

Internal Revenue Service

Department of the Treasury

Number: **200146006**
Release Date: 11/16/2001
Index Number: 3121.04-00, 3401.04-01

Washington, DC 20224

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CC:TE/GE:EOEG:ET2-PLR-131282-00
Date:
5/22/2001

Key:

Town =

Worker =

State =

This is in response to your request for a ruling concerning the Worker's status for federal employment tax purposes with respect to services he performs for the Town.

The applicable federal employment taxes are those imposed by the Federal Insurance Contributions Act (FICA) and the collection of income tax at source on wages. In cases that involve a possible employer-employee relationship, it is our practice to solicit information from the parties involved, so we requested information from the Worker as well.

The Worker is a Deputy Tax Collector for Town, with responsibility for collecting motor vehicle excise taxes. He receives a yearly Certificate of Appointment as Deputy Collector of Taxes. Pursuant to State-mandated procedures, the Town Tax Collector sends the Worker notice of taxpayers whose motor vehicle excise tax has not been paid. The Worker then serves notice on the taxpayers and notifies the Registry of Motor Vehicles electronically so that delinquent taxpayers cannot renew their licenses or registration before their tax is paid.

Taxpayers' checks for taxes, interest and fees are required to be made payable to the Town and are deposited in the Town's account. The Town pays the statutorily established collection fees to the deputy once a month. Procedures applicable to tax collectors, based upon State law, are found in the Collector's Manual.

The Worker maintains his own office with 2 clerical employees, as well as field employees, and works as Deputy Tax Collector for a number of municipalities. He pays expenses for rent, utilities, employees' wages, office equipment, etc. The Worker is required to swear an oath of office by some municipalities, but not by the Town. The

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Town reports compensation it pays the Worker on Form 1099-MISC as nonemployee compensation.

The question presented is whether the Worker is an employee subject to FICA taxes and/or federal income tax withholding. The answer will require a determination of whether the Worker is a public official.

Section 3402(a) of the Internal Revenue Code (the Code) provides that every employer making payment of wages shall deduct and withhold federal income taxes.

Code section 3401(c) provides that, for purposes of this chapter, the term “employee” includes an officer, employee, or elected official of a state, or any political subdivision thereof. For this purpose, the regulations include both elected and appointed officials in the definition of “employee.” Section 31.3401(c)-1(a), Employment Tax Regulations. The chapter referred to is Chapter 24, Collection of Income Tax at Source on Wages. In other words, section 3401(c) applies only for income tax withholding purposes. For purposes of FICA taxes, employee status is determined under the common law. Code section 3121(d)(2).

The Code does not define the term “public official,” but section 1.1402(c)-2(b) of the Income Tax Regulations gives the following examples: the president, the vice president, a governor, a mayor, the secretary of state, a member of Congress, a state representative, a county commissioner, a judge, a justice of the peace, a county or city attorney, a marshal, a sheriff, a constable, a registrar of deeds, or a notary public.

Taxes under the Self-Employment Contributions Act (SECA) are imposed pursuant to sections 1401 and 1402 on the gross income, less applicable deductions, derived by an individual from any trade or business. For SECA purposes, the term “trade or business” has the same meaning as when used in Code section 162, relating to trade or business expenses.

Section 1402(c)(1) provides that the performance of the functions of a public office is not a trade or business for SECA purposes.¹ Code section 1402(c)(1) and section 1.1402(c)-2(a)(2)(B), Income Tax Regulations, contain an exception, providing that the performance of the functions of a public office is a trade or business with respect to fees received for functions performed in a position compensated solely on a “fee basis,” but only if the functions are not covered by an agreement under section 218 of the Social Security Act (218 agreement). Thus a fee-based public official who is not

¹These provisions do not state that every public official is an employee, but only that a public official is not self-employed. They leave open the possibility that there may occasionally be non-employee public officials. Such individuals do not carry on a trade or business for SECA purposes and consequently are not subject to SECA tax on their compensation as public officials. Since they are not employees, they are not subject to FICA tax. See Rev. Rul. 61-113, 1961-1 C.B. 400, for an example.

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covered by a 218 agreement is subject to SECA tax.

Rev. Rul. 74-608, 1974-2 C.B. 275, clarifies that a fee-based public official is one who receives compensation in the form of fees directly from members of the public. A tax collector who is paid a salary based on the amount of tax collected is not a fee-based public official.

For FICA purposes, an individual is an employee if, under the common law rules, the relationship between the individual and the person for whom he or she performs services is the legal relationship of employer and employee. Generally this relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished but also as to the details and means by which the result is accomplished. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. Section 31.3121(d)-1(c), Employment Tax Regulations.

In applying the common-law rules, the IRS considers whether the service recipient has behavioral and financial control over the worker and evaluates the relationship between the parties, including how they view their relationship.

Behavioral controls are evidenced by facts which indicate whether the service recipient has a right to direct or control how the worker performs the tasks for which he or she is hired. Facts which illustrate the right to control how a worker performs a task include the provision of training or instruction.

Financial controls are evidenced by facts which indicate whether the service recipient has a right to direct or control the financial aspects of the worker's activities. These include significant investment, unreimbursed expenses, making services available to the relevant market, the method of payment, and the opportunity for profit or loss.

The relationship of the parties is generally evidenced by examining the parties' agreements and actions with respect to each other, paying close attention to those facts which show not only how they perceive their own relationship but also how they represent their relationship to others. Facts which illustrate how the parties perceive their relationship include the intent of the parties as expressed in written contracts; the provision of, or lack of, employee benefits; the right of the parties to terminate the relationship; the permanency of the relationship, and whether the services performed are part of the service recipient's regular business activities.

The fact that an individual is employed part-time, or works for more than one employer, is not evidence of independent contractor status. A part-time worker may be an employee under the common-law rules.

While the Code does not define the term "public official," there is a body of case law defining the term. In Buckley v. Valeo, 424 U.S.1 (1975), the Supreme Court stated

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that anyone who exercises significant authority pursuant to the laws of the United States is an officer. The term “officers” embraces all appointed officials exercising responsibility under the public laws of the nation. 424 U.S. at 131. Officers perform a significant governmental duty exercised pursuant to a public law. 424 U.S. at 141. Officers administer and enforce the public law. 424 U.S. 139.

Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1926), specifically defines the term “officer.” There the Supreme Court considered whether consulting engineers hired by states, municipalities, water supply and sewage districts were independent contractors or “officers and employees” of a state.² The Court stated: “An office is a public station conferred by the appointment of a government. The term embraces the idea of tenure, duration, emolument and duties fixed by law. Where an office is created, the law usually fixes its incidents, including its term, its duties, and its compensation.” 269 U.S. at 520 (citations omitted). Officers and employees are agents of a state to administer its laws. 269 U.S. at 520 (citations omitted). The independent contractor has liberty of action which excludes control or the right to control characteristic of the employer-employee relationship. 269 U.S. at 521.

In Pope v. Commissioner, 138 F.2d 1006 (6th Cir. 1943), the Sixth Circuit, following Metcalf & Eddy, established the following standards to define the term “public office.” (1) It must be created by the constitution or the legislature, or by a municipality or other body with authority conferred by the legislature. (2) There must be a delegation of a portion of the sovereign powers of government to be exercised for the benefit of the public. (3) The powers conferred and the duties to be discharged must be defined either directly or indirectly by the legislature or through legislative authority. (4) The duties must be performed independently and without control of a superior power other than the law. (5) The office must have some permanency and continuity, and the officer must take an official oath.

The provisions of State law applicable to the position of Deputy Tax Collector are as follows. State statutes provide for the creation of the position of Deputy Tax Collector, stating that a deputy has all the powers of a tax collector.³

²Section 201(a) of the War Revenue Act, 40 Stat. at 303, exempted from tax the compensation or fees received by “officers and employees” of the U.S. or any state, local subdivision, etc. The purpose of this Act was to exempt instrumentalities of a state or the federal government from taxation.

. A Treasurer or Collector of Taxes for a town can appoint and remove a deputy as he or she deems expedient. Collection methods are established in part in the same statute. Fees for each legal process, as well as interest, are established by law, and required to be accounted for to the town treasurer.⁴ The town then pays the collector's fees to the tax collector as his compensation.⁵

There are two methods of handling payments made to a deputy tax collector. The deputy can establish a deputy account into which all taxes, fees and interest are deposited; when the checks clear, the deputy pays the taxes over to the municipality and retains the fees.⁶ Otherwise, a municipality, as in the case of the Town, can receive the payments directly and remit the fees to the deputy. In either case, the checks must be made out to the municipality.

A deputy is required by statute to give bond for the faithful performance of duties and to

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keep specific records and make monthly reports.⁷ Procedures applicable to tax collectors are set forth in the Collector's Manual.⁸ State statutes establish penalties for neglect of duty.⁹

Is the Worker a public official within the meaning of section 3401(c) for income tax withholding purposes? According to Buckely v. Valeo, an officer administers and enforces the public law. 424 U.S. 139. Where an office is created, the law usually fixes its incidents, including its term, its duties, and its compensation. Metcalf & Eddy v. Mitchell, 269 U.S. at 520. The Deputy Tax Collector position conforms to these definitions in that the deputy enforces the taxing power of the State under a delegation of authority from the Tax Collector. The duties of the office and its compensation are fixed by statute. The Deputy Tax Collector position fulfills five of the six conditions for public office enumerated in Pope v. Commissioner, 138 F.2d 1006 (6th Cir. 1943). It is legislatively created, there is a delegation of a portion of the sovereign powers, the duties are defined by statute and performed with a degree of independence under the law. The only condition not satisfied is that the Worker does not take an oath of office. Some municipalities, however, do require the Worker to take an oath. We conclude that the Worker is a public official.

Consequently the Worker is subject to federal income tax withholding. Section 3401(c).

The common-law rules apply to determine whether an individual is an employee for FICA purposes. Section 3121(d)(2). In the case of a public official, many of the statutory provisions which establish his status as an official are also relevant to the determination of whether he is an employee. These provisions provide facts tending to show that the Town and the Tax Collector have a right to control the way in which the Worker performs his duties under the law, i.e., that the Worker does not operate with the freedom from control characteristic of an independent contractor.

Provision of training and instruction is one type of behavioral control. While the Town does not provide instruction to the Worker, it has the right to require him to change his methods if they do not conform to legal requirements. The duties of the office of Deputy Tax Collector are established by statute, and the required procedures are set forth in the Collector's Manual. If the Deputy does not conform to required procedures, the Tax Collector has the right to require him to change his procedures or to terminate his appointment.

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The Deputy Tax Collector operates with a certain amount of independence, but is constrained by the power of the law and the authority of the Town, exercised by the Tax Collector. This is one of the characteristics of an officer in Pope v. Commissioner, as well as an indication of the control typical of employee status.

The Worker represents himself to the public as an agent of the Town. Though the Worker pays for the forms issued by his office, the requirements of these forms are statutorily established.¹⁰ The forms bear the heading Town of _____, State. The envelopes the Worker uses contain the notice: Official Business, Penalty for Private Use.

Under State law, the Town could be held liable for a Deputy Tax Collector's malfeasance in the exercise of his duties. For instance, in _____,

_____ the plaintiff was awarded attorney's fees arising from a civil rights suit against a city and its officers, including treasurer, tax collector, and deputy tax collector. The case arose from one in which the Supreme Court held unconstitutional a State statute allowing for collection of motor vehicle taxes by imprisonment without adequate notice and an opportunity to be heard. The rationale for liability in tort or civil rights suits is that municipal officers acting within the scope of their authority are employees under the control of the municipality for which they work.¹¹

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We conclude the evidence establishes the Town has the right to exercise enough behavioral control over the Worker to create an employer-employee relationship.

The Worker has a considerable amount of financial independence. He maintains an office and has expenses for equipment and employees. He has a genuine risk of profit or loss different from that of a salaried employee. He does not work exclusively for the Town, but has a number of client towns.

On the other hand, he does not have absolute financial independence. His financial arrangements, including records, bank accounts, and reporting, are largely dictated by State statute. Payments to the deputy are limited to penalties and charges for the various notices he serves. He cannot negotiate for himself a payment schedule different from that provided by State statute. He cannot compromise a tax liability, except as permitted by statute.¹² Thus, while he bears a risk of profit or loss, he does not have the full measure of financial independence characteristic of an independent contractor.

The evidence concerning the relationship between the parties also contains indicia of both employee and independent contractor status. The parties apparently see their relationship as one of service recipient and independent contractor. The Town reports its payments to the Worker on Form 1099. The Worker does not receive employee benefits or reimbursement for business expenses. On the other hand, the Worker's contract, a yearly Certificate of Appointment as Deputy Collector of Taxes, suggests that he holds an appointed public office and is an employee.

While the relationship between the Town and the Worker has certain indicia of independent contractor status, we conclude that there is sufficient evidence of control and the right to control to establish an employer-employee relationship. In this decision, we gave great weight to the Supreme Court and appellate cases defining the term "public official" and holding public officials to be employees. Therefore the Town and the Worker are subject to FICA tax on the Worker's compensation.

This letter does not constitute a Notice of Determination Concerning Worker Classification Under Section 7436 of the Internal Revenue Code.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code

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provides that it may not be used or cited as precedent.

Sincerely yours,
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Office of Division Counsel/
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(Tax Exempt and Government Entities)

Enclosure:
Copy of ruling for 6110 purposes