

Internal Revenue Service
MEMORANDUM

CC:DOM:IT&A:3
MDFinley TR-45-34-95

INCOME TAX AND ACCOUNTING

date: JAN 10 1995

to: Chief, Taxpayer Service T
Attn: Candice Cromling

from: Assistant Chief Counsel (Income Tax & Accounting)

subject: Refunds of Employee FICA Tax

This responds to your November 25, 1994, memorandum that requested advice about the payment of refund claims from household employees for the employee portion of FICA in situations where the employer did not pay the FICA taxes on the employee's wages. Your request was prompted by enactment of the Social Security Domestic Employee Reform Act of 1994, Pub. L. No. 103-387. The 1994 Act added I.R.C. § 3121(x) and provides a \$1,000 cash remuneration threshold for 1994 for household employees in lieu of the \$50 per quarter threshold for FICA taxes which applied prior to the enactment of the 1994 Act.

You gave the example of an individual who worked as a household employee during January and February of 1994, but whose employer did not pay the FICA taxes on the employee's wages and either did or did not file Form 942, Employer's Quarterly Tax Return for Household Employees. We assume the employer withheld the employee share of FICA from the employee's wages. The employee claims a refund on Form 843, and you asked whether the Internal Revenue Service must pay the refund.

You point out that current Service procedures would not allow a refund or credit in this situation. These procedures follow Treasury Regulation § 31.6402(a)-2(b)(1), which states, "If more than the correct amount of employee tax under section 3101 ... is collected by an employer from an employee and paid to the district director, the employee may file a claim for refund of the overpayment" (Emphasis added.)

We believe that current Service procedures are in accord with § 31.6402(a)-2(b)(1) and are correct in not allowing a credit or refund in the situation you posit where no FICA tax was paid.

PMTA:00001

TR-45-34-95

In so concluding, we recognize that § 6413(c)(1) allows a credit or refund of withheld but unpaid employee FICA tax where the employee works for two or more employers and the employers together pay the employee wages that exceed the social security contribution and benefit base. See § 31.6413(b)-1(a)(1)(i).

We also recognize that § 31(a)(1) provides that the amount withheld as tax under chapter 24 [Collection of Income Tax at Source on Wages] shall be allowed to the recipient of the income as a credit against the tax imposed by this subtitle [subtitle A - Income Taxes]. Treas. Reg. § 1.31-1(a) provides if income tax has actually been withheld from wages, credit or refund shall be made to the recipient of the income even though the tax has not been paid over to the Government by the employer.

Sections 6413(c)(1) and 31(a)(1) provide for a credit or refund for withheld but unpaid tax. In other words, these sections deem tax to have been paid in the specific situations. But a similar rule is not provided for in § 6402, § 3101, or elsewhere in the Code for the situation under consideration. Also, the special refund provided in § 6413(c)(1) is limited in its applicability and does not apply to your example even though the section does concern the employee share of FICA tax.

You also posit a second example just like the first example except that the employee claims a refund on Form 1040, instead of on Form 843, for the employee share of FICA tax based on the increased threshold provided by the 1994 Act. No refund can be made in the second situation either because the Code does not deem the withheld but unpaid employee FICA tax to be paid and thus no overpayment exists to be refunded.

The one exception to the refund claimed on Form 1040 example would be if the taxpayer also qualified for the special refund under § 6413(c)(1). It may be unlikely that a household employee working for more than one employer would receive wages that exceed the social security contribution and benefit base and, thus, qualify for the special refund.

Assistant Chief Counsel
(Income Tax and Accounting)

By: (signed) Michael D. Finley
Michael D. Finley
Chief, Branch 3