

ID: CCA_2008102810293429

Number: **200851047**

Office:

Release Date: 12/19/2008

UILC: 1402.03-00

From:

Sent: Tuesday, October 28, 2008 10:29:35 AM

To:

Cc:

Subject: RE: CONSULTA - request for technical advise of Self employment tax

Based on our understanding of the limited facts given to our office, we believe that these payments that the judges in Puerto Rico receive are subject to self-employment tax.

Sections 1401 (a) and (b) of the Code impose a tax on self employment income. Section 1402(b) defines "self employment income" as the net earnings from self employment derived by an individual. Section 1402(a) defines "net earnings from self employment" as the gross income derived by an individual from any trade or business carried on by an individual.

While section 1402(c)(1) states that the performance of functions of public office normally do not constitute a "trade or business", section 1402(c)(1) also provides that if an individual receives fees for the performance of the functions of a public office for which he is compensated solely on a fee basis, and the service performed in such office is eligible (but is not made subject of) an agreement between the State and the Secretary of Health, Education, and Welfare pursuant to section 218 of the Social Security Act to extend social security coverage thereto, the service for which such fees are received constitutes a trade or business within the meaning of section 1402(c). As section 1402(c)(2)(E) provides, this inclusion of fee based services for self employment tax purposes applies even if the service is performed in their employee capacity. Additionally, section 3121(b)(7)(F)(v) excludes from FICA tax, the payments received by a public official for service compensated solely on a fee basis.

Revenue Ruling 74-608, 1974-2 C.B. 275, holds that when a public official receives remuneration in the form of fees directly from the members of the public with whom he does business, such remuneration is fees within the meaning of section 1402(c)(1). However, when a public official receives remuneration from a government fund and no portion of the monies collected by him belongs to or can be retained by him as compensation, the remuneration is not fees under section 1402(c)(1). I am attaching a copy of this Revenue Ruling as it is illustrative of the key issues presented in the case.

In the instant case, based on our understanding, the judges

perform duties of a public official at nuptial ceremonies on non-duty hours on a fee basis. If these fees are paid directly to the judge as compensation for the performance of the ceremony, then the judge appears to be performing functions of a public office solely on a fee basis, and therefore appears to conduct a trade or business within the meaning of section 1402(c)(1). As such, these fees would be self employment income and subject to self employment tax.

The fact that the judges are residents of Puerto Rico and the services take place in Puerto Rico does not alter the result. Section 1402(a)(6) explicitly mandates that residents of Puerto Rico calculate self employment income in the same manner as a United States citizen, without regard to the exclusion from gross income ins section 933, and section 1.1402(a)-9 states that for the purpose of the tax on also self-employment income, the gross income of a resident of Puerto Rico engaged in a trade or business in Puerto Rico also includes income from Puerto Rican sources despite the fact that this income would be excluded from income tax under section 933.

This informal response is given based on the very limited facts presented in the underlying email. Should the taxpayers desire a definitive ruling based on a more detailed set of facts, the taxpayers can submit a request for a ruling.

If you have any questions, feel free to contact me.