

## Section 3402.—Income Tax Collected at Source

*26 CFR 31.3402(r)–1: Withholding on distributions of Indian gaming profits to tribal members.*

**T.D. 8634**

**DEPARTMENT OF THE TREASURY  
Internal Revenue Service  
26 CFR Part 31**

### **Withholding on Distributions of Indian Gaming Profits to Tribal Members**

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Final regulations.

**SUMMARY:** This document contains final regulations relating to the income tax withholding requirement on distributions of profits from certain gaming activities made to members of Indian tribes under section 3402(r) of the Internal Revenue Code of 1986. Those affected by the regulations are persons, including Indian tribes, making payments to members of Indian tribes from net revenues of certain gaming activities conducted or licensed by the tribes. Also affected are members of Indian tribes who receive the payments.

**DATES:** These regulations are effective December 19, 1995. For the date of applicability, see § 31.3402(r)–1(b).

**FOR FURTHER INFORMATION CONTACT:** Rebecca Wilson (202) 622-6040 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

#### *Background*

This document contains amendments to the Employment Tax Regulations (26 CFR part 31) under section 3402(r). Section 3402(r) was added by section 701 of the Uruguay Round Agreements Act, which approved the trade agreements resulting from the Uruguay Round of multilateral trade negotiations under the auspices of the General Agreement on Tariffs and Trade (GATT) and the Statement of Administrative Action to implement the Agreements.

On December 22, 1994, temporary regulations (TD 8574 [1995–1 C.B. 194]) relating to withholding on distributions of Indian gaming profits to tribal members under section 3402(r) were published in the Federal Register (59 FR 65939). A notice of proposed rulemaking (EE–60–94 [1995–1 C.B. 857]) cross-referencing the temporary regulations was published in the Federal Register for the same day (59 FR 65982). No public hearing was requested or held.

Also on December 22, 1994, the IRS mailed a copy of Notice 1026, providing withholding tables for use in 1995, to Indian tribes and gaming establishments listed with the National Indian Gaming Commission. For 1996 and

subsequent years, tables will be printed in a supplement to Circular E.

The IRS received written comments responding to the notice of proposed rulemaking. After consideration of the comments, the regulations proposed by EE-60-94 are adopted as revised by this Treasury decision, and the corresponding temporary regulations are withdrawn. The regulations contain no substantive changes.

#### *Explanation of Provisions*

1. *Indian Gaming Regulatory Act.* Net revenue from certain gaming activities conducted or licensed by an Indian tribe may be used to make taxable distributions to members of the Indian tribe. The tribe must notify its members of the tax liability at the time the payments are made. 25 U.S.C. 2710(b)(3) and (d)(1).

2. *Prior law.* Prior to the addition of section 3402(r) in 1994, a tribe was not required to withhold on these distributions to tribal members except to the extent backup withholding rules applied under section 3406.

3. *Code section 3402(r).* Section 3402(r) generally requires that, for payments made after December 31, 1994, persons, including Indian tribes, making payments to members of Indian tribes from the net revenues of certain gaming activities conducted or licensed by the tribes deduct and withhold income taxes from those payments. Section 3402(r) provides that the withholding amount be calculated assuming that the taxpayer is single and has one exemption.

4. *Legislative history.* The legislative history of section 3402(r) indicates that the goal of the new withholding requirement was to make it easier for tribal members who receive gaming distributions to meet their tax responsibilities:

Distributions of net revenues from gaming activity by an Indian tribe may result in significant tax liability to the tribe's members. Establishing withholding on such payments will more closely match estimated tax payments to ultimate tax liability. For some tribal members, this change may eliminate the need to make quarterly estimated tax payments. For others, it will reduce the likelihood that they will face penalties for underpayment of tax at the time of tax filing.

H.R. Rep. No. 826, 103d Cong., 2d Sess., pt.1, at 170-171 (1994).

5. *Proposed regulations.* The proposed regulations implement the withholding method prescribed by section 3402(r). They also permit additional withholding by agreement between the tribal member and the tribe.

6. *Comments and final regulations.* The IRS received only two written comments on the proposed regulations. After consideration of both comments, the proposed regulations are adopted with no substantive changes.

No comments were received from the Chief Counsel for Advocacy of the Small Business Administration.

#### *Special Analyses*

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and, therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Small Business Administration for comment on its impact on small business.

#### *Drafting Information*

The principal author of the regulations is Rebecca Wilson, Office of the Associate Chief Counsel (Employee Benefits and Exempt Organizations), IRS. However, other personnel from the IRS and Treasury Department participated in their development.

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#### *Adoption of Amendments to the Regulations*

Accordingly, 26 CFR part 31 is amended as follows:

#### PART 31—EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT SOURCE

Paragraph 1. The authority citation for part 31 is amended by removing the entry for section 31.3402(r)-1T and adding an entry in numerical order to read as follows:

Authority: 26 U.S.C. 7805 \*\*\*  
Section 31.3402(r)-1 also issued under 26 U.S.C. 3402(p) and (r),\*\*\*

Par. 2. Section 31.3402(r)-1 is added to read as follows:

#### *§ 31.3402(r)-1 Withholding on distributions of Indian gaming profits to tribal members.*

(a)(1) *General rule.* Section 3402(r)(1) requires every person, including an Indian tribe, making a payment to a member of an Indian tribe from the net revenues of any class II or class III gaming activity, as defined in 25 U.S.C. 2703, conducted or licensed by such tribe to deduct and withhold from such payment a tax in an amount equal to such payment's proportionate share of the annualized tax, as that term is defined in section 3402(r)(3).

(2) *Withholding tables.* Except as provided in paragraph (a)(4) of this section, the amount of a payment's proportionate share of the annualized tax shall be determined under the applicable table provided by the Commissioner.

(3) *Annualized amount of payment.* Section 3402(r)(5) provides that payments shall be placed on an annualized basis under regulations prescribed by the Secretary. A payment may be placed on an annualized basis by multiplying the amount of the payment by the total number of payments to be made in a calendar year. For example, a monthly payment may be annualized by multiplying the amount of the payment by 12. Similarly, a quarterly payment may be annualized by multiplying the amount of the payment by 4.

(4) *Alternate withholding procedures—(i) In general.* Any procedure for determining the amount to be deducted and withheld under section 3402(r) may be used, provided that the amount of tax deducted and withheld is substantially the same as it would be using the tables provided by the Commissioner under paragraph (a)(2) of this section. At the election of an Indian tribe, the amount to be deducted and withheld under section 3402(r) shall be determined in accordance with this alternate procedure.

(ii) *Method of election.* It is sufficient for purposes of making an election under this paragraph (a)(4) that an Indian tribe evidence the election in any reasonable way, including use of a particular method. Thus, no written election is required.

5. *Additional withholding permitted.* Consistent with the provisions of section 3402(p), a tribal member and a tribe may enter into an agreement to provide for the deduction and withholding of additional amounts from payments in order to satisfy the anticipated tax liability of the tribal member. The agreement may be made in a manner similar to that described in § 31.3402(p)-1 (with respect to voluntary withholding agreements between employees and employers).

(b) *Effective date.* This section applies to payments made after December 31, 1994.

### § 31.3402(r)-1T [Removed]

Par. 3. Section 31.3402(r)-1T is removed.

Margaret Milner Richardson,  
*Commissioner of  
Internal Revenue.*

Approved November 28, 1995.

Leslie Samuels,  
*Assistant Secretary  
of the Treasury.*

(Filed by the Office of the Federal Register on December 18, 1995, 8:45 a.m., and published in the issue of the Federal Register for December 19, 1995, 60 F.R. 65237)

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