



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

OFFICE OF
CHIEF COUNSEL

Number: **200124017**
Release Date: 6/15/2001
UILC: 3121.16-01; 6413.01-00

CC:EBO:2
WTA-N-104498-00
March 31, 2000

MEMORANDUM FOR SERVICE CENTER

FROM: Patricia M. McDermott, Senior Technician Reviewer
(Employee Benefits and Exempt Organizations)

SUBJECT: State Retirement Contributions - FICA Adjustments

This responds to your request for assistance in reviewing Federal Insurance Contributions Act (FICA) tax refund claims and adjustments filed by school districts within the State that maintains the retirement system that received a favorable ruling from the Service in private letter ruling 102485-98 ("the ruling").¹ Specifically, you asked for assistance in determining what taxpayers are covered by the ruling and what criteria should be used in processing the refund claims.

The ruling involves the situation where members of a retirement plan established for all public schools within the State ("the plan") are required to contribute a percentage of their regular annual compensation to the plan. The members' contributions are made either by the school paying the contribution over and above the member's gross salary or, alternatively, by the school deducting the member's mandatory contribution from the member's gross salary. A statute was passed whereby the State is required to pick up a portion of each member's mandatory employee contribution and make a direct payment to the plan on behalf of the member. The member, in turn receives from the school the amount of the contribution paid by the State. The amount of the State contribution per employee varies depending on the number of years of service credited to each member. The statute required the plan to request a private letter ruling that the contributions picked up by the State are not subject to FICA and further required that, until the plan received a favorable ruling from the Service, the school districts must withhold and pay FICA taxes on the contributions.

In the ruling, the Service concluded that, in both situations, *i.e.*, where the school currently pays the member's mandatory contribution over and above the member's gross salary, and where the school currently deducts the member's mandatory contribution from the member's gross salary, the amount of employee

¹ The ruling was disclosed as PLR 9836005 (May 29, 1998).

WTA-N-104498-00

contributions picked up by the State and paid directly to the plan on behalf of the member pursuant to the State statute is not subject to FICA taxes. Inasmuch as the school districts had been paying FICA taxes on the employee contributions picked up by the State since the enactment of the statute, the school districts affected by the ruling had made an overpayment of FICA taxes which led to the refund claims or adjustments that are the subject of your request for assistance.

We note initially that only the school districts specifically involved in the ruling request have reliance on the ruling. However, to the extent that the amounts at issue in the refund claims relate to contributions paid by the State under the same statute, the same legal analysis set forth in the ruling would apply to refund claims filed by school districts that were not specifically involved in the ruling. Thus, all public schools within the State that withheld and paid FICA taxes on plan contributions paid by the State under the same statute would be eligible for a refund of or adjustment for overpaid FICA taxes, provided they followed proper procedures in claiming a refund or adjustment, as described below.

Section 6413(a)(1) of the Code provides that if more than the correct amount of FICA tax is paid with respect to any payment or remuneration, proper adjustments, with respect to both the tax and the amount to be deducted, shall be made, without interest, in such manner and at such times as prescribed by the regulations. An adjustment under section 6413(a)(1) is made on the current Form 941 and must be accompanied by a Form 941c showing the amount and period of the overpayment.

Section 6413(b) provides that if more than the correct amount of FICA tax is paid or deducted with respect to any payment or remuneration and the overpayment cannot be adjusted under section 6413(a), the amount of the overpayment shall be refunded in such manner and at such times as prescribed by the regulations.

The regulations contain various procedures by which employers and employees may recover overpayments of FICA taxes. Regulation § 31.6402(a)-2(a)(1) provides that any person who pays to the district director more than the correct amount of employer or employee tax under sections 3101 or 3111 may file a claim for refund. An employee from whom excess FICA tax has been withheld and paid may file a claim for a refund provided that he has not been reimbursed by the employer, has not authorized the employer to file a claim on his behalf, and has not claimed a credit against or refund of his income tax based on the overpayment. Regulation § 31.6402(a)-2(b).

An employer who withholds and pays more than the correct amount of employee tax is required under Regulation § 31.6413(a)-1(b) to repay or reimburse

WTA-N-104498-00

the employee for the overpayment or to apply the overcollection against employee taxes which attach to specified wages or compensation in the future. Moreover, every claim filed by an employer for a refund of excess employee tax must contain a statement that the employer has either repaid the employee or secured his written consent to the allowance of the employer's refund or credit. Regs. § 31.6402(a)-2(a)(2). Where an employer files for a refund or credit for an overpayment of employee tax in a prior year, the employer must also state that it has received from the employee a written statement that he has not successfully claimed a credit or refund and will not seek to do so.

Thus, based on the foregoing, the school district must take the overpayment as an adjustment on the Form 941 if possible. Otherwise the school district may file a refund claim. In addition, each claim for refund or adjustment filed by a school district within the State should include a statement that the school district has repaid the tax to the employees or has secured the written consent of the employees to the allowance of the refund or credit, and, if the claim relates to employee tax collected in a year prior to the year in which the claim for refund is filed, a statement that the school district has obtained from the employee a written statement that the employee has not successfully claimed a credit or refund and will not seek to do so.² See, for example, Part I of the Form 941c.

In order to verify the accuracy of the amount of refund claimed, the school district should be able to provide a schedule of the amount of State contributions on an employee-by-employee basis. The State statute pursuant to which the contributions were made applied to the plan year beginning on July 1, 1997 and ending on June 30, 1998. In our view, a schedule of the amount of State contributions on an employee-by-employee basis for the plan year beginning on July 1, 1997 and ending on June 30, 1998 would be adequate documentation of the amount of the overpayment of FICA taxes and would support entitlement to a claim for refund or adjustment.

The State statute described in the ruling related only to the plan year beginning on July 1, 1997 and ending on June 30, 1998. However, we understand that the State was expected to pass similar legislation to provide State contributions under an identical structure for later years. It is likely that the school districts did not withhold and pay FICA on the State contributions made under similar legislation for later years based on the analysis set forth in the ruling. However, to the extent that FICA was withheld and paid on such State contributions in later years and

² If the school district issued Forms W-2 to the employees that showed incorrect amounts of FICA wages and taxes, the school district must issue corrected Forms W-2.

WTA-N-104498-00

refund claims or adjustments are filed for those years, it would be appropriate to apply the same result for later years.

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

PATRICIA M. McDERMOTT