

From

Cracking the Code

The Fascinating Truth About Taxation In America

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W-9's And Other Alien Notions



"Anyone entering into an arrangement with the government takes the risk of having accurately ascertained that he who purports to act for the government stays within the bounds of his authority, even though the agent himself may be unaware of the limitations upon his authority."

The United States Supreme Court, *Federal Crop Ins. Corp. v. Merrill*, 332 US 380-388 (1947)

Each of the code section examples (other than 6048) used in "'W' Is For Weapon' regarding regulatory sleight-of-hand, as well as the sections 6041 and 6041A at which we looked in 'Crafting a Trade Or Business Plan...' have a bearing on one of the evidentiary instruments used against private citizens to create a presumption of taxability. They are among the pretexts behind the Form W-9. The form, traditionally used primarily against contractors and investors, is now being more widely deployed. Due to a fairly new regulatory reform, one of the United States government instrumentalities with which the bulk of the general population necessarily interacts-- national banks-- are required to request the execution of the form from

everyone opening an account. (*"National banks are instrumentalities of the federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States."* Davis v. Elmira Savings, 161 U.S. 275 (1896))

In either case the purpose is ostensibly to secure a correct "taxpayer identification number" (with, in the case of the banks, no explanation provided as to the purpose of the request-- they make it even in association with non-interest paying accounts with which the tax system has and can have no lawful concern whatever). Cooperation by the target is subtextually encouraged by the suggestion on the form that without its execution the requester will be obliged to withhold money from the requestee. We'll look at why the execution of this form is desired a bit later on. To begin with, let's examine the actual legal nature of the request.

Here is the certification language to which someone executing the form attests (from the 2003 form, and with some emphasis added; some is in the original):

Under penalties of perjury, I certify that:

- 1. The number shown on this form is my correct **taxpayer identification number** (or I am waiting for a number to be issued to me), and*
- 2. I am not subject to backup withholding because: (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding, and*
- 3. **I am a U.S. person** (including a U.S. resident alien).*

Here is the stated purpose of the form:

Purpose of Form

*A person who **is required** to file an information return with the IRS, must obtain your correct taxpayer identification number (TIN) to report, for example, income paid to you, real estate transactions, mortgage interest you paid, acquisition or abandonment of secured property, cancellation of debt, or contributions you made to an IRA.*

U.S. person. Use Form W-9 **only if you are a U.S. person** (including a resident alien), to provide your correct TIN to the person requesting it (the requester) and, when applicable, to:

- 1. Certify that the TIN you are giving is correct (or you are waiting for a number to be issued),*
- 2. Certify that you are not subject to backup withholding,*
or
- 3. Claim exemption from backup withholding if you are a U.S. exempt payee.*

You will have noted that the completion of this form is to be requested by persons *required* to file a return about another person, per such sections as we have examined earlier. However, there is a specific statutory structure under which, and only under which, anyone can actually be *required* to furnish the TIN and make the certification for which Form W-9 is intended: Section 6109.

Sec. 6109 - Identifying numbers

(a) Supplying of identifying numbers

When required by regulations prescribed by the Secretary:

(2) Furnishing number to other persons

Any person with respect to whom a return, statement, or other document is required under the authority of

this title to be made by another person or whose identifying number is required to be shown on a return of another person shall furnish to such other person such identifying number as may be prescribed for securing his proper identification.

The pertinent regulations prescribed by the Secretary are these (with relevant portions in bold). (These are reproduced here in the order written, but the reader would do well to start with paragraph (c)):

§ 301.6109-1 Identifying numbers.

(a) In general -- (1) Taxpayer identifying numbers -- (i) Principal types. There are several types of taxpayer identifying numbers that include the following: social security numbers, Internal Revenue Service (IRS) individual taxpayer identification numbers, IRS adoption taxpayer identification numbers, and employer identification numbers.

...

(b) Requirement to furnish one's own number -- (1) U.S. persons. Every U.S. person who makes under this title a return, statement, or other document must furnish its own taxpayer identifying number as required by the forms and the accompanying instructions. A U.S. person whose number must be included on a document filed by another person must give the taxpayer identifying number so required to the other person on request.

...

(2) Foreign persons. The provisions of paragraph (b)(1) of this section regarding the

furnishing of one's own number shall apply to the following foreign persons--

(i) A foreign person that has income effectively connected with the conduct of a U.S. trade or business at any time during the taxable year;

(ii) A foreign person that has a U.S. office or place of business or a U.S. fiscal or paying agent at any time during the taxable year;

(iii) A nonresident alien treated as a resident [alien] under section 6013(g) or (h);

...

(vi) A foreign person that furnishes a withholding certificate described in § 1.1441-1(e)(2) or (3) of this chapter or § 1.1441-5(c)(2)(iv) or (3)(iii) of this chapter to the extent required under § 1.1441-1(e)(4)(vii) of this chapter. [In other words, a foreign recipient who has furnished a withholding agent with a Form W-8 Certificate of Foreign Status of Beneficial Owner asserting that the "income" is actually going to someone claiming an exemption or reduced rate of tax under a tax treaty]

(c) Requirement to furnish another's number. Every person required under this title to make a return, statement, or other document must furnish such taxpayer identifying numbers of other U.S. persons

and foreign persons that are described in paragraph (b)(2)(i), (ii), (iii), or (vi) of this section as required by the forms and the accompanying instructions.

(Read carefully, now. Note that there is no comma after U.S. persons in paragraph (c)-- it DOES NOT say "...*other U.S. persons, and foreign persons that are described...*". Indeed, if that WERE what it said, it would be completely redundant, as exactly the same thing would have been said by (b) and (b)(2) et al. What (c) does say is that *only* those persons listed in (b)(2)(i), (ii), (iii), or (vi) are required to furnish a number to anyone else.)

The nature and meaning of this structure is reflected in that of the "*withholding agents*" for whose use the Form W-9 was created. Here is the last line of the Privacy Act notice found on the form's instructions:

*Payers must generally **withhold 30% of taxable interest, dividend, and certain other payments** to a payee who does not give a TIN to a payer.*

Again, the instruction from the form itself:

U.S. person. Use Form W-9 only if you are a U.S. person (including a resident alien), to provide your correct TIN to the person requesting it (the requester) and, when applicable, to:

2. Certify that you are not subject to backup withholding,

or

3. Claim exemption from backup withholding if you are a U.S. exempt payee.

Here is a relevant portion from the instructions for the requester:

Use Form W-9 to request the taxpayer identification number (TIN) of a U.S. person (including a resident alien) and to request certain certifications and claims for exemption. (See Purpose of Form on the Form W-9.)

Withholding agents may require signed Forms W-9 from U.S. exempt recipients to overcome any presumptions of foreign status.

Now, here is the definition of a “withholding agent” and the titles of the sections to which that definition refers:

Title 26, Section 7701(a)

(16) Withholding agent

The term “withholding agent” means any person required to deduct and withhold any tax under the provisions of section 1441, 1442, 1443, or 1461.

Section 1441- Withholding of tax on nonresident aliens

Section 1442- Withholding of tax on foreign corporations

Section 1443- Foreign tax-exempt organizations

Section 1461- Liability for withheld tax

Section 1461 is the only place in Subtitle A of the IRC where anyone is ‘made liable’ for a tax, by the way-- here it is in its entirety:

Sec. 1461. - Liability for withheld tax

Every person required to deduct and withhold any tax under this chapter [Chapter 3 - Withholding of tax on Nonresident Aliens and Foreign Corporations -PH] is hereby made liable for such tax and is hereby indemnified against the claims and demands of any person for the amount of any payments made in accordance with the provisions of this chapter

So the only entities whose numbers are *required* to be included on anyone else’s return (1099, etc.), and which therefore can be demanded, are three categories of foreign persons connected with a “United States” presence, “trade or business”, or tax treaty; and one group of “nonresident aliens” electing*, by virtue of the provision in section 6013 (g) and (h), to be technically characterized as “resident aliens”, and

therefore "U.S. persons". ***And, in all cases, only insofar as any of those entities have been paid 'income' by the filer, which is the starting point for the production of any information return.***

*The reason for the election is because the relevant law regarding nonresident aliens, primarily that originally enacted as sections 29 and 31 of the Revenue Act of 1894, and then re-enacted in subsequent legislation, provides that those so electing are entitled to the personal exemption available in the law for residents-- if they produce a return as though a resident and identify all "income" whether from sources within or without the "United States". This protocol also limits the tax to the "income" from sources "within the United States".

For the record, banks ARE required to REQUEST a number from people opening new accounts, under 31 CFR 103.34, but not for purposes of making a return; and they are considered in compliance with the all related requirements even if they don't get one, as long as they asked. Also for the record, they will usually make their request as, "We are required to ask you to execute this instrument", accurately enough. They generally won't inform their correspondent that he or she is *not* required to comply.

The many other persons who routinely demand the execution of one of these instruments from contractors and investors haven't even that regulatory excuse-- they have simply been misled to believe that they are 'required' just because they are paying someone money. However, as we have just determined, a number must only be furnished when requested by someone who is *required* to file a return-- which can only be in regard to a payment of "income", *and then* only when such a payment is made to a particular sort of person.

A great deal would seem to be being asked of a payer. Think of the litigation risks they face in unilaterally asserting that they are paying the other party "income", as well as that

the other party is among the short list of persons whose number can be required. The subtextual threat that money will be withheld unless the legal instrument is executed will encourage capitulation by the requestee, but still... What are they supposed to do if the payee simply refuses to furnish a number? Violate the terms of a contract to which they've agreed? On the other hand is the risk associated with the liability imposed by section 1461 if they make a bad call the other way. How *is* the payer to know that they are paying "income" (or, if you prefer, the "**taxable interest, dividend, and certain other payments**" identified in the form's Privacy Act notice)? Remember, the Supreme Court has unambiguously instructed us that "income" is not to be defined as "all that comes in"; and it's not defined at all in the code...

Think back to the statutes and regulations establishing the requirements for the filings of returns which we examined in 'Crafting A Trade Or Business Plan...' and "'W' Is For Weapon' (there are a few others as well, all of precisely the same character). Recall that there is a common thread running through them: They adhere exclusively to payments made consequent to "*the performance of the functions of a public office*" ("trade or business") or of federal territorial or instrumentality origin. Now it makes sense.

The requisite knowledge supporting the *legitimate* requester's assertions is that of *their own* status, involving no guesswork or risk-- because the legitimate requester is an agent of the federal government. Only an agent of the federal government, or payer operating under the federal government's special jurisdiction, is required to file a return-- and by virtue of the same qualification, payments made from such a source *are* "income", and are not challengeable by the payee. No one else has any business demanding the submission of a W-9.

By the way, some might be wondering just what is the 30% "backup withholding" that W-9 certification protects one from. We find the answer just where we would now expect:

1441. Withholding of tax on nonresident aliens

(a) General rule

*Except as otherwise provided in subsection (c), all persons, in whatever capacity acting (including lessees or mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of the United States) having the control, receipt, custody, disposal, or payment of any of the items of income specified in subsection (b) (to the extent that any of such items constitutes gross income from sources within the United States), of any nonresident alien individual or of any foreign partnership shall (except as otherwise provided in regulations prescribed by the Secretary under section 874) deduct and **withhold from such items a tax equal to 30 percent thereof,***

Sec. 1442. Withholding of tax on foreign corporations

(a) General rule

*In the case of foreign corporations subject to taxation under this subtitle, there shall be deducted and withheld at the source in the same manner and on the same items of income as is provided in section 1441 a **tax equal to 30 percent thereof.***

The furnishing of a "taxpayer identification number", such as a social security number, or the execution of certain forms, amount to an implicit declaration as to either one's own status, or that of the conduct or circumstances in which the number or form is being used. If one signs a document intended for use by a "U.S. person", for instance, one is

presumed to be intentionally declaring oneself as belonging to one of the several classes specified in the narrow, legal definition of that term. Similarly, if one provides an identifying number which only need be supplied by someone about whom an information return must be filed, one is also adopting a particular legal status for oneself and/or one's receipts-- a status that is quite rarified in its proper application, as we have just seen.

In both cases, any related activities or receipts, all of which may actually be of a purely unprivileged (and thus untaxable) character, are legally colored as being taxable-- either as the consequence of privilege or of jurisdictional infirmity. Establishing support for these presumptions is one of the main purposes behind the scheme's encouragement of private parties utterly unconnected with any "trade or business", and banks, to induce the submission of W-9's.

I suspect that the primary reason for promoting the use of these forms, though, is simply to induce persons who haven't already done so to get numbers and thus announce themselves to the scheme; and to establish documentation that they are a "U.S. person". Once this is done, a rationale is created for treating them as subject to the code, and, more importantly, such status will subsequently be used against those that THEY pay, in turn, as being beneficiaries of privilege. It will be relied upon in the future to justify treating the receipts and payments of both as "income".

One who is not a "U.S. person", but is facing stubborn insistence that a W-9 be submitted, could, perhaps, consider complying-- after replacing the relevant line with an accurate declaration, like: "I am a Pennsylvania citizen" (or whatever is true); and adding language such as:

"I have submitted this instrument solely to declare my belief that payments made to the named entity are not subject to withholding. No declaration, admission, or

conclusion as to any other matter is to be presumed or understood thereby. If any law or doctrine precludes me from submitting this instrument, and/or confining its import thusly, or inflicts any infirmity or burden of any kind upon me for doing either of those things, this instrument is rescinded, null, and void.”

Obliging the requesting entity to complete the instrument itself (which we'll discuss later in 'Feeding The Hand That Bites You') might be another option.

But the better course is equally stubborn insistence on lawful treatment, informed by the certain knowledge that compliance as regards a W-9-- or any other legal instrument-- cannot actually be *required* under any circumstances. As the United States Supreme Court reminds us in *Hale v. Henkel*, 201 U.S. 43 (1906):

“The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the state or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. He owes no such duty to the state, since he receives nothing therefrom, beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the state, and can only be taken from him by due process of law, and in accordance with the Constitution.”