



National
Congress of
American
Indians

Regional Tribal Tax Meeting

May 17-18, 2012

National Congress of American Indians

Intertribal Tax Initiative Update &

The General Welfare Exclusion as Applied to Indian
Tribes

Intertribal Tax Initiative

April 2011 - NCAI, USET, ATNI, and the Miccosukee Tribe of Florida hosted a Tribal Leaders Tax Summit

Numerous tax issues were identified

NCAI Midyear – The group elected to focus on four central initiatives in the short-term

4 Areas of Focus

- The ‘general welfare exclusion’ as applied to Indian tribes
- Restrictions on the authority of tribal governments to issue tax-exempt bonds
- The state’s taxation of permanent improvements on tribal trust land; and
- Tobacco compliance issues presented by the PACT Act and the STOP Act

These issues were those we felt we could get good traction in; and the decision to focus on four was simply to pick a realistic number of issues to focus on

Background & Foundation

“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. The IRS doctrine which states that everything is income unless proven otherwise (26 U.S.C. § 61)
2. Taxation of gaming per capita payments (26 U.S.C. § 3402(r))

General Welfare Exclusion

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

General Welfare Exclusion

Things to Remember

- The General Welfare Exclusion is a doctrine developed over time by the IRS; it is not the result of enacted legislation
- ‘Means testing’ is frequently used to justify the tax-exempt status of payments or benefits
- Tribes help themselves when they enact benefit programs through a legislative process – this signals that the tribe intends to exercise internal checks and balances in allocating the benefit

IRS/Treasury Consultation on the 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

Determination of “Need”

- “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 equally, regardless of financial need - if the tribe has the resources and desire to do so

Example(s):

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.

Arlington, VA provides a wide panoply of services and programs for its community

Listening Session – NCAI ECWS

- IRS and Treasury reviewed a Draft of our Comments in good faith; then met with tribes to discuss the GWE
- IRS and Treasury Reps seemed sincere in wanting to develop a policy around this issue that improved the field audit process for Indian tribes, but also seemed unfamiliar with Indian tribes, tribal needs, and tribal governments
- The concept of deference was discussed:
 - “Lavish and Extraordinary Under the Circumstances” standard
 - Internal Process/Checks and Balances

Intertribal Tax Initiative: Comments Submitted in March

Comments were intended to state our position, but also give a quick briefing on key concepts of federal Indian law

Comments were also intended to paint the landscape of tribal programs and benefits, as well as historical shortcomings in the federal trust responsibility in areas such as:

- Education
- Cultural preservation
- Healthcare

Aftermath of Submitted Comments

Comments were to be a starting point in this process

IRS/Treasury noted that they would host, at least, one other listening session via teleconference

We met with IRS and Treasury on April 27, 2012 to discuss next steps regarding the General Welfare Exclusion, as well as to present another topics raised by tribes in the Northwest

Tuesday, May 15, 2012 – the Senate Committee on Finance hosted a hearing entitled: “Tax Reform: What it Means to Tribes and Territories”

Audits

A discussion/review of finances to ensure compliance with the Code

Requests for audits will be made by phone or snail mail only

Rights:

- Courteous service;
- Right to represent yourself or select someone to represent you;
- Right to privacy and confidentiality; and
- Right to seek judicial review or Administrative Review

Audits

Generally, there are three manners in which taxpayers are selected for audit:

- Random
- Norm Comparison
- **Document Matching** – ensuring forms W-2, **1099**, etc. amounts are reported

Record retention is generally advised to be for 3 years after the corresponding tax year

The auditor should request only information pertinent to the stated reason for the examination

Audits

- At end of audit there will be issued a “report of proposed changes” or a “no-change determination”

Suggestions:

- Hire an experienced tax attorney to represent you
- Conduct your own internal audits routinely to ensure when and if you are audited by the IRS, you will most likely receive a “no-change determination”
- You may disagree with determination and file an appeal request, or request for mediation

Compliance Checks

These are less formal and **voluntary** scoping checks

At the end of a compliance check, the field agent will make corrective recommendations in its closing letter; or

If necessary, the field agent will notify the entity (the tribe) that it is under audit and will notify them of their rights

Office of Indian Tribal Governments

<u>ITG Event</u>	<u>FY 2005</u>	<u>FY 2006</u>	<u>FY 2007</u>
Outreach contacts	6,360	5,400	4,133
Completed compliance checks	334	226	153
Closed examinations	284	466	553