



OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

July 23, 2008

Number: **INFO 2008-0036**

Release Date: 9/26/2008

CONEX-128097-08

UIL: 9999.98-00

The Honorable Neil Abercrombie
Member, U.S. House of Representatives
300 Ala Moana Boulevard
Room 4-104
Honolulu, HI 96850

Attention:

Dear Congressman Abercrombie:

I am responding to your letter of June 13, 2008, on behalf of your constituent, _____, a retired _____ employee, wrote about his liability for taxes under the Federal Insurance Contributions Act (FICA) on amounts deferred under a nonqualified deferred compensation plan. _____ said he did not receive the deferred amounts in their entirety due to his employer terminating the plan and therefore would like a refund of the FICA taxes associated with the deferred amounts he never received. You asked for a review of his claims.

A nonqualified deferred compensation plan is an arrangement between an employer and an employee to pay the employee compensation in the future. Nonqualified deferred compensation plans are generally unfunded arrangements whereby the employer's promise to pay the deferred compensation benefits in the future is not secured in any manner. Therefore, amounts deferred are subject to claims by the employer's creditors. Thus, the risk that an employee may not receive any benefits in the future is an inherent feature of nonqualified deferred compensation plans.

The law imposes FICA tax on the wages employers pay employees for employment [sections 3101 and 3111 of the Internal Revenue Code (Code)]. Generally, an employer must withhold and pay FICA tax on compensation deferred under a nonqualified deferred compensation plan as of the later of:

- When the employee performs the services that create the right to a deferral

- When a substantial risk that the employee's rights to the deferred amounts will be forfeited no longer exists [section 3121(v)(2)(A) of the Code]

Nonqualified deferred compensation arrangements can be either account balance plans or nonaccount balance plans. A nonaccount balance plan, such as the plan in case, does not credit deferred amounts to a particular participant's individual account [Employment Tax Regulations section 31.3121(v)(2)-1(c)(2)(i)]. For a nonaccount balance plan, an employer can delay withholding and paying FICA taxes until the amount deferred is reasonably ascertainable [Employment Tax Regulations section 31.3121(v)(2)-1(e)(4)(i)(A)].

The law considers amounts deferred under nonaccount balance plan reasonably ascertainable on the first date the employer knows the amount, form, and beginning date of the benefits to compute their present value [Employment Tax Regulations section 31.3121(v)(2)-1(e)(4)(i)(B)]. When the present value of a benefit becomes reasonably ascertainable, the present value amount is subject to FICA tax. Under some nonaccount balance plans, retirement benefits do not become reasonably ascertainable until retirement. The present value calculation does not consider the probability that an employer will not make payments because of the unfunded status of the plan, the risk associated with any deemed or actual investment of the amounts deferred under the plan, or similar risks or contingencies [Employment Tax Regulations section 31.3121(v)(2)-1(c)(2)(ii)].

The nonqualified deferred compensation plan at _____ was a nonaccount balance plan. Thus, FICA taxes were due and payable when the amount deferred was reasonably ascertainable. Consequently, the present value of _____ benefits on the date of his retirement became subject to FICA taxes. Although I sympathize with _____ situation, the law does not provide for a refund of FICA taxes that he properly paid even though he never received his total benefits due to termination of the plan.

I am sorry my response could not have been more favorable; however, I hope this information is helpful in responding to _____. If you have any questions, please contact me or _____ at () _____.

Sincerely,

Susan L. Hartford
Acting Senior Technician Reviewer
Office of the Associate Chief
Counsel/Division Counsel
Tax Exempt & Government Entities