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INTERNAL REVENUE SERVICE NATIONAL OFFICE SERVICE CENTER ADVICE  
MEMORANDUM FOR CHARLES FELTHAUS  
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SUBJECT: FICA Refund Claims Based Upon the Case of  
North Dakota State University v. United States

This revises a Service Center Advice, SCA 200235029, issued August 30, 2002, in connection with questions posed by the Philadelphia Service Center concerning how to process refund claims filed by taxpayers based on the decision in North Dakota State University v. United States, 255 F.3d 599 (8<sup>th</sup> Cir. 2001). This revision reflects the Service's modification of its litigating position related to the North Dakota State University case set forth in Revised Action on Decision, AOD 2007-01 (January 19, 2007). In accordance with I.R.C. § 6110(k)(3), this Service Center Advice should not be cited as precedent.

**Issue**

Whether Service Centers should make refund payments to taxpayers who file claims for refunds of Federal Insurance Contributions Act (“FICA”) taxes paid based upon the North Dakota State University decision.

## Conclusion

Service Centers should make refunds of FICA taxes only to taxpayers having claims that arise within the jurisdiction of the Eighth Circuit of the United States Court of Appeals that have the exact facts as the facts in North Dakota State University and only to the extent that the relevant payments were made before January 12, 2005. Cases having the exact facts are cases involving payments made to college or university professors in exchange for the relinquishment of their tenure rights. All other claims of refund of FICA taxes that cite to the North Dakota State University decision should be denied.

## Discussion

The Eighth Circuit of the United States Court of Appeals is the first circuit court to address the issue of whether payments made to tenured faculty members under an early retirement program are wages subject to FICA taxes. When the Eighth Circuit held in North Dakota State University that a payment made to a tenured faculty member under North Dakota State University’s early retirement program was made in exchange for the relinquishment of the tenured faculty member’s contractual and constitutionally protected tenure rights rather than as remuneration for services to the University, it cited Rev. Rul. 58-301, 1958-1 C.B. 23<sup>1</sup> as support for its decision.

In an Action on Decision, AOD 2001-08 (December 31, 2001) (the original Action on Decision), the Service did not acquiesce in the Eighth Circuit’s decision in North Dakota State University. While the Service disagreed with the court’s analysis that the case was analogous to Rev. Rul 58-301, it nevertheless, recognized the precedential effect of the decision to cases appealable to the Eighth Circuit, and stated that it would follow the decision within the Eighth Circuit with respect to cases that had the exact facts of North Dakota State University. Exact facts are cases involving payments to college or university professors made in exchange for the relinquishment of their tenure rights. Consistent with this AOD, the Service issued SCA 200235029 to explain how Service Centers should process refund claims filed by taxpayers citing this decision.

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<sup>1</sup> Revenue Ruling 58-301, 1958-1 C.B. 23, concludes that a lump sum payment received by an employee as consideration for his agreement to cancel the remaining period of a five-year employment contract during the second year of the term and to relinquish his contract rights is ordinary income, not capital gain, and is includible in his gross income in the year of receipt. The ruling further concludes that the payment is not subject to FICA and Federal income tax withholding.

Subsequently, on December 13, 2004, the Service issued Rev. Rul. 2004-110, 2004-2 C.B. 960, which modified and superseded Rev. Rul. 58-301. Rev. Rul. 2004-110 holds that an amount paid to an employee as consideration for the cancellation of an employment contract and relinquishment of contract rights is ordinary income and wages for purposes of FICA, the Federal Unemployment Tax Act (FUTA), and Federal income tax withholding. Rev. Rul. 2004-110 states that Rev. Rul. 58-301 erred in its analysis by failing to apply the Code and regulations appropriately to the question of whether the payments made in cancellation of the employment contract were wages. Rev. Rul. 2004-110, under the authority of section 7805(b), also provides that the Service will not apply this ruling to any payment made before January 12, 2005, provided that the payment is made under facts and circumstances that are substantially the same as in Rev. Rul. 58-301.

To reflect the issuance of Rev. Rul. 2004-110 and the change in its published rulings, the Service recently issued Revised Action on Decision, AOD 2007-01 (January 19, 2007) with respect to North Dakota State University. AOD 2007-01 provides that the Service will follow North Dakota State University within the Eighth Circuit only with respect to cases that have the exact facts as that case and only to the extent that payments were made before January 12, 2005 – that is, during the period of time when the Service made relief available to cases falling under Rev. Rul. 58-301. Consistent with the original Action on Decision, the Service will continue to litigate cases in the Eighth Circuit involving early retirement payments but otherwise having different facts from North Dakota State University regardless of when the payments were made. Moreover, the Service will continue to take the position that early retirement payments made to tenured professors are remuneration for services subject to FICA taxes in all cases in other circuits.

Consistent with the Revised Action on Decision, we are modifying SCA 200235029 concerning how Service Centers should process taxpayer refund claims for the FICA taxes withheld and paid by their employers based upon the North Dakota State University decision. Service Centers should deny all refund claims of FICA taxes filed that cite the North Dakota State University decision as support for issuing the refund unless: (1) the taxpayer's claim concerns a case that arises within the jurisdiction of the Eighth Circuit, (2) has the exact facts as the North Dakota State University case, and (3) the subject payment to college or university professors made in exchange for the relinquishment of their tenure rights was made before January 12, 2005. In those cases, the taxpayer must submit adequate proof of tenured status and a copy of the early retirement agreement to support a claim for refund of FICA taxes.

If you have any additional questions, please contact \_\_\_\_\_ at  
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