

INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

October 22, 1998

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Number: **199906001**
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CASE MIS Number: TAM-110047-98

Taxpayer's Name:

Taxpayer's Address:

Taxpayer's Identification No:

Years Involved:

Date of Conference:

LEGEND:

Tribe =

Year A =

Year B =

ISSUES:

- 1) Whether amounts paid to Tribal Council Members for services performed as Tribal Council Members are "wages" for purposes of the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA), and Collection of Income tax at Source on Wages.
- 2) Whether Tribal Council Members are employees when providing services as Tribal Council Members for all purposes of the Internal Revenue Code, including Code section 105 (amounts received under accident and health plans), Code section 132 (certain fringe benefits), as well as the sections

TAM-110047-98

found in Subchapter D of Chapter 1 of Subtitle A (deferred compensation).

FACTS:

Tribe is a federally recognized Native American tribe. The members of Tribe and the affairs of Tribe are governed by the Tribal Council, which consists of seven members, including a Tribal chairperson and vice-chairperson. The Tribal Council members are elected by the eligible voting members of the Tribe. Their duties include generating Tribal resolutions and signing all legal documents on behalf of the Tribe. The facts indicate that the Tribal Council members are common-law employees of the Tribe.

The Tribe issues a Form W-2 to each Tribal Council Member reporting remuneration received for their services as Tribal Council Members. In Year A, the year at issue, the Tribe paid the employer's share of FICA and withheld the employee's share of FICA from some, but not all, of the Tribal Council Members. The Tribe withheld Federal income tax on all amounts paid to the Tribal Council Members for their service as Tribal Council Members.

In Year B, Tribe began paying the employer portion of FICA and withholding the employee the portion of FICA on all salary payments made to the Tribal Council Members.

LAW AND ANALYSIS:

Section 3101 of the Code imposes FICA tax on the income of every individual equal to a certain percentage of wages received with respect to employment. Section 3102 requires employer withholding of the tax imposed by section 3101. Section 3111 imposes an excise tax on employers, calculated as percentages of wages paid with respect to employment.

Section 3121(a) of the Code defines "wages" for FICA purposes, in pertinent part, as all remuneration for employment. Section 3121(b) defines "employment," in pertinent part, as any service, of whatever nature, performed by an employee for the person employing the employee.

Section 3301 of the Code imposes FUTA tax on every employer with respect to wages paid by him with respect to employment. Section 3306(b) defines "wages," in pertinent part, as all remuneration for employment. Section 3306(c) defines "employment," in pertinent part, as any service, of whatever nature, performed by an employee for the person employing the employee.

TAM-110047-98

Section 3402(a)(1) of the Code provides, in pertinent part, that every employer making payment of wages is required to deduct and withhold upon those wages an income tax determined in accordance with tables or computational procedures prescribed by the Secretary. Section 3401(a) defines "wages," in pertinent part, as all remuneration for services performed by an employee for his employer.

Section 3402(p)(3) of the Code provides that the Secretary is authorized by regulations to provide for withholding from remuneration for services performed by an employee for the employee's employer which (without regard to this paragraph) does not constitute wages.

Section 31.3402(p)-1(a) of the Employment Tax Regulations provides that an employee and the employer may enter into an agreement to provide for the withholding of income tax upon the payment of amounts described in section 31.3401(a)-3(b)(1) of the regulations. These amounts include, with certain exceptions, any remuneration for services performed by an employee for an employer which, without regard to section 31.3401(a)-3 of the regulations, does not constitute wages under section 3401(a). Section 31.3402(p)-1(b) of the regulations sets forth the method by which an employee and employer may enter into an agreement under section 3402(p).

Rev. Rul. 59-354, 1959-2 C.B. 24, sets forth a limited employment tax exception for amounts paid to tribal council members for services performed by them as council members. Rev. Rul. 59-354 holds that while these amounts are includible in the council member's gross income, they do not constitute wages for purposes of FICA, FUTA, and Federal income tax withholding.

Based on the facts as stated, in accordance with Rev. Rul. 59-354, we conclude that remuneration paid to the Tribal Council Members, for their services as Tribal Council Members, is not be subject to FICA, FUTA or Federal income tax withholding. Pursuant to the provisions of section 3402(p) of the Code and the regulations thereunder, individual Tribal Council Members may enter into voluntary withholding agreements with the Tribe.

CONCLUSIONS:

- 1) Amounts paid to Tribal Council Members for services performed as Tribal Council Members are not "wages" for purposes of FICA, FUTA and Federal income tax withholding.
- 2) Members of the Tribal Council of Tribe are common-law employees. To the extent other sections of the Code utilize the same definition of employee, Tribal Council members will be employees for purposes of those Code sections.

TAM-110047-98

CAVEATS

Except as specifically ruled on above, no opinion is express or implied concerning the application of any other section of the Code to this transaction.

A copy of this technical advice memorandum is to be given to the Tribe. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.