

THE GENERAL WELFARE DOCTRINE & INDIAN TRIBAL GOVERNMENTS

January 31, 2012

NCAI, USET, CATG, NAFOA

PRESENTERS

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PURPOSE

The IRS/Treasury announced the government's intent to consult with tribes on applying the General Welfare Doctrine to tribal governments

Written comments are due February 13, 2012

As part of the Intertribal Tax Initiative, NCAI, USET, CATG, ATNI and NAFOA call this webinar to provide background and discuss the framework for comments to maximize their impact

TAX INITIATIVE

NCAI, USET, ATNI, CATG, and NAFOA launched the Intertribal Tax Initiative following a tax summit in April 2010. The Initiative focuses on four tax policy priorities that tribal leaders identified as obstacles to tribal economic development and self-determination.

These four issues for strategic action in the short-term are as follows:

- + Ensure that tribal cultural and educational program benefits are exempt from taxation
- + Expand the availability of tribal tax-exempt bond financing
- + Prevent state taxation of improvements to tribal trust land
- + Respect tribal rights to regulate Indian commerce (PACT Act/Tobacco Compliance)

The General Welfare Doctrine falls in the first of these four areas of focus.

GENERAL WELFARE DOCTRINE

Intertribal Tax Initiative Priority: Why?

- Tribes concerned about federal intrusion into tribal sovereignty due to audits being conducted related to tribal government services and benefits to members
- Legislative success in exempting health benefits from taxation
- Ability to achieve tribal objectives through dialogue between tribes and the IRS through the regulatory process

BACKGROUND

“The first thing you need to know is that the Internal Revenue Service’s middle name is ‘Revenue’ . . .”

~ Complete Idiot’s Guide to Lawsuits

Federal law requires Indian tribal governments to consider whether benefits provided to members are taxable income on which the tribe must report and withhold taxes. IRS authority:

1. Taxation of per cap (26 U.S.C. § 3402(r))
 2. The IRS doctrine which states that everything is income unless proven otherwise (26 U.S.C. § 61)
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THE GENERAL WELFARE DOCTRINE

Under the General Welfare Doctrine, the IRS recognizes that payments made under legislatively provided social benefit programs for promotion of the general welfare are excludable from gross income. Such payments are generally not reportable and not taxable.

3 Parts:

- (1) Process (“legislatively provided”);
- (2) Purpose (“promotion of the general welfare”);
- (3) Payments must not be compensation for services

TRIBAL GENERAL WELFARE DOCTRINE

Tribal general welfare doctrine provides for the exclusion of payments that are:

- (1) paid by or on behalf of an Indian tribe
- (2) under a social benefit program,
- (3) based on either needs of the Indian community itself or upon individual needs of the recipient (which need not be financial in nature), and
- (4) that are not compensation for services or per capita payments.

TRIBAL GENERAL WELFARE DOCTRINE

If Means Testing is used:

“Need” can be based either on individual need (means testing) or on broader needs of the community itself. For example, states provide free education (k-12) and subsidize college tuition for in state residents regardless of individual need.

Compensation for services should reflect that qualifying programs are not disguised employment. However, Tribal Governments should be free to structure programs with community service ties.

IRS/TREASURY CONSULTATION ON GENERAL WELFARE DOCTRINE

Listening Session - November 30, 2011

Federal Panelists:

Aaron Klein (Treasury), Deputy Assistant Secretary for Policy Coordination;

Lisa Zarlenga (Treasury), Deputy Tax Legislative Counsel for Regulations;

Jeffrey Van Hove (Treasury), Tax Legislative Counsel;

Andrew Keyso (IRS), Deputy Associate Chief Counsel (Income Tax & Accounting);

Joseph H. Grant (IRS), Acting Commissioner, Tax Exempt and Government Entities; and

Jonathan Dam (IRS), Office of Indian Tribal Governments

IRS/TREASURY CONSULTATION – THEMES

General Scope of Tribal Programs (but not limited to these programs):

Tribal Housing, Education, Transportation, Cultural and Elder Programs

Purpose (as communicated by federal panelists):

- To generate clarity and consistency
- To examine whether certain social welfare program benefits should be excluded from taxation even where recipients do not establish ‘financial need’
- To reconcile the General Welfare Doctrine with unique programs and benefits offered by tribal governments to their citizens

IRS/TREASURY CONSULTATION - THEMES

Tribal Leaders' Themes:

- Tribes provide for all regardless of whether financial need is established; “Benefits” provided as a tribal program for the general welfare should not be taxable income of the recipient
- IRS audits are intrusive, perceived as attacks on tribal sovereignty, and there is concern that consultation process will lead to more audits and enable the IRS to target programs and benefits that it is currently unaware of
- IRS must respect tribal sovereignty -- Tribes question whether the IRS audits of tribal government programs treat them the same as states and local governments
- Tribes find it unfair that the IRS is assessing taxes on programs and benefits which seek to supplement unmet federal trust responsibility in areas such as health, education, and economic development opportunities
- Tribes call for suspension of audits while consultation is underway

COMMENTS: BROAD COMMON THEMES

- There is no "one size fits all" guidance; There are 566 recognized tribes, with diverse histories, needs, and policy approaches.
- Respect Tribal Sovereignty
 - Each tribal government, through its own policy process, is best situated to determine the needs of the tribe and its members
 - Any guidance must respect the tribal government's determination of needs and appropriate solutions.
- Guidance should be developed in a true collaborative process, not just by "listening" and then drafting and publishing guidance behind closed doors, without the participation of the tribes.
- Timeframe for issuing guidance should be based on a process that assures tribal input and government-to-government dialogue

COMMENT PROCESS/THINGS TO CONSIDER

Written Comments Due: February 13, 2012

- Any comments should be general:
Do not provide specifics about tribal programs/benefits
- Comments may include, or take the form of an IRS Field Audit “Guidebook”
written broadly to encompass a wide-breadth of programs
- Comments should specify that IRS field agents must defer to applicable tribal code

TRIBAL GOVERNMENT POLICY PRIORITY – DEVELOPMENT/ADOPTION OF YOUR TRIBAL GENERAL WELFARE CODE, ORDINANCE OR POLICY

- Comments regarding 1099 requirements per 3402(r) should limit per capita taxation to those percentages identified in a Tribal Revenue Allocation Plan

COMMENT PROCESS/THINGS TO CONSIDER (CONT.)

- Taxation of compensation for services should be excepted:
There should be an exclusion for the taxation of compensation for services, when the tax would amount to a tax on cultural/traditional practices
- “Means testing” (income testing) should be opposed – The tribe is best situated to determine the “needs” of its citizens; and, as a government, has the sovereign authority to provide for each citizen, regardless of financial need - equally if it has the resources and desire to do so

Example: California state colleges were once tuition free for all California state citizens, yet the IRS did not require tax reporting from citizens on the value of the benefit since California provided the tuition waiver to all citizens as general public policy. Similarly, a tribe providing full tuition to its citizens should not trigger tax liability on behalf of the recipient.

HOW BEST TO DEVELOP COMMENTS?

- Some tribes have been advised to filter their comments through an intertribal organization, such as NCAI, USET, CATG, or ATNI
- Intertribal Tax Group proposes using R. Yoder Key Points draft (see PDF in Docs Section) as a starting point for Draft Guidelines for IRS Field Audits
- Deadline for Intertribal Tax Group to receive suggestions/additions to 'Draft' Comments? February __, 2012

- **Formally Submit Comments by February 13, 2012**

NOTE: All comments will be available for public inspection and copying