



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, DC 20224

July 28, 2002

OFFICE OF
CHIEF COUNSEL

Number: **200235029**
Release Date: 8/30/2002
CC:TEGE:EOEG:ET1
SCAF-114853-02
UILC: 3121.00-00

INTERNAL REVENUE SERVICE NATIONAL OFFICE SERVICE CENTER ADVICE

MEMORANDUM FOR ELIZABETH S. HENN
DEPUTY AREA COUNSEL
(NORTHEAST and MIDATLANTIC AREA)
CC:TEGE:NEMA:BAL
Attention: Sandra M. Jefferson

FROM: Michael A. Swim
Acting Assistant Chief Counsel
(Exempt Organizations/Employment Tax/Government Entities)
Office of Division Counsel/Associate Chief Counsel
(Tax Exempt and Government Entities)
CC:TEGE:EOEG

SUBJECT: FICA Refund Claims Based Upon the Case of North Dakota State University v. United States

This responds to your request for Significant Service Center Advice dated April 25, 2002, in connection with questions posed by the Philadelphia Service Center concerning how to process refund claims filed by taxpayers based on the decision in North Dakota State University v. United States, 255 F.3d 599 (8th Cir. 2001). In accordance with I.R.C. § 6110(k)(3), this Significant Service Center Advice should not be cited as precedent.

Issue

Whether Service Centers should make refund payments to universities and colleges, or university and college professors, who file claims for refunds of the employer or employee portion of Federal Insurance Contributions Act ("FICA") taxes paid based upon the North Dakota State University decision.

Conclusion

Service Centers should make refunds of FICA taxes only to taxpayers having claims that concern cases that arise within the jurisdiction of the Eighth Circuit of the United States Court of Appeals and that have the exact facts as the facts in the North Dakota State University case. Cases having the exact facts are cases involving

TL-N-1440-00

payments to college or university professors made in exchange for the relinquishment of their tenure rights. All other claims of refund of FICA taxes that cite the North Dakota State University decision should be denied. As provided in North Dakota State University v. United States, AOD CC-2001-08 (December 31, 2001), we will continue to litigate our position in cases having different facts in cases that are appealable to the Eighth Circuit and in all cases in other circuits.

Discussion

The Eighth Circuit of the United States Court of Appeals is the first circuit court to address the issue of whether early retirement benefits paid to tenured university professors should be considered wages for the purposes of FICA. In the North Dakota State University case, the IRS argued that the determination of whether early retirement payments made to tenured faculty members are subject to FICA taxes depends upon whether such payments arise out of the employer-employee relationship and not upon whether the payments are made to employees to relinquish a “contractual and constitutionally-protected right.” In Social Security Board v. Nierotko, 327 U.S. 358 (1946), the Supreme Court stated that the term “wages” is to be broadly interpreted “to import the breadth of coverage” consistent with the purposes of the Social Security Act. Since no statutory exclusion from “wages exists for early requirement payments made to employees or for payments made to employees for relinquishment of tenure rights, and because the payments in this case arise out of the employer-employee context for services rendered by the tenured faculty members for their employer, these payments should be considered wages subject to FICA taxes. The IRS further argued that the payments should be considered wages subject to FICA because the payments were similar to the amounts employees received in relinquishing their seniority rights acquired as a consequence of past services under Rev. Rul. 75-44, 1975-1 C.B. 15.

After the Eighth Circuit entered a judgment adverse to the Service, we issued an Action on Decision CC-2001-08 (December 31, 2001), 2001 AOD Lexis 6, stating the Service’s nonacquiescence in the decision.

Although the IRS disagrees with the decision, several taxpayers have filed refund claims with the Philadelphia Service Center for the FICA taxes withheld and paid by their employers citing the North Dakota State University decision as support for issuing the refunds. You requested advice on how to process these refund claims.

In accordance with Action on Decision CC-2001-08 (December 31, 2001), Service Centers should deny all refund claims of FICA taxes filed that cite the North Dakota State University as support for issuing the refund unless the taxpayer’s claim concerns a case that arises within the jurisdiction of the Eighth Circuit and has the exact facts as the North Dakota State University case. In those cases, the taxpayer must submit adequate proof of tenured status and a copy of the early retirement agreement to support a claim for refund of FICA taxes.

If you have any additional questions, please contact Elliot Rogers at (202) 622-6040.