



OFFICE OF THE CHIEF COUNSEL

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

April 2, 2012

CC:TEGE:EOEG:ET2
CONEX-112008-12

Number: **2012-0032**
Release Date: 6/29/2012

UIL: 3121.16-02

Dear _____ :

This letter is in reply to your inquiry, dated February 29, 2012, concerning Federal Insurance Contributions Act (FICA) taxes imposed on your nonqualified deferred compensation plan annuity payments. I hope the following information addresses your concerns.

The law imposes FICA taxes on the wages employers pay to employees with respect to employment [See Internal Revenue Code (Code) sections 3101 and 3111]. The FICA tax is comprised of two separate taxes. Code sections 3101(a) and 3111(a) impose Old-Age, Survivors and Disability Insurance (social security) taxes, and sections 3101(a) and 3111(b) impose Hospital Insurance (Medicare) taxes on employees and employers, respectively.

Generally, wages are subject to FICA tax when employers actually or constructively pay the wages to employees. However, a special rule applies for wages deferred under a "nonqualified deferred compensation plan."¹ Code section 3121(v)(2) and Employment Tax Regulations (regulations) section 31.3121(v)(2)-1 provide that any amount deferred under a nonqualified deferred compensation plan must be taken into account as wages for FICA purposes as of the later of (1) the date on which the employee performs the services that create the right to a deferral, or (2) the date on which the amount deferred is no longer subject to a substantial risk of forfeiture. The special rule at Code section

¹ A nonqualified deferred compensation plan is any plan or other arrangement for deferral of compensation other than a qualified retirement plan, a tax-favored annuity, or other plan described in Code section 3121(a)(5).

3121(v)(2) generally accelerates the timing of FICA taxation to the time of deferral. Thus, FICA taxation will generally occur before the item of nonqualified deferred compensation is includable in income (when actually or constructively paid to the employee).

Because you are receiving monthly benefits in the form of an annuity, a defined monthly benefit, the plan providing such benefits is a “nonaccount balance plan”. There is a special rule for nonaccount balance plans which permits an employer to delay taking a deferral under the plan into account for FICA tax purposes until the amount deferred is considered “reasonably ascertainable”, which is the first date on which the amount, form, and commencement date of the benefit are known, so that its present value can be computed [Regulations § 31.3121(v)(2)-1(e)(4)]. When the present value of a benefit becomes reasonably ascertainable, the present value amount is subject to FICA tax. Under some nonaccount balance plans, retirement benefits become reasonably ascertainable at the time of retirement.

According to the facts you provided, it appears that your employer withheld and paid FICA taxes on the present value of your nonqualified deferred compensation benefits in the year you began receiving distributions under the plan. As explained above, according to the Code and regulations, this is a proper method of withholding and paying FICA taxes on amounts deferred under a nonqualified deferred compensation plan that is a nonaccount balance plan. Any questions concerning the details of the deferred compensation plan should be directed to your employer.

This letter has called your attention to certain general principles of the law. It is intended for informational purposes only and does not constitute a ruling. See Rev. Proc. 2011-1, §2.04, 2011-1 IRB 1. If you have additional questions, please contact
of my staff. can be reached at .

Sincerely,

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