



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

OFFICE OF THE CHIEF COUNSEL

February 22, 2010

Number: **INFO 2010-0043**

Release Date: 3/26/2010

CC:TEGE:EOEG:ET2:  
GENIN-137854-09

Index (UIL) No.: 3121.02-00

Dear \_\_\_\_\_ :

We regret the delay in replying to your correspondence concerning the payment of employer and employee Federal Insurance Contributions Act (FICA) taxes with respect to certain services you performed in the United States.

According to the information submitted, you performed a full-time teaching role at a college in the United States (hereinafter "US College") for two periods:

\_\_\_\_\_ . Both of these periods were teaching exchanges. You were paid by a foreign college located in \_\_\_\_\_ (hereinafter "Foreign College") as if you were teaching at that institution. Both before and after each exchange, you were teaching on staff at Foreign College. The person replacing you at Foreign College was paid by US College as if he were teaching at US College. No totalization agreement was in effect between the United States and \_\_\_\_\_ during your periods of employment in the United States.

You have indicated that during the time you performed services in the United States pursuant to the teaching exchanges, no FICA taxes were deducted from the salary you received from Foreign College and no FICA taxes were paid by US College on your behalf. You are interested in obtaining social security coverage with respect to your periods of employment within the United States. Although under Revenue Procedure 2010-1, 2010-1 I.R.B. 1, we can not provide a ruling as to your FICA tax liability, we can provide the following general information.

FICA taxes consist of two taxes: the Old-Age, Survivors, and Disability Insurance tax (social security tax) and the hospital insurance tax (Medicare tax). FICA taxes are imposed on wages, which is defined in section 3121(a) as remuneration for employment, with certain specific exceptions. Employment is defined in section 3121(b) as including services performed within the United States, irrespective of the citizenship or residence of the employer and the employee, unless an exception applies. Thus, generally remuneration for services performed within the United States is subject to FICA taxes regardless of the nationality of the employee. Special rules sometimes apply under totalization agreements in determining whether certain services are FICA employment, but as noted no totalization agreement was in effect with the country in which Foreign College is based during your period of employment in the United States.

There is an exception from FICA employment that may apply to nonresident alien professors or nonresident alien scholars from foreign universities who are performing services in the United States pursuant to an exchange program. Section 3121(b)(19) provides an exception from employment for purposes of the FICA for service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F), (J), (M), or (Q) of section 101(a)(15) of the Immigration and Nationality Act, as amended, and which is performed to carry out the purpose specified in subparagraph (F), (J), (M), or (Q) as the case may be. This exception only applies to nonresident aliens who are present in the United States performing services under these visas and does not apply to United States citizens.

If no exception applies and services performed in the United States are subject to FICA taxes, the employer reports both the employee and employer portions of FICA taxes on Form 941, Employer's Quarterly Federal Tax Return, which the employer files with the Internal Revenue Service (IRS). The FICA taxes (including the employee portion of the taxes withheld from the employee) are paid by the employer either by making deposits with depository banks or by making payment with the return, depending upon the amount of the liability for the FICA taxes combined with the liability for income tax withholding. Generally, the liability of a taxpayer for FICA taxes for prior years is subject to a period of limitations, which is in part derived from the date the employer files a return for a particular period. See section 6501 of the Internal Revenue Code. Generally, except in the case of fraudulent returns or in cases where the period of limitations has been extended with the consent of the employer, an employer that filed Forms 941 on a timely basis for \_\_\_\_\_ would have no current liability for FICA taxes for wages paid for periods in \_\_\_\_\_. However, if an employer never filed an employment tax return for these periods, the period of limitations would remain open for purposes of FICA tax liability for those periods.

The question of whether FICA tax liability exists for the period during which an exchange professor performed services may therefore depend on whether the employer has filed a return for the period in which the services were performed. If the professor from Foreign College is an employee of the US College when performing services in the

United States and the US College has timely filed FICA tax returns and paid the tax due on those returns, the statute of limitations will have generally closed with respect to FICA tax liability for \_\_\_\_\_ unless the statute has been extended. On the other hand, if the professor for Foreign College is an employee of Foreign College when performing services in the United States, the statute of limitations will still remain open if Foreign College never filed Form 941 for these periods. Thus, if an exchange professor was an employee of Foreign College during periods of services within the United States for \_\_\_\_\_ and the remuneration for such services was subject to FICA (and the professor's services were not excepted from FICA employment as discussed above), Foreign College could pay the FICA employer and employee tax with respect to such services. Foreign College could report the FICA employer and employee tax on Form 941 and pay the FICA taxes according to the Instructions on Form 941, and Publication 15, Circular E, Employer's Tax Guide, which are available on the IRS web site.

Generally, the employer portion of FICA tax is paid by employers on the appropriate forms (generally Form 941). There are a limited number of situations in which an employee reports the employee portion of the FICA tax together with Form 1040, U.S. Individual Income Tax Return, filed by the employee and pays the employee social security and Medicare tax directly to the IRS. These situations include as follows:

(1) A taxpayer is required to file Form 8919, Uncollected Social Security and Medicare Tax on Wages, and pay employee FICA (social security and Medicare) taxes if four conditions are met: the employee performed services for a firm, the firm did not withhold the employee portion of social security and Medicare taxes, the employee's pay was not for services as an independent contractor, and one or more of the reasons listed on the first page of Form 8919 (see Form attached) apply to the employee;

(2) if an employee failed to report tips to the employer and is liable for the employee portion of FICA taxes with respect to such unreported tips, the employee files Form 4137, Social Security and Medicare Tax on Unreported Tip Income, to report and pay such FICA taxes;

(3) when an employee has reported tips to an employer but the employer had inadequate funds available to deduct from the wages of the employee to pay the FICA employee taxes, the employee pays the uncollected social security and Medicare tax on Form 1040.; and

(4) when an employer has provided group term life insurance to a retired employee and has not deducted from the employee's wages the employee FICA taxes due with respect to the amount of the group term life insurance that is wages, the employee pays the uncollected social security and Medicare tax on Form 1040.

None of the above procedures to pay just the employee portion of social security and Medicare taxes seems to apply to the situation of a foreign exchange professor who wants to pay employer and employee FICA taxes on his wages. As noted, the Form

941, which is filed by the employer, would normally be used to pay the employer and employee portion of FICA taxes

We suggest that you contact the Social Security Administration if you have any questions about your entitlement to social security benefits. With respect to social security benefits, we note that the earnings record of an employee for social security benefit purposes is not necessarily the same as the record of wages on which FICA taxes were paid.

We hope the above information will prove helpful to you. We emphasize that this is not a ruling as to your tax status.

Sincerely,

---

Lynne Camillo  
Branch Chief, Employment Tax Branch 2 (Exempt  
Organizations/Employment Tax/Government  
Entities)  
(Tax Exempt & Government Entities)

Enclosure  
Form 8919