance, requires them to file semimonthly reports, and determines the total fee to be charged the individual for whom the sitting is performed. Individuals who need a babysitter contact the agency, are informed of the charges, and, if agreement is reached, a sitter is sent to perform the services. The sitter collects the entire amount of the charges and remits a percentage to X as a fee for the placement. X is a companion sitting placement service within the meaning of paragraph (a)(1) of this section. Therefore, since the agency does not actually pay or receive the wages of the sitters, X is not treated as the employer of the sitters for purposes of this subtitle. The sitters are deemed to be self-employed for the purpose of the tax imposed by section 1401.

Example 2. Assume the same facts as in example 1, except that the individual for whom the sitting is performed pays to X the entire amount of the charges. X retains a percentage and pays the difference to the sitter. Since X actually receives and pays the wages of the sitters, X is the employer of the sitters.

Example 3. As a service to the community a neighborhood association maintains a list of individuals who are available to babysit. Parents in need of a sitter contact the association and are provided with a list of names and telephone numbers. The association charges no fee for the service and takes no action other than compiling the list of sitters and making it available to members of the community. Issues such as hours of work, amount of payment, and the method by which the services are performed are all resolved between the sitter and parent. A, a parent, used the list to hire B to sit for A's child. B performs the services four days a week in A's home and follows specific instructions given by A. Under § 31.3121(d)–1, B is the employee of A rather than the employee of the neighborhood association. Consequently, this section does not apply and B remains the employee of A.

(f) *Effective date.* This section shall apply to remuneration received after December 31, 1974.

(Secs. 3506 and 7805 of the Internal Revenue Code of 1954; 91 Stat. 1356 (26 U.S.C. 3506); 68A Stat. 917 (26 U.S.C. 7805))

[T.D. 7691, 45 FR 24129, Apr. 9, 1980]

§ 31.3507–1 Advance payments of earned income credit.

(a) *General rule*—(1) *In general.* Every employer paying wages after June 30,

1979, to an employee with respect to whom an earned income credit advance payment certificate is in effect must, at the time of paying the wages, also pay the employee the advance earned income credit amount of that employee. For the purposes of applying this section and § 31.3507–2—

(i) In the case of an individual who receives wages which are subject to income tax withholding, the term ''employee'' has the same meaning as set forth in section 3401(c) and the regulations thereunder, and the term ''wages'' has the same meaning as set forth in sections 3401(a) and 3402(e) and the regulations under those sections; and

(ii) In the case of an individual who does not receive wages which are subject to income tax withholding, but who receives wages which are subject to employee FICA taxes, the term ''employee'' has the same meaning as set forth in section 3121(d) and the regulations thereunder and the term ''wages'' has the same meaning as set forth in section 3121(a) and the regulations thereunder.

An individual not having wages subject to either income tax withholding or employee FICA taxes is not entitled to advance payments of the earned income credit. Moreover, notwithstanding paragraph (a)(1)(i) and (ii) of this section, employers are not required to pay advance earned income credit amounts to agricultural workers paid on a daily basis. For this purpose an ''agricultural worker'' is an employee who performs ''agricultural labor'', as that term is defined in section 3121(g) and the regulations thereunder.

(2) *Cross references.* For determination of the advance earned income credit amount of an employee, see paragraph (b) of this section. For rules relating to the treatment of the payment of an employee's advance earned income credit amount as equivalent to payment by the employer of withholding and FICA taxes, see paragraph (c) of this section. For rules describing the earned income credit advance payment certificate, see § 31.3507–2 (a) and (b). For rules relating to the employee's furnishing of the earned income credit advance payment certificate and the payroll periods for which the certificate is effective, see § 31.3507–2 (c) and (d).

(b) *Advance earned income credit amount.* The advance earned income credit amount of an employee is determined, with respect to any payroll period, on the basis of the employee's wages from the employer for the period and in accordance with the advance amount tables prescribed by the Commissioner of Internal Revenue and then in effect for the payroll period. See, however, paragraph (c)(2) of this section. The advance amount paid is reflected on the employee's W–2 form as a separate item (and neither as a reduction of withholding nor an increase in compensation). For purposes of applying this section and § 31.3507–2, the term ''payroll period'' has the meaning set forth in section 3401(b) and the regulations thereunder. As required by section 3507(c)(2)(A), these advance amount tables must be similar in form to, and coordinated with, the tables prescribed under section 3402 (relating to income tax collected at the source). Sections 3507(c)(2)(B) and 3507(c)(2)(C) provide, respectively, separate rules for the treatment in the advance amount tables of the advance earned income credit of the following two separate classes of employees:

(1) Employees who are not married (within the meaning of section 143), or employees whose spouses do not have an earned income credit advance payment certificate in effect; and

(2) Employees whose spouses have an earned income credit advance payment certificate in effect.

If during the calendar year an employer has paid an employee amounts of earned income, within the meaning of section 43(c)(2)(A)(i), which in the aggregate equal or exceed $10,000, the employer need not make further payments of advance earned income credit to the employee during that calendar year.

(c) *Payment of advance earned income credit amount as payment of withholding and FICA taxes*—(1) *In general.* (i) The provisions of this paragraph (c) apply for all purposes of the Internal Revenue Code of 1954. Payments of advance earned income credit amounts pursuant to paragraph (a)(1) of this section

do not constitute the payment of compensation. These payments by the employer are treated as made—

(A) First, from the aggregate amount, with respect to all employees, required to be deducted and withheld for the payroll period under section 3401 (relating to income tax withholding);

(B) Second, from the aggregate amount, with respect to all employees, required to be deducted for the payroll period under section 3102 (relating to employee FICA taxes); and

(C) Third, from the aggregate amount of the taxes imposed for the payroll period under section 3111 (relating to employer FICA taxes).

For purposes of the requirements of sections 3401, 3102, and 3111, as the case may be, and 6302, amounts equal to the advance earned income credit amounts paid to employees are treated as if paid to the Treasury Department on the day on which the wages (and advance amounts) are paid to the employees. The employer must report the payment and treatment of the advance amounts on the employer's Form 941, 941E, 942, or 943, as the case may be, in accordance with the applicable instructions.

(ii) The provisions of paragraph (c)(1)(i) of this section may be illustrated by the following example:

Example. Employer X has ten employees, each of whom is entitled to advance earned income credit payment of $10. The total of advance amounts paid by the employer to the ten employees for the payroll period is $100. The total of income tax withholding for the payroll period is $90. The total of employee FICA taxes for the payroll period is $61.30, and the total of employer FICA taxes for the payroll period is also $61.30. Under the rules of paragraph (c)(1)(i) of this section, the total of advance amounts paid to employees is treated as if X had paid the Treasury Department on the day X paid the employees' wages: first, the $90 aggregate amount of income tax withholding; and second, $10 of the aggregate amount of employee FICA tax. X remains liable only for $112.60 of the aggregate FICA tax [$51.30+$61.30=$112.60].

(2) *Advance payments exceeding taxes due.* (i) if, for any payroll period, the aggregate amount of advance earned income credit amounts required to be paid by an employer under paragraph (a)(1) of this section exceeds the sum of the amounts for the payroll period referred to in paragraphs (c)(1)(i) (A) through (C) of this section, the employer reduces each advance amount paid for the payroll period by an amount which bears the same ratio to the excess of the advance amounts as the subject advance amount bears to the aggregate of advance amounts for the payroll period. However, this paragraph (c)(2) does not apply if the employer makes the election provided by paragraph (c)(3) of this section.

(ii) The provisions of paragraph (c)(2) of this section may be illustrated by the following example.

Example. Assume the same facts as the example in paragraph (c)(1)(ii) of this section, except that the employer is a state government which does not pay FICA taxes. Under these facts, the advance amounts would be $10 greater than the $90 total of income tax withholding for the payroll period. Assume 10 employees each receiving $10 in advance payments. Under the rule of this paragraph (c)(2), the employer X reduces the amount of the advance amount paid to each employer by 1/10, computed as follows: $10/$100=1/10. This is the same result as would be obtained by reducing the advance payment of $10 for each of the ten employees by one-tenth 10/100 of the $10 excess or $1.00.

(3) *Election to treat excess amounts as advance tax payment.* In lieu of reducing advance payments under paragraph (c)(2) of this section, an employer may elect under this paragraph (c)(3) to pay in full all advance earned income credit amounts. However, if no election is made, the employer is required to reduce advance amounts paid in accordance with paragraph (c)(2) of this section. The election, if made, applies to all advance earned income credit amounts required to be paid for the payroll period. The employer reflects the election on the employer's Form 941, 941E, 942, or 943 as the case may be, and must specify (with supporting computations) the amount of the excess of advance amounts paid and the payroll period to which the excess relates. Separate elections may be made for separate payroll periods. The excess of advance amounts paid is treated as an advance payment by the employer of employment taxes described in paragraph (c)(3)(i) through (iii) of this section and due for the period reported on the

Form 941, 941E, 942, or 943 which includes the payroll period during which the excess amounts were paid. The amount of the excess advance payment is applied to the amounts of the employer's liability—

(i) First, for income tax withholding due under section 3401 for the reporting period in which the payment is made;

(ii) Second, for employee FICA taxes due under section 3102 for the reporting period in which the payment is made; and

(iii) Third, for employer FICA taxes due under section 3111 for the reporting period in which the payment is made.

If the amount of the employment taxes (as described) for which the employer remains liable for the reporting period in which the excess payment is made is less than the excess payment, the employer may claim a refund of that portion of the excess amount paid which exceeds the employer's remaining liability for these taxes for the reporting period. This refund may be claimed, in the same manner as a refund of wage withholding taxes paid by the employer under section 3401, on the employer's Form 941, 941E, 942, or 943, as the case may be, for the reporting period. In the absence of a claim for refund, that portion of the excess amount will be applied by the Internal Revenue Service against the employer's liability for employment taxes reported on the employer's Form 941, 941E, 942, or 943, as the case may be, filed for the next reporting period.

(4) *Failure to make advance payments.* The failure to pay an employee, at the time required by paragraph (a)(1) of this section, all or any part of an advance earned income credit amount as required by this section is treated, for all purposes including penalties, as a failure by the employer as of that time to deduct and withhold under chapter 24 of the Internal Revenue Code of 1954 an amount equal to the advance amount (or part thereof) not paid. This treatment applies to the failure to pay an advance amount to an eligible employee without regard to whether the employee is ultimately not entitled to claim the earned income credit (in full or in part) on a return for the year, so long as the employee has a valid earned income credit advance payment certificate in effect with the employer at the time when the wages were paid. If an employer fails to pay an advance earned income credit amount as required under this section, the advance amount will not be collected by the Internal Revenue Service from the employer if the employer has properly withheld and deposited all income taxes and FICA taxes applicable with respect to the employee. However, such amount may be collected if the employer has not properly withheld and deposited these taxes.

[T.D. 7766, 46 FR 10151, Feb. 2, 1981]

§ 31.3507–2 Earned income credit advance payment certificates.

(a) *Definition.* For the purposes of this section and § 31.3507–1, an earned income credit advance payment certificate is a statement furnished by an employee to the employer which—

(1) Certifies that the employee reasonably expects to be eligible to receive the earned income credit provided by section 43 for the employee's last taxable year under subtitle A of the Internal Revenue Code of 1954 which begins in the calendar year in which the wages are paid:

(2) Certifies that the employee does not have an earned income credit advance payment certificate in effect for the calendar year (in which the wages are paid) with respect to the payment of wages by another employer, and

(3) States if the employee's spouse has an earned income credit advance payment certificate in effect with any employer. For the rule for determining if an employee's spouse has a certificate in effect, see paragraph (c)(3) of this section.

(b) *Form and content of earned income credit advance payment certificate*—(1) *In general.* Form W–5 (Earned Income Credit Advance Payment Certificate) is the prescribed form for the earned income credit advance payment certificate. The Form W–5 must be prepared in accordance with the instructions applicable thereto and must set forth fully and clearly the data therein called for. In lieu of the prescribed form, a form the provisions of which are identical with those of the prescribed form may be used.

(2) *Invalid certificates.* A Form W–5 does not meet the requirements of section 3507 or this section and is invalid if it is not completed or signed or contains an alteration or unauthorized addition (as defined in §31.3402(f)(5)–1(b)(1) and (2)). Any earned income credit advance payment certificate which the employee clearly indicates to be false by oral statement or written statement to the employer must be treated by the employer as a certificate which is invalid as of the date of the employee's statement. For purposes of the preceding sentence, the term ''employer'' includes any individual authorized by the employer to receive earned income credit advance payment certificates or to make payroll distributions. If an employer receives from an employee an invalid certificate, the employer must consider it a nullity with respect to all payments of wages thereafter to the employee and must inform the employee of the certificate's invalidity. The employer is not required to ascertain whether any completed and signed earned income credit advance payment certificate is correct. However, the employer should inform the district director if the employer has reason to believe that the certificate contains any incorrect statement.

(c) *When earned income credit advance payment certificate takes effect*—(1) *No previous certificate.* An earned income credit advance payment certificate furnished the employer where no previous certificate is or has been in effect with the employer for that employee for the calendar year takes effect with—

(i) The date of the beginning of the first payroll period ending on or after the date on which the certificate is received by the employer;

(ii) The date of the first payment of wages made without regard to a payroll period on or after the date on which the certificate is received by the employer; or

(iii) The first day of the calendar year for which the certificate is furnished, if that day is later than the otherwise applicable effective date specified in paragraph (c)(1)(i) or (ii) of this section.

(2) *Previous certificate.* Except as otherwise provided in this paragraph (c)(2), an earned income credit advance payment certificate furnished the employer where a previous certificate is or has been in effect with the employer for that employee for the calendar year takes effect on the date of the first payment of wages made on or after the first status determination date (as defined in paragraph (c)(4) of this section) occurring at least thirty days after the date on which the certificate is received by the employer. However, if the employer so chooses, the employer may treat the certificate as effective on the date of any payment of wages made on or after the date on which the certificate is received by the employer (without regard to any status determination date).

(3) *Certificate of spouse.* For the sole purpose of applying paragraph (a)(3) of this section, in determining if a certificate is in effect with respect to an employee's spouse, the spouse's certificate is treated as then in effect if the spouse's certificate will be or is reasonably expected to be in effect on the first status determination date following the date on which the employer receives the employee's certificate.

(4) *Status determination date.* For the purposes of this section, the term ''status determination date'' means January 1, May 1, July 1, and October 1 of each year.

(d) *Period during which certificate remains in effect; change of status*—(1) *Period certificate remains in effect.* An earned income credit advance payment certificate which takes effect during a calendar year continues in effect with respect to the employee only during that calendar year and until revoked by the employee or until another certificate takes effect. See paragraphs (d)(2) and (c)(2) of this section.

(2) *Change of status*—(i) *Revocation of certificate.* If, after an employee has furnished an earned income credit advance payment certificate—

(A) The employee no longer wishes to receive advance earned income credit payments; or

(B) There has been a change of circumstances which has the effect of either making the employee ineligible for the earned income credit for the taxable year or causing a certificate to be in effect for the employee's spouse, then the employee must revoke the

certificate previously furnished by furnishing the employer a new certificate (Form W–5 or identical form) in revocation of the earlier certificate. Depending upon the nature of the change of circumstances, the employer may be required, pursuant to the new certificate, to pay further advance earned income credit amounts to the employee (but in different amounts than previously paid to the employee). The Form W–5 (or identical form) must be prepared in accordance with the instructions applicable thereto and must set forth fully and clearly the data therein called for. In the case of revocation due to change of circumstances, the new certificate in revocation must be delivered to the employer within ten days after the employee first learns of the change of circumstances. The new certificate is effective under the rules provided in paragraph (c)(2) of this section for later certificates. A new certificate furnished by an employee which is invalid within the meaning of paragraph (b)(2) of this section is considered a nullity with respect to all payments of wages thereafter to the employee. The prior certificate of the employee remains in effect, unless the employee clearly indicates by an oral or written statement to the employer that the prior certificate is invalid. See paragraph (b)(2) of this section.

The employer is not required to ascertain whether any employee has experienced a change of circumstances described in subdivision (i)(B) of this paragraph which necessitates the employee's furnishing a new certificate. However, the employer should inform the district director if the employer has reason to believe than an employee has experienced a change of circumstances as described if the employee does not deliver a new certificate to the employer within the ten day period.

(ii) *Change in spouse's certificate.* If, after an employee has furnished an earned income credit advance payment certificate stating that a certificate is in effect for the spouse of the employee, the certificate of the spouse is no longer in effect, the employee may furnish the employer with a new certificate which reflects this change of circumstances.

[T.D. 7766, 46 FR 10152, Feb. 2, 1981]

Subpart G—Administrative Provisions of Special Application to Employment Taxes (Selected Provisions of Subtitle F, Internal Revenue Code of 1954)

§ 31.6001–1 Records in general.

(a) *Form of records.* The records required by the regulations in this part shall be kept accurately, but no particular form is required for keeping the records. Such forms and systems of accounting shall be used as will enable the district director to ascertain whether liability for tax is incurred and, if so, the amount thereof.

(b) *Copies of returns, schedules, and statements.* Every person who is required, by the regulations in this part or by instructions applicable to any form prescribed thereunder, to keep any copy of any return, schedule, statement, or other document, shall keep such copy as a part of his records.

(c) *Records of claimants.* Any person (including an employee) who, pursuant to the regulations in this part, claims a refund, credit or abatement, shall keep a complete and detailed record with respect to the tax, interest, addition to the tax, additional amount, or assessable penalty to which the claim relates. Such record shall include any records required of the claimant by paragraph (b) of this section and by §§ 31.6001–2 to 31.6001–5, inclusive, which relate to the claim.

(d) *Records of employees.* While not mandatory (except in the case of claims), it is advisable for each employee to keep permanent, accurate records showing the name and address of each employer for whom he performs services as an employee, the dates of beginning and termination of such services, the information with respect to himself which is required by the regulations in this subpart to be kept by employers, and the statements furnished in accordance with the provisions of § 31.6051–1.

(e) *Place and period for keeping records.* (1) All records required by the regulations in this part shall be kept,