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Internal Revenue Service (I.R.S.)

Technical Advice Memorandum

October 29, 1959

Section 3306 -- Definitions
3306.00-00 Definitions
3306.01-00 Employers

District Director

Director, Tax Rulings Division

Attention: 433:WFS

This is in reference to your memorandum of September 1, 1959, with enclosures, which relates to the liability of the *** under the Federal Unemployment Tax Act. You transmitted your office file of correspondence in this case for our consideration and advice regarding the taxability of the organization under the above Act in view of the conflict of holdings by our Service and the Employment Security Commission of ***. You call attention to the ruling contained in our memorandum to you on March 18, 1957, wherein we concluded that services performed in the employ of the *** are not excepted from 'employment' by virtue of section 3306(c)(6) of the Federal Unemployment Tax Act, and that the organization is subject to the tax imposed by the Act. However, you point out that the Employment Security Commission has taken the position, as set forth in their letter addressed to you in February 5, 1959, and included in the administrative file, that the Band is an instrumentality and wholly owned by the United States and, therefore, services performed for it are exempt under the Employment Security Law of *** It appears that the State Commission previously ruled in 1956 that, the Tribal Community Services employees were ineligible for unemployment compensation benefits under the State law. You advise that further correspondence has failed to resolve the apparent stalemate.

Pursuant to our ruling of March 18, 1957, your office prepared returns on behalf of the *** , under the provisions of section 6020 of the Internal Revenue Code of 1954, for the years 1956 and 1957. Since no credit was available for State Contributions, the Federal unemployment tax at the full three percent rate in the amounts of \$2,395.69 and \$2,812.90, together with twenty-five percent delinquency penalty and interest, has been assessed for the respective years.

In view of the unequitable position in which the organization is placed by reason of the conflicting rulings by our Service and the State of *** you feel that the enforcement by your office of the collection of the tax liability in question where no unemployment compensation benefits will be available to the employees could result in unfavorable publicity. Under the circumstances, the matter is referred to us for consideration and advice regarding the proper course of procedure to be followed in the case. It is noted that the organization has submitted an offer in compromise with respect to the 1956 and 1957 tax liabilities, and that action thereon will be held in abeyance by your office pending a further clarification of the whole issue.

The position taken by the Employment Security Commission of *** as indicated in its letter of February 5, 1959, is based on the findings that the land and real property of the *** in that State have been transferred to the United States Government to be held in trust for the Tribe; that the affairs and trade of the *** are regulated by Congress in accordance with express provisions of the Constitution of the United States; and that the regulation of such affairs are carried out under the laws of the United States by the

Commissioner of the Bureau of Indian Affairs, Department of the Interior. Further, it is the Commission's understanding that the tribal affairs of the *** are conducted by a tribal council, headed by a principal chief, which acts for all members of the Band; that the council makes up a budget covering the expenditures and money necessary for the operation of its enterprises and other activities; and that the budget must be approved by the Commissioner of Indian Affairs and the Secretary of Interior, and the amount involved then appropriated by Congress before any moneys taken in by the Band can be spent. The Commission is of the opinion that under the above circumstances, the *** is an instrumentality of the Federal Government, and that all services by individuals in the employ of the tribal council, acting in behalf of the Band, are in exempt employment under the provisions of the Employment Security Law of *** The Commission expresses the further opinion that the Band is under the entire control of the Federal Government with respect to the management of its affairs and disbursement of its moneys and thus it should be considered as coming, within the definition of an instrumentality which is 'wholly owned by the United States'. The question is also raised as to whether the Employment Security Commission could enforce payment of State contributions in the instant case in the event it would be determined that the organization is subject to the State law, and such payment was refused by the present tribal council or future councils. The taxability of Indian tribes, such as here involved, has been the subject of extended consideration by our Service. As indicated in our memorandum to you on March 18, 1957, a letter was issued to the Secretary of the Interior under date of January 10, 1950, wherein we concluded that the various Indian tribes are political communities with limited powers of local government, and that although their existence is fostered by Congressional enactment and their functions are subject to the supervision of the Secretary of Interior in many respects, the services performed in the employ of these Indian tribes cannot be said to be in the employ of the United States Government or of an instrumentality wholly owned by the United States. It was, therefore, held that the taxes imposed by the Federal employment tax statutes are applicable with respect to the remuneration for such services.

We expressed the conclusion in Rev. Rul. 56--110, C.B. 1956--1, 488, that where a business enterprise of an Indian tribe was not organized by specific statutory authorization of the Congress of the United States and is not operated by the Department of Interior, but was organized and is operated by the tribe itself with the approval and under the supervision and control of the Bureau of Indian Affairs of the Department of the Interior, such enterprise does not constitute an instrumentality wholly owned by the United States within the meaning of section 3306(c)(6) of the Federal Unemployment Tax Act. Such an enterprise is considered a tribal enterprise and services performed in its employ are not excepted from 'employment' under such section of the Act.

We have reviewed the data in our files in the instant case, in the light of the additional information now made available by your office, and we can find no bases which would warrant a change in the conclusions reached in our memorandum to you on March 18, 1957. The factual situation indicates that the *** is a political community, with limited powers of local government, which exists under its own constitution and by-laws. While it seems that title to the lands occupied by the *** is now held by the United States in trust for the Tribe; that its affairs and trade are fostered by Congressional enactments; and that its functions are subject to supervisory control in many respects by the Secretary of the Interior, it appears clear that the Government merely exercises guardianship and protection over the Indian community for the benefit and welfare of the Tribe. Thus, in our opinion even if the Band might be considered to be an instrumentality of the United States, it cannot, under the facts present in the case, be said that it is one 'wholly owned by the United States' within the meaning of section 3306(c)(6) of the Federal Unemployment Tax Act. Furthermore, there appears to be no other provision of law which would exempt the Band from the taxing provisions of the Act. In view of the foregoing, it is our conclusion that office ruling of March 18, 1957, holding the *** to be liable for the Federal unemployment tax is in accord with the applicable law and regulations and such ruling is affirmed.

As you know the Federal Unemployment Tax Act is separate and distinct from the State unemployment compensation laws and liability under the Act is not dependent upon whether the employees are eligible to receive State unemployment compensation benefits. However, it is recognized that difficulties may be encountered in the collection of the Federal taxes in cases such as here involved where the employees are not eligible for unemployment compensation. There is enclosed for your information in this regard a copy of Circular No. 3710 issued by the Secretary of the Interior relative to the applicability of the Federal employment taxes to employees of Indian Tribes and containing instructions to superintendents and area directors of the Bureau of Indian Affairs as to the procedure to be followed in these cases. Accordingly, it is suggested that you take up this case with the area director of the Bureau of Indian Affairs if any difficulty arises.

It appears that the provisions of section 3305(b) of the Federal Unemployment Tax Act are applicable in the above case, and that pursuant thereto the State of *** could require payment of unemployment compensation contributions by the ***.

(Signed) John W. S. Littleton
Director
Tax Rulings Division

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