

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 31

(IA-104-88)

Imposition of Backup Withholding Due To Notification of an Incorrect Taxpayer Identification Number and the Due Diligence Exception to the Imposition of a Penalty for a Missing or an Incorrect Taxpayer Identification Number**AGENCY:** Internal Revenue Service, Treasury.**ACTION:** Notice of proposed rulemaking by cross-reference to temporary regulations.**SUMMARY:** In the Rules and Regulations portion of this issue of the *Federal Register*, the Internal Revenue Service is issuing temporary regulations that would amend and clarify the rules concerning the requirement for payors to backup withhold and the actions that payors must take to exercise due diligence with respect to a missing or an incorrect taxpayer identification number due to notification of an incorrect taxpayer identification number. The text of the temporary regulations also serves as the comment document for this notice of proposed rulemaking.**DATES:** The regulations are proposed to be effective for reportable payments made after December 31, 1983, and to information returns filed after December 31, 1984. However, the requirements of § 35a.3406-1 are proposed to be effective on and after January 1, 1989. Written comments and requests for a public hearing must be delivered or mailed by June 12, 1989.**ADDRESS:** Send comments and requests for a public hearing to: Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Attn: CC:CORP:TR (IA-104-88), Washington, DC 20044.**FOR FURTHER INFORMATION CONTACT:** Renay France at (202) 566-3627 (not a toll-free number).**SUPPLEMENTARY INFORMATION:****Background**

The temporary regulations published in the Rules and Regulations portion of this issue of the *Federal Register* amend the rules set forth in § 35a.3406-1 and §§ 35a.9099-1 and 35a.9999-3 in order to conform those rules to the changes made by Notice 88-77, 1988-28 I.R.B. 28, and Notice 88-89, 1988-34 I.R.B. 22. Further, the temporary regulations would provide a new due diligence standard for payors of certain accounts with post-1987 awaiting-TIN certifications, for payors of beneficiaries

under life-insurance contracts, and for payors of certain payees who are exempt from the payment of the tax on self-employment income under Code section 1401 or the Federal Insurance Contributions Act tax on employers or employees under Code section 3111 or 3101, respectively. For the text of the new temporary regulations, see T.D. 8248 published in the Rules and Regulations portion of this issue of the *Federal Register*. The preamble to the temporary regulations explains the regulations.

Special Analyses

These proposed rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. Although this document is a notice of proposed rulemaking that solicits public comments, the notice and public procedure requirements of 5 U.S.C. 553 do not apply because the regulations proposed herein are interpretative. Therefore, an initial Regulatory Flexibility Analysis is not required by the Regulatory Flexibility Act (5 U.S.C. Chapter 6).

Comments and Requests for a Public Hearing

Before adopting these proposed regulations, consideration will be given to any written comments that are submitted (preferably a signed copy and seven copies) to the Internal Revenue Service. All comments will be available for public inspection and copying in their entirety. A public hearing will be scheduled and held upon written request by any person who submits written comments on the proposed rules. Also, the Internal Revenue Service intends to publish a notice of proposed rulemaking in the near future that will provide comprehensive rules on backup withholding. Generally, the pertinent provisions of all the temporary regulations with respect to backup withholding will be incorporated in the notice of proposed rulemaking. The Internal Revenue Service intends to schedule one hearing to receive comments under these proposed rules and under the comprehensive proposed rules that will be published shortly. Notice of the time and place of the hearing will be published in the *Federal Register*. However, the notice and hearing will not cover any of the rules set forth in INTL-52-86. See 53 FR 5991 and 54 FR 11236.

Drafting Information

The principal author of these proposed regulations is Renay France of the Office of the Assistant Chief Counsel (Income Tax and Accounting), Internal Revenue Service. However,

other personnel from the Internal Revenue Service and the Treasury Department participated in their development.

Lawrence B. Gibbs,

Commissioner of Internal Revenue.

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DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Part 218

Interest Rate Applicable to Late Payments and Underpayments of Oil and Gas Royalties, Rentals, Bonuses, and Other Monies

March 3, 1989.

AGENCY: Minerals Management Service (MMS), Interior.**ACTION:** Proposed rule.

SUMMARY: The Minerals Management Service (MMS) is proposing to amend its regulations at 30 CFR 218.54, 218.55, and 218.103 governing the rate of interest charged on underpayments or late payments of oil and gas royalties, rentals, bonuses, and other monies due the Federal Government by lessees and other royalty payors, and the rate of interest paid on late disbursements of an Indian Tribe's or Allottee's royalty or a State's share of royalty revenues. The existing oil and gas regulations reference section 6621 of the Internal Revenue Code of 1954 for the applicable interest rate. Section 6621 was, however, amended by the 1986 tax reform act and presently references two different interest rates, one rate for overpayments and another rate for underpayments. This proposed rulemaking will clarify the ambiguity in the existing regulations created by the amendment to section 6621 as to which of the two different rates would apply.

The rate of interest charged on underpayment or late payment of monies due on solid mineral or geothermal resource leases is not affected by this proposed rulemaking.

DATE: Written comments must be received on or before May 11, 1989.**ADDRESS:** Written comments may be mailed to Minerals Management Service, Royalty Management Program, Rules and Procedures Branch, Denver Federal Center, Building 85, P.O. Box 25165, Mail Stop 682, Denver, Colorado 80225, Attention: Dennis C. Whitcomb.**FOR FURTHER INFORMATION CONTACT:** Dennis C. Whitcomb, Chief, Rules and Procedures Branch, (303) 231-3432, (FTS) 326-3432.

SUPPLEMENTARY INFORMATION: The principal author of this rule is Randall Drake of the Fiscal Accounting Division of the Minerals Management Service.

I. Background and Discussion

Section 111 of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. 1721, requires the Secretary of the Interior (Secretary) to (1) charge interest on royalty from Federal and Indian oil and gas leases that is either underpaid or paid late (section 111(a), 30 U.S.C. 1721(a)); (2) pay interest on disbursements to States which are not made by the time prescribed under 30 U.S.C. 191, as amended by FOGRMA section 104(a) (section 111(b), 30 U.S.C. 1721(b)); and (3) pay interest to Indian Tribes and allottees if royalty revenues are not disbursed by the date prescribed in FOGRMA section 104(b) (section 111(d), 30 U.S.C. 1721(d)).

Sections 111(a), (b), and (d) of FOGRMA each provide that the interest shall be "at the rate applicable" under section 6621 of the Internal Revenue Code of 1954 (26 U.S.C. 6621). Section 6621 establishes the rate of interest which must be applied to late payment or underpayment of taxes under 26 U.S.C. 6601(a), and to overpayment of taxes under 26 U.S.C. 6611(a). (Until 1975, sections 6601 and 6611 established a fixed rate of 6 percent, with no reference to section 6621. Sections 6601 and 6611 were amended in 1975 by sections 7(a)(2)(A) and 7(a)(2)(LC), respectively, of Pub. L. 93-625, 88 Stat. 2108, 2115, to apply the rate set by section 6621.)

After FOGRMA's enactment, section 6621 was modified. Prior to its amendment by the Tax Reform Act of 1986 (TRA), Pub. L. 99-514, 100 Stat. 2744, section 6621 contained a single rate of interest, 26 U.S.C. 6621 (1982). Thus, the FOGRMA interest provisions imposed the same rate of interest to both underpayments of royalty and to late disbursements to the States and Indians by the Secretary. As amended, however, section 6621 provides for two rates. For underpayments of tax the rate is a "short-term Federal rate" plus three percentage points, 26 U.S.C. 6621(a)(2) (Supp. 1986). For overpayments the rate is the same "short-term Federal rate" plus 2 percentage points, 26 U.S.C. 6621(a)(1) (Supp. 1986). Thus, under section 6621, as amended, underpayments of taxes have a higher rate of interest charged to them than do overpayments of taxes. The effect of this two-rate provision is to impose a higher interest burden on taxpayers who underpay taxes than on the Government when it refunds overpayments of taxes.

The FOGRMA interest provisions invoke the rates established by section 6621 without qualification, and were not amended either in conjunction with or subsequent to the amendment of section 6621 in 1986. The purpose of this rulemaking is to clarify which of the two interest rates in the amended section 6621 is to be applied under the various FOGRMA provisions referring to that section. Under MMS's current rules, which refer only to section 6621 (*see* 30 CFR 218.54, 218.55, and 218.103), there now is an ambiguity as to which of the two section 6621 rates applies.

At the time FOGRMA became law, Congress did not anticipate more than one interest rate reference in section 6621. Consequently, there is nothing in the legislative history to provide guidance for the present situation. The FOGRMA legislative history (H.R. Rep. No. 859, 97th Cong., 2d Sess. 36 (1982), reprinted in 1982 U.S. Code Cong. & Admin. News 4268, 4290) discusses only the reason for using the rate from the Internal Revenue Code:

Imposition of such high penalties against those owing money to the United States is to remove the incentives such persons may have to hold the money owed and invest it rather than pay it on time to the MMS. Also, the high penalty required of the United States should be a strong incentive to the MMS to disburse moneys under the mineral leasing laws of 1920 promptly.

Since a rate from section 6621 must be applied under section 111(a), (b), and (d) of FOGRMA, 30 U.S.C. 1721(a), (b), and (d), there are four possible results. First, the "overpayment" rate in section 6621(a)(1) could be applied uniformly under FOGRMA section 111(a), (b), and (d). Second, the "underpayment" rate in section 6621(a)(2) could be applied uniformly under FOGRMA section 111(a), (b), and (d). Third, the "overpayment" rate could be applied under FOGRMA section 111(a) (underpayment or late payment of royalty) and the "underpayment" rate could be applied under FOGRMA section 111(b) and (d) (late disbursement to States and Indians). Fourth, the "overpayment" rate could be applied under FOGRMA section 111(b) and (d) and the "underpayment" rate could be applied under FOGRMA section 111(a).

Regulations governing solid mineral and geothermal resource leases provide for late payment or underpayment charges to be calculated on the basis of a percentage assessment rate. In the absence of a specific lease, permit, license, or contract provision prescribing a different rate, this percentage assessment rate is prescribed by the Department of the Treasury as the "Treasury Current Value of Funds

Rate." Because the interest rate provided for in section 6621 of the Internal Revenue Code of 1954 does not apply to solid mineral or geothermal resource leases, the proposed rulemaking does not apply to solid mineral or geothermal resource leases.

II. Proposed Rule

As noted above, Congress intended that the interest provisions of FOGRMA would act as incentives to both oil and gas royalty payors and the Government to make required payments in a timely manner. Taken alone, this intent could be fulfilled by any of the four possible applications set out above. The MMS believes that the approach most justified under the two-rate structure of the amended section 6621 is to apply the "underpayment" rate in 26 U.S.C. 6621(a)(2) under FOGRMA section 111(a), 30 U.S.C. 1721(a), and the "overpayment" rate in 26 U.S.C. 6621(a)(1) under FOGRMA section 111 (b) and (d), 30 U.S.C. 1721 (b) and (d). This approach most conforms with the legislative direction Congress gave Treasury in the Tax Reform Act of 1986.

The intent of the amendment to section 6621 under the TRA is expressed in the Senate Report on H.R. 3838, the bill which ultimately became law. The Senate report states:

[T]he committee is concerned that both the interest rate taxpayers pay the Treasury and the rate the Treasury pays to taxpayers are the same rate. Few financial institutions, commercial operations, or other entities, borrow and lend money at the same rate. Thus, either the rate taxpayers pay the Treasury or the rate the Treasury pays taxpayers is necessarily out of line with general interest rates in the economy. This distortion may cause taxpayers either to delay paying taxes as long as possible to take advantage of an excessively low rate or to overpay to take advantage of an excessively high rate. Consequently, the committee has approved a one-percent differential between these two interest rates.

[S. Rep. No. 313, 99th Cong., 2d Sess. 184 (May 29, 1986). (The relevant language in the House report is identical. *See* H.R. Rep. No. 426, 99th Cong., 1st Sess. 849 (Dec. 7, 1985)).]

Although MMS's relationship with its business constituents is not precisely the same as Treasury's relationship with taxpayers, the financial principle that Congress made referent to for Treasury (few institutions borrow and lend money at the same rate) is also valid for MMS. The MMS performs a service and acts as a conduit for funds, disbursing them to States and Tribes as received. Late payment by MMS to States or Tribes are principally caused by payors either not properly identifying funds or paying late. The MMS not only does not have use of

these funds, it is also burdened with the administrative costs necessary to clear and process the funds. In such a role, MMS should not bear the same "loan" (underpayment) rate that a payor is responsible for because of late payments or underpayments. The MMS, therefore, is proposing to be responsible for the "borrow" (overpayment) rate. Therefore, under the proposed rule, the "overpayment" rate in section 6621(a)(1) would be applied where the Federal Government owed money under subsections (b) and (d), and the "underpayment" rate of section 6621(a)(2) would apply where lessees underpay oil and gas royalties, bonuses, and other monies due the Federal Government or pay them late under subsection (a) of FOGRMA section 111.

The regulations implementing the FOGRMA interest provisions are found at 30 CFR 218.54, 218.55, and 218.103. Section 218.54 concerns late payments and underpayments of oil and gas royalties, bonuses, and other monies to the Department of the Interior. Section 218.54(b) sets the rate of interest to be applied to such late payments and underpayments. Section 218.54(b) now refers to "the rate applicable under section 6621 of Title 26 of the Internal Revenue Code of 1954." Under the discussion above, the most appropriate rate of interest under the amended section 6621 is the "underpayment" rate under section 6621(a)(2). Thus, the proposed rule would amend § 218.54(b) to apply the "underpayment" rate established by § 6621(a)(2) of the Internal Revenue Code."

Section 218.103 concerns disbursements to States of oil and gas lease revenues by the Secretary of the Interior which are not made by the date due. Section 218.103(b) sets the rate of interest to be applied to such late payments. Section 218.103(b) now refers to "the rate applicable under section 6621 of Title 26 of the Internal Revenue Code of 1954." Under the discussion above, the most appropriate rate of interest under the amended section 6621 is the "overpayment" rate under section 6621(a)(1). Thus, the proposed rule would amend § 218.103(b) to apply the "overpayment" rate established by section 6621(a)(1) of the Internal Revenue Code."

Section 218.55 concerns disbursements to Indian Tribes or allottees of oil and gas lease revenues by the Secretary of the Interior which are not made by the date due. Section 218.55(c) sets the rate of interest to be applied to such late payments. Section 218.55(c) now refers to "the rate applicable under section 6621 of Title

26 of the Internal Revenue Code of 1954." Under the discussion above, the most appropriate rate of interest under the amended section 6621 is the "overpayment" rate under section 6621(a)(1). Thus, the proposed rule would amend § 218.55(c) to apply the "overpayment" rate established by section 6621(a)(1) of the Internal Revenue Code."

The proposed amendments include two different rates. An alternative to the proposed amendment is to apply a single interest rate to late payments by royalty payors and to late disbursements by MMS. The single rate would be the higher rate of interest established by section 6621(a)(2) of the Internal Revenue Code. This alternative approach would require amending 30 CFR 218.54, 218.55, and 218.103 accordingly. The single interest rate would make the interest burden the same for royalty payors and for MMS. Public comments are also requested on the alternative single rate approach.

The policy of the Department of the Interior is, whenever practicable, to afford the public an opportunity to participate in the rulemaking process. Accordingly, interested persons may submit written comments, suggestions or objections regarding the proposed amendment to the location identified in the ADDRESS section of this preamble. Comments must be received on or before the day specified in the DATE section of this preamble.

III. Procedural Matters

Executive Order 12291 and the Regulatory Flexibility Act

The proposed rulemaking is necessary to clarify an ambiguity in existing regulations as to which of two interest rates apply. Therefore, the Department has determined that this rulemaking is not a major rule under E.O. 12291 and certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

Paperwork Reduction Act of 1980

This rule does not contain information collection requirements which require approval by the Office of Management and Budget under 44 U.S.C. 3501 et seq.

National Environmental Policy Act of 1969

It is hereby determined that this rulemaking does not constitute a major Federal action significantly affecting the quality of the human environment and a detailed statement pursuant to section 102(2)(C) of the National Environmental

Policy Act of 1969 [42 U.S.C. 4332(2)(C)] is not required.

List of Subjects in 30 CFR Part 218

Coal, Continental shelf, Electronic funds transfer, Geothermal energy, Government contracts, Indian lands, Mineral royalties, Natural gas, Penalties, Petroleum, Public lands—mineral resources, Reporting and recordkeeping requirements.

Date: March 20, 1989.

James E. Cason,

Acting Assistant Secretary, Land and Minerals Management.

For the reasons set out in the preamble, 30 CFR Part 218 is proposed to be amended as set forth below:

TITLE 30—MINERAL RESOURCES

CHAPTER II—MINERALS MANAGEMENT SERVICE, DEPARTMENT OF THE INTERIOR

SUBCHAPTER A—ROYALTY MANAGEMENT

PART 218—COLLECTION OF ROYALTIES, RENTALS, BONUSES AND OTHER MONIES DUE THE FEDERAL GOVERNMENT

1. The authority citation for Part 218 continues to read as follows:

Authority: 25 U.S.C. 396 et seq.; 25 U.S.C. 396a et seq.; 25 U.S.C. 2101 et seq.; 30 U.S.C. 181 et seq.; 30 U.S.C. 351 et seq.; 30 U.S.C. 1001 et seq.; 30 U.S.C. 1701 et seq.; 31 U.S.C. 9701; 43 U.S.C. 1301 et seq.; 43 U.S.C. 1331 et seq.; and 43 U.S.C. 1801 et seq.

2. Paragraph (b) of § 218.54 is revised to read as follows:

§ 218.54 Late payments and underpayments.

(b) The interest charge on late payments and underpayments shall be at the "underpayment" rate established by section 6621(a)(2) of the Internal Revenue Code.

3. Paragraph (c) of § 218.55 is revised to read as follows:

§ 218.55 Interest payments to Indians.

(c) Interest shall be computed at the "overpayment" rate established by section 6621(a)(1) of the Internal Revenue Code.

4. Paragraph (b) of § 218.103 is revised to read as follows:

§ 218.103 Payments to States.

(b) Interest shall be computed at the "overpayment" rate established by section 6621(a)(1) of the Internal Revenue Code.