



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

OFFICE OF THE CHIEF COUNSEL

March 1, 2017

Number: **2017-0001**
Release Date: 3/31/2017

CONEX-104179-17

UIL: 3121.02-09

The Honorable Bill Nelson
United States Senate
Washington, DC 20510

Attention:

Dear Senator Nelson:

I am responding to your email inquiry dated December 19, 2016, on behalf of your constituent, . She also asked about the employment tax obligations of . She also expressed concern over the airline's decision to stop withholding, depositing, and paying certain employment taxes on amounts paid to U.S. based flight attendants.

You specifically asked about the legality of the airline's actions, and if there is any guidance for the affected workers. We appreciate your concerns about an employer's employment tax obligations. Although we cannot comment on specific taxpayer situations, we can provide general information.

Under section 3121(b)(4) of the Internal Revenue Code (Code), if a U.S. citizen employee provides services for a non-American employer on or in connection with a non-American aircraft while outside the United States, the employee's services on or in connection with the aircraft (including those services performed within the United States) are not considered employment for purposes of the Federal Insurance Contributions Act (FICA) and the remuneration paid for those services is not subject to FICA tax.

However, if an individual provides services exclusively within the United States, the exception under section 3121(b)(4) of the Code does not apply. Therefore, if an individual performs services exclusively within the United States, even in connection with a non-American aircraft for a non-American employer, those services are not excepted from the FICA definition of employment under section 3121(b)(4). Payment for

those services is subject to FICA taxes unless another exception applies. For a complete list of exceptions to the term employment for FICA tax purposes, see sections 3121(b)(1) to (b)(21) of the Code.

Generally, FICA taxes are imposed upon wages, which is defined in section 3121(a) of the Code as “all remuneration for employment.” As relevant here, section 3121(b) defines the term employment for purposes of FICA as any service performed:

- (A) by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, or
- (B) outside the United States by a citizen or resident of the United States as an employee for an American employer.

Section 3121(b)(4) of the Code provides an exception to the FICA definition of employment. Under section 3121(b)(4), employment does not include service performed by an individual on or in connection with a vessel not an American vessel, or on or in connection with an aircraft not an American aircraft, if:

- (A) the individual is employed on and in connection with such vessel or aircraft, when outside the United States and
- (B)(i) such individual is not a citizen of the United States or
(ii) the employer is not an American employer.

Section 3121(f) of the Code defines an “American aircraft” as an aircraft registered under the laws of the United States.

Section 3121(h) of the Code defines “American employer” as an employer which is:

1. The United States or any instrumentality thereof,
2. An individual who is a resident of the United States,
3. A partnership, if two-thirds or more of the partners are residents of the United States,
4. A trust, if all the trustees are residents of the United States, or
5. A corporation organized under the laws of the United States or of any state.

No provision in the Code allows an employer to voluntarily withhold FICA taxes for services that are not considered employment under section 3121(b) of the Code, and an employee may not voluntarily elect to pay FICA taxes in relation to such services, except in some very limited circumstances relating to American employers with foreign affiliates, religious orders, and certain state and local government employees. Depending on the specific facts at issue, the affected workers who contacted your office can find more information on our website at IRS.gov, Publication 15, (Circular E), Employer's Tax Guide, and Publication 54, Tax Guide for U.S. Citizens and Resident Aliens Abroad.

I hope this information is helpful. If you have additional questions, please contact me at
or contact at .

Sincerely,

Victoria A. Judson
Associate Chief Counsel
Tax Exempt and Government Entities