Office of Chief Counsel
Internal Revenue Service
memorandum

CC:TEGE:EOEG:ET2:DMParkinson
PRESP-132112-08

date: May 5, 2009

to: Director, Federal, State & Local Governments (FSLG)
Attn: Paul Marmolejo

from: Marie Cashman
Special Counsel, (Exempt Organizations/Employment Tax/Government Entities)
(Tax Exempt & Government Entities)

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subject: Section 218 Modifications

We have been asked for advice on how a state or local government could make payments of Federal Insurance Contributions Act (FICA) taxes for past years in order to effectuate a modification to its section 218 Agreement and provide retroactive coverage for certain workers.

Under section 218(c)(4) of the Social Security Act, an entity covered by a section 218 Agreement and the Social Security Administration can agree to modify the section 218 Agreement, and section 218(e) specifies that coverage may be made for a retroactive period of not more than five years. It is our understanding that the affected government entity is expected to pay the additional FICA taxes associated with such retroactive coverage in conjunction with entering into the modification.

Under sections 6501(a) and 6501(b)(3) of the Internal Revenue Code, the statute of limitations for assessment of FICA taxes is three years. When returns are timely filed it runs from the April 15th of the calendar following the calendar year for which the FICA returns are due and filed. Thus, if a government entity seeks to implement a retroactive modification to a 218 agreement running back the full five years permitted under the Social Security Act, the earliest two years will generally be barred for assessment under the statute of limitations. If a taxpayer makes a payment of tax for which there is no corresponding assessment, the Service will return the payment.

An entity that wishes to make its payments so that they can implement modifications with a full five-year retroactive effect may enter into a closing agreement under which it waives the statute of limitations for assessment, agrees to an assessment in the amount of the tax to be paid, and agrees to pay the amount in full.

If you have any further questions on this matter, please call me at (202) 622-6010 or Don Parkinson at (202) 622-6040.

Marie Cashman