



United South and Eastern Tribes, Inc.

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September 17, 2014

Via Electronic Mail

Commissioner John Koskinen
Internal Revenue Service
CC:PA:LPD:PR (Notice 2014-17), Room 5203
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044
notice.comments@irscounsel.treas.gov

Dear Commissioner Koskinen,

The United South and Eastern Tribes (USET) appreciates the opportunity to provide comments on the Internal Revenue Service's (IRS or "Service") proposed guidance on the Per Capita Distributions of Funds Held in Trust by the Secretary of the Interior (IRS Notice 2014-17). USET is a non-profit, inter-tribal organization representing 26 federally recognized Indian Tribes from Texas across to Florida and up to Maine.¹ USET is dedicated to enhancing the development of federally recognized Indian Tribes, to improving the capabilities of Tribal governments, and assisting the USET Members and their governments in dealing effectively with public policy issues and in serving the broad needs of Indian people.

Introduction

The IRS Notice achieves important clarification by setting forth the general rule that Tribal trust per capita payments are exempt from taxation pursuant to federal law. The general rule expresses federal tax law and policy in a manner that is consistent with USET's views as expressed in USET Resolution No. 2014:006 (attached) and that conforms to the terms of the Per Capita Act of 1983 (25

¹ USET member Tribes include: Alabama-Coushatta Tribe of Texas, Aroostook Band of Micmac Indians of Maine, Catawba Indian Nation of South Carolina, Cayuga Nation of New York, Chitimacha Tribe of Louisiana, Coushatta Tribe of Louisiana, Eastern Band of Cherokee Indians of North Carolina, Houlton Band of Maliseet Indians of Maine, Jena Band of Choctaw Indians of Louisiana, Mashantucket Pequot Indian Tribe of Connecticut, Mashpee Wampanoag Tribe of Massachusetts, Miccosukee Tribe of Florida, Mississippi Band of Choctaw Indians, Mohegan Tribe of Connecticut, Narragansett Indian Tribe of Rhode Island, Oneida Nation of New York, Passamaquoddy Tribe at Indian Township of Maine, Passamaquoddy Tribe at Pleasant Point of Maine, Penobscot Indian Nation of Maine, Poarch Band of Creek Indians of Alabama, Saint Regis Mohawk Tribe of New York, Seminole Tribe of Florida, Seneca Nation of New York, Shinnecock Indian Nation of New York, Tunica-Biloxi Tribe of Louisiana, and the Wampanoag Tribe of Gay Head (Aquinnah) of Massachusetts.

U.S.C. § 117a-117c). USET welcomes the IRS's adoption of this general rule in IRS Notice 2014-17 and calls upon the IRS to retain this rule when the IRS publishes its final guidance.

USET continues to have concerns, however, regarding the IRS's description of the exceptions to this rule related to the mischaracterization of taxable personal income as non-taxable per capita distributions. For the reasons discussed below, USET calls for the IRS to eliminate reference to those exceptions and instead expressly reference that the IRS will defer to the Department of Interior and its procedures for the audit and accounting for Tribal trust funds.

Furthermore, in the interest of strengthening government-to-government consultation and align federal tax policy with the federal policy objectives of Tribal self-determination, USET requests that the Department of the Treasury and the IRS fully assess the lessons learned from this experience engaging with Tribes and the Department of Interior as to the proper administration of this important policy matter. USET makes several specific requests regarding the lessons learned from this process, which arose from the IRS's preliminary errors regarding the applicability of the Per Capita Act and was corrected through a sustained dialogue with Tribes and the Department of the Interior. As discussed below, adoption of these requests will improve interagency coordination, enhance Tribal consultation and allow for more consistent implementation of federal tax law and policy applicable to Tribal governments and Tribal citizens.

The General Rule: Tribal Trust Per Capita Payments are Exempt from Taxation Pursuant to Federal Law

In Notice 2014-17, the IRS provides guidance reflecting that per capita payments from Tribal trust funds are specifically excluded from federal taxes under the Per Capita Act of 1983, 25 U.S.C. § 117a-117c. The IRS guidance, which is consistent with USET Resolution No. 2014:006, clarifies the tax treatment of distributions made from Indian Tribal trust resources. Importantly, the IRS general rule conforms to longstanding, settled expectations regarding the tax exclusion of income derived from trust lands. Indeed, even before the enactment of the Per Capita Act in 1983, this tax exclusion existed in federal law because it is derived from Indian treaties and the federal trust responsibility. Indian Tribes ceded to the United States millions of acres of land in which they held title, which have since been held in trust or restricted status by the United States for the benefit of the Tribes, and have never been subject to property taxes or taxes on the income derived from those lands. The general rule from Notice 2014-17 acknowledges the Per Capita Act and conforms to longstanding recognition in federal law that lands held in trust or restricted status by the United States for the benefit of the Tribes shall not be subject to taxation on the income derived from those lands. This general rule must be retained by the IRS final guidance and be consistently administered by the Service with adequate policy oversight by the Department of the Treasury and the Department of the Interior.

The Notice Must Replace its Discussion of Exceptions and Provide for Deference to the Department of the Interior

USET Resolution 2014:006 notes that in the Per Capita Act Congress established statutory obligations whose duties fall upon the Department of the Interior. Those duties have been delegated to the Assistant Secretary for Indian Affairs. In working to finalize the terms for the interim guidance in

Notice 2014-17, the Department and the Service engaged in inter-agency dialogue with the Assistant Secretary for Indian Affairs as well as consultation with Tribes. USET commends this inter-agency dialogue and consultation as necessary to ensure that federal tax law and policy is consistent with federal Indian law and policy.

USET cautions, however, that the issuance of final guidance must not be used by IRS to justify abandoning inter-agency dialogue or authorize IRS to implement its guidance from within an IRS silo. To ensure sustained inter-agency collaboration and proper deference to the Department of Interior on the taxation of per capita trust distributions, USET calls on the IRS to eliminate discussion in its final guidance of the three exceptions discussing the mischaracterization of taxable personal income. The final trust per capita guidance should instead expressly defer to the Department of Interior. Final guidance should specifically refer to the Interior regulations at 25 C.F.R. § 115.702 as well as the audit and accounting roles of the Office of Special Trustee (OST) and the Bureau of Indian Affairs (BIA). By adopting this approach, USET believes the final guidance will help ensure that the IRS will not pursue duplicative, intrusive and unnecessary audits and examinations of Tribal financial and other internal records.

Lesson Learned: The Department and the Service Must Coordinate and Collaborate with Interior and Tribes whenever Federal Tax Issues Intersect with Federal Indian Law and Policy

Treasury Department and IRS officials have acknowledged that engagement with the Office of the Assistant Secretary for Indian Affairs was an integral element in the development of the guidance in Notice 2014-17. Those same officials have also indicated that they were obligated to engage Interior because the Per Capita Act of 1983 is a statute administered by the Department of Interior pursuant to Title 25 of the United States Code. While USET applauds the inter-agency collaboration that produced the general rule of this guidance, USET firmly believes that improving the administration of federal tax law and policy demands interagency coordination and collaboration whenever there is an indication of uncertainty or inconsistency with federal Indian law (whether based on statute, treaty, course of dealings, or case law). The objections raised by Indian Tribes in the Pacific Northwest after the IRS field office suggested that per capita distributions of timber revenues derived from trust lands were taxable should have immediately triggered an inter-agency dialogue. Yet, that did not happen in this case. It appears that inter-agency dialogue did not begin in earnest until after the issue came before both the Senate Committee on Indian Affairs and the House Subcommittee on Indian and Alaska Native Affairs in oversight hearings and only after repeated requests from Tribes and Tribal organizations.

USET calls upon the Department and the Service to evaluate the lessons learned from the per capita trust experience and implement new procedures to ensure that inter-agency dialogue with Interior is triggered promptly upon notice of inconsistency or uncertainty in the administration of policies or practices involving the intersection of federal tax law and federal Indian law. Further, such dialogue must properly defer to the broad body of federal Indian law (including treaties, course of dealings, and case law as well as federal statutes) administered by the Department of Interior. Finally, upon such notice, the Department and Service should also launch a process of Tribal consultation to ensure the inter-agency dialogue is fully informed and responsive to the views, concerns and recommendations of the Tribes.

Lesson Learned: The Department and the Service Would Benefit from a Tribal Advisory Committee to Provide Input and Advice on Legal and Policy Matters as They Arise

USET has consistently urged the Department of the Treasury to establish and formally institutionalize a Tribal advisory body that would be available to the Department and the Service to identify and provide advice on the administration of tax policies affecting Tribal governments and Tribal citizens. USET suggests that if such an advisory body had been in place several years ago, when the taxation of per capita trust distributions first arose, the advice from that body may have enabled the federal government to have taken prompt corrective action on the initial error by the Northwest Field Office or would have ensured that the inter-agency dialogue and Tribal consultation process was triggered more promptly.

USET and its partner Tribal organizations have submitted various proposals to the Department of the Treasury and IRS urging establishment of a Tribal Advisory Committee and/or a Tribal Tax Policy Advisory Work Group, including the one made in the Joint Comments submitted by USET and other Tribal organizations in June 2013 regarding the General Welfare Exclusion (GWE). USET's proposals are consistent with the recommendations of the Advisory Committee on Tax Exempt and Government Entities (ACT) to form a Treasury/IRS Secretary's Tribal Advisory Committee (STAC).

The recommendations from Tribes and the ACT have made clear that a Tribal advisory body would assist in ensuring treaty rights and principles of self-governance are properly balanced with the IRS' internal policies. Further, such an advisory body would be consistent with this Administration's commitment to Indian Country, and align directly with Executive Order 13175. In the Joint Comments submitted in June 2013, USET and its partner organizations recommended that the Assistant Secretary for Indian Affairs might also have an observer role in such an advisory body. The experience addressing the taxation of per capita trust distributions demonstrates the urgent need for a Tribal advisory group to assist the Department. Meanwhile, recent examples of positive engagement between Treasury and Tribes suggest that, through increased federal-Tribal engagement, sound policy decision can be achieved.

Lesson Learned: IRS Needs to Provide Greater Oversight and Supervision of IRS Field Offices and Establish Effective Training Programs for IRS Agents on Indian Law and Policy

Longstanding practice and express statutory law for decades have operated to provide that per capita distributions made from Indian Tribal trust resources are not subject to federal taxation. Yet, through the action of one IRS field office, the settled expectations and clarity in the law was unnecessarily placed in doubt. The field office actions created confusion and uncertainty that required numerous meetings, briefings, position papers, and congressional hearings simply to return to the longstanding status quo: per capita distributions made from Indian Tribal trust resources are not subject to federal taxation. This experience provides further illustration of why USET has insisted upon and now reiterates its recommendations that IRS exercise greater supervision of its field staff, particularly regarding audits and examinations, and that a robust training program is needed for those agents responsible for implementing federal tax policy within Indian Country.

USET finds this unnecessary and costly experience to be a matter of serious concern that should never be repeated. USET is deeply concerned that IRS has not undertaken the steps necessary to prevent problems like this one from occurring in the future. The January 2013 report released by the

Treasury Inspector General for Tax Administration examined the ITG's Abuse Detection and Prevention Team (ADAPT) and found considerable deficiencies.² In that report, ADAPT examiners are shown to be operating without any underlying internal regulations or guidance, yet Indian Tribal governments are forced to pay the costs associated with attorney's fees, dedicated work hours for Tribal finance employees, and other costs, to combat referrals of abuse that could have transpired through word of mouth from individuals, or skewed news reporting of Tribal governance, among other sources.

The implementation of the Per Capita Act is not the first time field audits and examinations have led to inconsistencies and uncertainty in tax administration with respect to Tribal governments. Indeed, the lack of supervision and training for IRS field agents was among the critical concerns that USET and other Tribes and Tribal organizations raised with respect to the IRS administration of the GWE. The comments USET and other Tribal organizations asserted in our June 2013 Joint Comments on the GWE merit repeating here: It is difficult to collaborate on a "government-to-government" basis when IRS is conducting Tribal audits that scrutinize and penalize Tribal programs based upon questionable or mistaken legal premises.

The IRS must immediately implement procedures to provide greater oversight of field offices and establish a training program that informs field agents of legal, policy and regulatory authorities applicable to tax matters affecting Indian Tribal governments and their citizens. USET requests that IRS inform USET of the action IRS has taken to address these concerns as soon as practicable.

Lesson Learned: Notice 2014-17 Provisions Allowing Tribes to Rely Immediately on Draft Guidance while Consultation Continues should be Adopted as a General Practice.

IRS Notice 2014-17 clearly states that Tribes may immediately rely on its guidance even though it represents interim and not final terms for administering tax policy regarding per capita trust distributions. USET believes that issuing interim draft guidance that can be relied upon while further consultation takes place illustrates a sound balancing of the interests of achieving policy certainty as soon as possible while allowing for meaningful input from Tribal elected leaders, staff and advisors on permanent guidance. USET appreciates this accommodation by the IRS, which it also applied in its interim GWE guidance (Notice 2012-75). USET requests that IRS adopt the practice of issuing interim guidance (that can be relied upon while consultation continues to establish final guidance) as a general practice regarding its engagement with Indian Tribes when such interim guidance affirms an existing exclusion from taxation or preserves the status quo that favors Indian Tribes.

Conclusion

USET welcomes IRS Notice 2014-17 and its general rule reaffirming that per capita distributions of Tribal trust funds are not taxable. USET strongly encourages the Department and the Service to adopt each of USET's recommendations set forth above in issuing final guidance implementing the Per Capita Act and in implementing tax policy matters affecting Indian Tribal governments and their citizens.

² TIGTA Final Audit Rep – Audit # 201210018 (Jan. 28, 2013).

USET appreciates the opportunity to provide comments. Should you have questions or require additional information please do not hesitate to contact Mr. Kitcki Carroll, USET Executive Director, at (615) 872-7900 or by e-mail at kcarroll@usetinc.org.

Sincerely,



Kitcki A. Carroll
Executive Director

cc: Dr. Elaine Buckberg, Deputy Assistant Secretary for Policy Coordination
Christie Jacobs, Director, Indian Tribal Governments

“Because there is strength in Unity”



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USET Resolution No. 2014:006

URGING CLARIFICATION THAT TRUST PER CAPITA PAYMENTS ARE NOT TAXABLE INCOME

- WHEREAS,** United South and Eastern Tribes Incorporated (USET) is an intertribal organization comprised of twenty-six (26) federally recognized Tribes; and
- WHEREAS,** the actions taken by the USET Board of Directors officially represent the intentions of each member Tribe, as the Board of Directors comprises delegates from the member Tribes' leadership; and
- WHEREAS,** some member Tribes of USET have provided and continue to provide their enrolled members with modest per capita distributions of revenue ("trust per capita payments") generated from the development or utilization of Tribal trust resources; and
- WHEREAS,** such trust per capita payments have always been regarded by USET member Tribes, the Department of Interior (DOI), and by the United States (U.S.) Congress as excluded from taxation by federal or state governments; and
- WHEREAS,** at least one field office of the Internal Revenue Service (IRS) has asserted to Tribes that it views such trust per capita payments as taxable income to the recipient Tribal members; and
- WHEREAS,** Tribes and Tribal organizations requested consultation with the U.S. Treasury and the DOI regarding this taxation effort in conflict with longstanding policy and practice and which constitutes a shift in IRS policy requiring meaningful consultation with the affected Tribes, on a government-to-government basis, as mandated by Executive Order No. 13175; and
- WHEREAS,** the IRS issued Notice 12-60 in September, 2012, to clarify per capita payments from the settlement of Tribal trust fund mismanagement cases are not considered income and are not taxable, but did not address the taxability of per capita payments to Tribal members arising from the development or use of trust resources; and
- WHEREAS,** congressional hearings on the IRS's efforts to tax Tribal trust per capita payments were held in the Senate Committee on Indian Affairs in June, 2012, and in the House Resources Committee's Subcommittee on Indian and Native Alaskan Affairs in September, 2012, with Committee members on a bi-partisan basis strongly urging the IRS to immediately issue published guidance to clarify that Tribal trust per capita payments are not taxable; and
- WHEREAS,** the IRS testified during the September, 2012, House Subcommittee hearing that the "legal reasoning" of the Treasury Department's September 2012 Notice of Guidance No. 2012-60 declaring that the per capita distributions of recent Tribal trust claim settlements are non-taxable would also apply to trust per capita payments under the 1983 Per Capita Act (Public Law 98-64); and

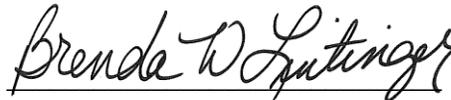
- WHEREAS,** the Per Capita Act establishes statutory obligations upon the DOI, and the Assistant Secretary for Indian Affairs has also indicated his commitment to inter-agency dialogue with Treasury on specific tax matters as they arise; and
- WHEREAS,** IRS and Treasury officials have stated in meetings with USET member Tribes and USET representatives that the publication of written guidance on the trust per capita tax rules would be a priority for 2013, yet no such guidance has been shared in either a draft or final form; and
- WHEREAS,** in December 2010, the U.S. recognized the rights of its First Peoples through its support of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), whose provisions and principles support and promote the purposes of this resolution; therefore, be it
- RESOLVED** the USET Board of Directors calls upon the United States Internal Revenue Service and the Department of Treasury to immediately provide USET and affected Tribes with a discussion draft of the proposed official guidance that would establish a permanent policy clarifying that Tribal trust per capita payments are non-taxable and are subject to the income exclusions set out in the 1983 Per Capita Act; and, be it further
- RESOLVED** the USET Board of Directors urges the United States Internal Revenue Service, the Department of Treasury, to fulfill its commitment to provide clarifying guidance that trust per capita payments are not taxable; and, be it further
- RESOLVED** that USET calls upon the Assistant Secretary for Indian Affairs, in recognition of his delegated authority for the administration of trust resources, to urge the United States Internal Revenue Service, and the Department of Treasury to expedite final guidance on the non-taxability of trust per capita payments.

CERTIFICATION

This resolution was duly passed at the USET Annual Meeting, at which a quorum was present, in Cherokee, NC, on Thursday, October 31, 2013.



Brian Patterson, President
United South and Eastern Tribes, Inc.



Brenda Lintinger, Secretary
United South and Eastern Tribes, Inc.

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