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

OFFICE OF THE CHIEF COUNSEL

July 21, 2017

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The Honorable Dianne Feinstein
United States Senate
Washington, DC 20510

Attention:

Dear Senator Feinstein:

I am responding to your inquiry dated May 19, 2017, and Representative Speier's additional inquiry dated June 15, 2017. Your requests for information relate to decision to stop withholding certain employment taxes and no longer pay the employer portions of these taxes and any options for employee crew members who are U.S. citizens.

We appreciate your concerns about an employer's employment tax obligations and the importance of the Social Security system and unemployment and disability programs. Thank you for understanding that we cannot comment on specific taxpayer situations due to the privacy protections of the Internal Revenue Code (Code).

You asked several questions about refunds under the Federal Insurance Contributions Act (FICA). Because some of the inquiries involved matters under the jurisdiction of the Social Security Administration (SSA), we coordinated this response with that agency. I hope the following general information about FICA taxes that relate to the Social Security system is helpful in your response to your constituents.

As we stated in our letter dated February 28, 2017, Section 3121(b)(4) of the Code provides that if a U.S. citizen employee performs services for a non-American employer on or in connection with a non-American aircraft while outside the United States, the employee's services on or in connection with the aircraft (including those services performed within the United States) are not considered employment for FICA purposes. Therefore, the remuneration paid for those services is not subject to FICA tax. By contrast, services provided exclusively within the United States, even in connection with a non-American aircraft for a non-American employer, do not fall within the Section

3121(b)(4) exception and thus may be subject to FICA tax.

Open Tax Years

In your most recent inquiries, you asked about the deadline for requesting a refund of FICA taxes paid. Generally, section 6511(a) limits how long a taxpayer has to claim a credit or refund of taxes. A taxpayer must file for a claim for credit or refund of tax by the later of (1) three years after the return was filed, or (2) two years after the tax was paid.

This rule applies to FICA overpayments as well as other types of taxes. Section 6513(c) provides that for purposes of section 6511, with respect to FICA tax, if a return for any period ending with or within a calendar year is filed before April 15 of the following year, the return shall be considered filed on April 15 of such following year. This Code section also provides that if any tax with respect to remuneration paid during any period of a calendar year is paid before April 15 of the following year, such tax shall be considered paid on April 15 of such following year.

Section 6511(c) provides an exception to this general rule if the parties agree under section 6501(c)(4) to extend the period of limitations on assessment. When a taxpayer and the IRS enter into such an agreement to extend the period of limitations on assessment (often on a Form SS–10, *Consent to Extend the Time to Assess Employment Taxes*), the taxpayer's, and only that taxpayer's, period for filing a claim for refund or credit is extended until 6 months after the extended period of assessment expires.

Claiming a Refund

Generally, an employer claims a refund of FICA taxes on Form 941-X, Adjusted Employer's QUARTERLY Federal Tax Return or Claim for Refund. The employer must file a separate Form 941-X for each period it claims a refund. Generally, an employer must include the employee portion of FICA tax in its claim for refund on Form 941-X.

The IRS cannot refund the employee share of the overpaid FICA taxes unless one of the following conditions is met:

- The employer has first repaid or reimbursed its employee or
- The employer has secured the employee's consent to the allowance of the refund claim.

Treasury Regulation, Section 31.6402(a)-2(a)(1)(ii). For refund claims for employee tax overcollected in prior years, the employer must also certify that it has obtained the employee's written statement confirming that the employee has not made any previous claims (or the claims were rejected) and will not make any future claims for refund of the amount of the overcollection. Treasury Regulation, Section 31.6402(a)-2(a)(2).

Revenue procedure 2017-18, 2017-14 IRB 1, describes the basic requirements for requesting employee consent.

If the IRS grants the refund, the IRS will refund the taxes (including any applicable interest paid under Section 6611) to the employer. The employer must then give each employee his or her share of the refund.

If an employee does not consent to the employer's claim for refund on Form 941-X on his or her behalf, the employer may only get a refund of the employer portion of FICA tax.

However, an employee may separately file a claim for refund of his or her portion of FICA tax using Form 843, *Claim for Refund and Request for Abatement*. The Form 843 instructions contain requirements an employee must satisfy, including attaching a statement to the Form 843 that indicates:

- The amount, if any, the employer has repaid or reimbursed the employee for excess taxes withheld, and
- The amount, if any, of credit or refund claimed by the employer or authorized by the employee to be claimed by the employer.

Similar to the Form 941-X, an employee must file Form 843 for each taxable period for which a refund is requested. However, an extension of the period of limitation by the employer does not extend the period of limitation for an employee to claim a refund on Form 843. While an employee also can utilize the agreement process from Section 6501(c)(4) of the Code to extend a period of limitation for years for which the applicable period of limitations has not yet expired, alternatively the employee can protect its interests by filing a refund claim for each such period in accordance with the instructions to Form 843.

Social Security Benefits

Whether or not a refund is requested by the employer or the employee may not affect the allocation of wage credits for Social Security purposes, however. Collection of FICA taxes and wage credits are related, but separate questions. The IRS administers FICA taxes while the SSA records wages reported. See 42 U.S.C. Section 405(c)(2)(A). Wages subject to FICA are generally treated the same as wages recorded and used by SSA to determine entitlement to benefits, but not always. See, for example*, U.S. v. Cleveland Indians Baseball Company*, 532 U.S. 200 (2001) (differing on what time period should be used for taxation purposes versus wage crediting purposes).

If wages are exempt from eligible employment under 42 U.S.C. Section 410(a)(4) and should not be credited, then SSA cannot give credit for the wages under the law. The SSA relies on taxpayers filing correct Forms W-2c so that it has sufficient information to correct wrongly reported wages. If an employer does not file the required forms, SSA would still remove credit for wages if it became aware of the wrongly attributed wages. Whether a FICA refund was requested and allowed would not affect the SSA's decision to remove wrongly attributed wages from its records.

Filing Form W-2c

An employer is required to properly report wages. Section 6051 requires every

employer to file with the SSA and furnish to its employees a Form W-2, *Wage and Tax Statement*, showing the amount of wages and taxes withheld. Occasionally, there are errors in the reporting of wages. Employers use Form W-2c, *Corrected Wage and Tax Statement*, to correct a mistake on a previously issued Form W-2. The law requires employers to provide the statement to the employee. Treasury Regulation, Section 31.6051-1(d)(1).

Employers are required to file the Form W-2c with the SSA. Treasury Regulation, Sections 31.6051-2, 31.6071(a)-1. The SSA will correct errors, but must first have evidence of the error. The SSA frequently uses the Form W-2c to identify errors and make necessary corrections. However, other evidence may alert the SSA to errors in wage reporting. Wage record corrections are generally subject to a time limitation (defined at 42 U.S.C. Section 405(c)(1)(B) as 3 years, 3 months, and 15 days after the wage year), but there are exceptions to this rule. See 42 U.S.C. Section 405(c)(5)(allowing changes to wage records after the expiration of the time limitation). For example, if a Form W-2c is filed outside of the statute of limitations, 42 U.S.C. Section 405(c)(5)(F) permits the SSA to change its records to conform to the W-2c. Other exceptions may also apply and permit the SSA to correct wage records outside of the prescribed statute of limitations.

Under Sections 6721 and 6722, an employer may be penalized for reporting incorrect information on a Form W-2. Filing a Form W-2c will, in certain circumstances, result in a reduced penalty or penalties for the employer.

I hope this information is helpful. I am also sending a response to Representative Speier. If you have further questions, please contact me at or at .

Sincerely,

Victoria A. Judson
Associate Chief Counsel
Tax Exempt and Government Entities

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