

Application of the General Welfare Exclusion to Indian Tribal Government Programs That Provide Benefits to Tribal Members

Notice 2012-75

PURPOSE

This notice proposes a revenue procedure that would describe general principles for the general welfare exclusion and provide safe harbors under which the Internal Revenue Service would presume that the individual need requirement of the general welfare exclusion is met for benefits provided under Indian tribal governmental programs described in sections 5.02 and 5.03 of the proposed revenue procedure, and would not assert that benefits provided under programs described in section 5.03 represent compensation for services. The proposed revenue procedure provides certainty that the value of the benefits described will be excluded from gross income under the general welfare exclusion, but does not limit the applicability to Indian tribes of existing guidance holding that certain benefits are excluded from gross income under the general welfare exclusion.

Under the general welfare exclusion, the Service has consistently concluded that certain payments made to or on behalf of individuals by governmental units under legislatively provided social benefit programs for the promotion of the general welfare are not included in a recipient's gross income. Pursuant to Executive Order 13175, representatives of the Service and the Treasury Department consulted with tribal leaders and members of Indian tribes

concerning the application of the general welfare exclusion to programs of Indian tribal governments. In Notice 2011-94, 2011-49 I.R.B. 834, the Service invited comments concerning the application of the general welfare exclusion to Indian tribal government programs that provide benefits to tribal members. The Service received over 85 comments from Indian tribal governments and other individuals and groups describing various Indian tribal government programs for tribal members and how the general welfare exclusion should apply to those programs.

The proposed revenue procedure responds to the issues addressed in the written comments and discussed as part of the consultation process, including the requirement under the general welfare exclusion to establish individual need. Under the proposed revenue procedure, the Service would conclusively presume that the individual need requirement is met for each tribal member, spouse, or dependent receiving a benefit under the housing programs, educational programs, elder and disabled programs, other qualifying assistance programs, and cultural and religious programs described in sections 5.02 and 5.03 of the proposed revenue procedure. For tribal members receiving a benefit described in section 5.03, the Service also would conclusively presume that the benefit does not represent compensation for services.

Pursuant to Executive Order 13175, the Service and Treasury Department are issuing this proposed revenue procedure to allow Indian tribes to review the guidance and provide comments prior to the issuance of final guidance.

Accordingly, the Service and Treasury Department request comments on the proposed revenue procedure. Comments may be submitted in writing on or

before June 3, 2013. Comments should be submitted to Internal Revenue Service, CC:PA:LPD:PR (Notice 2012-75), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044, or electronically to Notice.Comments@irsounsel.treas.gov. Please include "Notice 2012-75" in the subject line of any electronic communications. Alternatively, comments may be hand delivered between the hours of 8:00 a.m. and 4:00 p.m. Monday to Friday to CC:PA:LPD:PR (Notice 2012-75), Courier's Desk, Internal Revenue Service, 1111 Constitution Ave., NW, Washington, DC. All comments will be available for public inspection and copying.

Although the revenue procedure is in proposed form, until additional guidance is published taxpayers may apply the proposed revenue procedure in taxable years for which the period of limitation on refund or credit under § 6511 has not expired.

PROPOSED REVENUE PROCEDURE

SECTION 1. PURPOSE

This revenue procedure describes general principles for the general welfare exclusion and provides safe harbors under which the Internal Revenue Service will presume that the individual need requirement of the general welfare exclusion is met for benefits provided under Indian tribal governmental programs described in sections 5.02 and 5.03 of this revenue procedure, and will not assert that benefits provided under programs described in section 5.03 of this revenue procedure represent compensation for services. Consequently, under this revenue procedure, the Service will not assert that members of an Indian tribe or

their spouses or dependents must include the value of their benefits described in section 5.02 or 5.03 of this revenue procedure in gross income under § 61 of the Internal Revenue Code or that the benefits are subject to the information reporting requirements of § 6041.

SECTION 2. BACKGROUND

.01 *Gross income.* Under § 61(a), except as otherwise provided in subtitle A, gross income means all income from whatever source derived. Under § 61, Congress intends to tax all gains or undeniable accessions to wealth, clearly realized, over which taxpayers have complete dominion. *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955), 1955-1 C.B. 207.

Section 1.61-1(a) of the Income Tax Regulations provides that gross income includes income realized in any form, whether in money, property, or services. Income may be realized, therefore, in the form of services, meals, accommodations, or other property or in-kind benefits, as well as in cash.

Indians are citizens subject to the payment of income taxes. *Squire v. Capoeman*, 351 U.S. 1, 6 (1956), 1956-1 C.B. 605, 607.

.02 *General welfare exclusion.* Payments made to or on behalf of individuals or other persons under governmental programs are included within the broad definition of gross income under § 61 unless an exclusion applies. See Notice 2003-18, 2003-1 C.B. 699; Rev. Rul. 79-356, 1979-2 C.B. 28. The Service has consistently concluded, however, that certain payments made to or on behalf of individuals by governmental units under legislatively provided social benefit programs for the promotion of the general welfare are not included in a

recipient's gross income (general welfare exclusion). See, for example, Rev. Rul. 98-19, 1998-1 C.B. 840 (relocation payment authorized by the Housing and Community Development Act and made by a local jurisdiction to an individual moving from a flood-damaged residence to another residence is not includible in the individual's gross income); Rev. Rul. 74-205, 1974-1 C.B. 20 (replacement housing payments to aid individuals displaced from their homes in acquiring decent, safe, and sanitary dwellings of modest standards are not includible in gross income).

To qualify under the general welfare exclusion, the payments must (1) be made pursuant to a governmental program, (2) be for the promotion of the general welfare (that is, based on need), and (3) not represent compensation for services. Rev. Rul. 2005-46, 2005-2 C.B. 120; Rev. Rul. 82-106, 1982-1 C.B. 16; Rev. Rul. 75-246, 1975-1 C.B. 24. Thus, the general welfare exclusion applies if "the grant [is] received under a program requiring the individual recipient to establish need. [Internal citations omitted.] Grants received under social welfare programs that [do] not require recipients to establish individual need" do not qualify under the general welfare exclusion. *Bailey v. Commissioner*, 88 T.C. 1293, 1300 (1987), *acq.*, 1989-2 C.B. 1.

Whether a payment qualifies under the general welfare exclusion is determined under the federal income tax laws (including provisions not in the Internal Revenue Code), not under the laws of state, local, sovereign tribal, or foreign governments, or other federal laws. Thus, an incentive payment that a United States citizen received from the City of Berlin, Germany under a program

to encourage spending and consumption was not excludable from the recipient's gross income simply because it was a program of a sovereign government when the program did not meet the requirements of the general welfare exclusion under U.S. tax law. *Foley v. Commissioner*, 87 T.C. 605 (1986).

If the activity engaged in is basically the performance of services, the payments are compensation for services rendered and are includible in the gross income of the recipient under § 61. Thus, Rev. Rul. 74-413, 1974-2 C.B. 333, concludes that payments to participants in a state program that provided short-term employment in disaster relief activities for unemployed individuals, but not any training or retraining to help the participants obtain better employment opportunities, are compensation includible in gross income under § 61.

In the context of job training programs, however, the Service has held that payments that primarily provide job-training skills to unemployed and underemployed individuals to enhance their employability are not compensation for services and, therefore, are excluded from the gross income of recipients under the general welfare exclusion. For example, Rev. Rul. 68-38, 1968-1 C.B. 446, concludes that payments to participants in a program sponsored by an Indian tribal council to train underemployed and unemployed residents of the Indian reservation in construction skills to enhance employability are excluded from the participants' gross income under the general welfare exclusion because the basic purpose of the program is training.

Payments under training programs that include reasonable and limited allowances for meals, travel, transportation, subsistence, emergency, and other

purposes also are excluded from gross income under the general welfare exclusion. Rev. Rul. 75-246 (*Situation 1*). Allowances on the basis of need to cover certain expenses incident to the training (such as payments for auto insurance or to make the trainee's presence possible, or expenditures for work clothing, without which the trainee could not engage in the work training experience) also are excluded from gross income under the general welfare exclusion. Rev. Rul. 75-246 (*Situation 3*).

Benefits qualify under the general welfare exclusion only if they are not lavish or extravagant. For example, replacement housing payments to help displaced individuals and families acquire dwellings of modest standards qualify for exclusion from gross income under the general welfare exclusion. Rev. Rul. 74-205. Assistance to help disaster victims meet necessary expenses or serious needs in the categories of medical or dental, housing, personal property, transportation, and funeral expenses qualifies for exclusion from gross income under the general welfare exclusion, but assistance for nonessential, luxurious, or decorative items does not qualify. Rev. Rul. 76-144, 1976-1 C.B. 17.

Payments to compensate individuals for unreimbursed reasonable and necessary personal, living, and family expenses they incur due to a disaster or emergency situation also are excluded from gross income under the general welfare exclusion. Notice 2002-76, 2002-2 C.B. 917 (Q&As 1 and 2).

In general, payments to businesses do not qualify under the general welfare exclusion because the payments are not based on individual or family need. See Rev. Rul. 2005-46; Notice 2003-18. Rev. Rul. 77-77, 1977-1 C.B. 11, however,

provides that nonreimbursable grants made under the Indian Financing Act of 1974 to Indians to expand profit-making Indian-owned economic enterprises on or near reservations are excludable from gross income under the general welfare exclusion.

.03 Application of the general welfare exclusion to programs of Indian tribal governments. Indian tribal governments have a unique legal status. They have inherent sovereignty and a government-to-government relationship with the United States. Indian tribes have developed a broad range of programs to address their unique social, cultural, and economic issues. In developing these programs, Indian tribes give significant consideration to the needs of the entire community. The general welfare exclusion applies to payments by Indian tribal governments no less favorably than it applies to payments by federal, state, local, or foreign governments.

Payments by Indian tribal governments qualify for the general welfare exclusion if the payments are (1) made pursuant to a governmental program of the tribe; (2) for the promotion of general welfare (that is, based on individual or family need, and, uniquely in the case of programs of Indian tribal governments, to help establish Indian-owned businesses on or near a reservation); and (3) not compensation for services. Rev. Rul. 2005-46; Notice 2003-18; Rev. Rul. 77-77; Rev. Rul. 75-246; Rev. Rul. 82-106. Payments under Indian tribal governmental programs meeting these requirements qualify for the general welfare exclusion whether the revenues that the Indian tribal government uses to fund the programs derive from levies, taxes, service fees, or revenues from tribally-owned

businesses. For example, general welfare programs may be funded from casino revenues. However, per capita payments to tribal members of tribal gaming revenues that are subject to the Indian Gaming Regulatory Act are gross income under § 61, are subject to the information reporting and withholding requirements of §§ 6041 and 3402(r), and are not excludable from gross income under the general welfare exclusion or this revenue procedure. See 25 U.S.C. §§ 2701-2721 and 25 C.F.R. Part 290.

.04 *Benefits excluded generally from § 61.* This revenue procedure does not address benefits under Indian tribal governmental programs that do not fall within the definition of gross income under § 61. For example, an Indian tribal government may provide benefits in the form of public libraries or recreational facilities, which are available for the general public use of members of the tribe. Like other taxpayers, members of Indian tribes and their dependents do not include the value of these benefits in income regardless of whether the requirements of the general welfare exclusion are met because these benefits are not gross income under § 61. In addition, this revenue procedure does not address payments under programs of Indian tribal governments that qualify for an exclusion from gross income under a specific provision of the Internal Revenue Code or other federal statute. For example, § 139D provides that gross income does not include the value of any qualified Indian health care benefit. A qualified Indian health care benefit includes amounts that an Indian tribe (as defined in § 45A(c)(6)) provides for the medical care (as used in § 213) of a member of the tribe or the member's spouse or dependents. Thus, a payment

that an Indian tribe makes to an Indian medicine man to use traditional practices for the purpose of treating a tribal member's disease may be excludable from the tribal member's gross income under § 139D. See *Tso v. Commissioner*, T.C.M. 1980-399.

SECTION 3. SCOPE

This revenue procedure applies to Indian tribal governments and members of Indian tribes, their spouses, and dependents.

SECTION 4. DEFINITIONS

The following definitions apply for purposes of this revenue procedure.

.01 Indian tribal government. The term "Indian tribal government" has the same meaning as in § 7701(a)(40) but for purposes of this revenue procedure includes agencies or instrumentalities of the Indian tribal government.

.02 Indian tribe. The term "Indian tribe" has the same meaning as in § 45A(c)(6).

.03 Member of an Indian tribe. The term "member of an Indian tribe" has the same meaning as in 25 C.F.R. § 290.2.

.04 Reservation. The term "reservation" has the same meaning as in § 168(j).

SECTION 5. APPLICATION

.01 Application of general welfare exclusion to Indian tribal government programs. If section 5.01(1) or 5.01(2) of this revenue procedure applies, the Service will not assert that members of an Indian tribe or their spouses or dependents must include the value of the applicable benefits in gross income

under § 61 or that the benefits are subject to the information reporting requirements of § 6041.

(1) If an Indian tribal government provides a benefit (whether in cash or in kind) meeting the criteria specified in section 5.02(1) of this revenue procedure and described in section 5.02(2) of this revenue procedure, the Service will conclusively presume that individual need is met for each tribal member, spouse, or dependent of a tribal member receiving the benefit.

(2) If an Indian tribal government provides a benefit meeting the criteria specified in section 5.03, the Service will conclusively presume that individual need is met for each tribal member, spouse, or dependent receiving the benefit and that the benefit does not represent compensation for services.

.02 Benefits provided by a tribe for which individual need is presumed.

Section 5.01(1) of this revenue procedure applies to benefits meeting the general criteria of section 5.02(1) of this revenue procedure and described in section 5.02(2) of this revenue procedure.

(1) *General criteria.* To qualify for exclusion under this revenue procedure, a benefit described in section 5.02(2) of this revenue procedure must meet the following requirements--

(a) The benefit is provided pursuant to a specific Indian tribal government program;

(b) The program has written guidelines that specify how individuals may qualify for the benefit;

(c) The benefit is available to any tribal member who satisfies the program guidelines;

(d) The distribution of benefits from the program does not discriminate in favor of members of the governing body of the tribe;

(e) The benefit is not compensation for services; and

(f) The benefit is not lavish or extravagant.

(2) *Specific benefits.* Benefits provided under the following programs are benefits described in this section 5.02(2).

(a) *Housing programs.* Programs relating to principal residences that--

(i) Assist in making mortgage or rent payments for residences on or near a reservation;

(ii) Enhance habitability of housing, such as by remedying water, sewage, sanitation service, or heating or cooling issues;

(iii) Provide basic housing repairs or rehabilitation; and

(iv) Assist in paying utility bills and charges (such as water, electricity, and gas).

(b) *Educational programs.* Programs to--

(i) Provide students (including post-secondary students) transportation to and from school, tutors, and supplies (including clothing, backpacks, laptop computers, musical instruments, and sports equipment) for use in their studies;

(ii) Provide tuition payments for students (including allowances for room and board for the student, spouse, and dependents) to attend an

accredited college or university, educational seminars, vocational education, technical education, adult education, continuing education, and alternative education; and

(iii) Provide job counseling and programs for which the primary objective is job placement or training, including allowances for--

(A) Expenses for interviewing or training away from home (such as travel, auto expenses, lodging, and food);

(B) Tutoring; and

(C) Necessary clothing for a job interview or training (for example, an interview suit or a uniform required during a period of training).

(c) *Elder and disabled programs.* Programs for individuals who have attained age 55 or are disabled that provide--

(i) Meals through home-delivered meals programs or at a community center;

(ii) Home care such as assistance with preparing meals or doing chores, or day care outside the home;

(iii) Local transportation assistance;

(iv) Travel expenses for doctor appointments or other medical care;

(v) Transportation costs and admission fees to attend educational, social, or cultural programs offered by the tribe or another tribe; and

(vi) Improvements to adapt housing to special needs (such as grab bars and ramps).

(d) *Other qualifying assistance programs.* Programs to--

(i) Pay bus, taxi, or public transportation fares from the Indian reservation to public facilities (such as medical facilities and grocery stores);

(ii) Pay for the cost of transportation and temporary meals and lodging of a tribal member, spouse, or dependent while the tribal member, spouse, or dependent is receiving medical care away from home;

(iii) Provide assistance to individuals in exigent circumstances (such as victims of abuse), including the costs of food, clothing, shelter, transportation, auto repair bills, and similar expenses;

(iv) Pay costs for temporary relocation and shelter for individuals displaced from their homes (for example, when a home is destroyed by a fire or natural disaster);

(v) Provide emergency assistance in the form of bus fare, a hotel room, or meals for an individual who is stranded off the Indian reservation; and

(vi) Provide or reimburse the cost of nonprescription drugs.

(e) *Cultural and religious programs.* Programs to--

(i) Pay or reimburse travel expenses (transportation, food, and lodging) to attend an Indian tribe's cultural, social, or community activities such as pow-wows, ceremonies, and traditional dances;

(ii) Pay or reimburse travel expenses (transportation, food, and lodging) to visit other Indian reservations or sites that are culturally and historically significant for the tribe;

(iii) Pay or reimburse the costs of receiving instruction about an Indian tribe's culture, history, and traditions (for example, traditional language, music, and dances); and

(iv) Pay or reimburse funeral and burial expenses and expenses of hosting or attending wakes, funerals, burials, or similar bereavement events.

.03 Benefits provided by a tribe that are presumed not to be compensation for services. Except as provided in this section 5.03, section 5.01 of this revenue procedure does not apply to benefits that are compensation for services. However, section 5.01(2) of this revenue procedure applies to benefits provided under an Indian tribal governmental program that are items of cultural significance (not lavish or extravagant) or nominal cash honoraria provided to medicine men or women, shamans, or similar religious or spiritual officials to recognize their participation in cultural, religious, and social events (for example, pow-wows, rite of passage ceremonies, or funerals, wakes, burials, or other bereavement events). The Service will conclusively presume that individual need is met for the tribal officials receiving these benefits and that the benefits do not represent compensation for services.

DRAFTING INFORMATION

The principal author of this notice is Sheldon Iskow of the Office of Associate Chief Counsel (Income Tax and Accounting). For further information regarding this revenue procedure, please contact Mr. Iskow at (202) 622-4920 (not a toll-free call).