May 19, 2014

Mr. John Koskinen  
Commissioner  
Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, DC 20024

Re: Comments on IRS Form SS-8

Dear Commissioner Koskinen:

Enclosed are comments on Internal Revenue Service Form SS-8: Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding. These comments represent the view of the American Bar Association Section of Taxation. They have not been approved by the Board of Governors or the House of Delegates of the American Bar Association, and should not be construed as representing the policy of the American Bar Association.

Sincerely,

Michael Hirschfeld  
Chair

Enclosure

cc: Nina Olson, National Taxpayer Advocate, Taxpayer Advocate Service  
William J. Wilkins, Chief Counsel, Internal Revenue Service  
Mark J. Mazur, Assistant Secretary (Tax Policy), Department of the Treasury  
Emily S. McMahon, Deputy Assistant Secretary (Tax Policy), Department of Treasury
ABA SECTION OF TAXATION
COMMENTS ON
INTERNAL REVENUE SERVICE FORM SS-8

These comments (“Comments”) are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Diana Leyden and Andrew VanSingel of the Pro Bono and Tax Clinics Committee of the Section of Taxation. Substantive contributions were made by Susan Morgenstern and T. Keith Fogg, of the Committee. The Comments were reviewed by George Willis, Pro Bono and Tax Clinics Committee Chair and Chaya Kundra, Employment Taxes Committee Chair. The Comments were further reviewed by Kathryn Sedo of the Section’s Committee on Government Submissions and by C. Wells Hall, III, Council Director, for the Pro Bono and Tax Clinics Committee.

Although the members of the Section of Taxation who participated in preparing these Comments have clients who might be affected by the federal income tax principles addressed by these Comments, no such member or the firm or organization to which such member belongs has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

Contacts:
Diana Leyden
Phone: (860) 570-5461
Email: diana.leyden@law.uconn.edu

Andrew VanSingel
Phone: (630) 580-3315
Email: avansingel@pslegal.org

Date: May 19, 2014
INTRODUCTION

The Internal Revenue Service (IRS) has requested public comments on current IRS Form SS-8: Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding.\(^1\) The form was last revised in August 2011.

Form SS-8 is an important tool used to help taxpayers and the IRS resolve tax controversies involving worker status. As low income taxpayer clinicians, we see that taxpayers most often use Form SS-8 in cases where a payor has reported to the IRS that the taxpayer received income as an independent contractor, and the taxpayer maintains that s/he is an employee.

There are no proposed changes to Form SS-8 outlined in the request for comments; however, the IRS requested comments as to the following: (a) whether the collection of information requested on the form is necessary for the proper performance of functions of the agency, including whether the information has practical utility; (b) the accuracy of the agency’s estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. Our comments address items (a), (c) and (d) of Form SS-8 only.

We believe that Form SS-8 can be revised to better clarify and thus increase accuracy when completing the form. If changes to Form SS-8 are adopted, similar changes should be incorporated into the Spanish language version of the form, numbered SS-8PR (Oct 2011). These comments are in part based on our extensive experience in representing low income taxpayers who have difficulty in using this form to support thorough and accurate requests for worker classification or reclassification.

As outlined herein, we recommend eight changes to Form SS-8 in order to enhance the quality of the form and assist both taxpayers and the IRS in the use of the form.

COMMENTS

1. Create Separate Forms for Workers and Firms.

Currently, Form SS-8 is completed by two different users: those referred to as “Workers” and those referred to as “Firms.” This is not only confusing, but the users often have conflicting interests.

The form evolved in this way because it is currently serving two functions. First, it is generally used by a worker who is disputing classification as either an employee or independent contractor who is seeking a reclassification of worker status. Second, it is used by IRS to elicit

\(^1\) Proposed Collection; Comment Request for Form SS-8, 78 Fed. Reg. 23,981 (Apr. 23, 2013).
information from the firm who paid the worker. A payor may also use form SS-8 to seek worker classification determinations, although this is less frequent.

We suggest two forms. Workers would complete a Form SS-8W. Firms would complete a separate form SS-8F to respond to the IRS’s requests or to initiate a firm’s request for worker classification determinations. This change would be similar to the way in which the IRS processes innocent spouse requests. There, a requesting spouse completes Form 8857: Request for Innocent Spouse Relief. While investigating the request, the IRS asks for information from the non-requesting spouse on Form 12509: Statement of Disagreement. Having forms specific to each party makes it clearer and easier for each party to address their respective positions.

We also believe having separate forms in worker misclassification cases will make it easier for workers and firms to clearly understand the way to use the form to best present their arguments.

While we recommend the use of separate forms, we recommend the creation of a booklet that would include both forms so that the requesting party understands the information that IRS will request from the non-requesting party.

2. More Space is Needed to Complete Answers.

The space provided to answer the questions in long-hand is insufficient. While the fill-in PDF version of the form makes for neater answers, it does not offer enough space to provide the level of detail necessary for the fact-bound reclassification determination.

Both workers and firms may be misled into believing that the information being solicited is not important because some of the response fields are small. This may lead to incomplete submissions, increase processing times and cause undue requests for additional information.

Although the instructions do say that firms and workers should attach additional pages if necessary, that is written in a section that not everyone may read. We suggest repeating this instruction at the top of each page of Form SS-8.

The current form has truncated pages, making the form less than three and a half pages in length. There is at least one-half of a page of space available to use before adding a new page. If this current blank space were fully utilized, it may reduce the necessity of attaching additional explanatory sheets.

Therefore, we recommend that (1) an instruction to attach additional pages should be printed on the first page of Form SS-8 and (2) more space in general be provided to complete the form, especially: Part I, Questions 2, 4, and 6; Part II, Questions 5 and 6; and Part IV, Question 10.
3. **Recommended Terminology Changes.**

   We recommend that the term “Firm” be changed to “Business.” The word “Firm” implies a formal entity, such as a corporation, and may not be obvious to sole proprietorships or small businesses that it applies to them. Many unsophisticated taxpayers will not understand that “Firm” means the payor even in cases when the payor is a person, and not a corporation. Alternatively, a caption such as “payor” could be added so that the form says “Firm (or payor)” and “Worker (or payee).”

4. **Update the “Disclosure of Information” Paragraph.**

   This important paragraph alerts both parties that the IRS may be required to disclose information on the form to the other party as part its investigation of the request. This potentially has the greatest impact on the worker. We believe that the language of the disclosure warning should be updated. It should also be in larger, bold font to call attention to its importance. By way of suggestion, we propose the following revision:

   **DISCLOSURE OF INFORMATION (in all caps)**

   The information you provide on this form may be disclosed to other parties—e.g., a business, a worker or a payor. This disclosure is necessary if the IRS is to fully investigate your request and make a determination.

   If you do not want information listed on this form disclosed to others STOP-DO NOT SUBMIT THIS FORM.

   If you do not submit this form you cannot obtain a determination of worker status for purposes of Federal Employment Taxes and Income Tax Withholding.

   The current Disclosure of Information also incorporates a reminder to taxpayers that incomplete information may result in their request not being processed. This is a separate issue from disclosure and the reminder should not be mixed with the disclosure paragraph. We recommend that the reminder regarding filling out the form completely be moved to the “General Instructions” section.

5. **List More Examples of Documentation to Provide.**

   Taxpayers often do not understand exactly what types of documents are relevant or may be useful in their request for determination of status. Some parts of the current form provide helpful examples of what documents would aid in making a determination. Specifically, Part I, Question 5, lists several examples of supporting documentation.

   We recommend that wherever the IRS is requesting supporting documents, that, at a minimum, examples be listed in a manner similar to Part I, Question 5, noted above. If that is not possible, then those same examples should be listed in the line-by-line instructions to the
form. Better than providing examples, it would be preferred that a check list or check box system be utilized wherever possible.\textsuperscript{2} This would make it simpler and easier for a taxpayer to accurately and complete fill out the form.

To illustrate, Part II, Question 1, could be re-worded as follows:

**What specific training and/or instructions were you given by the business that you worked for?** (Check the boxes below describing the documents you are attaching to support your request.)

- Job descriptions
- Memos describing what work you were to do
- Contracts or documents you signed when you were hired
- Training manuals
- Employee handbooks
- Other: __________________________
  __________________________

6. **Add a New Question Inquiring About Tax Return Filings.**

If the taxpayer did not file a return (or protective claim) for the year(s) covered by the request, he or she may be subject to the three year statute of limitations for refunds. Likewise, if the taxpayer did file a tax return, he or she may need to amend the return to recover any overpayment of employment taxes that are subject to the two year statute of limitations. By asking a question in the form, it may direct the taxpayer to refer to the instructions, which may otherwise be overlooked. We recommend a reference to the instructions or a statement about tax return filing issues including the time period for seeking refunds of taxes paid. We recommend a question about tax return filings to alert the taxpayer to the importance of this question. The question is simple, yet important:

**Did you file a tax return for the year(s) covered in this request?**

- Yes  - No

Please refer to the “Instructions for Workers” section of this form for an explanation of the time for filing a claim for refund or amending your tax return.

The form (or the instructions) should also indicate that the taxpayer may file an original return or amended return using Form 8919 to report the uncollected portion of Social Security and Medicare taxes.

\textsuperscript{2} By way of example, see the use of check lists on IRS Form 8857: Request for Innocent Spouse Relief (Sept. 2010).
7. **Add a New Question Inquiring About Prior IRS Determinations and Other Determinations.**

Form SS-8 should ask whether the worker has received a determination from the IRS for another tax year, or adjudication from another agency regarding their classification with the same firm. Adjudication from another government agency is very common. Even if not determinative, it is highly relevant to the worker’s case before the IRS. Suggested language such as the following could be added to the form:

**Have you received a determination from the IRS regarding your worker classification with this Firm for any other tax year(s)?**

☐ Yes ☐ No

If “Yes,” please attach a copy of the determination letter to this form.

**Have you received a determination regarding your worker classification from any other agency?** (e.g., state unemployment office, workers’ compensation board, trial court.)

☐ Yes ☐ No

If “Yes,” please attach a copy of the determination letter to this form.

8. **Add a “How to Get Help” Section on the Instructions to Form SS-8.**

The General Instructions section of Form SS-8 should include a “How to Get Help” section that directs taxpayers to assistance from IRS toll-free numbers, website, and the Taxpayer Advocate Service as well as the availability of qualified Low Income Taxpayer Clinics. This section should follow the format seen on form number INST-8857: Instructions for Form 8857.

Inserting this section will alert taxpayers to the availability of potential resources that may assist them filling out Form SS-8 in a more complete and correct manner before submitting the form to the IRS. This will help improve accuracy, improve claim processing and generally aid the IRS in its goal of efficient tax administration.

---

3 For example, many states’ Departments of Unemployment and Departments of Worker’s Compensation make worker status determinations before issuing benefits.

4 Rev. 09-2011.