



OFFICE OF
CHIEF COUNSEL

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

November 7, 2013

MEMORANDUM FOR CHRISTIE JACOBS, DIRECTOR,
OFFICE OF INDIAN TRIBAL GOVERNMENTS, SE:T:GE:ITG

FROM: Casey Lothamer, Senior Technician Reviewer,
Tax Exempt and Government Entities, CC:TEGE:EOEG:EO

SUBJECT: Request for Technical Assistance – Section 6331 Levy on
Settlement Distributions Received by Individual Indians

This memorandum responds to your request for technical advice regarding the authority of the Internal Revenue Service to levy on settlement distributions received by individual Indians. Your request refers to unspecified settlements of “Tribal Trust” cases that are the subject of Notice 2013-1, as well as to settlements in two specific cases: *Keepseagle v. Vilsack*, Civil Action No. 1:99CV03119 (EGS) and *Cobell v. Salazar*, Case No. 1:96CV01285-TFH. We have coordinated your request for assistance with CC:PA.

Notice 2013-1 does not identify the several lawsuits settled by the United States, although it does provide that the various tribes in the litigation alleged that the U.S. Interior and Treasury Departments mismanaged monetary assets and natural resources that the United States held in trust for the benefit of the tribes. In *Keepseagle*, the plaintiffs claimed that the U.S. Department of Agriculture (USDA) had denied thousands of Indian farmers and ranchers the same opportunities to get farm loans or loan servicing as were given to white farmers and ranchers. The plaintiffs’ in *Keepseagle* claimed also that the USDA did not give Indian farmers and ranchers the technical assistance they needed to prepare applications for loans and loan servicing. The plaintiffs in *Cobell* claimed that the federal government violated its trust duties to individual Indian trust beneficiaries by (1) not providing a proper historical accounting relating to Individual Indian Money (IIM) accounts and other trust assets, (2) mismanaging individual Indian trust funds, and (3) violating trust responsibilities for management of land, oil, natural gas, mineral, timber, grazing, and other resources.

ISSUES

1. Whether the per capita payments from the settlement proceeds of the Indian Tribal Trust Cases referred to in Notice 2013-1 (the Appendix of which has been modified and superseded by Notices 2013-16 and 2013-36) are property of a taxpayer that may be levied upon to pay the tax liabilities of individual Indians.
2. Whether settlement distributions to individual Indians in *Keepseagle* are property of a taxpayer that may be levied on to pay tax liabilities of the individual Indians.
3. Whether settlement distributions to individual Indians in *Cobell* are property of a taxpayer

that may be levied on to pay tax liabilities of the individual Indians.

SUMMARY CONCLUSIONS

1. Notice 2013-1 is a summary document that neither identifies the specific Tribal Trust cases settled nor identifies the potential factual discrepancies between those cases and the related settlements. If the per capita payments of the settlement proceeds referred to in Notice 2013-1 and received by taxpayer-Indians are “restricted property,” and if the Indians entitled to distributions in the settlements referred to in Notice 2013-1 are restricted¹, the distributions should not be treated as property of the taxpayer under Treas. Reg. § 301.6331-1(a)(5) and, therefore, are not subject to levy under I.R.C. § 6331.

2. [REDACTED]

3. [REDACTED]

DISCUSSION

If the Service assesses a tax and the taxpayer fails to pay the entire amount due after notice and demand, a lien arises in favor of the United States upon all property and rights to property of the taxpayer. I.R.C. § 6321(a). If the taxpayer fails to pay any tax within 10 days after notice and demand, the Service may levy upon any property or rights to property of the taxpayer. I.R.C. § 6331. Any interest in “restricted land” held in trust by the United States for an individual restricted Indian is not property or a right to property of the taxpayer-Indian for purposes of levy. Treas. Reg. § 301.6331-1(a)(5).

For the distributions in *Keepseagle* and *Cobell* to be considered property of the taxpayer-Indian and subject to levy, the Indian must be competent (not restricted) and the land must be unrestricted.

Rev. Rul. 77-78 refers to restricted Osage Indians as tribal members who cannot alienate certain lands they own. The Justice Department’s Office of Legal Counsel has acknowledged that a restricted Indian is “one who holds allotted lands only under a trust patent, and who may not dispose of his property without the approval of the Secretary of the Interior.” 9 *U.S. Op. Off. Legal Counsel* 103, 107 n. 7, 1985 WL 185399 (1985).

1 According to the web site for the IRS Office of Indian Tribal Governments (ITG), the term “[n]oncompetent” is used to denote an Indian’s inability to hold fee simple title to trust land. ... The term ‘noncompetent’ is sometimes interchanged with the word ‘restricted’....” www.irs.gov/Government-Entities/Indian-Tribal-Governments/ITG-FAQ-%232-Answer-What-is-meant-by-the-term-“non-competent-Indian%3F.

As we understand from speaking with ITG personnel, each tribe maintains a certified list of tribal members that documents the status of each member as either restricted or not restricted. See *Big Eagle v. United States*, 300 F.2d 765 (Cl. Ct. 1962). To determine whether a particular Indian is restricted, the Service must contact that Indian's tribe.

For settlement distributions to be excepted from the property of taxpayer-Indians, in addition to the requirement that individual Indian recipients be restricted, the distributions themselves must be "restricted land held in trust by the United States". "Restricted land" is land that is not held in fee by an individual Indian. Rather, "restricted land" is held in fee by the government and is subject to restrictions on alienation. See *Squire v. Capoeman*, 351 U.S. 1, 4 (1956) (recognizing that Indian land held by the United States as trustee is "not subject to alienation or encumbrance by [the Indian beneficiary], except with the consent of the United States Government").

The concept of "restricted land" not being the fee simple property of a taxpayer-Indian is not limited to the real property itself. It also may include income or resources derived from that property, such as timber harvested from the restricted land. *Id.* at 5 (exempting from capital gain treatment the sale of timber from restricted land because the timber was the key factor in determining the value of the land).

As we understand from speaking with ITG personnel, most Indian land is restricted: reservation lands, lands held in trust, and allotted lands. There is some land held by tribes or individual Indians in fee simple, but this is the exception.

Notice 2013-1

The incoming request for technical advice cites Notice 2013-1, which refers to settlements of several Tribal Trust cases between the United States and sixty-nine different Indian tribes. The notice is a summary document that does not identify the specific cases that were settled and does not contain specific facts regarding the settlements. We cannot identify the specific taxpayer-Indians receiving any of the settlement proceeds referred to in the Notice, nor can we identify whether the taxpayer-Indians in *Cobell* or *Keepseagle* belong to one of the tribes listed in the Notice. The Notice provides that the tribes listed in the Notice's appendix generally alleged that the Department of the Interior and the Department of the Treasury mismanaged monetary assets and natural resources that the United States holds in trust for the benefit of the tribes. The issue addressed by Notice 2013-1 is whether the per capita settlement distributions (*i.e.*, payments made to individual taxpayer-Indians from the settlement proceeds) are taxable. Although the Notice and the technical assistance memo indicate that the settlement proceeds arose from the government's alleged mismanagement of monetary assets and natural resources held in trust by the United States, this is a relatively broad category, and it is impossible for us to identify any factual nuances or differences between the several cases without knowing case specifics. Unlike the situation with the *Cobell* and *Keepseagle* cases, we do not have copies of the actual settlements to review. While it is possible that the settlement proceeds sufficiently originate from "restricted land" so as to be themselves "restricted", we cannot make that determination without the settlement documents.

In addition, we cannot identify from the Notice whether all taxpayers receiving per capita payments from the subject settlement proceeds are restricted.

If the per capita payments of the settlement proceeds referred to in Notice 2013-1 and received by taxpayer-Indians are restricted property, and if the Indians entitled to distributions in the subject settlements are restricted, then the distributions should not be treated as property of the taxpayer under Treas. Reg. § 301.6331-1(a)(5) and, therefore, are not subject to levy under I.R.C. § 6331.

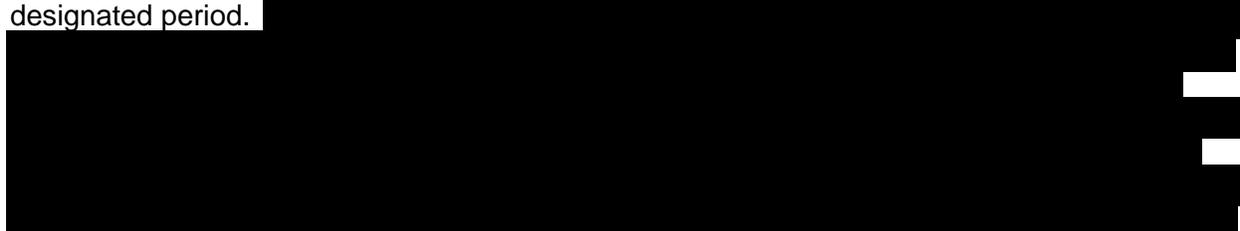
Cobell Settlement

In *Cobell*, individual Indian plaintiffs claimed that the federal government had mismanaged trusts created for the benefit of the Indians by failing to provide a proper accounting for Individual Indian Money (IIM) accounts and other trust assets, by mismanaging the IIM accounts, and by mismanaging the land, oil, natural gas, mineral, timber, grazing, and other resources held in trust. As we understand from your request for advice, IIM accounts contain money collected by the federal government from farming and grazing leases, timber sales, mining, oil and gas production, and other activities on restricted trust land. While the money in the IIM accounts derived from restricted land is not in itself restricted land, for purposes of section 6331, we believe it should be treated the same as restricted land. Likewise, the settlement distributions should be viewed as restricted land for this purpose, because the settlement amounts were paid in lieu of amounts that would have been earned by the Indians from the IIM accounts and trust lands had the government not mismanaged the accounts, as alleged.

Based on the facts provided in ITG's request for assistance and from the *Cobell* settlement agreement, and assuming that the Indians entitled to distributions in the *Cobell* settlement are restricted, the distributions should not be treated as property of the taxpayer under Treas. Reg. § 301.6331-1(a)(5) and, therefore, are not subject to levy under I.R.C. § 6331.

Keepseagle Settlement

The analysis of the settlement payments in *Keepseagle* differs somewhat from that of the *Cobell* payments, but we reach the same conclusion. The plaintiffs in *Keepseagle* claimed that the USDA had denied thousands of Indian farmers and ranchers the same opportunities to get farm loans or loan servicing from a farm loan program as were given to white farmers and ranchers. According to the settlement, distributions to individual Indians follow one of two tracks: (1) payment of up to \$50,000 in liquidated damages and eligibility for an additional 25 percent of the claim amount paid directly to the Service for the purpose of reducing any income tax owed on the award or (2) payment of actual damages up to \$250,000 as determined by an experienced agricultural economist without eligibility for the tax payments. The settlement distributions are deposited into a designated account set up in a designated bank for the benefit of the class: individual Indians who were harmed by USDA's discriminatory loan policy over the designated period.





If you have any questions, please call Martin Schäffer at (202) 622-3905.