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SPECIAL RELEASE

Notice 2012-75. The IRS Rules on Tribal General Welfare Exclusions

On December 5, 2012, at the auspicious event of the President's Tribal Nations Conference, the IRS announced its long-awaited guidance for excluding from income the general welfare benefits paid by an Indian tribal government to its members. The guidance, Notice 2012-75, proposes a procedure for a safe harbor exclusion from the income of members, their spouses, and their dependents. The IRS and Treasury request comments from the tribes on the proposed revenue procedure, by June 3, 2013.

Under the general welfare exclusion, certain payments made to or on behalf of individuals by governmental units, under legislatively provided social benefit programs for promotion of the general welfare, are not included in a recipient's gross income. The IRS' application of this general welfare exclusion to tribal government general welfare programs has been historically uneven, uninformed and so narrowly construed as to result in the asserted taxation of most tribal welfare benefits. After consulting with tribes and tribal organizations to address their concern about IRS efforts to tax their members for general welfare benefits, IRS and Treasury have attempted to formulate a general welfare exclusion that acknowledges the unique social, cultural and economic issues that tribal governments seek to address through their general welfare programs.

Notice 2012-75 provides for essentially a "safe harbor" from taxation. That is, if the particular tribal welfare program meets the criteria set out in Notice 2012-75, then the IRS will presume the benefits paid under the program are made for the promotion of social welfare, and as such are excluded from member income. The IRS sets out not only guidelines for tribal governments to follow to qualify their program benefits for the general welfare exclusion and safe harbor, but the IRS also identifies a number of common tribal government general welfare benefits which will qualify to be excluded from income.

Excluded General Welfare Benefits

Payments made by Indian tribal governments will qualify for the general welfare exclusion if the payments meet the following general parameters:

- 1) The payment is 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
- 3) Is not compensation for services.

For the following programs, the IRS will presume that the "need" requirement is met:

- a) Housing Programs relating to Principal Residences. This includes mortgage and rent assistance payments for residences on or near the reservation, payments to render a home habitable and to make basic housing and rehabilitation repairs (home does not have to be on the reservation), and utility assistance payments.

- b) Educational Programs. This includes providing transportation to and from school, tutors, school supplies, tuition payments, and room and board (for students, spouse and dependents). These educational benefits can be paid for all levels, including post-secondary. As to tuition, room and board specifically, these benefits may be paid for most any type of education, including educational seminars, vocational education, technical education, adult education, continuing education and alternative education.
- c) Job Placement and Training Programs. This includes payments made to help a member with job placement or job training, such as expenses for tutoring, travel expenses (lodging, food, transportation) for training and interviewing away from home, and the cost of procuring “necessary” clothing for job interviews or job training uniforms.
- d) Elder and Disabled Programs. Members who have attained age 55 (“elders”) or are disabled may receive tax-free benefits in the form of meals, in-home care and assistance, local transportation assistance, payments to adapt their home to their special needs (handicap rails, ramps, etc.) and financial assistance (payment for transportation and admission fees) to attend education, social or cultural programs offered by Indian tribes.
- e) Transportation off the Reservation. Payments made to a member to assist them in obtaining transportation to public facilities off the reservation (such as medical facilities, grocery stores) are excluded from income.
- f) Emergency Assistance. To receive medical care away from home, the tribe may pay the cost of transportation, meals and lodging for the member, their spouse and their dependent. In the case of natural disasters which displace members from their homes, payment for the cost of temporary relocation and shelter are excluded from income. Emergency assistance in the form of food, clothing, shelter, transportation, and similar expenses are also excluded from income. And, while a member is stranded off the reservation, payment for lodging, meals and transportation are excluded from income.
- g) Cultural and Religious Programs. This includes 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) or to visit other Indian reservations and sacred sites. In addition, the cost of receiving instruction about a tribe’s culture, history and traditions (including language, music and dancing) may be paid or reimbursed by the tribe and is not included in the member’s income.
- h) Funeral and Burial Expenses. The cost of attending or hosting a funeral, burial, wake or similar bereavement event may be paid or reimbursed by the tribe and is not included in the member’s income.

To receive the benefit of the safe harbor from tax (that is, the presumption that the above programs address “need”) the program must be a tribal governmental program with written qualification guidelines that are administered fairly. That is, the program benefits must be available to any tribal member who satisfies the program guidelines and administration of the program cannot favor members of the tribe’s governing body. It is unclear what evidence will be required of the Tribe to prove the program does not discriminate in favor of its governing body. Presumably, a showing that the program, by its terms, is available to all members and is administered according to its terms should suffice.

Further, the benefit payments cannot be “lavish or extravagant.” The payments must be for reasonable, necessary and essential personal and living expenses and not for non-essential or decorative items.

Finally, if any of the above program benefits are paid to a member as a form of compensation, the payment will not be excluded from income. That is, if the payment is made in recognition of services rendered by the individual, then it is compensation (except for the limited exception described later with respect to certain payments to religious officials of the tribe). For example, providing short term employment to members to assist in disaster relief efforts is compensation and not excludable “emergency assistance” benefits, particularly if the focus is not to train the individuals for a job.

Special Payments to Religious or Spiritual Officials Are Excluded

In-kind or cash payments of a nominal value that are paid to medicine men or women, shamans, or similar religious or spiritual officials for their participation in cultural, religious and social events (including pow-wows, bereavement events, rites of passage, and similar events) are not considered taxable compensation for services and are excluded from income as a general welfare benefit. The payments cannot be lavish or extravagant. So, modest cash payments or tangible items of cultural significance may be given. It is not clear whether these types of payments must be made according to a tribal governmental program that has written guidelines, or whether it is sufficient that tribal culture provides for these types of payments. This factor may require further clarification during the comment period.

Conclusion

In all, Notice 2012-75 is a significant and commendable step in the right direction. The Notice is the culmination of meaningful government to government consultation on the issue. It is clear the IRS and Treasury listened to what tribal governments had to say about their unique role in meeting the needs of a tribal community, the customs and traditions for addressing those needs, and the general condition of vast unmet need in Indian Country. Hopefully this portends a positive trend in the process and manner in which tax policy disputes are resolved between Indian tribal governments and the United States government.