



DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C. 20224

OFFICE OF  
CHIEF COUNSEL

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INTERNAL REVENUE SERVICE CHIEF COUNSEL ADVICE

MEMORANDUM FOR ASSOCIATE DISTRICT COUNSEL,

FROM: Assistant Chief Counsel  
(Employee Benefits and Exempt Organizations) CC:EBEO

SUBJECT: EIC and amounts earned while civilly committed at a  
treatment facility

This responds to your request for Significant Service Center Advice dated November 10, 1999, regarding whether amounts earned by an individual while confined at an institution for sex offenders is earned income for purposes of the earned income tax credit (EIC) under section 32 of the Internal Revenue Code. This Chief Counsel Advice is not binding, is not a final determination, and is not to be cited as precedent.

ISSUES:

1. Whether amounts earned by an individual who has been civilly committed to a treatment facility for sex offenders are earned income under section 32(c)(2) of the Code.
2. Whether amounts earned by an individual who is serving a prison sentence at a treatment facility for sex offenders are earned income under section 32(c)(2) of the Code.
3. Whether amounts earned by an individual who has been civilly committed to a treatment facility for sex offenders, but is physically located in a prison rather than a separate treatment facility, are earned income under section 32(c)(2) of the Code.

CONCLUSIONS:

1. Amounts earned by an individual who has been civilly committed to a treatment facility for sex offenders are earned income under section 32(c)(2) of the Code.

2. Amounts earned by an individual who is serving a prison sentence at a treatment facility for sex offenders are not earned income under section 32(c)(2) of the Code.

3. Amounts earned by an individual who has been civilly committed to a treatment facility for sex offenders, but is physically located in a prison rather than a separate treatment facility, are earned income under section 32(c)(2) of the Code.

#### FACTS:

A number of states have enacted statutes that permit the civil commitment of sex offenders. For example, under a Minnesota statute, a “sexually dangerous person”<sup>1</sup> may be civilly committed to a treatment facility such as a hospital. See Minn. Stat. section 253B.02, subdivisions 18c and 19; section 253B.07 (West 1999).

Generally, there are several situations in which a “sexually dangerous person” may be confined to a treatment facility. These situations include (1) an individual who has been found incompetent to stand trial; (2) an individual who has been found “not guilty” by reason of his or her mental state; and (3) an individual who has been found guilty, served his or her sentence, and is civilly committed after release from prison. Also, in some states, convicted felons may serve out their prison sentences in a treatment facility. As a practical matter, most civil commitments of “sexually dangerous persons” occur when an individual is released from prison.

Most treatment facilities for “sexually dangerous persons” are under the control of the department of health rather than the department of corrections. Generally, residents of the treatment facility are not required to work, but many of them choose to work.

#### LAW AND ANALYSIS:

Section 32(a) of the Code allows an EIC in the case of an eligible individual. Generally, the amount of the EIC is based on earned income. Earned income is defined in section 32(c)(2)(A)(i) of the Code to include wages, salaries, tips, and other employee compensation. Amounts received for services provided by an individual while the individual is an inmate at a penal institution are excluded from the definition of earned income by section 32(c)(2)(B)(iv) of the Code.

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<sup>1</sup> A “sexually dangerous person” is an individual who (1) has engaged in a course of harmful sexual conduct; (2) has manifested a sexual, personality, or other mental disorder or dysfunction; and (3) as a result is likely to engage in acts of harmful sexual conduct in the future. Minn. Stat. section 253B.02, subdivision 18c (West 1999).

Section 32(c)(2)(B)(iv) of the Code was added by section 723(a) of the Uruguay Round Agreements Act, Pub. L. 103-465, enacted on December 8, 1994. The Ways and Means Committee Report and the Senate Finance Committee Report contain an identical explanation of this addition:

The EITC is designed to alleviate poverty and to provide work incentives to low-income individuals. Because of the compulsory nature of much of the work performed by prison inmates, it does not further the objectives of the EITC to include in earned income for EITC calculations any amounts paid for inmates' services.

See H.R. Rep. 826 (Part I), 103d Cong., 2d Sess. 182 (1994); S. Rep. 412, 103d Cong., 2d Sess. 148 (1994).

Although not defined in section 32 of the Code (or anywhere else in the Code) or its legislative history, the phrase "penal institution" is a generic term that includes places of confinement for individuals convicted of a crime. These places include jails, prisons, workhouses, and other correctional facilities. See Black's Law Dictionary (6th Ed.); 60 AmJur.2d sec. 2 (1987 and 1988 Supp.). An inmate is a person confined to a prison, penitentiary, or penal institution. See Black's Law Dictionary (6th Ed.)

No case law arising under section 32(c)(2)(B)(iv) of the Code addresses the issue of whether amounts received for services performed while confined to a treatment facility are considered earned income. However, discussions of treatment facilities in other contexts provide guidance on this issue.

In the same year that section 32(c)(2)(B)(iv) was added to the Code, changes were also made to the Social Security Act. Under section 4 of the Social Security Domestic Employment Reform Act of 1994, Pub. L. 103-387, 42 U.S.C. section 402(x)(1) was amended to extend the denial<sup>2</sup> of social security benefits to persons confined by court order to public institutions in connection with a verdict or finding of not guilty by reason of insanity, of guilty but insane, or of not being competent to stand trial, or a similar verdict or finding based on similar factors such as mental disease or defect. See also H.R. Rep. No. 842, 103<sup>rd</sup> Cong., 2<sup>nd</sup> Sess. 15 (1994).

Several cases considered whether an individual who has been both committed to a mental hospital or treatment center and convicted of a criminal offense should be denied disability benefits under 42 U.S.C. section 402(x), as in effect before the amendment described above. In these cases, the courts emphasize the fact that

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<sup>2</sup> Under prior law, social security benefits were denied to persons confined in a jail, prison, or other penal institution or correctional facility pursuant to the conviction of a felony.

the individual is not free to leave the hospital or center, and if the individual recovers from his or her mental condition, confinement would continue in a jail, prison, or other penal institution. Thus, the courts generally conclude that the individual should be denied disability benefits because he or she is confined to a jail, prison, or other penal institution or correctional facility when he or she is committed to a mental hospital or treatment center in lieu of being confined in a penal institution. See Quintal v. Secretary of Health and Human Services, 1994 U.S. App. LEXIS 36501 (1<sup>st</sup> Cir. 1994) (unpublished opinion); Davel v. Sullivan 902 F.2d 559 (7<sup>th</sup> Cir. 1990); Wilkins v. Chater, 953 F. Supp. 1192 (D.C. Kan. 1996), aff'd 127 F.3d 1260 (10<sup>th</sup> Cir. 1997). In a case considering the same issue where the individual was merely civilly committed, but not convicted of a criminal offense, the court noted that a mental hospital is not a jail, prison, or other penal institution or correctional facility and found that the individual was entitled to disability benefits. See Graves v. Heckler, 607 F. Supp. 1186 (D.C. D.C. 1985).<sup>3</sup>

In Kansas v. Hendricks, 521 U.S. 346 (1997), the United States Supreme Court rejected arguments that the Kansas Sexually Violent Predator Act violates substantive due process requirements and the prohibition against double jeopardy and ex post facto lawmaking. In rejecting these arguments, the Court emphasized the civil nature of the commitment scheme. According to the Court, the commitment scheme does not affix culpability for prior criminal conduct, but rather uses criminal conduct for evidentiary purposes; it does not make criminal conviction a prerequisite for commitment; and it lacks a scienter requirement. Additionally, the commitment scheme permits immediate release on a showing that an individual is no longer dangerous. Thus, the Court concluded that the Kansas Act is nonpunitive in nature. See also, In re Linehan, 594 N.W. 2d 867 (Minn. Sup. Ct. 1999).

In light of the above discussion, individuals civilly committed to a treatment facility who have not been convicted of a criminal offense are not inmates at a penal institution. If an individual recovers from his or her mental condition, that individual would be released from civil commitment because the individual was not committed due to a criminal conviction. Neither section 32(c)(2)(B)(iv) of the Code nor its legislative history suggests that “penal institution” or “inmate” should be construed to include any individual civilly committed to a treatment facility, center, or institution because of mental condition. Thus, any amounts earned by an individual who is civilly committed to a treatment facility are earned income for purposes of the EIC.

Similarly, amounts earned by an individual who has been civilly committed to a treatment facility for sex offenders, but is physically located in a prison rather than a

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<sup>3</sup> The award of disability benefits in this case would not occur under the current version of section 42 U.S.C. section 402(x)(1).

separate treatment facility are earned income for purposes of the EIC. The fact that such an individual is physically located at a prison or jail does not alter the conclusion that the individual is not an "inmate" at a penal institution. Thus, section 32(c)(2)(B)(iv) of the Code does not apply.

With respect to amounts earned by an individual serving a prison sentence at a treatment facility for sex offenders, the fact that the individual is serving the sentence at a treatment facility that also houses the civilly committed does not alter the conclusion that the individual is an inmate at a penal institution. That individual has been convicted of a criminal offense, has not been released from his or her criminal sentence while receiving treatment, and, if the individual recovers from his or her mental condition, would be sent to a penal institution to complete the remainder of his or her criminal sentence. With respect to that individual, therefore, the treatment facility itself falls within the general definition of a penal institution. Thus, amounts earned by an individual serving a prison sentence at a treatment facility that also houses the civilly committed are not earned income for purposes of the EIC.

If you have any questions regarding this memorandum, please call (202) 622-6060.

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