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

December 19, 2000

OFFICE OF
CHIEF COUNSEL

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[redacted]

Dear [redacted]:

This responds to your letter dated November 8, 2000, concerning whether amounts paid to you for services performed by you in Hong Kong for a company based in Hong Kong are subject to social security taxes. IRS Publication 54, (Tax Guide for U.S. Citizens and Resident Aliens Abroad), contains guidance on this issue. We have enclosed a copy of Publication 54 for your information.

Unfortunately, we are not able to provide legal advice specific to your case due to the fact that your submission does not comport with the requirements for requesting a private letter ruling. Revenue Procedure 2000-1, 2000-1 I.R.B. 4, sets forth procedures for requesting letter rulings. If you wish to request formal guidance, such as a private letter ruling, you should follow the procedures set forth in Revenue Procedure 2000-1. In the absence of a request for formal guidance, we are only able to provide general information. Accordingly, in response to your request, we have reviewed the facts provided to us and set forth below general information, which we hope will be helpful to you. We have assumed that you are a United States citizen.

Section 3121 of the Internal Revenue Code provides the definitions for determining if there is liability for Federal Insurance Contribution Act (FICA) taxes. Generally, there is FICA tax liability if wages are paid to an employee because of employment. Section 3121(b) defines the term "employment." Generally, employment is limited to either services performed within the United States or services performed by a United States citizen outside of the United States for an American employer. Thus, as a general rule, United States social security and Medicare taxes do not apply to wages for services you perform as an employee outside of the United States for an employer that is not an American employer, unless certain exceptions apply. See, I.R.S. Publication 54, Chapter 2.

Section 1402(a) defines the term "net earnings from self-employment." Net earnings from self-employment generally means the gross income derived by an individual from any trade or business carried on by such individual less allowable deductions

attributable to such trade or business. Section 1402(c) defines the term “trade or business.” Specifically, section 1402(c)(2) generally excludes the performance of services as an employee from the definition of a “trade or business.” Thus, income you receive as a result of services you perform as an employee is generally not subject to self-employment taxes.

You have inquired whether you can voluntarily pay social security tax retroactively on past earnings. The Social Security Act imposes a mandatory tax, and thus payment may not be made by voluntary contributions. Unless the services you performed are covered by the United States social security system, you are not subject to United States social security taxation.

The United States has established a network of bilateral social security agreements with several foreign countries to coordinate U.S. social security coverage and taxation of workers who are employed in those countries with the comparable programs of other countries. Under these agreements, which are often referred to as “totalization agreements,” dual coverage and dual contributions (taxes) for the same work are eliminated. The agreements generally ensure that you pay social security taxes to only one country.

A list of the countries where these agreements are in effect is set forth in Chapter 2 of Publication 54. It is important to note that these agreements do not change the basic coverage provisions of the participating countries’ social security laws – such as those that define covered earnings or work. They simply exempt workers from coverage under the system of one country or the other when their work would otherwise be covered under both systems. Thus, the agreements do not enable a worker whose services do not otherwise constitute covered employment for United States social security purposes to obtain United States social security coverage.

Workers who are exempt from United States or foreign social security taxes under an agreement must document their exemption by obtaining a certificate of coverage from the country that will continue to cover them. When the Social Security Administration issues a certificate certifying United States coverage, a copy of the certificate usually must be presented to the appropriate foreign authorities as proof of entitlement to the foreign exemption for the United States employee and the employer. When the other country issues a certificate certifying that the employee is covered by the foreign system, the employer can immediately stop withholding and paying United States social security taxes on the employee’s earnings.

Employers are generally required to request certificates on behalf of an employee they have transferred to a foreign country; self-employed persons request their own certificate. Requests for certificates, as well as requests for information about the United States' Social Security Totalization agreements program, including details about specific agreements that are in force, should be directed to the following address:

U.S. Social Security Administration
Office of International Programs
P.O. Box 17741
Baltimore, MD 21235
USA

This letter provides general information only. It describes well-established interpretations and principles of tax law without applying them to a specific set of facts. It is advisory only and has no binding effect with the Internal Revenue Service. This letter is intended only to provide you with general guidance for determining how to comply with applicable law.

The attorney assigned to this matter is Lynne Camillo (Employee ID #50-01066). She can be reached at (202) 622-6040.

Sincerely,

Jerry E. Holmes
Chief, Employment Tax Branch 2
Office of the Assistant Chief Counsel
(Exempt Organizations/Employment
Tax/Government Entities)