



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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OFFICE OF
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Dear _____ :

This letter responds to your October 26, 2004, request for information on sections 6041 and 6041A of the Internal Revenue Code (Code). In particular, you asked whether the escrow agent in the below-situation is required to file information returns for real estate commissions paid to the listing broker and the salesperson under either section 6041 or section 6041A of the Code, and whether the listing broker in the below-situation is required to file information returns for real estate commissions paid to the salesperson under section 6041A of the Code.

You provided the following information. A real estate broker (the listing broker), through a real estate agent (salesperson), contracts with an owner (the seller) to sell a piece of California real property. The contract is signed by the salesperson on behalf of the listing broker. The listing broker approves the contract prior to or after the signing. The particular agreement entered into is called an "Exclusive Right to Sell Listing Agreement" (ERSLA). An ERSLA is a listing agreement commonly used in the real estate sales industry between the seller and the listing broker. Under the ERSLA, the listing broker is entitled to a full commission regardless of who finds the buyer.

The real property is sold and the seller instructs an escrow agent to pay the commission out of the sale proceeds. The listing broker instructs the escrow agent to pay one-half of the commission to the broker that represented the buyer of the property (the buyer's broker), one-quarter of the commission to the salesperson, and one-quarter of the commission to the listing broker.

Section 6041

Section 6041(a) provides that all persons engaged in a trade or business and making payment in the course of such trade or business to another person, of rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other

fixed or determinable gains, profits, and income, of \$600 or more in any taxable year, shall file a return with the Secretary.

Section 1.6041-1(e)(1) of the Income Tax Regulations provides that a person that makes a payment in the course of its trade or business on behalf of another person is the payor. The payor must file an information return if, under all the facts and circumstances, the payor performs management or oversight functions in connection with the payment or has a significant economic interest in the payment.

Section 1.6041-1(e)(5), Example 3, provides that a settlement agent that makes payments from an escrow account to real estate agents or brokers according to the provisions of the real estate contract and written instructions from the lender is not performing management or oversight functions and does not have a significant economic interest in the payments. Consequently, the settlement agent is not subject to the information reporting requirements of section 6041.

If all of the requirements of section 6041(a) are satisfied and if section 1.6041-1(e)(5) does not apply, the escrow agent would be required to file information returns for real estate commissions paid to a listing broker and a salesperson under section 6041(a) of the Code.

Section 6041A

Section 6041(A)(a) provides that if any service-recipient engaged in a trade or business pays in the course of such trade or business during any calendar year remuneration to any person for services performed by such person, and the aggregate of such remuneration paid to such person during such calendar year is \$600 or more, then the service-recipient shall make a return, according to the forms or regulations prescribed by the Secretary. The term "service-recipient" means the person for whom the service is performed.

Section 1.6041A-1(d)(2) of the proposed Income Tax Regulations provides that no return shall be required for a payment which is exempted under section 1.6041-3 from the reporting requirement of section 6041.

Section 1.6041-3(o) provides that information returns are not required under section 6041 for payments made to corporations.

If the escrow agent is a service-recipient, if all of the requirements of section 6041A(a) are satisfied, and if the payment is not exempted under section 1.6041-3 from the reporting requirement of section 6041, the escrow agent would be required to file information returns for real estate commissions paid to a listing broker and a salesperson under section 6041A of the Code.

If the listing broker is a service-recipient, if all of the requirements of section 6041A(a) are satisfied, and if the payment is not exempted under section 1.6041-3 from the

reporting requirement of section 6041, the listing broker would be required to file information returns for real estate commissions paid to a salesperson under section 6041A of the Code.

The seller may be a service-recipient if the seller is engaged in a trade or business and if the seller contracts with the listing broker and salesperson to sell real property in the course of its trade or business. Thus, if the seller is a service-recipient, if all of the requirements of section 6041A(a) are satisfied, and if the payment is not exempted under section 1.6041-3 from the reporting requirement of section 6041, the seller would be required to file information returns for real estate commissions paid to a listing broker and a salesperson under section 6041A of the Code.

This letter has called your attention to certain general principles of the law. It is intended for informational purposes only and does not constitute a ruling. See Rev. Proc. 2004-1, §2.04, 2004-1 IRB 7. If you have any additional questions, please contact our office at

Sincerely,

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