



# ITG News

Keeping First Nations Informed



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## Message From The Director

As the office of Indian Tribal Governments moves into its fifth year of existence, I want to reiterate my commitment to maintaining open communications with our customer base, America's First Nations. While tax issues are often complex and sometimes contentious, we are committed to ensuring that we do everything possible to assist in resolving federal tax concerns.

We continue to seek opportunities to dialogue with tribes and tribal associations. We have found these opportunities to be invaluable, not only for the ability it provides us to share current tax information, but also for the opportunity to listen to questions and concerns on the part of tribes. We welcome all invitations to meet with individual tribes, regional tribal groups, tribal tax associations, and tribal leadership councils.

We have continued to enhance our web site, by adding new products, such as Publication 4268 – an Employment Tax Guide for Tribes, to existing products such as our Frequently Asked Questions and Publication 3908 - the gaming tax guide. Because many tribes have told us that they have minimal Internet access, we have also created and distributed publications, along with common tax forms, via a CD-Rom. If you would like a copy of the CD-Rom please feel free to contact your ITG Specialist.

As many of you may be aware, several years ago the Tax Exempt Government Entities Division formed an outside stakeholder group to assist in identifying areas where the Service needed to undertake improvements to better meet customer needs. The Advisory Committee to the TEGE Commissioner (ACT) has 20 total members who each serve a multi-year term. I am pleased to announce that Robert Gips and Lenor Scheffler were recently appointed to fill vacancies on the ACT, and will be representing tribal interests. Both have extensive experience with tribal issues, and we look forward to their invaluable contributions.

Finally, I want to ensure that all of you feel free to contact me at any time with any concerns you may have that cannot be resolved by our field staff. I can be contacted at (202) 283-9800, or via e-mail at [christie.jacobs@irs.gov](mailto:christie.jacobs@irs.gov).



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*Christie Jacobs*



## An Incentive to Join EFTPS

The Internal Revenue Service has announced an incentive to encourage enrollment in and use of the Electronic Federal Tax Payment System (EFTPS). Approximately 1 million employers could qualify for a refund of a previously paid federal tax deposit (FTD) penalty.

The EFTPS-FTD penalty refund offer allows business taxpayers an opportunity to receive an automatic one-time penalty refund if they have been assessed a deposit penalty on a Form 941, Employer's Quarterly Federal Tax Return. The offer is available to employers who are not mandated to use EFTPS. To qualify for the offer, the employer must:

- use EFTPS for one year (four consecutive quarters),
- make all Form 941 payments on time and,
- have previously fully paid the penalty.

Using the electronic payment system is much more accurate and much less burdensome for taxpayers. At the same time, the government saves money because there are fewer errors, fewer notices and fewer problems.

Using EFTPS eliminates the vast majority of the errors found on paper submissions. These errors on paper coupons result in late or misapplied payments and an FTD penalty. Paying taxes using EFTPS means almost 20 times greater accuracy. Greater accuracy means fewer penalties. Beginning in 2005, the IRS will automatically determine which employers have achieved the four quarters of EFTPS compliance and reverse the most recent full-paid FTD penalty minus any outstanding taxes. No other action by the employer is necessary.

The IRS will look back up to four quarters prior to the four-quarter compliance period for a full paid FTD penalty to abate. Penalties paid earlier than one year prior to the four-quarter compliance period are not eligible for the automatic offer.

EFTPS is a free service provided by two bureaus of the U.S. Department of the Treasury, IRS and the Financial Management Service (FMS). EFTPS gives employers the ability to make federal tax payments electronically online, by phone or with batch provider software for professionals.


Employers can enroll in EFTPS by visiting [EFTPS.gov](http://EFTPS.gov) or by calling EFTPS Customer Service at 1-800-555-4477 to receive an enrollment form by mail.

EFTPS was introduced in 1996 and since that time more than 4.6 million employers have enrolled in the system to make their federal tax payments electronically. In fiscal year 2003, EFTPS processed more than 68.5 million transactions totaling more than \$1.5 trillion. Employers can make payments through a secure web site or by phone 24 hours a day, seven days a week from home or office; schedule payments up to 120 days in advance (for businesses) and 365 days in advance (for individuals); and review the last 16 months of tax payment history online or by calling Customer Service. In addition, taxpayers receive an immediate acknowledgement number for every EFTPS transaction for easy record keeping and as proof of the transaction.

### Web Links:

- Electronic Federal Tax Payment System -- <http://www.eftps.gov>
- Financial Management Service -- <http://fms.treas.gov>

If you are not already enrolled and need assistance, please contact your ITG Specialist.



## Section 501(c)(4) Entities and FUTA

Although the Consolidated Appropriations Act of 2000 allowed tribes the opportunity to be exempted from Federal Unemployment Tax, that provision did not automatically extend to entities that a tribe structured under Section 501(c)(4) of the Internal Revenue Code. As a result, advice was requested to clarify FUTA requirements for these entities, which can best be summarized through the following Questions and Answers:

Question: A Tribal government is a federally recognized tribe with its own EIN. They have a separate entity with a different EIN and an exemption under 501(c)(4). One or more of the tribal council members sit on the board, but the exempt organization makes its own decisions. The tribal government does not control it. Is the entity subject to FUTA?

Answer: Yes. The entity must file Form 940 and pay FUTA. The facts suggest this entity is wholly independent from the tribe. Although the tribal council may have some representation on the entity's board, the entity is structured so to be able to operate wholly independent of the tribe.

Question: If a Tribal government has only one entity for the tribe and has structured it under Section 501(c)(4), and the tribal council controls the exempt organization, is the entity liable for paying FUTA and filing Form 940?

Answer: No. The entity has no liability for FUTA. The facts suggest the entity could be seen as either operated directly by the tribe or wholly owned by the tribe.

Question: A Tribal government is a federally recognized tribe with its own EIN. They have a separate entity with a different EIN that is exempt from income tax under Section 501(c)(4). The board's members consist of the entire tribal council, and they control the entity. Is the 501(c)(4) entity subject to FUTA?

Answer: No. The entity has no liability for FUTA. Although there are two separate EINs, the facts suggest the entity is either operated directly by the tribe or wholly owned by the tribe, since the entire tribal council constitutes the Board of the entity.

In summary, a 501(c)(4) entity that is 100% controlled by the tribe and has no autonomy, yet does not exercise government authority on its own, will probably qualify for relief from FUTA. Other 501(c)(4) entities will normally be subject to FUTA.

## Consultation Policy Update

We continue to progress in the development of an IRS/Tribal Consultation Policy, following the outline provided by the Advisory Committee on Tax Exempt and Government Entities (ACT). The Office of Indian Tribal Governments held a series of 12 regional meetings and met with tribal representatives to listen to their input on the development of an IRS/Tribal Consultation Policy. A summary was compiled and posted to the ITG web site, and interested parties were offered an opportunity to comment on the input before April 30, 2004.

A joint IRS/Tribal group has now begun the process of developing an initial Consultation Policy draft, with further opportunities to review and comment as we proceed. We expect to have the initial draft posted to our web site by the fall of 2004.

We would like to thank everyone who has participated in the process to date, and we look forward to the continuing evolution of a Consultation Policy that will best meet the needs of all parties.



## Annual Reporting Requirements under TRDA and GITCA

Many tribes have entered into Tip Reporting agreements such as the Tip Rate Determination Agreement (TRDA) and the Gaming Industry Tip Compliance Agreement (GITCA). While these agreements assist both the tribe and the IRS in improving compliance, both also contain an annual reporting mechanism to assist in addressing noncompliance by non-participating employees. Section II(b) of the TRDA, and section 5(f) of the GITCA outline these requirements.

Many tribes have inquired about the process to be used to meet the reporting obligation. In order to assist, we will be contacting each entity with an existing agreement in order to determine the reporting process that will work best for both parties. In the interim, any questions concerning the annual reporting process can be directed to Julie Reese at (303) 231-5250, ext. 236.

## Private Letter Ruling Clarifies Reporting Requirements for Pow-Wow Prizes

IRS Counsel has issued Private Letter Ruling (PLR) 200420028 in response to questions regarding the taxability of powwow prizes. While the PLR was issued in response to a specific tribe's question, this information is an indication of the position the IRS would take in similar cases.

The question presented was whether the tribe is required to issue a Form 1099 to a pow-wow contest winner who receives \$600 or more as a cash prize. The tribe requesting the PLR raised three arguments – they are not subject to tax and by extension not subject to information reporting, that they are not a “person” under the meaning of Section 7701, and that a pow-wow is not a trade or business for the tribe thus further exempting them from reporting the prizes.

The PLR indicated that Form 1099 was required, and provided responses to each of the three positions raised by the tribe;

1. Although federally recognized tribes are not subject to income tax, they are subject to employment taxes and information reporting requirements in the same manner as all other governmental entities. Thus, the “not subject to tax” position was not applicable as there is no nexus to information reporting requirements.
2. In *Chickasaw Nation v. United States*, 208 F.3d 871, 879 (10th Cir. 2000), the court concluded that an Indian tribe is a “person” within the meaning of section 7701(a)(1). It explained that “Congress unambiguously intended for the word ‘person,’ as used in section 7701(a)(1), to encompass all legal entities, including Indian tribes and tribal organizations, that are the subject of rights and duties.” In Revenue Ruling 85-194, 1985-2 C.B. 301, the Service ruled that section 6041 applies to an Indian tribe.
3. The regulations state that “all persons engaged in a trade or business” includes not only those so engaged for gain or profit, but also organizations the activities of which are not for the purpose of gain or profit. As a result, the information reporting requirements of section 6041 are not limited to organizations that are engaged in activities for gain or profit.

Thus, the PLR ruled that Forms 1099 are required to be issued for pow-wow prizes of \$600 or more.



## Indian Employment Credit

Indian Employment Credit (Internal Revenue Code Section 45A) is one of the employment tax credits generally available to businesses that do business with or employ Native Americans.

### A. What is the intent of the Indian Employment Credit (Section 45A)?

- The Indian employment credit provides businesses with an incentive to hire certain individuals who live on or near an Indian reservation.
- A business does not have to be in an empowerment zone, enterprise community, or renewal community to qualify for this credit.
- The credit can be claimed by businesses that pay or incur "qualified wages" to a "qualified employee."

### B. Who is a qualified employee?

A qualified employee, for any tax period, is any employee who meets **all three** of the following tests:

- The employee is an enrolled member of an Indian tribe or the spouse of an enrolled member of an Indian tribe.
- The employee performs substantially all of his or her services for the employer within an Indian reservation.
- While performing those services, the employee has his or her main home on or near that reservation.

Also, more than 50% of the wages you pay or incur to the employee during the year must be for services performed in your trade or business.

### C. Who is considered to be a "nonqualified employee?"


The following individuals are not qualified employees for purposes of the Indian Employment Credit:

- Any employee to whom you pay or incur wages (including wages for services outside an Indian reservation) at a rate that would cause you to pay the employee more than \$35,000 if the rate applied for the entire year (the wage limit was for 2003, but may be adjusted for inflation for tax years beginning after 2003).
- Certain related taxpayers (any individual who bears any of the relationships to the employer): son, daughter, stepson, stepdaughter, brother, sister, father, mother, stepfather, stepmother, and etc.
- Certain dependents of the employer

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**???Questions???**

**Contact your ITG Specialist, or our toll-free call site at 877-829-5500**

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- Any person who owns (or is considered to own under Internal Revenue Code Section 318) more than 5% of the outstanding or voting stock of the employer or, if not a corporate employer, more than 5% of the capital or profits interest in the employer.
  - Any individual who performs services involving certain gaming activities.
  - Any individual who performs services in a building, which houses certain gaming activities.

#### **D. What are “qualified wages?”**

Qualified wages are any wages you pay or incur for services performed by a qualified employee. Wages are generally defined as those wages subject to the Federal Unemployment Tax Act (FUTA) without regard to the FUTA dollar limit.

Qualified wages also include any qualified employee’s health insurance benefits that are paid or incurred on behalf of a qualified employee. However, **do not** include any amount paid or incurred for health insurance under a salary reduction arrangement.

The total amount of qualified wages (including qualified employee health insurance costs) that can be used to figure the credit cannot be more than \$20,000 for each employee each tax year.

#### **E. How do you determine the amount of the credit?**

The credit is 20% of the current qualified wages and qualified employee health insurance costs (not to exceed \$20,000) over the sum of the corresponding amounts that were paid or incurred during the calendar year of 1993.

#### **F. What effect does the credit have on the salary and wage deduction?**

The deduction for salary and wages and health insurance costs on the tax return must be reduced by the amount of the Indian Employment Credit.

#### **G. What effect does a qualified employee’s termination have on the Indian Employment Credit?**

If an otherwise qualified employee is terminated sooner than one year after the date of initial employment, the credit cannot be claimed for that employee for the tax year the employment is terminated. You may also have to recapture credits allowed in earlier years. These rules DO NOT apply in the following situations:

- The employee voluntarily quits.
- The employee is terminated because of misconduct.
- The employee becomes disabled. However, if the disability ends before the end of the first year of employment, you must offer reemployment to the former employee.

#### **H. What form is used to claim the credit?**

Form 8845, Indian Employment Credit, is used to claim the credit. The credit will expire on December 31, 2004 unless congress extends it.

To add your name or e-mail address to our mailing list, please contact us via e-mail at Sandra.K.Leggett@irs.gov, or call Sandra Leggett at (909) 388-8115



**NOTICE OF PROPOSED CIVIL PENALTY**  
Notice 972CG

It's that time of year for the issuance of Notice 972CG. Soon, some but hopefully not all of you, will be receiving this notice and a listing of the information returns you filed with missing or incorrect name/TIN combinations. A name/TIN combination is incorrect when it does not match or cannot be found on IRS files that contain Social Security Numbers and Employer Identification Numbers. Notice 972CG proposes a penalty of \$50 for each return you did not file correctly. You should compare the listing with your records to determine:

- If you took appropriate action to meet the requirements for reasonable cause, **and**
- If you must make an annual solicitation in the current year to avoid penalties in future years

**Notice 972CG also may include proposed penalties for late filing and failure to file information returns on magnetic media. If your notice includes these penalties, you must also submit an explanation to substantiate reasonable cause in order to have them waived.**

Within the contents of Notice 972CG you will find:

- An explanation of the proposed penalty.
- An explanation of how you should answer the notice.
- A record of each submission considered in the penalty, including the form type, date received (if filed late), whether the returns were original or amended, the transmitters control code (for magnetic/electronic filers), and the type of (penalty's) that **applies**.
- A response page. This is the only page you should return to the Internal Revenue Service Customer Service Center with your written explanation substantiating reasonable cause. You must check the appropriate box to indicate whether you fully agree, partially agree, or totally disagree with the proposed penalty. If you fully agree, you must sign in the space provided.

You have 45 days to answer Notice 972CG. If you need more time, you must submit your request in writing (to the IRS Customer Service Center listed on the notice) before the end of the 45-day period. In order for us to consider waiving the penalty, you must answer the notice.

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To add your name or e-mail address to our mailing list, please contact us via e-mail at Sandra.K.Leggett@irs.gov, or call Sandra Leggett at (909) 388-8115



**NOTICE OF PROPOSED CIVIL PENALTY**  
Notice 972CG "Continued"

If your reply shows that you established reasonable cause, you will receive IRS Letter 1948C in about 30 days saying that we accept your explanation. If your reply does not establish or only partially establishes reasonable cause, the penalty will be assessed and you will receive a balance due notice along with a separate letter explaining your appeal rights.

If you do not answer within 45 days, the full amount of the proposed penalty will be assessed and a balance due notice will be issued. However, you still have the opportunity to establish reasonable cause by submitting a written explanation.

The penalty may be waived if you show that the failure was due to reasonable cause and not willful neglect. To get a waiver, you must demonstrate that you acted in a responsible manner both before and after the failure occurred **and** establish that:

- There were significant mitigating factors (for example, you have an established history of filing information returns with correct TINs), **or**
- The failure was due to events beyond your control (for example, a payee did not provide you with a correct name/TIN in response to your request for it).

**Additional information can be found in Publication 1546 regarding Notice 972CG but if you have questions, call your ITG specialist for assistance.** We can further explain the notice and the reasonable cause criteria.

To add your name or e-mail address to our mailing list, please contact us via e-mail at Sandra.K.Leggett@irs.gov, or call Sandra Leggett at (909) 388-8115



# Federal Tax Calendar for Third Quarter 2004

## July 2004

SUN	MON	TUE	WED	THU	FRI	SAT
				1	2 * Payroll date 6/26-6/29	3
4	5	6	7	8 * Payroll date 6/30-7/2	9 * Payroll date 7/3-7/6	10
11	12 Employees report tips from June	13	14 * Payroll date 7/7-7/9	15 ** Monthly Deposit for June	16 * Payroll date 7/10-7/13	17
18	19	20	21 * Payroll date 7/14-7/16	22	23 * Payroll date 7/17-7/20	24
25	26	27	28 * Payroll date 7/21-7/23	29	30 * Payroll date 7/24-7/27	31

## August 2004

SUN	MON	TUE	WED	THU	FRI	SAT
1	2	3	4 * Payroll date 7/28-7/30	5	6 * Payroll date 7/31-8/3	7
8	9	10 Employees report tips from July	11 * Payroll date 8/4-8/6	12	13 * Payroll date 8/7-8/10	14
15	16 ** Monthly Deposit for July	17	18 * Payroll date 8/11-8/13	19	20 * Payroll date 8/14-8/17	21
22	23	24	25 * Payroll date 8/18-8/20	26	27 * Payroll date 8/21-8/24	28
29	30	31				

\*= Make a Payroll Deposit if you are under the semi-weekly deposit rule. \*\* = Make a Monthly Deposit if you qualify under that rule.

NOTE: Deposits made through EFTPS are due one day prior to the dates listed.

# September 2004

SUN	MON	TUE	WED	THU	FRI	SAT
			1 * Payroll date 8/25-8/27	2	3 * Payroll date 8/28-8/31	4
5	6	7	8	9 * Payroll date 9/1-9/3	10 * Payroll date 9/4-9/7 Employees report tips from August	11
12	13	14	15 * Payroll date 9/8-9/10 ** Monthly Deposit for August	16	17 * Payroll date 9/11-9/14	18
19	20	21	22 * Payroll date 9/15-9/17	23	24 * Payroll date 9/18-9/21	25
26	27	28	29 * Payroll date 9/22-9/24	30		

\*= Make a Payroll Deposit if you are under the semi-weekly deposit rule.

\*\*= Make a Monthly Deposit if you qualify under that rule.

NOTE: Deposits made through EFTPS are due one day prior to the dates listed

## Return Filing Dates

### July 1st

File Form 11-C to register and pay the annual Occupational tax if you are in the business of taking wagers

### August 2nd

File Form 941 for the quarter ended June 30, 2004. If the tax was deposited in full and on time, file by August 10th.  
File Form 730 and pay the tax on applicable wagers accepted during June

### August 31st

File Form 730 and pay the tax on applicable wagers accepted during July

### September 30th

File Form 730 and pay the tax on applicable wagers accepted during August