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§ 31.3402(j)–1 Remuneration other than in cash for service performed by retail commission salesman.

(a) *In general.* (1) An employer, in computing the amount to be deducted and withheld as tax in accordance with section 3402, may, at his election, disregard any wages paid, after August 9, 1955, in a medium other than cash for services performed for him by an employee if (i) the noncash remuneration is paid for services performed by the employee as a retail commission salesman and (ii) the employer ordinarily pays the employee remuneration solely by way of cash commissions for services performed by him as a retail commission salesman.

(2) Section 3402(j) and this section are not applicable with respect to noncash wages paid to a retail commission salesman for services performed by him in a capacity other than as such a salesman. Such sections are not applicable with respect to noncash wages paid by an employer to an employee for services performed as a retail commission salesman if the employer ordinarily pays the employee remuneration other than by way of cash commissions for such services. Thus, noncash remuneration may not be disregarded in computing the amount to be deducted and withheld in a case where the employee, for services performed as a retail commission salesman, is paid both a salary and cash commissions on sales, or is ordinarily paid in something other than cash (stocks, bonds, or other forms of property) notwithstanding that the amount of remuneration paid to the employee is measured by sales.

(b) *Retail commission salesman.* For purposes of section 3402(j) and this section, the term ''retail commission salesman'' includes an employee who is engaged in the solicitation of orders at retail, that is, from the ultimate consumer, for merchandise or other products offered for sale by his employer. The term does not include an employee salesman engaged in the solicitation on behalf of his employer of orders from wholesalers, retailers, or others, for merchandise for resale. However, if the salesman solicits orders for more than one principal, he is not excluded from the term solely because he solicits orders from wholesalers or retailers on behalf of one or more principals. In such case the salesman may be a retail commission salesman with respect to services performed for one or more principals and not with respect to services performed for his other principals.

(c) *Noncash remuneration.* The term ''noncash remuneration'' includes remuneration paid in any medium other than cash, such as goods or commodities, stocks, bonds, or other forms of property. The term does not include checks or other monetary media of exchange.

(d) *Cross reference.* For provisions relating to records required to be kept and statements which must be furnished an employee with respect to wage payments, see sections 6001 and 6051 and the regulations thereunder in Subpart G of this part.

§ 31.3402(k)–1 Special rule for tips.

(a) *Withholding of income tax in respect of tips*—(1) *In general.* Subject to the limitations set forth in paragraph (a)(2) of this section, an employer is required to deduct and withhold from each of his employees tax in respect of those tips received by the employee which constitute wages. (For provisions relating to the treatment of tips as wages, see §§ 3401(a)(16) and 3401(f).) The employer shall make the withholding by deducting or causing to be deducted the amount of the tax from wages (exclusive of tips) which are under the control of the employer or other funds turned over by the employee to the employer (see paragraph (a)(3) of this section). For purposes of this section the terms ''wages (exclusive of tips) which are under the control of the employer'' means, with respect to a payment of wages, an amount equal to wages as defined in section 3401(a) except that tips and noncash remuneration which are wages are not included, less the sum of—

(i) The tax under section 3101 required to be collected by the employer in respect of wages as defined in section 3121(a) (exclusive of tips);

(ii) The tax under section 3402 required to be collected by the employer in respect of wages as defined in section 3401(a) (exclusive of tips); and

(iii) The amount of taxes imposed on the remuneration of an employee withheld by the employer pursuant to State and local law (including amounts withheld under an agreement between the employer and the employee pursuant to such law) except that the amount of taxes taken into account in this subdivision shall not include any amount attributable to tips.

(2) *Limitations.* An employer is required to deduct and withhold the tax on tips which constitute wages only in respect of those tips which are reported by the employee to the employer in a written statement furnished to the employer pursuant to section 6053(a). The employer is responsible for the collection of the tax on tips reported to him only to the extent that the emloyer can, during the period beginning at the time the written statement is submitted to him and ending at the close of the calendar year in which the statement was submitted, collect the tax by deducting it or causing it to be deducted as provided in subparagraph (1) of this paragraph.

(3) *Furnishing of funds to employer.* If the amount of the tax in respect of tips reported by the employee to the employer in a written statement furnished pursuant to section 6053(a) exceeds the wages (exclusive of tips) which are under the control of the employer from which the employer is required to withhold the tax in respect of such tips, the employee may furnish to the employer, within the period specified in subparagraph (2) of this paragraph, an amount of money equal to the amount of such excess.

(b) *Less than $20 of tips.* Notwithstanding the provisions of paragraph (a) of this section, if an employee furnishes to his employer a written statement—

(1) Covering a period of less than 1 month, and

(2) The statement is furnished to the employer prior to the close of the 10th day of the month following the month in which the tips were actually received by the employee, and

(3) The aggregate amount of tips reported in the statement and in all other statements previously furnished by the employee covering periods within the same month is less than $20, and such statements, collectively, do not cover the entire month,

the employer may deduct amounts equivalent to the tax on such tips from wages (exclusive of tips) which are under the control of the employer or other funds turned over by the employee to the employer. For provisions relating to the repayment to an employee, or other disposition, of amounts deducted from an employee's remuneration in excess of the correct amount of tax, see §31.6413(a)–1. (As to the exclusion from wages of tips of less than $20, see §31.3401(a)(16)–1.)

(c) *Priority of tax collection*—(1) *In general.* In the case of a payment of wages (exclusive of tips), the employer shall deduct or cause to be deducted in the following order:

(i) The tax under section 3101 and the tax under section 3402 with respect to such payment of wages.

(ii) Any tax under section 3101 which, at the time of payment of the wages, the employer is required to collect—

(a) In respect of tips reported by the employee to the employer in a written statement furnished to the employer pursuant to section 6053(a), or

(b) By reason of the employer's election to make collection of the tax under section 3101 in respect of tips on an estimated basis,

but which has not been collected by the employer and which cannot be deducted from funds turned over by the employee to the employer for such purpose. (See §31.3102–3, relating to collection of, and liability for, employee tax on tips.)

(iii) Any tax under section 3402 which, at the time of the payment of the wages, the employer is required to collect—

(a) In respect of tips reported by the employee to the employer in a written statement furnished to the employer pursuant to section 6053(a), or

(b) By reason of the employer's election to make collection of the tax under section 3402 in respect of tips on an estimated basis,

but which has not been collected by the employer and which cannot be deducted from funds turned over by the employee to the employer for such purpose. For provisions relating to the

withholding of tax on the basis of average estimated tips, see paragraph (b) of § 31.3402(h)(1)–1.

(2) *Examples.* The application of paragraph (b)(1) of this section may be illustrated by the following examples (The amounts used in the following examples are intended for illustrative purposes and do not necessarily reflect currently effective rates or amounts.):

Example 1. W is a waiter employed by R restaurant. W's principal remuneration for his services is in the form of tips received from patrons of R; however, he also receives a salary from R of $40 per week, which is paid to him every Friday. W is a member of a labor union which has a contract with R pursuant to which R is to collect dues for the union by withholding from the wages of its employees at the rate of $1 per week. In addition to the taxes required to be withheld under the Internal Revenue Code, W's wages are subject to withholding of a state income tax imposed upon both his regular wage and his tips received and reported to R.

On Monday of a given week W furnishes a written statement to R pursuant to section 6053(a) in which he reports the receipt of $160 in tips. The $40 wage to be paid to W on Friday of the same week is subject to the following items of withholding:

	Taxes with respect to regular wage	Taxes with respect to tips	Total
Section 3101 (F.I.C.A.) ..	$1.76	$7.04	$8.80
Section 3402 (income tax at source)	5.65	28.30	33.95
State income tax	1.20	4.80	6.00
Union dues	.....	.....	1.00
Total	.....	.....	49.75

W does not turn over any funds to R. R should satisfy the taxes imposed by sections 3101 and 3402 out of W's $40 wage as follows: The taxes imposed with respect to the regular wage (a total of $74l) should be satisfied first. The taxes imposed with respect to tips are to be withheld only out of ''wages (exclusive of tips) which are under the control of the employer'' as that phrase is defined in §§ 31.3102–3(a)(1) and 31.3402(k)–1(a)(1). The amount of such wages under the control of employer in this example is $31.39, or $40, less the amounts applied in satisfaction of the Federal and State withholding taxes imposed with respect to the regular $40 wage ($8.61). This $31.39 is applied first in satisfaction of the tax under section 3101 with respect to tips ($7.04) in the balance of $24.35 is applied in partial satisfaction of the withholding of income tax at source under section 3402 with respect to tips. The amount of the tax with respect to tips under section 3402 which remains unsatisfied ($3.95) should be withheld from wages under the control of the employer the following week.

Example 2. During the week following the week dealt with in example 1, W furnishes a written statement to R pursuant to withholding:

	Taxes with respect to regular wage	Taxes with respect to tips	Total
Section 3101 (F.I.C.A.) ..	$1.76	$5.72	$7.48
Section 3402 (Income tax at source):			
Current week	5.65	22.30	27.95
Carryover from prior week	.....	3.95	3.95
State income tax	1.20	3.90	5.10
Union dues	.....	.....	1.00
Garnishment	.....	.....	10.00
Total	.....	.....	55.48

As in example 1, the amount of ''wages (exclusive of tips) which are under the control of the employer'' is $31.39. This amount is applied first in satisfaction of the tax under section 3101 with respect to tips ($5.72) and the balance is applied in partial satisfaction of the withholding of income tax at source under section 3402 with respect to tips (a total of $26.25), including that portion of the amount required to be withheld from the prior week's wages which remained unsatisfied. The amount of the tax with respect to tips under section 3402 which remains unsatisfied ($0.58) should be withheld from wages under the control of the employer the following week.

[T.D. 7001, 34 FR 1002, Jan. 23, 1969, as amended by T.D. 7053, 35 FR 11628, July 21, 1970]

§ 31.3402(l)–1 Determination and disclosure of marital status.

(a) *Determination of status by employer.* An employer in computing the tax to be deducted and withheld from an employee's wages paid after April 30, 1966, shall apply the applicable percentage method or wage bracket method withholding table (see section 3402 (a), (b), and (c) and the regulations thereunder) for the pertinent payroll period which relates to employees who are single persons, unless there is in effect with respect to such payment of wages a withholding exemption certificate furnished to the employer by the employee after March 15, 1966, indicating that the employee is married in which