

TAM 8748004, 1987 WL 428385 (IRS TAM)

Internal Revenue Service (I.R.S.)

Technical Advice Memorandum

August 27, 1987

Section 3306 -- Definitions

3306.00-00 Definitions

3306.01-00 Employers

3306.02-00 Wages

Taxpayer's Name: \* \* \*

Taxpayer's Address: \* \* \*

Taxpayer's Identification No.: \* \* \*

Years Involved: \* \* \*

Date of Conference: \* \* \*

#### ISSUE

Whether payments made by the taxpayer under the Job Training Partnership Act (JTPA), [29 U.S.C. sections 1501-1781 \(1982 & Supp. III 1985\)](#), to its members for the performance of services are subject to the provisions of the Federal Unemployment Tax Act (FUTA)?

#### FACTS

The taxpayer, an American Indian tribe, engaged members of the tribe to perform services for it pursuant to programs established under the JTPA. The programs included a summer youth program and a college summer employment program and were funded by the Department of Labor under the JTPA. The purpose of the JTPA is to establish programs to prepare youth and unskilled adults for entry into the labor force and to afford training to those economically disadvantaged individuals and other individuals facing serious barriers to employment who are in special need of such training to obtain productive employment. The JTPA authorizes financial assistance to agencies selected to administer these programs. Formerly, these and similar programs were administered under the Comprehensive Employment and Training Act (CETA), [29 U.S.C. sections 811-851 \(1982\)](#).

Payments made under the JTPA programs as remuneration for the performance of services by tribal members were reflected on the taxpayer's Form 940, Employer's Annual Federal Unemployment Tax Return, as tax exempt payments. However, these payments were reflected on the taxpayer's Form 941, Employers Quarterly Federal Tax Return, as taxable payments.

The taxpayer's position is that because payments made under JTPA programs by the state in which the taxpayer is located were excepted from the FUTA, the taxpayer's payments should also be excepted.

No issue has been raised whether the recipients of the remuneration were common law employees, whether the remuneration was wages includible in gross income, or whether the taxpayer was an employer. For purposes of this technical advice memorandum we assume that the recipients were common law employees, that the remuneration was wages includible in gross income, and that the taxpayer was an employer.

#### LAW

[Section 3301 of the Internal Revenue Code](#) imposes on every employer, as defined in

section 3306(a), an excise tax, with respect to having individuals in his or her employ, equal to a stated percentage of the total wages paid by the employer during the calendar year with respect to employment, as defined in section 3306(c).

Section 3306(a) of the Code defines the term 'employer' to mean any person who during any calendar quarter in the calendar year or preceding calendar year paid wages of \$1,500 or more, or on each of some 20 days during the calendar year or during the preceding calendar year, each day being in a different calendar week, employed at least one individual for some portion of the day.

Section 3306(b) of the Code defines the term 'wages' as all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash, unless otherwise excepted by this section.

Section 3306(c) of the Code provides, in part, that the term 'employment' means any service performed after 1954 within the United States by an employee for the person employing him, with certain enumerated exceptions. Section 3306(c)(6) excepts from the definition of employment service performed in the employ of the United States Government or of an instrumentality of the United States that is wholly or partially owned by the United States or that is exempt from the tax imposed by [section 3301](#) by virtue of any provision of law that specifically refers to such section in granting such exemption. Section 3306(c)(7) excepts from the definition of employment service performed in the employ of a State, any political subdivision of a State, and any wholly owned instrumentality of a State or political subdivision.

[Rev. Rul. 59-354, 1959-2 C.B. 24](#), discusses the position of the Internal Revenue Service with respect to the federal employment tax status of Indian tribes and tribal governments. The revenue ruling states that there is no provision in the federal income tax laws that would exempt Indians, as such, from income taxation. Therefore, unless the income of an Indian derived from a particular source is otherwise exempt, such income will be subject to tax in his or her hands the same as it would be in the hands of any other taxpayer. Similarly, all remuneration received by a Indian for services performed as an employee for his or her employer would constitute 'wages' for federal employment tax purposes, including the FUTA, unless a payment is specifically excepted.

[Rev. Rul. 75-246, 1975-1 C.B. 24](#), concerns payments under the CETA, the predecessor to the JTPA. Situation 2 of the revenue ruling concludes that payments received by an individual who is basically engaged in the performance of services are compensation for services rendered, even though some degree of training is involved. The payments maintain their character as wages with respect to which the payor is required to withhold income tax, to deduct and pay the Federal Insurance Contributions Act (FICA) taxes, and to pay the FUTA tax.

In general, an Indian tribe is not a political subdivision of the United States or of a State. See [Rev. Rul. 74-179, 1974-1 C.B. 279](#). Indian tribal governments are, however, treated as states or political subdivisions thereof for purposes of certain provisions of the Code listed in section 7871, but the FUTA provisions ([sections 3301](#) through [3311](#)) are not listed in section 7871.

[Rev. Rul. 68-493, 1968-2 C.B. 426](#), provides, in pertinent part, that there is no exception that excludes from the term 'employment' the services rendered by a member of an Indian tribe merely because he is a ward of the United States. Accordingly, the revenue ruling holds that the taxes imposed under the FUTA are applicable with respect to wages for services performed by a member of an Indian tribe unless such services fall within the specific exceptions contained in section 3306(c) of the Code.

*Washoe Tribes of the States of Nevada and California and Washoe Construction Co. v. U.S.A.*, No. 78-0169-BRT, (D. Nev., Sept. 14, 1979), considered the issue of whether the tribe was liable for the FUTA tax on wages paid to its member-employees. The court stated that the following statement from [Commissioner v. Walker, 326 F.2d 261 \(9th Cir. 1964\)](#), summarized the principles applicable to federal taxation of Indian tribes:

A general Act of Congress applying to all persons applies to Indians and their property interests. . . . Because the Internal Revenue Code is a general Act of Congress, it follows that Indians are subject to taxation unless an exemption from taxation can be found in a

treaty or Act of Congress.

The court found no exemption from the FUTA tax for the wages in question and dismissed the tribe's suit for a refund of the tax.

#### RATIONALE

An American Indian tribe is subject to the FUTA tax unless an exemption can be found in a treaty or Act of Congress. Washoe Tribes of the States of Nevada and California and Washoe Construction Co. v. U.S.A. There is no provision in the Code that exempts the payments from the provisions of the FUTA, and the taxpayer does not contend that any treaty provision provides such exemption.

#### CONCLUSION

Payments made by the taxpayer under the JTPA to its members for the performance of services are subject to the provisions of the FUTA.

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

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

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