

Internal Revenue Service (I.R.S.)

Private Letter Ruling

Issue: October 26, 1990

August 2, 1990

Section 3121 -- Definitions
3121.00-00 Definitions

CC: EE: 2-TR-31-01469-90

LEGEND

X = * * *

Y = * * *

Dear * * *

This is in response to a letter dated March 16, 1990, submitted on behalf of X by X's authorized representative. X requests a ruling concerning its responsibility for Federal Insurance Contributions Act (FICA) taxes imposed under [sections 3101](#) and [3111 of the Internal Revenue Code of 1986](#) (Code).

X is a federally recognized Indian Tribe and is listed in [Rev. Proc. 83- 87, 1983-2 C.B. 606](#), as a tribal entity for purposes of the Indian Tribal Governmental Tax Status Act of 1982, [Pub. L. No. 97-473](#), Title II, 1983-1 C.B. 511. The affairs of X are managed by its board of directors, which has the power to manage the enterprises of X and engage in business. Under that authority, X operates Y, a casino-style facility that is located on the lands of X. The proceeds from the operation of Y belong to X and are used by the tribal board of directors for governmental and charitable purposes.

For several years, X has reported and paid FICA taxes on a Form 941, Employer's Quarterly Federal Tax Return, for the appropriate reporting period. Upon filing the original Form 941, the Service notified X that it was exempt from FICA taxes unless it had entered into a section 218 agreement with the Department of Health and Human Services. Because X had not entered into such an agreement, the Service told X to file Form 843, Claim, to obtain a refund of previously paid FICA taxes. X followed the Service's instructions and received a refund of the FICA taxes. Since that time, X has tendered the FICA taxes when due and each time the FICA taxes have been refunded to X. X has maintained an escrow account for the refunded FICA taxes.

[Section 3101](#) of the Code imposes on the income of every individual a tax on the wages received by him with respect to employment. Section 3102 requires employer withholding of the tax imposed by [section 3101](#). [Section 3111](#) imposes on every employer an excise tax to fund old-age, survivors, and disability insurance with respect to employed individuals. The taxes are computed as a specified percentage of wages.

Section 3121(a) of the Code defines 'wages' as all remuneration for employment unless otherwise excepted from the definition of wages or excepted from the term 'employment' under section 3121(b). Section 3121(a)(21) excepts from the definition of 'wages' in the case of a member of an Indian tribe, any remuneration on which no FICA tax is imposed by reason of section 7873 (relating to income derived by Indians from exercise of fishing rights).

Section 3121(b) of the Code broadly defines 'employment' as any service of whatever nature. Section 3121(b)(5) excepts from the definition of employment service performed for the United States or any instrumentality of the United States. Section 3121(b)(7)

excepts from the definition of employment service performed for a State or its political subdivisions unless the employer elected social security coverage under an agreement authorized by section 218 of the Social Security Act.

For certain limited tax purposes described in section 7871 of the Code, an Indian tribal government may be treated as a State. However, no mention is made under section 7871 of the federal employment tax provisions.

It is a long-standing principle, expressed by the United States Supreme Court in [Choteau v. Commissioner, 283 U.S. 691 \(1931\)](#), and [Squire v. Capoeman, 351 U.S. 1 \(1956\)](#), that Indians are citizens of the United States and are subject to payment of income taxes as are other citizens. [Rev. Rul. 59-354, 1959-2 C.B. 24](#), expresses the position that unless a federal statute or treaty grants Indians a tax exemption for income derived from a particular source, such income will be subject to tax as it would be with any other taxpayer. That ruling notes that common law employees of an Indian tribal council (other than the tribal council officials) are subject to FICA taxes on their wages.

According to the Opinions of the Solicitor of the Department of Interior Relating to Indian Affairs, 1 Int. Op. 1044 (May 1, 1941), social security taxes apply to Indians. Further, in the [Matter of Cabazon Indian Casino, 57 BR 398 \(Bankr. 9th Cir. 1986\)](#), the bankruptcy appellate court held that Indian tribes are not States, State instrumentalities, or political subdivisions of a State and, accordingly, are subject to FICA taxes. In the Matter of Cabazon Indian Casino is a bankruptcy case in which the debtor, a recognized Indian tribe, was denied the benefit of exemptions from employment taxes under sections 3121(b)(5) and 3306(c)(7) of the Code, which except from the definition of 'employment' service performed in the employ of a State, a political subdivision of a State, or a State instrumentality.

There is no exception under federal statute or treaty that applies to X in this case. The wages and employment at issue do not involve fishing rights, thus, no exception is available under section 3121(a)(21) of the Code. Moreover, for federal employment tax purposes, an Indian tribe is not a State or a wholly owned instrumentality or subdivision of a State or of the United States. Thus, X does not fit within the exception of section 3121(b)(5) or (7).

We conclude that X is liable for FICA taxes under [sections 3101](#) and [3111](#) of the Code and must repay all refunded FICA taxes. Furthermore, all correspondence X previously received from the Internal Revenue Service on this matter is modified to the extent that it contains any information inconsistent with the conclusion in this letter.

This ruling is directed only to the taxpayer who requested it. Section 6110(j)(3) of the Code provides that it may not be used or cited as precedent. In accordance with the power of attorney on file, we are sending a copy of this letter to your authorized representative.

Sincerely yours,

Jerry E. Holmes
Chief, Branch 2
Office of the Assistant Chief Counsel
(Employee Benefits and Exempt Organizations)

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

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