

Internal Revenue Service

Department of the Treasury
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Legend

Department =
Payroll Service Provider =

Dear

This is in reply to your letter of July 30, 2010, requesting a ruling concerning whether the Department is liable for the employee portion of Federal Insurance Contributions Act (FICA) taxes with respect to the services of employees of international organizations who have been transferred to the international organizations from the Department and whose services in the employ of the international organizations meet the requirements of section 3121(y) of the Internal Revenue Code. (All references to sections in the remainder of this letter refer to sections of United States Code Title 26, the Internal Revenue Code, unless another title is specifically referenced.)

The Department is a department of the United States Government. Certain individuals (the "transferees"), who were employees of the Department, were transferred to be employees of international organizations pursuant to the provisions of 5 U.S.C. § 3582. It has been represented that the service of the transferees meets the requirements of section 3121(y).

Section 3121(y)(1) provides that for purposes of the FICA, service performed in the employ of an international organization by an individual pursuant to a transfer of such

individual to such international organization pursuant to 5 U.S.C. § 3582, shall constitute “employment” if --

(A) immediately before such transfer, such individual performed service with a Federal agency which constituted “employment” under section 3121(b) for purposes of the taxes imposed by sections 3101(a) and 3111(a) (i.e., Old-Age, Survivors, and Disability Insurance Tax (OASDI), or social security taxes], and

(B) such individual would be entitled, upon separation from such international organization and proper application, to reemployment with such Federal agency under 5 U.S.C. § 3582.

Section 3121(y)(2) defines “Federal agency” as an agency as defined in 5 U.S.C. § 3581(1). Section 3121(y)(2) provides that the term “international organization” has the meaning provided such term by 5 U.S.C. § 3581(3).

The Department recently learned that its payroll service provider (Payroll Service Provider) failed to collect FICA taxes for several years from the transferees during their period of employment with the international organization which met the requirements of section 3121(y) as described above. Under Office of Personnel Management procedures, the Payroll Service Provider should have billed transferees for their share of FICA taxes as the taxes were due and collected the tax from the transferees, but the Payroll Service Provider failed to do this billing on a timely basis. You indicate that most of the overdue employee FICA taxes with respect to years within the applicable statute of limitations have now been paid by the transferees. However, certain of the transferees who were not timely billed for FICA have informed the Department that they do not believe they should be required to pay these overdue taxes to the Department. The Department has not yet paid the employer FICA taxes with respect to these transferees. The Department was informed that there is no procedure under these circumstances where the employer could pay only the employer’s share of FICA tax without also paying the employee’s share of these taxes. This ruling relates to years at issue that are within the applicable period of limitations for assessment of the FICA taxes.

You have requested a ruling on the following issue: Is the Department liable under sections 3102(a) and (b) and 3122 for the employee portion of the FICA tax on wages paid for the transferee’s services with an international organization that meets the requirements of section 3121(y) and 5 U.S.C. § 3582, where the Department is unable to collect the FICA taxes from the transferee?

FICA taxes are imposed on wages, which is defined as all remuneration for employment unless specifically excepted. FICA tax consists of (a) the Old-Age, Survivors, and Disability Insurance Tax (OASDI, or social security tax), imposed by sections 3101(a) (employee portion) and 3111(a) (employer portion) of the Internal Revenue Code, and (b) the Hospital Insurance Tax (Medicare tax), imposed by sections 3101(b) (employee portion) and 3111(b) (employer portion). Section 3102(a) provides the employee portion of FICA taxes imposed by section 3101 shall be collected by the employer of the

taxpayer, by deducting the amount of the tax from the wages as and when paid. Section 3102(b) provides that every employer required so to deduct the tax shall be liable for the payment of such tax, and shall be indemnified against the claims and demands of any person for the amount of any such payment made by such employer. The term employment is defined in section 3121(b) with certain specific exceptions. Section 3121(b)(5) provides an exception for certain federal employment and generally provides which federal service is subject to social security tax.

Section 3121(y)(1) provides that for purposes of the FICA, service performed in the employ of an international organization by an individual pursuant to a transfer of such individual to such international organization pursuant to 5 U.S.C. § 3582, shall constitute “employment” for FICA tax purposes (social security tax and Medicare tax) if –

(A) immediately before such transfer, such individual performed service with a Federal agency which constituted “employment” under section 3121(b) for purposes of the taxes imposed by sections 3101(a) and 3111(a) [OASDI, or social security taxes], and

(B) such individual would be entitled, upon separation from such international organization and proper application, to reemployment with such Federal agency under 5 U.S.C. § 3582.

An employee who is transferred to an international organization terminates employment with the United States government and becomes an employee of the international organization. The transfers are authorized in 5 U.S.C. § 3582, which provides that, if certain requirements are met, a transferring employee may retain many rights and benefits of federal employment, and may retain a right of reemployment by the federal government when employment with the international organization is terminated. Under 5 USC § 3582(a)(1), an employee transferred from an agency to an international organization retains retirement coverage, rights, and benefits, provided that necessary employee deductions and agency contributions in payment for the coverage, rights, and benefits for the period of employment with the international organization are currently deposited in the system’s fund or depository, and such service for the period of employment with the international organization is treated as creditable service for purposes of the federal government retirement system. However, such service is not considered creditable service for federal retirement if it forms the basis for an annuity or pension under the retirement system of the international organization.

Section 3121(b)(15) provides an exception from the definition of employment under the FICA for service performed in the employ of an international organization, except service which constitutes “employment” under section 3121(y).

Section 3122 provides the general rule that in the case of FICA tax with respect to services performed in the employ of the United States, the determination of the amount of remuneration for the services, and the return and payment of the taxes imposed by this chapter (chapter 21 of the Internal Code, the FICA) shall be made by the head of

the Federal agency having control of the services, or by such agents as such head may designate. Section 3122 provides a special rule that in the case of the taxes imposed by this chapter with respect to services performed in the employ of an international organization pursuant to a transfer to which the provisions of section 3121(y) are applicable, the determination of the amount of remuneration for such service, and the return and payment of the taxes imposed by this chapter, shall be made by the head of the Federal agency from which the transfer was made. Section 3122 also provides that nothing in section 3122 shall be construed to affect the Secretary's authority to determine under section 3121(a) and (b) whether any such service constitutes employment, the periods of such employment, and whether remuneration paid for any such service constitutes wages.

Section 3102(e) provides that in the case of any payments of wages for services performed in the employ of an international organization pursuant to a transfer to which the provisions of section 3121(y) are applicable---

- (1) section 3102(a) shall not apply,
- (2) the head of the agency from which the transfer was made shall separately include on the statement required under section 6051 –
 - (A) the amount determined to be the amount of the wages for such service, and
 - (B) the amount of the tax imposed by section 3101 on such payments, and
- (3) the tax imposed by section 3101 on such payments shall be paid by the employee.

The Office of Personnel Management has established procedures for the payment of the tax by Federal agencies in Benefits Administration Letter 95-105 dated October 20, 1995. The letter states that for international organization service both within and outside the United States, the Federal agency from which the employee transfers is responsible for computing and billing owed FICA tax, both employer and employee shares, and for the payment of collected FICA tax. The letter further states that an agency must submit the employer share of FICA tax even when an employee fails to submit payment of the employee portion of FICA tax.

Generally, the employer pays both the employer and employee portion of FICA taxes and reports them on Form 941, Employer's Quarterly Federal Tax Return. There are limited procedures under which employers can pay employer FICA tax only without employee FICA taxes on an amount of wages. These procedures apply only in the following three situations: (1) uncollected employee FICA tax on tips; (2) uncollected employee FICA tax on certain group term life insurance provided to retirees; and (3) sick pay paid by third parties in situations where the third party has withheld the FICA tax and reported the amounts of sick pay paid to the common law employer. The Form 941 has lines providing for adjustments of the employer's liability for FICA taxes with respect to such amounts to reflect that the employer is not paying the employee portion of FICA taxes. These three situations are the only situations in which employers can

pay the employer tax without the employee portion and make current period adjustments on Form 941 to reflect no liability for the employee FICA tax. There is no such procedure applicable for purposes of FICA taxes with respect to service that is employment pursuant to section 3121(y).

Section 3122 provides that, in the case of employment described in section 3121(y), the return and payment of the taxes imposed by the FICA shall be made by the head of the Federal agency from which the transfer is made. Section 3122 also provides that nothing in section 3122 shall be construed to affect the Secretary's authority to determine under section 3121(a) and (b) whether any such service constitutes employment, the periods of such employment, and whether remuneration paid for any such service constitutes wages. This power to determine whether any service constitutes employment and whether remuneration is wages in effect gives the Secretary the authority to determine under section 3122 when liability exists for FICA taxes and the procedures and forms under which such FICA taxes will be paid. Section 3102(e) clarifies that the transferee remains liable for the employee portion of FICA taxes with respect to such services even though the federal agency from which the transfer is made cannot deduct the employee portion of the FICA taxes from the wages of the transferee. The wages are paid by the international organization and therefore the employee must pay the employee portion of the FICA taxes, but under the procedures established pursuant to section 3122.

The employee portion of the FICA tax is paid to and collected by the Federal agency from which the transfer was made to enable the Federal agency to pay both the employer and employee portion of FICA taxes and include the wages on its Form 941, Employer's Quarterly Federal Tax Return, under the procedure set forth for payment of the tax with respect to section 3121(y) employment pursuant to section 3122. Under section 3122, the Federal agency is liable for the payment of the employer and employee portion of the FICA taxes with respect to employment under section 3121(y). Under section 3102(e) and the procedure under section 3122 for payment of the FICA taxes, the transferee is liable for the payment of the employee portion of the FICA taxes to the Department, and such liability is not extinguished by the payment of the employee portion of the FICA tax by the Department without collection from the transferee.¹

¹ Note that if an employer pays the employee portion of FICA taxes without collecting the taxes from the employee, the amount of the FICA employee tax paid by the employer is includible in the gross income of the employee and additional wages for employment tax purposes (including FICA and income tax withholding). See Rev. Rul. 86-14, 1986-1 C.B. 304.

Accordingly, the Department is liable for payment of the employee portion of FICA tax with respect to the services of employees of the international organizations who have been transferred to the international organizations from the Department and whose services meet the requirements of section 3121(y) of the Internal Revenue Code, whether or not collected from the employee.

Sincerely,

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