



OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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CC:TEGE:EOEG:ET2
COR-133403-01



Dear [REDACTED]:

This responds to your letter dated June 12, 2001, wherein you request a ruling concerning whether or not employees of the [REDACTED] who are members of the [REDACTED] Retirement System are entitled to a refund of taxes paid under the Federal Insurance Contributions Act (FICA).

Unfortunately, we are not able to provide a ruling on this issue due to the fact that your submission does not comport with the requirements for requesting a private letter ruling. Revenue Procedure 2000-1, 2001 I.R.B. 4, sets forth procedures for requesting letter rulings. We have included a copy of Revenue Procedure 2001-1 for your information. If you wish to request a letter ruling, you should follow the procedures set forth in Revenue Procedure 2001-1. We are, however, able to provide you with the following general information, which we hope will be helpful to you.

Taxes under the FICA are computed as a percentage of "wages" paid by the employer and received by the employee with respect to "employment." In general, all payments of remuneration by an employer for services performed by an employee are subject to FICA taxes, unless the payments are specifically excepted from the term "wages" or the services are specifically excepted from the term "employment."

Under section 3121(b)(7) of the Internal Revenue Code (the Code), the term "employment" for purposes of FICA taxation does not include service performed in the employ of a state, or any political subdivision of a state, or any wholly owned instrumentality of a state or political subdivision of a state. However, under Code section 3121(b)(7)(E), the exception from employment does not apply to services included under an agreement entered into pursuant to section 218 of the Social Security Act. Such agreements, commonly referred to as "section 218 agreements," are voluntary agreements between states and the Commissioner of Social Security to

COR-133403-01

extend Social Security coverage to services performed by employees of the state or any political subdivision of the state.

In the event that the services performed are not included under a section 218 agreement, Code Section 3121(b)(7)(F) provides that the exception from employment shall not apply to services performed by an employee of a state, political subdivision or wholly owned instrumentality thereof by an individual who is not a member of the retirement system of such state, political subdivision or wholly owned instrumentality.

Section 31.3121(b)(7)-2(b) of the Employment Tax Regulations provides that the rules under section 31.3121(b)(7)-2 generally treat an employee as a member of a retirement system if the employee (1) is a qualified participant in a system that provides retirement benefits, and (2) has an accrued benefit or receives an allocation under the system that is comparable to the benefits the employee would have received under Social Security.

Thus, if your organization is a wholly owned instrumentality of a state or a political subdivision of a state, and its employees are members of the state retirement system whose services are not covered by a section 218 agreement, then the wages paid to such employees would not be subject to FICA taxation.

If you think an overpayment of FICA has occurred, the methods of making adjustments and filing claims for refund of overpayments of FICA tax are explained in Circular E, Employer's Tax Guide. For further guidance, you may want to review a publication entitled "Federal State Reference Guide," Publication 963, which provides state and local government employers with a reference source for Social Security and Medicare coverage and FICA tax withholding issues. Circular E and Publication 963 are available on the IRS website at www.IRS.gov.

The attorney assigned to this matter is Patricia P. Holdsworth. She can be reached at (202) 622-6040.

Sincerely,

Jerry E. Holmes
Chief, Employment Tax Branch 2
Office of the Assistant Chief Counsel
(Exempt Organizations/ Employment Tax/
Government Entities)

Enclosure (1)