



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

OFFICE OF THE CHIEF COUNSEL

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Dear _____ :

I am responding to the letter you sent to Senator Bill Nelson asking about the taxation of post-retirement payments you receive from _____. You were particularly concerned with whether these payments are subject to self-employment tax.

Under current law, the post-retirement payments you receive from _____ are subject to self-employment tax because the payments resulted from your 34 years of services on behalf of the company.

The analysis of current applicable law begins with section 1402(b) of the Internal Revenue Code (which, for the remainder of this letter, I will refer to as “the Code”), which states that payments are subject to self-employment tax if they are “net earnings from self-employment derived by an individual . . . during any taxable year.” The net earnings this definition refers to are “the gross income derived by an individual from any trade or business carried on by such individual.”

Interpreting this provision of the Code, a number of courts—including the United States Tax Court in a case titled *Newberry v. Commissioner*, 76 T.C. 441 (1981)—have concluded that self-employment tax applies when there is “a nexus between the income received and a trade or business that is, or was, actually carried on.” The Tax Court in *Newberry* indicated that the income “must arise from some actual (whether present, past, or future) income-producing activity of the taxpayer before such income becomes subject to . . . self-employment taxes.”

A Federal Court of Appeals considered the application of this general principle to payments such as yours just this past May. The United States Court of Appeals for the Eleventh Circuit, in a case titled *Peterson v. Commissioner*, 827 F.3d 968 (11th Cir.

2016), addressed whether Mary Kay retirement payments are subject to self-employment tax. The taxpayer in the case was a long-serving Mary Kay National Sales Director who retired from Mary Kay and began receiving post-retirement payments. The court concluded these payments were subject to self-employment tax because they resulted from her association with Mary Kay.

Finally, as you correctly observed, section 1402(k) provides that certain payments are not subject to self-employment tax. This exclusion, however, is a narrow one, applying only to certain payments made to former insurance company salesmen (and even then, only if those payments meet a series of specific requirements). Section 1402(k) therefore does encompass the payments you receive from . Any broadening of the scope of this provision would need to be made by amending the Code.

I am sorry my response is not favorable, but I hope this information is helpful. If you would like to discuss this further, please contact or of my staff, at .

Sincerely,

Victoria A. Judson
Associate Chief Counsel
(Tax Exempt & Government Entities)

cc: The Honorable Bill Nelson