



January 17, 2013

Mr. Steven T. Miller
Acting Commissioner
Internal Revenue Service
1111 Constitution Ave., N.W.
Washington, DC 20224

The Honorable William J. Wilkins
Chief Counsel
Internal Revenue Service
1111 Constitution Ave., N.W.
Washington, DC 20224

Re: Form 1099-MISC, Miscellaneous Income –
Filing requirements for taxpayers with rental real estate

Dear Messrs. Miller and Wilkins:

The American Institute of Certified Public Accountants (AICPA) urges the Internal Revenue Service (IRS) to issue clear guidance as to when a taxpayer with rental real estate activity must file a Form 1099-MISC, Miscellaneous Income, for payments of \$600 or more in a year to third parties. Until such guidance is issued, we strongly recommend that the IRS remove the two questions on the Form 1040, Schedule E, Supplemental Income and Loss, regarding Forms 1099 listed later in this letter and hereinafter referred to as “Questions A and B.”

If the IRS determines that all rental real estate owners should file Forms 1099-MISC, or reaches any position contrary to the wide-spread belief of taxpayers and tax practitioners that only taxpayers whose rental real estate activity is considered a trade or business are subject to the filing requirements, we also strongly recommend that the IRS grant relief for all affected taxpayers for 2012 and prior tax years.

The AICPA is the world’s largest member association representing the accounting profession, with nearly 386,000 members in 128 countries and a 125-year heritage of serving the public interest. Our members advise clients on federal, state and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America’s largest businesses.

Background

For many years, a taxpayer with rental real estate activity needed to file a Form 1099-MISC only if the taxpayer was in the “trade or business” of rental real estate and made payments in the course of such trade or business of \$600 or more to another person.¹

Unfortunately, as noted in a General Accounting Office (GAO) Report 08-956, dated August 28, 2008, entitled “Actions That Could Improve Rental Real Estate Reporting Compliance,” the law was unclear as to when an activity was considered a trade or business:

Another potential change to existing information reporting requirements is to expand the requirement for taxpayers to file Forms 1099-MISC for certain payments they deduct as expenses, for example, when taxpayers pay contractors to perform repair work on their rental properties. Existing law on whether taxpayers must file information returns on selected rental real estate expenses they incur requires a case-by-case analysis that depends on the facts and circumstances for each taxpayer. Currently, only taxpayers whose rental real estate activity is considered a trade or business are required to report payments on Form 1099-MISC. However, the law for filing information returns does not clearly spell out how to determine whether taxpayers’ rental real estate activity should be considered a trade or business, and IRS must make this determination on a case-by-case basis. Without concrete statutory language, it may be difficult for taxpayers who report rental real estate activity to determine if they are required to file Forms 1099-MISC for certain expense payments they make.

As a result of the GAO’s report, Congress enacted section 2101 of the Small Business Jobs Act of 2010 (P.L. 111-240) (“SBJA”), which specifically addressed information reporting requirements for taxpayers owning rental real estate. Section 6041² requires “persons engaged in a trade or business” to satisfy reporting requirements. The SBJA expanded the information reporting requirements to payments for rental property expenses paid by all persons receiving rental income, whether or not they are “engaged in a trade or business,” providing only limited exceptions. Similar to other “persons engaged in a trade or business,” the reporting requirements were triggered upon the purchase of \$600 or more in services from another entity.

¹ Section 6041(a).

² All section references in this letter are to the Internal Revenue Code of 1986, as amended, or the Treasury regulations promulgated there under, unless otherwise specified.

Mr. Steven T. Miller
The Honorable William J. Wilkins
January 17, 2013
Page 3 of 5

Congress quickly retracted its position and passed the Comprehensive Taxpayer Protection and Repayment of Exchange Subsidy Overpayments Act of 2011, signed into law by President Obama on April 14, 2011, that strikes section 6041, subsection (h). This law repealed the expanded Form 1099 reporting requirements imposed on taxpayers who receive rental income. As a result, the information reporting requirements only apply to taxpayers engaged in a trade or business.

Form 1040, Schedule E, Supplemental Income and Loss, and Instructions

The IRS revised the Schedule E for the 2011 and 2012 tax year. Most significantly, two questions were added to the Schedule E (among other schedules) regarding Forms 1099:

- (A) Did you make any payments in 2011 that would require you to file Form(s) 1099? (see instructions) and
- (B) If “Yes,” did you or will you file all required Forms 1099?

The form instructions were also revised. Under the instructions for Schedule E, line A, the following language now appears (bold type added):

TIP: Generally, you must file Form 1099-MISC if you paid at least \$600 in rents, services, prizes, medical and healthcare payments, and other income payments. The Guide to Information Returns on page 15 of the General Instructions for Certain Information Returns has more information, including the due dates for the various information returns.

However, under “General Instructions,” the following language still appears (bold type added):

“Information returns. **You may have to file information returns** for wages paid to employees, certain payments of fees and other nonemployee compensation, interest, rents, royalties, real estate transactions, annuities, and pensions. You generally use Form 1099-MISC, Miscellaneous Income, to report rents and payments of fees and other nonemployee compensation. For details, see the instructions for line A and the 2011 General Instructions for Certain Information Returns (Forms 1097, 1098, 1099, 3921, 3922, 5498, and W-2G).”

The phrasing of “you may” which appears in the General Instructions has been used in the instructions for Schedule E for many years, and we believe is accurate. The new phrasing “generally, you must” used in the line A TIP is simply misleading.

Confusion and Uncertainty

The revisions to the Schedule E and instructions have resulted in widespread confusion and uncertainty. In particular, the introduction of Questions A and B now place the issue of whether a Form 1099-MISC is required into greater uncertainty than before the enactment of section 6041(h).

With the repeal of the expanded reporting requirements for rental property owners, our members thought the question of when taxpayers with rental real estate activity needed to file a Form 1099-MISC had substantially been put to rest. Only taxpayers whose rental real estate activity is considered a trade or business are required to report payments on Form 1099-MISC. This is consistent with longstanding regulations and law which require Form 1099-MISC reporting “only when payments are made in the course of your trade or business.”³

We understood that individuals who own a small rental property generally do not fall under the same reporting requirements as businesses. However, with the addition of Questions A & B to Schedule E, we are questioning whether the IRS has a different interpretation.

Administrative Burden

The AICPA believes an overly broad interpretation of whether a taxpayer is “engaged in a trade or business” will result in undue confusion for individuals. For example, many individuals, who own a vacation property that is rented part of the year to help defray their costs, would be negatively affected if subject to strict, business-like reporting requirements. We are concerned that (1) obtaining tax identification numbers and other information from service providers, and (2) providing Forms 1099-MISC during January, a month when taxpayers would not normally be focused on tax issues, would be extremely burdensome.

While we generally support the IRS’s efforts to use additional information reporting to minimize the “Tax Gap,” we think those requirements should be applied only to businesses. It is our belief that Congress, in repealing the expanded reporting requirements, shares similar concerns.

Recommendations

The AICPA urges the IRS to issue clear and immediate guidance as to when a taxpayer must file a Form 1099-MISC with regard to a rental real estate activity. In the interim, we recommend that the IRS remove Questions A & B from Schedule E since these questions

³ Form 1099-MISC Instructions.

Mr. Steven T. Miller
The Honorable William J. Wilkins
January 17, 2013
Page 5 of 5

will continue to trigger confusion and uncertainty. We also recommend that you revise the language in the instructions to state that “**You may** have to file Form 1099-MISC if you paid at least \$600.”

If the IRS believes that taxpayers must use facts and circumstances on a case-by-case basis to determine if the taxpayer’s rental real estate activity is a trade or business, taxpayers and tax preparers need specific, easy-to-apply guidance. A good tax system – one that facilitates and encourages compliance – needs to be understandable to those who are expected to pay the tax and by those who administer the tax. In addition, if the IRS determines that all rental real estate owners should file Forms 1099-MISC, we strongly recommend that the IRS grant relief for all affected taxpayers for 2012 and prior tax years.

* * * * *

Thank you for considering our views on this very important topic. If you have any questions or would like to discuss this issue or our recommendations, please contact me at (304) 522-2553 or jporter@portercpa.com; Jonathan Horn, Chair of the AICPA’s Individual Income Tax Technical Resource Panel, at (212) 744-1447 or JMHCPA@verizon.net; or Abraham Schneier, AICPA Senior Technical Manager, at (202) 434-9229 or aschneier@aicpa.org.

Sincerely,



Jeffrey A. Porter, CPA
Chair, AICPA Tax Executive Committee

cc: Delray Jenkins, Director, Business Modernization
Small Business Self-Employed Division, Internal Revenue Service
Laurie Tuzynski, Executive Director
Small Business Self-Employed Division, Internal Revenue Service
Candice V. Cromling
Director of National Public Liaison, Internal Revenue Service