

A wholly-owned State instrumentality may in some circumstances qualify for exemption from Federal income tax under section 501(c)(3) of the Internal Revenue Code of 1954.

Coverage under the Social Security Act of employees of a wholly-owned State instrumentality may be effected only pursuant to a compact under section 218 of the Social Security Act. The 'waiver' procedure provided in section 3121(k) of the Federal Insurance Contributions Act is not applicable to a wholly-owned State instrumentality irrespective of whether the particular instrumentality is exempt under section 501(c)(3) of the Code.

An inquiry has been received whether (1) a wholly-owned State instrumentality may also qualify for exemption from Federal income tax under section 501(c)(3) of the Internal Revenue Code of 1954 and (2), if so, whether the 'waiver' procedure provided in section 3121(k) of the Federal Insurance Contributions Act (chapter 21, subtitle C, Internal Revenue Code of 1954) is applicable in effecting coverage for its employees under the Social Security Act.

It is held that where an organization desires to have the benefit of a particular tax feature extended to its employees, such as the exception provided by section 403 of the Code, which depends on exemption under section 501(a) of an employer described in section 501(c)(3), and the particular organization meets the statutory requirements for exemption under section 501(c)(3) of the Code, it may be granted exemption thereunder, regardless of the fact that it also qualifies as a wholly-owned State instrumentality and, as such, would not be subject to Federal income tax.

It does not follow, however, that coverage under the Social Security Act may be effected for employees of such an organization by the 'waiver' procedure provided by section 3121(k) of the Federal Insurance Contributions Act.

Section 3121(b)(8)(B) of the Act, as amended by the Social Security Amendments of 1954, excepts from 'employment' service performed in the employ of an organization exempt from income tax under section 501(c)(3) of the Code. However, such an organization may waive its exception as to certain employees by complying with the provisions of section 3121(k) of the Act.

Section 3121(b)(7) of the Act excepts from 'employment' service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing, which is wholly owned by one or more States or political subdivisions. Section 218 of the Social Security Act, as amended, 42 U.S.C. 418, provides for the coverage of employees of wholly-owned State organizations if the State and the Department of Health, Education, and Welfare enter into a compact

providing for such coverage.

To secure coverage under the Social Security Act of employees of an organization exempt under section 501(c)(3) of the Code, section 3121(k) of the Federal Insurance Contribution Act requires the consent of the particular organization and two-thirds of its employees; but to secure coverage for a wholly-owned State instrumentality, section 218 of the Social Security Act requires the consent of the State, rather than that of the particular instrumentality.

In view of the Congressional purpose behind section 218 of the Social Security Act of allowing State governments, rather than a particular State instrumentality, discretion in determining which State employees should be covered under the Social Security Act, it is held that employees of wholly-owned State instrumentalities may secure social security coverage only by the procedure outlined in section 218 of the Social Security Act. See Senate Report No. 1669 on Social Security Act Amendments of 1950, C.B. 1950-2, 302, at 307, and 324. Therefore, the 'waiver' procedure provided in section 3121(k) of the Federal Insurance Contributions Act is not applicable to a wholly-owned State instrumentality irrespective of whether the particular instrumentality also qualifies for exemption under section 501(c)(3) of the Code.