



ITG News

Keeping First Nations Informed



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Message From The Director



As the office of Indian Tribal Governments moves into its fifth year of existence, I want to reiterate my commitment to maintaining open communications with our customer base, America's First Nations. While tax issues are often complex and sometimes contentious, we are committed to ensuring that we do everything possible to assist in resolving federal tax concerns. The key is communication.

We continue to seek opportunities to dialogue with tribes and tribal associations. We have found these opportunities to be invaluable, not only for the ability it provides us to share current tax information, but also for the opportunity to listen to questions and concerns on the part of tribes. We welcome all invitations to meet with individual tribes, regional tribal groups, tribal tax associations, and tribal leadership councils.

We have continued to enhance our web site as a communication tool, by adding new products, such as Publication 4268 – an Employment Tax Guide for Tribes, to existing products such as our Frequently Asked Questions and Publication 3908 - the gaming tax guide. Because many tribes have told us that they have minimal Internet access, we have also created and distributed publications, along with common tax forms, via a CD-Rom. If you would like a copy of the CD-Rom please feel free to contact your ITG Specialist.

As many of you may be aware, several years ago the Tax Exempt Government Entities Division formed an outside stakeholder group to assist in identifying areas where the Service needed to undertake improvements to improve communications with customers and better meet customer needs. The Advisory Committee to the TEGE Commissioner (ACT) has 20 total members who each serve a multi-year term. I am pleased to announce that Robert Gips and Lenor Scheffler were recently appointed to fill vacancies on the ACT, and will be representing tribal interests. Both have extensive experience with tribal issues, and we look forward to their invaluable contributions.

Finally, I want to ensure that all of you feel free to contact me at any time with any concerns you may have that cannot be resolved by our field staff. I can be contacted at (202) 283-9800, or via e-mail at christie.jacobs@irs.gov.

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Christie Jacobs



An Incentive to Join EFTPS

The Internal Revenue Service has announced an incentive to encourage enrollment in and use of the Electronic Federal Tax Payment System (EFTPS). Approximately 1 million employers could qualify for a refund of a previously paid federal tax deposit (FTD) penalty.

The EFTPS-FTD penalty refund offer allows business taxpayers an opportunity to receive an automatic one-time penalty refund if they have been assessed a deposit penalty on a Form 941, Employer's Quarterly Federal Tax Return. The offer is available to employers who are not mandated to use EFTPS. To qualify for the offer, the employer must:

- use EFTPS for one year (four consecutive quarters),
- make all Form 941 payments on time and,
- have previously fully paid the penalty.

Using the electronic payment system is much more accurate and much less burdensome for taxpayers. At the same time, the government saves money because there are fewer errors, fewer notices and fewer problems.

Using EFTPS eliminates the vast majority of the errors found on paper submissions. These errors on paper coupons result in late or misapplied payments and an FTD penalty. Paying taxes using EFTPS means almost 20 times greater accuracy. Greater accuracy means fewer penalties. Beginning in 2005, the IRS will automatically determine which employers have achieved the four quarters of EFTPS compliance and reverse the most recent full-paid FTD penalty minus any outstanding taxes. No other action by the employer is necessary.

The IRS will look back up to four quarters prior to the four-quarter compliance period for a full paid FTD penalty to abate. Penalties paid earlier than one year prior to the four-quarter compliance period are not eligible for the automatic offer.

EFTPS is a free service provided by two bureaus of the U.S. Department of the Treasury, IRS and the Financial Management Service (FMS). EFTPS gives employers the ability to make federal tax payments electronically online, by phone or with batch provider software for professionals.

Employers can enroll in EFTPS by visiting EFTPS.gov or by calling EFTPS Customer Service at 1-800-555-4477 to receive an enrollment form by mail.

EFTPS was introduced in 1996 and since that time more than 4.6 million employers have enrolled in the system to make their federal tax payments electronically. In fiscal year 2003, EFTPS processed more than 68.5 million transactions totaling more than \$1.5 trillion. Employers can make payments through a secure web site or by phone 24 hours a day, seven days a week from home or office; schedule payments up to 120 days in advance (for businesses) and 365 days in advance (for individuals); and review the last 16 months of tax payment history online or by calling Customer Service. In addition, taxpayers receive an immediate acknowledgement number for every EFTPS transaction for easy record keeping and as proof of the transaction.

Web Links:

- Electronic Federal Tax Payment System -- <http://www.eftps.gov>
- Financial Management Service -- <http://fms.treas.gov>

If you are not already enrolled and need assistance, please contact your ITG Specialist.



Section 501(c)(4) Entities and FUTA

Although the Consolidated Appropriations Act of 2000 allowed tribes the opportunity to be exempted from Federal Unemployment Tax, that provision did not automatically extend to entities that a tribe structured under Section 501(c)(4) of the Internal Revenue Code. As a result, advice was requested to clarify FUTA requirements for these entities, which can best be summarized through the following Questions and Answers:

Question: A Tribal government is a federally recognized tribe with its own EIN. They have a separate entity with a different EIN and an exemption under 501(c)(4). One or more of the tribal council members sit on the board, but the exempt organization makes its own decisions. The tribal government does not control it. Is the entity subject to FUTA?

Answer: Yes. The entity must file Form 940 and pay FUTA. The facts suggest this entity is wholly independent from the tribe. Although the tribal council may have some representation on the entity's board, the entity is structured so to be able to operate wholly independent of the tribe.

Question: If a Tribal government has only one entity for the tribe and has structured it under Section 501(c)(4), and the tribal council controls the exempt organization, is the entity liable for paying FUTA and filing Form 940?

Answer: No. The entity has no liability for FUTA. The facts suggest the entity could be seen as either operated directly by the tribe or wholly owned by the tribe.

Question: A Tribal government is a federally recognized tribe with its own EIN. They have a separate entity with a different EIN that is exempt from income tax under Section 501(c)(4). The board's members consist of the entire tribal council, and they control the entity. Is the 501(c)(4) entity subject to FUTA?

Answer: No. The entity has no liability for FUTA. Although there are two separate EINs, the facts suggest the entity is either operated directly by the tribe or wholly owned by the tribe, since the entire tribal council constitutes the Board of the entity.

In summary, a 501(c)(4) entity that is 100% controlled by the tribe and has no autonomy, yet does not exercise government authority on its own, will probably qualify for relief from FUTA. Other 501(c)(4) entities will normally be subject to FUTA.

Consultation Policy Update

We continue to progress in the development of an IRS/Tribal Consultation Policy, following the outline provided by the Advisory Committee on Tax Exempt and Government Entities (ACT). The Office of Indian Tribal Governments held a series of 12 regional meetings and met with tribal representatives to listen to their input on the development of an IRS/Tribal Consultation Policy. A summary was compiled and posted to the ITG web site, and interested parties were offered an opportunity to comment on the input before April 30, 2004.

A joint IRS/Tribal group has now begun the process of developing an initial Consultation Policy draft, with further opportunities to review and comment as we proceed. We expect to have the initial draft posted to our web site by the fall of 2004.

We would like to thank everyone who has participated in the process to date, and we look forward to the continuing evolution of a Consultation Policy that will best meet the needs of all parties.



Annual Reporting Requirements under TRDA and GITCA

Many tribes have entered into Tip Reporting agreements such as the Tip Rate Determination Agreement (TRDA) and the Gaming Industry Tip Compliance Agreement (GITCA). While these agreements assist both the tribe and the IRS in improving compliance, both also contain an annual reporting mechanism to assist in addressing noncompliance by non-participating employees. Section II(b) of the TRDA, and section 5(f) of the GITCA outline these requirements.

Many tribes have inquired about the process to be used to meet the reporting obligation. In order to assist, we will be contacting each entity with an existing agreement in order to determine the reporting process that will work best for both parties. In the interim, any questions concerning the annual reporting process can be directed to Julie Reese at (303) 231-5250, ext. 236.

Private Letter Ruling Clarifies Reporting Requirements for Pow-Wow Prizes

IRS Counsel has issued Private Letter Ruling (PLR) 200420028 in response to questions regarding the taxability of powwow prizes. While the PLR was issued in response to a specific tribe's question, this information is an indication of the position the IRS would take in similar cases.

The question presented was whether the tribe is required to issue a Form 1099 to a pow-wow contest winner who receives \$600 or more as a cash prize. The tribe requesting the PLR raised three arguments – they are not subject to tax and by extension not subject to information reporting, that they are not a “person” under the meaning of Section 7701, and that a pow-wow is not a trade or business for the tribe thus further exempting them from reporting the prizes.

The PLR indicated that Form 1099 was required, and provided responses to each of the three positions raised by the tribe;

1. Although federally recognized tribes are not subject to income tax, they are subject to employment taxes and information reporting requirements in the same manner as all other governmental entities. Thus, the “not subject to tax” position was not applicable as there is no nexus to information reporting requirements.
2. In *Chickasaw Nation v. United States*, 208 F.3d 871, 879 (10th Cir. 2000), the court concluded that an Indian tribe is a “person” within the meaning of section 7701(a)(1). It explained that “Congress unambiguously intended for the word ‘person,’ as used in section 7701(a)(1), to encompass all legal entities, including Indian tribes and tribal organizations, that are the subject of rights and duties.” In Revenue Ruling 85-194, 1985-2 C.B. 301, the Service ruled that section 6041 applies to an Indian tribe.
3. The regulations state that “all persons engaged in a trade or business” includes not only those so engaged for gain or profit, but also organizations the activities of which are not for the purpose of gain or profit. As a result, the information reporting requirements of section 6041 are not limited to organizations that are engaged in activities for gain or profit.

Thus, the PLR ruled that Forms 1099 are required to be issued for pow-wow prizes of \$600 or more.

???Questions???

Contact your ITG Specialist, or our toll-free call site at 877-829-5500



Taxable Fringe Benefits: Accountable vs. non-accountable plans

Stipends: A stipend is defined as a fixed sum of money paid periodically for services or to defray expenses.

The fact that remuneration is termed a “fee” or “stipend” rather than salary or wages is immaterial. Wages are generally subject to employment taxes and should be reported on Form W-2. IRS Publication 15, Circular E, Employer’s Tax Guide, defines employee business expense reimbursements. A reimbursement or allowance arrangement is a system by which you substantiate and pay the advances, reimbursements, and charges for your employees’ business expenses. How you report a reimbursement or allowance amount depends on whether you have an **accountable or a non-accountable plan**. If a single payment includes both wages and an expense reimbursement, you must specify the amount of the reimbursement. These rules apply to all ordinary and necessary employee business expenses that would otherwise qualify for a deduction by the employee.

Accountable plan: To be an accountable plan, your reimbursement or allowance arrangement must require your employees to meet all three of the following rules.

- 1) They must have paid or incurred deductible expenses while performing services as your employees.
- 2) They must adequately account to you for these expenses within a reasonable period of time.
- 3) They must return any amounts in excess of expenses within a reasonable period of time.

Amounts paid under an accountable plan are not wages and are not subject to income tax withholding and payment of social security, Medicare and Federal unemployment (FUTA) taxes. (*Reminder: Announcement 2001-16 indicates which Indian tribes are not subject to FUTA taxes.*) If the expenses covered by this arrangement are not substantiated or amounts in excess of expenses are not returned within a reasonable period of time, the amount is treated as paid under a non-accountable plan. This amount is subject to income tax withholding and payment of social security, Medicare, and FUTA taxes for the first payroll period following the end of the reasonable period.

A reasonable period of time depends on the facts and circumstances. Generally, it is considered reasonable if your employees receive the advance within 30 days of the time they incur the expense, adequately account for the expenses within 60 days after the expenses were paid or incurred, and they return any amounts in excess of expenses within 120 days after the expense was paid or incurred. Also, it is considered reasonable if you give your employees a periodic statement (at least quarterly) that asks them to either return or adequately account for outstanding amounts and they do so within 120 days.

Non-accountable plan: Payments to your employee for travel and other necessary expenses of your business under a non-accountable plan are wages and are treated as supplemental wages and subject to income tax withholding and payment of social security, Medicare, and FUTA taxes. Your payments are treated as paid under a non-accountable plan if:

- 1) Your employee is not required to or does not substantiate timely those expenses to you with receipts or other documentation or
- 2) You advance an amount to your employee for business expenses and your employee is not required to or does not return timely any amount he or she does not use for business expenses. See section 7 of Publication 15 for more information on supplemental wages.

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To add your name or e-mail address to our mailing list, please contact us via e-mail at robert.d.bixby@irs.gov, or call Robert Bixby at (920) 433-3810

Account or Tax Questions??
Call Customer Account Services at
1-877-829-5500



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Per diem or other fixed allowance: You may reimburse your employees by travel days, or miles, or some other fixed allowance. In these cases, your employee is considered to have accounted to you if the payments do not exceed rates established by the Federal Government. The 2002 standard mileage rate for auto expenses is 36.5 cents per mile. The rate for 2003 is 36 cents per mile. The 2004 standard mileage rate for auto expenses is 37.5 cents per mile. The government per diem rates for meals and lodging in the continental United States are listed in Publication 1542, Per Diem Rates. Other than the amount of these expenses, your employees' business expenses must be substantiated (for example, the business purpose of the travel or the number of business miles driven). If the per diem or allowance paid exceeds the amounts specified, you must report the excess amount as wages. This excess amount is subject to income tax withholding and payment of social security and Medicare taxes. Show the amount equal to the specified amount (i.e., the nontaxable portion) in box 12 of the Form W-2, using code L. IRS Publication 15-B, Employer's Tax Guide to Fringe Benefits, discusses "Are Fringe Benefits Taxable?" If the recipient of a taxable fringe benefit is your employee, the benefit is subject to employment taxes and must be reported on Form W-2, Wage and Tax Statement. However, you can use special rules to withhold, deposit, and report the employment taxes. Refer to section 4 of Publication 15-B, Rules for Withholding, Depositing and Reporting.

Withholding on Distributions of Indian Gaming Profits

Recently a potential problem was discovered at a Volunteer Income Tax Preparation site located on a reservation. The withholding on Per Capita payments to tribal members when they reach the age of majority was not sufficient to cover the tax liability. After asking a few questions the following facts developed. The 18 year old was still a student and was being supported by Mom and Dad and still claimed as a dependent on the parent's tax return.

The tables for withholding on distributions of gaming profits are set for individuals that can claim themselves, these tables can be found in Publication 15-A (Employer's Supplemental Tax Guide). In the student situation, the 18 year old cannot claim themselves because Mom and Dad will be claiming them on their return. The result of this is that the student will receive a substantial tax liability and probably have very few ways to pay this tax liability. A solution to this problem is to have the tribe withhold more from the gaming profits distribution to the 18 year old that is still a dependent of their parents. This would create a situation where the student would have withholding that would more accurately reflect their actual tax liability for the year. Another solution for the young tribal member would be to make estimated payments during the year of the large distribution. Estimated payments are made using the form 1040 ES which can be acquired at www.irs.gov.

If you have more questions about this type of situation, contact your Indian Tribal Government Specialist in your area.

Tribal Employment Tax Guide Now Available

Publication 4268, our on-line Employment Tax Guide for Tribal Governments, is now available at our web site at www.irs.gov/tribes.

Federal Tax Calendar for Third Quarter 2004

July 2004

SUN	MON	TUE	WED	THU	FRI	SAT
				1	2 * Payroll date 6/26-6/29	3
4	5	6	7	8 * Payroll date 6/30-7/2	9 * Payroll date 7/3-7/6	10
11	12 Employees report tips from June	13	14 * Payroll date 7/7-7/9	15 ** Monthly Deposit for June	16 * Payroll date 7/10-7/13	17
18	19	20	21 * Payroll date 7/14-7/16	22	23 * Payroll date 7/17-7/20	24
25	26	27	28 * Payroll date 7/21-7/23	29	30 * Payroll date 7/24-7/27	31

August 2004

SUN	MON	TUE	WED	THU	FRI	SAT
1	2	3	4 * Payroll date 7/28-7/30	5	6 * Payroll date 7/31-8/3	7
8	9	10 Employees report tips from July	11 * Payroll date 8/4-8/6	12	13 * Payroll date 8/7-8/10	14
15	16 ** Monthly Deposit for July	17	18 * Payroll date 8/11-8/13	19	20 * Payroll date 8/14-8/17	21
22	23	24	25 * Payroll date 8/18-8/20	26	27 * Payroll date 8/21-8/24	28
29	30	31				

* = Make a Payroll Deposit if you are under the semi-weekly deposit rule. ** = Make a Monthly Deposit if you qualify under that rule.

7 NOTE: Deposits made through EFTPS are due one day prior to the dates listed.

September 2004

SUN	MON	TUE	WED	THU	FRI	SAT
			1 * Payroll date 8/25-8/27	2	3 * Payroll date 8/28-8/31	4
5	6	7	8	9 * Payroll date 9/1-9/3	10 * Payroll date 9/4-9/7 Employees report tips from August	11
12	13	14	15 * Payroll date 9/8-9/10 ** Monthly Deposit for August	16	17 * Payroll date 9/11-9/14	18
19	20	21	22 * Payroll date 9/15-9/17	23	24 * Payroll date 9/18-9/21	25
26	27	28	29 * Payroll date 9/22-9/24	30		

* = Make a Payroll Deposit if you are under the semi-weekly deposit rule.

** = Make a Monthly Deposit if you qualify under that rule.

NOTE: Deposits made through EFTPS are due one day prior to the dates listed

Return Filing Dates

July 1st

File Form 11-C to register and pay the annual Occupational tax if you are in the business of taking wagers

August 2nd

File Form 941 for the quarter ended June 30, 2004. If the tax was deposited in full and on time, file by August 10th.
File Form 730 and pay the tax on applicable wagers accepted during June

August 31st

File Form 730 and pay the tax on applicable wagers accepted during July

September 30th

File Form 730 and pay the tax on applicable wagers accepted during August