

NATIONAL CONGRESS OF AMERICAN INDIANS

May 31, 2013

Secretary Jack Lew
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Solicitor Hilary Tompkins
U.S. Department of Interior
18th & C Streets, NW
Washington, DC 20240

Deputy Asst. Secretary Elaine Buckberg
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Re: Notice 2012-60, the Per Capita Act and Tribal Consultation

Dear Secretary Lew, Deputy Assistant Secretary Buckberg, and Solicitor Tompkins:

On behalf of the National Congress of American Indians, I write to thank you and the Internal Revenue Service again for the recent Notice 2012-60. This Notice gave much-needed clarity to Indian tribes regarding the intentions of the federal government in regards to the tax treatment of distributions made from Indian tribal trust settlements. We particularly appreciate that the Notice is timely in addressing the settlements.

And while we appreciate the breadth of Notice 2012-60, we also urge you to move forward in issuing broader guidance on the tax treatment of all distributions made from tribal trust resources such as timber under the auspices of the Per Capita Act of 1983. Notice 2012-60 limited its effect by stating “[t]he federal income tax treatment of other per capita payments made by the Secretary of the Interior or Indian tribes to members of Indian tribes is outside the scope of this notice and may be addressed in future guidance.”

Consultation with Indian tribes on this matter has occurred already during the development of Notice 2012-60, and we do not feel that further consultation is needed at this time. Provided however, we request that the guidance be issued as a notice of proposed rule-making (ANPRM) in order to allow tribes a period of time for formal comment on the proposed guidance. We would hope that Treasury and IRS will allow additional consultation during this comment period. The ANPRM process has been very effective in vetting another major tribal tax issue, the general welfare exclusion, and we think the per capita issue is of the same import and would be served well by the same process.

In addition, and in order to facilitate this process, we attached a draft guidance for your consideration and would be willing to discuss the principles within this draft guidance prior to any issuance of proposed guidance if this is helpful.



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Finally, we urge that this future guidance be provided very soon. In treaties and agreements with the United States, Indian tribes ceded millions of acres of land -- worth untold trillions to the United States. In return, certain lands were reserved for the exclusive use and benefit of the tribes. It is clear that our lands and the income derived from our lands should never be taxed by the United States, and this is reinforced by the Per Capita Act. We believe Notice 2012-60 actually provides a strong framework of analysis to support extending its reach to include all trust resource per capita payments.

We thank you again for your tireless efforts and want to convey that Indian Country appreciates the strong working relationship we have developed with both IRS and Treasury over the past several years. We look forward to strengthening this relationship and working to better the policies and regulations affecting the tax treatment of tribal governments and tribal citizens. Thank you again, and if you have any further questions or comments, please feel free to contact me or John Dossett, NCAI General Counsel, at (202) 466-7767 or jdossett@ncai.org.

Sincerely,

A handwritten signature in black ink that reads "Jefferson Keel". The signature is written in a cursive, flowing style.

Jefferson Keel
President, NCAI

Notice _____

PURPOSE

This notice provides guidance concerning the federal income tax treatment of per capita payments that members of Indian tribes receive from revenue derived from tribal trust resources.

Pursuant to Executive Order 13175, the Service and Treasury Department are issuing this proposed revenue rule to allow Indian tribes to review the guidance and provide comments prior to the issuance of final guidance. In addition, the Service and Treasury Department will engage in additional consultation sessions with tribal leaders and members of Indian tribes prior to issuing final guidance.

Although this revenue rule is in proposed form, until additional guidance is published taxpayers may apply the proposed revenue rule in taxable years for which the period of limitation on refund or credit under 26 U.S.C. § 6511 has not expired.

BACKGROUND

Several tribes and other affiliated organizations requested direct consultation on the income tax treatment of per capita payments from tribal trust resources, in response to a preliminary determination by the Internal Revenue Service that said per capita payments were includible in the gross income of individual tribal members. Pursuant to Executive Order 13175, direct consultation and communication occurred with certain tribes, affiliated organizations, Department of Treasury and Department of Interior. In addition, certain tribes and affiliated organizations requested consultation as to how the Internal Revenue Service's preliminary determination would impact the tax treatment of certain settlements of tribal trust cases.

In response to these consultation requests, Notice 2012-60 was issued in September, 2012. Notice 2012-60 provides that, under 25 U.S.C. § 117b(a), per capita payments made from the proceeds of an agreement between the United States and an Indian tribe settling the tribe's claims that the United States mismanaged monetary assets and natural resources held in trust for the benefit of the tribe by the Secretary of the Interior are excluded from the gross income of the members of the tribe receiving the per capita payments. Notice 2012-60 was specifically limited only to per capita payments from proceeds of tribal trust case settlements entered into by specified Indian tribes, leaving open the tax treatment of other per capita payments made by the Secretary of Interior or Indian tribes to tribal members.

APPLICABLE PROVISIONS OF LAW

Section 61(a) of the Internal Revenue Code provides that, except as otherwise provided by law, gross income means all income from whatever source derived. Under § 61, Congress intends to tax all gains and 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. Indians are citizens subject to the payment of income taxes. *Squire v. Capoman*, 351 U.S. 1, 6 (1956), 1956-1 C.B. 605.

The Per Capita Act, Pub. L. No. 98-64, 97 Stat. 365, 25 U.S.C. §§ 117a through 117c, provides authority to Indian tribes to make per capita payments to Indians out of tribal trust revenue. Under 25 U.S.C. § 117a, funds held in trust by the Secretary of the Interior for an Indian tribe that are to be distributed per capita to members of that tribe may be distributed by either the Secretary of the Interior or, at the request of the governing body of the tribe and subject to the approval of the Secretary of the Interior, the tribe.

Revenue Ruling 56-342, C.B. 1956-2, based on the decision of the Supreme Court of the United States in *Squire v. Horton Capoeman et ux*, 351 U.S. 1, Ct. D. 1796, C.B. 1956-1, 605, holds that income held in trust for or received by the patent holder which is derived directly from allotted and restricted Indians lands while such lands are held by the United States, as trustee, in accordance with section 5 of the General Allotment Act, *supra*, is exempt from Federal income tax. Some of the types of exempt income according to that Revenue Ruling are rentals (including crop rentals), royalties, proceeds from the sales of natural resources, income from the sale of crops, and income from the use of the land for grazing purposes. The Supreme Court in the *Capoeman* decision found in section 6 of the General Allotment Act a Congressional intent that lands held in trust under section 5 be exempt from tax.

Under 25 U.S.C. § 117b(a), funds distributed pursuant to 25 U.S.C. § 117a are subject to the provisions of 25 U.S.C. § 1407.¹ Under 25 U.S.C. § 1407, the funds described in that section, and all interest and investment income accrued on the funds while held in trust, are not subject to federal income taxes. The House and Senate reports accompanying 25 U.S.C. 117, et. seq, provide that per capita distributions of tribal trust revenue “shall be subject to the provisions of [25 U.S.C. § 1407] with respect to tax exemptions.” See H.R. Rep. No. 98-230 at 3 (1983); S. Rep. No. 659, 97th Cong., 2d Sess. 2 (Sep. 8, 1982). In addition to the tax exemption, 25 U.S.C. 1407 provides that the funds distributed per capita shall not be considered as income or resources nor otherwise utilized as the basis for denying or reducing the financial assistance or other benefits to which such household or member would otherwise be entitled under the Social Security Act or any Federal or federally assisted program.

The Per Capita Act confirms Congressional intent that funds held in trust by the Secretary of the Interior, by and through the Office of the Special Trustee, which are derived from the use of tribal (unallotted) trust lands, restricted fee lands or trust resources and are distributed per capita to individual members of the tribe, are exempt from tax. The Per Capita Act further clarifies that there is to be no inconsistent administrative treatment of income derived from tribal trust resources, and held in trust by the Secretary of Interior, whether it is distributed per capita by the tribe or the Secretary of Interior. 25 U.S.C. § 117a. The Per Capita Act authorizes the Secretary of Interior to transfer trust funds to the tribe for per capita distribution, at the request of the governing body of the tribe and subject to the approval of the Secretary of Interior.

25 C.F.R. §§ 115.002 and 115.702 define the trust fund accounts maintained and held by the Secretary of the Interior for federally recognized tribes and the types of payments that must be accepted into the

¹ The Indian Tribal Judgment Funds Use or Distribution Act, 25 U.S.C. §§ 1401 through 1408, concerns the distribution of certain judgment funds to Indian tribes.

trust account, which include, but are not limited to, those resulting from use of trust lands or restricted fee lands or trust resources when paid directly to the Secretary of the Interior on behalf of the tribal account holder.

“Per capita payments” are defined as payments made pro rata to all members of an Indian tribe or a specified group of members. *See, eg.*, 25 C.F.R. 290.2.

FEDERAL INCOME TAX TREATMENT OF PER CAPITA PAYMENTS

Under 25 U.S.C. 117b(a), per capita payments made from trust funds maintained and held by the Secretary of Interior for federally recognized tribes, according to its regulations which define funds required to be accepted into the trust account (including 25 C.F.R. §§ 115.002 and 115.702, and any later amended form), are excluded from the gross income of the members of the tribe receiving the per capita payments. The Service will, therefore, recognize the exempt status of per capita payments received by an enrolled member of an Indian tribe where each of the following tests are met: (1) The funds in question were held in trust by the United States Government; (2) the Secretary of Interior approved the per capita distribution of the trust funds pursuant to the Per Capita Act; and (3) the trust funds are distributed per capita to all members, or a designated group of members, by either the Secretary of Interior, by and through the Office of Special Trustee, or the Indian tribe.

Interest and investment income accrued on the trust funds while held by the Secretary of Interior is excluded from the income of the individual tribal member who receives such investment or interest income as part of the per capita payment. Interest and investment income accrued on the trust funds while held by the tribe is likewise excluded from income of the individual tribal member who receives such investment or interest income as part of the per capita payment.

This ruling modifies Rev. Rul. 58-320, 1958-1 C.B. 24. To the extent Rev. Rul. 58-320 makes distinction between the tax treatment of income directly derived from allotted land and income derived from unallotted tribal trust land, it is not valid to the extent said tribal trust income is paid per capita to individual Indian members of the tribe pursuant to the Per Capita Act.

LIMITATION

This notice applies only to payments made pursuant to the Per Capita Act, and does not apply to payments made by a tribe pursuant to Treaty or other federal statute.