



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

CHIEF COUNSEL

JUN 28 2002

MEMORANDUM FOR Joseph Urban, Acting Manager
T:EO:RA:G

FROM:

Lynne Camillo, Branch Chief
CC:TEGE:EOEG:ET2

SUBJECT:

[REDACTED] (The Foundation)

This memorandum is responsive to your request for our opinion on the application of Internal Revenue Code (the Code) section 102(c) to the facts you provided.

FACTS

The Foundation is a Code section 501(c)(3) public charity which intends to operate and make payments from the Fund.

The Fund is established to provide disaster relief and emergency hardship payments for a limited period of time to the employees and their family members and the former employees and their family members of [REDACTED] and its wholly-owned subsidiary [REDACTED]

All amounts in the Fund are to be provided by three individuals who were directors and/or officers of [REDACTED] and/or [REDACTED] merged or was acquired by [REDACTED] and [REDACTED] did not survive as separate entities following the merger.

LAW AND ANALYSIS

Code section 102(a) provides that gross income does not include the value of property acquired by gift. Code section 102(c) provides that Code section 102(a) will not exclude from gross income any amount transferred by or for an employer to, or for the benefit of, an employee. In the first instance, application of Code section 102(c) requires determining whether an employer-employee relationship exists.

Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. It is not necessary that the employer actually direct or control the manner in which the services are performed; it is

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sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. Section 31.3121(d)-1(c)(2). See also Sections 31.3306(i)(b)-1(b) and 31.3401(c)-1(b).

Code section 3401(d) provides that for income tax withholding purposes, the term "employer" means the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person, except that if the person for whom the individual performs or performed the services does not have control of the payment of the wages for such services, the term "employer" means the person having control of the payment of such wages.

There is no definition of "employer" similar to the one found in Code section 3401(d) in the Code provisions related to Federal Insurance Contributions Act (FICA) taxes. However, Otte v. U.S., 419 U.S. 43 (1973), 1975-1 C.B. 329, holds that a person who is an employer under Code section 3401(d) for income tax withholding purposes (i.e., the person that controls the payment of wages) is also the employer for the purposes of withholding the employee portion of FICA taxes. The Court in In re Armadillo Corp., 410 F. Supp. 407 (D. Col. 1976), aff'd, 561 F.2d 1382 (10th Cir. 1977) relied on the Otte decision to hold that the person having control of the payment of wages is the employer for the purposes of payment of the employer portion of FICA taxes. However, the determination of whether a worker is an employee under Code section 3121(d), and who is the employer, is made in reference to a common law employer, even though another entity may have control of the payment of wages.

Based on the facts you provided, we have concluded that no employment relationship exists between possible Fund payment recipients and the three individuals contributing to the fund for the purposes of Code section 102(c). As noted above, the three individuals were directors, and/or officers of [REDACTED] entities which no longer exist. The potential Fund payment recipients are persons and their family members who were both (1) pre-merger [REDACTED] employees and (2) persons who are post-merger [REDACTED] employees.

Although a common law employment relationship may exist between [REDACTED] and certain possible Fund payment recipients, [REDACTED] is not a contributor to the Fund and, as far as we can tell, the individuals that contribute to the fund do not have a controlling interest in the [REDACTED]. Recognizing that benefits provided to an employee need not be provided by the employee's employer to be included in gross income and treated as compensation for services for the employer, (See Income Tax Regulation section 1.61-21(a)(5)), we find the nexus between the possible Fund payment recipients and the employer [REDACTED] too tenuous to conclude that the payments are made "by or for an employer to, or for the

benefit of, an employee." Accordingly, we find Code section 102(c) inapplicable to these facts.

You also requested advice with respect to Code section 170(c) issues. Although we have forwarded a request to Karin Gross of the Income Tax and Accounting Division, we have not received a response. Accordingly, we suggest that you contact Karin Gross directly to discuss the Code section 170(c) issues.

The attorney assigned to this matter is Dan Boeskin. He can be reached at (202) 622-6040.