

TAM 9410006, 1993 WL 597877 (IRS TAM)

Internal Revenue Service (I.R.S.)

Technical Advice Memorandum

Issue: March 11, 1994

November 23, 1993

Section 1401 -- Rate and Applicability of Self-Employment Tax

1401.00-00 Rate and Applicability of Self-Employment Tax

1401.01-00 Rate of Tax

Section 1402 -- Definitions

1402.00-00 Definitions

1402.02-00 Self-Employment Income

1402.04-00 Employee and Wages(Reference to Chapter 21)

CC:EBEO:3 / TR-32-260-93

Taxpayer's Name: ***

Taxpayer's Address: ***

Taxpayer's Identification No: ***

Taxpayer's Legal Rep: ***

Years Involved: ***

Conference Held: ***

Key:

Taxpayer = ***

ISSUE:

Whether amounts paid to Taxpayer, an elected Indian tribal council member, for services rendered as such, are subject to self-employment tax?

FACTS:

The Taxpayer is a member of an American Indian tribe and was an elected tribal council member.

For the tax year ending December 31, 1991, he filed a joint return reporting earnings of \$2,977.92 while serving as an elected official of his tribal council. His four-year elected term ended the second week of 1991 and he received \$92,660.86 deferred compensation income at the conclusion of his 4 year term.

The tribe did not withhold or pay the taxes imposed under the Federal Insurance Contributions Act (FICA), Federal Unemployment Tax Act (FUTA) or the Collection of Income Tax at Source on Wages on the earnings and deferred compensation paid to the Taxpayer.

Taxpayer included all of the income on his 1991 tax return. The return was examined and a determination was made that earnings and deferred compensation received are subject to the self-employment tax pursuant [section 1402 of the Internal Revenue Code](#) (Code).

LAW:

[Section 1402\(a\)](#) of the Code provides, generally, that the term "net earnings from self-employment" means the gross income derived by an individual from any trade or business carried on by such individual, less the allowable deductions attributable to such trade or business.

Section 3121(a) of the Federal Insurance Contributions Act (FICA) provides that the term "wages" mean all remuneration for employment. Section 3121(b) of the FICA provides that the term "employment" means any service of whatever nature performed by an employee. In both cases, there are numerous exceptions. Section 3121(d) defines "employee" as including any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of employee. (Other definitions are not pertinent in this discussion.) Section 3401 of the Code, pertaining to income tax withholding, provides a definition of "wages" similar to that for FICA purposes.

[Section 1402\(c\)\(1\)](#) of the Code provides that the term "trade or business" when used with reference to self-employment income or net earnings from self-employment, shall have the same meaning as when used in section 162 (relating to business expenses), except that such term shall not include the performance of the functions of a public office (other than the functions of a public office of a State or a political subdivision thereof with respect to fees received in any period in which the functions are performed in a position compensated solely on a fee basis and in which such functions are not covered under an agreement entered into by such State and the Secretary of Health and Human Services pursuant to section 218 of the Social Security Act.)

[Section 1402\(c\)\(2\)](#) of the Code also provides that the term "trade or business" shall not include the performance of service by an individual as an employee, with exceptions not relevant here.

Section 1.1402(c)-1 of the Income Tax Regulations provides that in order for an individual to have net earnings from self-employment, he must carry on a trade or business, either as an individual or as a member of a partnership.

Section 1.1402(c)-2(b) of the regulations provides that the term "public office" includes any elective or appointive office of the United States or any possession thereof, of the District of Columbia, of a State or its political subdivision, or of a wholly-owned instrumentality of any one or more of the foregoing.

Section 1.1402(c)-3 provides that as a general rule, with exceptions not here relevant, the performance of services by an individual as an employee, as defined in Chapter 21 of the Code relating to the FICA, does not constitute a trade or business within the meaning of [sections 1402\(c\)](#) and 1.1402(c)- [1. Revenue Ruling 59-354, 1959-2 C.B. 24](#), concludes that services performed by members of tribal councils in their capacities as council members do not constitute "employment" for Federal employment tax purposes and, although includible in gross income under section 61 of the Code, amounts paid to members of tribal councils for services performed by them as council members do not constitute "wages" where their duties appear to be similar to the duties of a city council.

[Revenue Ruling 66-52, 1966-1 C.B. 203](#), holds, in part, that for self-employment tax purposes, an individual is not engaged in a trade or business in the performance of the functions of a public office as a city constable.

[Revenue Ruling 61-113, 1961-1 C.B. 400](#), examines the status of members of a hearing board of an air pollution control district established within a county pursuant to the state law, and concludes that the services performed constitute the performance of the functions of a public office and are excluded from the term trade or business. Computation for such services is not to be included in computing net earnings from self-employment.

RATIONALE:

[Rev. Rul. 59-354](#) concludes that the services performed by the tribal council member do not constitute "employment", and that the remuneration paid therefore do not constitute "wages" for FICA or income tax withholding purposes. The revenue ruling does not conclude that Indian tribal council members are not employees; indeed, the assumption is that they were common law employees. Furthermore, the cited revenue rulings support the conclusion that an elected tribal council member is a common law employee and is not self-employed. Based on the facts available to us and the cited Code provisions and other authorities, we conclude that the Taxpayer, in his capacity as an elected tribal council member, is a common law employee for Federal employment tax purposes. We also conclude, based on [Rev. Rul. 59-354](#), that the remuneration paid to the Taxpayer is not subject to the FICA taxes or income tax withholding.

CONCLUSION:

The amounts paid to the Taxpayer for services rendered as an elected tribal

council member are not subject to the taxes imposed under the Self-Employment Contributions Act.

No opinion is expressed as to the Federal tax consequences of the transaction described above under any other provisions of the Code.

A copy of this Technical Advice Memorandum is to be given to the taxpayer. Section 6110(j)(3) of the Code provides that it may not be used or cited as precedent.

This document may not be used or cited as precedent. [Section 6110\(j\)\(3\) of the Internal Revenue Code.](#)