



OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

May 27, 2004

Number: **INFO 2004-0085**
Release Date: 6/30/2004
CONEX-113356-04/CC:TEGE:EOEG:ET1
UILC: 3121.01-11

Dear _____ :

This letter is in response to your letter dated March 1, 2004, on behalf of your constituent, Mr. _____, about a refund claim for Federal Insurance Contributions Act (FICA) tax made on his behalf by _____.

According to the information which accompanied your letter, Mr. _____ received severance pay from _____ withheld the employee share of FICA tax from the severance pay. Subsequently, _____ apparently filed a claim for refund of both the employer and employee portions of the FICA tax. _____ states in a letter dated _____, that it understands from its accountants that the IRS suspended the claim.

Although we cannot address the status of a taxpayer's claim for refund without a power of attorney (Form 2848, Power of Attorney and Declaration of Representative), we can provide general information on the refund claim process and the tax issue.

General Refund Claim Information

Taxpayers can file a claim for refund of employment taxes by filing Form 843, Claim for Refund and Request for Abatement, at the IRS Center where they filed their return. The IRS may grant, deny, or not act on the claim. If the IRS denies a claim for refund, the taxpayer has two years to file a refund suit against the United States for a refund of the tax. If the IRS does not render a decision on the claim within six months, the taxpayer can file a refund suit in a United States District Court or the Court of Federal Claims.

General Rule—Payments to Employee Are Wages

The FICA requires employers to collect and pay Old-Age, Survivors, and Disability Insurance (OASDI or Social Security) and Hospital Insurance (HI or Medicare) taxes on wages paid to their employees. For purposes of the FICA, "wages" is defined as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." This definition of wages for purposes of the FICA continues with a list of 21 exceptions; severance pay is not one of them. (Internal Revenue Code section 3121(a).) The Employment Tax Regulations define "wages" as all remuneration (payment) for employment unless specifically excepted. The regulations state that remuneration generally constitutes wages even though at the time paid the individual is no longer an employee. (Section 31.3121(a)-1(b) and (i) of the Employment Tax Regulations.)

Narrow Exception—Supplemental Unemployment Benefit Pay

The IRS has long taken the position that supplemental unemployment benefit pay (often referred to as "SUB-pay") paid under a SUB-pay plan is not wages for FICA purposes if certain criteria are met. These criteria include the following: the individual receiving the SUB-pay was involuntarily separated from service due to a plant closing, layoff, or reduction in force; the individual receiving the SUB-pay is also receiving state unemployment compensation; and the SUB-pay is not a lump sum payment. See Revenue Ruling 56-249, 1956-1 C.B. 488; Revenue Ruling 58-128, 1958-1 C.B. 89; Revenue Ruling 60-330, 1960-2 C.B. 46; Revenue Ruling 90-72, 1990-2 C.B. 211.

Because we do not know the nature of the severance pay Mr. _____ received, we do not know whether it might fall within the narrow exception for SUB-pay.

The Interlocutory Opinion in *CSX Corp. v. United States*

The materials submitted with your letter suggest that _____'s refund claim for FICA tax may have been based on a court opinion that is not yet final. In *CSX Corp. v. United States*, 52 Fed. Cl. 208 (2002), the Court of Federal Claims, in an interlocutory opinion, rejected the IRS's definition of SUB-pay for FICA purposes. The court instead applied the definition developed under section 3402(o)(2)(A) of the Code, which addresses income tax withholding requirements for SUB-pay rather than FICA. The Court of Federal Claims has not entered a final decision in this case, and thus the period when the parties decide whether to appeal has not yet begun. Because the CSX opinion reflects a partial win by each party, both parties could appeal.

I hope this information is helpful in responding to Mr. _____. If you have further questions, please contact me at _____ or _____ of my staff at _____.

3

Sincerely,

Catherine E. Livingston
Associate Chief Counsel
(Tax Exempt and Government Entities)