



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

OFFICE OF
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The Honorable Rick Larsen
Member, U.S. House of Representatives
Suite 9F
2930 Wetmore Avenue
Everett, Washington 98201

Attention: Mr. Bill Phillips

Dear Congressman Larson:

I apologize for the delay in responding to your inquiry dated March 30, 2005, on behalf of your constituent, Mr.

. Mr. requested information about the refund of income and employment taxes erroneously withheld and paid on remuneration contributed to a retirement plan from . He also asked for a waiver of the 3 year statute of limitations on refunds.

Based on the facts provided, I cannot tell whether actually over-withheld income and/or FICA taxes and whether is entitled to a refund. Assuming did over-withhold taxes, or its employees, whichever is applicable, must file a timely claim to obtain a refund of these payments. To be timely, a refund claim must be filed within three years from the time the return was filed or two years from the time the tax was paid, whichever is later. An employer must generally file a refund claim (Form 843) within three years from April 15 of the year after the taxes were withheld (which is the time the Form 941 is deemed filed), or 2 years from the time the tax is paid, whichever is later. An employee must generally file a refund claim (Form 1040X) within three years from the time Form 1040 is filed, or 2 years from the time the tax is paid, whichever is later. Unfortunately, the IRS has no authority to waive or extend the time for filing a refund claim. We must deny claims that are untimely even if they are correct on their merits.

The Federal Insurance Contributions Act (FICA) imposes an excise tax on the “wages paid by an employer to an employee for employment.” [Internal Revenue Code (the Code) sections 3101(a)-(b), 3111(a)-(b)]. Generally, 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.” One such exception is for employer contributions made on behalf of the employee to a pension plan qualified under section 401(a) of the Code. An employee’s own contributions to a qualified plan are not excepted from the FICA definition of wages. Thus, employer contributions are not subject to FICA, but employer contributions are.

Amounts contributed to a qualified plan may not, for any tax purposes, be treated as employer contributions if they are designated by the employer as employee contributions. However, contributions (otherwise designated as employee contributions) to state and local government pension plans can be treated as employer contributions if the employer “picks up” the contributions. Employer contributions are not included within FICA wages, as noted above, and thus are not immediately subject to FICA, though employee contributions are. However, included within the definition of FICA wages is any amount treated as an employer contribution under section 414(h)(2) of the Code where the pickup is in the form of a salary reduction agreement (whether evidenced by a written agreement or otherwise).

The federal income tax treatment for contributions that are picked up by the employer within the meaning of section 414(h)(2) is specified in Revenue Ruling 77-462, 1977-2 C.B. 358. In that ruling, the IRS held that these amounts are excluded from the employees’ gross income until they are distributed to the employees. The revenue ruling further held that under the provisions of section 3401(a)(12)(A) of the Code, employer contributions to the plan are excluded from wages for income tax purposes; therefore, no withholding is required from the employees’ salaries for these picked-up contributions.

You requested information on obtaining a refund of taxes erroneously withheld and paid on contributions to the plan. Assuming that the plan is a state or local government plan that is qualified under section 401(a) of the Code, and that employee contributions to the plan are picked up by the employer within the meaning of section 414(h)(2) of the Code, such contributions are neither includable in the employees’ gross income nor subject to income tax withholding until they are distributed to the employees. The contributions may or may not be subject to FICA, depending on whether they were made under a salary reduction agreement, as described above.

If an employer discovers that it has made a mistake in computing its FICA liability in a prior tax return, the employer can correct the mistake by making an adjustment on its Form 941 for the quarter during which the error was discovered. The adjustment

increases or decreases the employer's tax liability for the quarter in which it is reported (the quarter the error is discovered) and is interest free. Alternatively, the employer can file a claim for refund on Form 843, Claim for Refund and Request for Abatement. Similar procedures exist for mistakes an employer discovers in computing income tax withholding liability in a prior tax return. However, an employer can not make an adjustment or file a claim for refund of amounts reported as income tax withheld in a prior calendar year. This is because the amount of income tax withholding from the prior year is used as a credit on the employee's own income tax return. Thus, if an employer has incorrectly treated remuneration as wages subject to income tax withholding in a prior calendar year, only the employees may file a claim for refund on Form 1040X. The employer is required to file a corrected Form W-2 for income tax withholding to reflect the revised amount of wages. [Regulations section 31.6051-1(c)(2)]. I have enclosed a copy of Circular E, Employer's Tax Guide, which explains these procedures in detail, for your information.

I hope this information is helpful. If you have any questions or wish to discuss this matter further, please contact me or . We can be reached at (202) 622-6040.

Sincerely,

Lynne Camillo
Chief, Employment Tax Branch 2
Office of the Assistant Chief Counsel
(Exempt Organizations/Employment
Tax/Government Entities)
Tax Exempt and Government Entities
Division

Enclosure