

Per Capita Payments from Proceeds of Settlements of Indian Tribal Trust Cases

Notice 2012-60

PURPOSE

This notice provides guidance concerning the federal income tax treatment of per capita payments that members of Indian tribes receive from proceeds of certain settlements of tribal trust cases between the United States and those Indian tribes.

BACKGROUND

The United States has entered into settlement agreements with the federally recognized Indian tribes listed in the Appendix to this notice, settling litigation in which the tribes allege that the Department of the Interior and the Department of the Treasury mismanaged monetary assets and natural resources the United States holds in trust for the benefit of the tribes ("Tribal Trust cases"). Upon receiving the settlement proceeds, the tribes will dismiss their claims with prejudice. See Press Release, U.S. Department of Justice, Attorney General Holder and Secretary Salazar Announce \$1 Billion Settlement of Tribal Trust Accounting and Management Lawsuits Filed by More Than 40 Tribes (April 11, 2012) at <http://www.justice.gov/opa/pr/2012/April/12-ag-460.html>. The United States foresees the possibility of future substantially similar settlements of substantially similar claims brought by other federally recognized Indian tribes.

Most of the Indian tribes that have reached Tribal Trust case settlements with the United States have directed that the settlement proceeds be transferred to accounts at private banks or other third-party institutions, where the proceeds will be invested until the tribes use the funds for various purposes, which may include making per capita payments to their members. Other Indian tribes have directed that all or part of the settlement proceeds be paid into a trust account established or maintained by the

Secretary of the Interior, through the Office of the Special Trustee for American Indians, for the benefit of the tribes, until the tribes provide instructions for the disposition of the funds, which may include making per capita payments to their members.

Although agreeing to settlements, the United States admits no liability in the Tribal Trust case settlements and the government has no fiduciary responsibilities over the Tribal Trust case settlement proceeds that the tribes receive and that are deposited into accounts at private banks or other third-party institutions.

CONSULTATION

Several tribes and other affiliated organizations requested direct consultation on the income tax treatment of per capita payments from the Tribal Trust case settlements. In response to these requests and in the spirit of Executive Order 13175, direct consultation and communication occurred. These consultations and conversations were extremely useful in preparing this notice.

APPLICABLE PROVISIONS OF LAW

Section 61(a) of the Internal Revenue Code provides that, except as otherwise provided by law, gross income means all income from whatever source derived. Under § 61, Congress intends to tax all gains and undeniable accessions to wealth, clearly realized, over which taxpayers have complete dominion. *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955), 1955-1 C.B. 207. Indians are citizens subject to the payment of income taxes. *Squire v. Capoeman*, 351 U.S. 1, 6 (1956), 1956-1 C.B. 605.

The Per Capita Act, Pub. L. No. 98-64, 97 Stat. 365, 25 U.S.C. §§ 117a through 117c, provides authority to Indian tribes to make per capita payments to Indians out of tribal trust revenue. Under 25 U.S.C. § 117a, funds held in trust by the Secretary of the Interior for an Indian tribe that are to be distributed per capita to members of that tribe may be distributed by either the Secretary of the Interior or, at the request of the governing body of the tribe and subject to the approval of the Secretary of the Interior,

the tribe.

The Indian Tribal Judgment Funds Use or Distribution Act, 25 U.S.C. §§ 1401 through 1408, concerns the distribution of certain judgment funds to Indian tribes. Under 25 U.S.C. § 117b(a), funds distributed under 25 U.S.C. § 117a are subject to the provisions of 25 U.S.C. § 1407. Under 25 U.S.C. § 1407, the funds described in that section, and all interest and investment income accrued on the funds while held in trust, are not subject to federal income taxes. See also H.R. Rep. No. 98-230 at 3 (1983), which provides that per capita distributions of tribal trust revenue “shall be subject to the provisions of [25 U.S.C. § 1407] with respect to tax exemptions.”

To determine the federal income tax treatment of per capita payments from Tribal Trust case settlement proceeds, “the test is not whether the action was one in tort or contract, but rather the question to be asked is ‘In lieu of what were the damages awarded?’” See *Raytheon Production Corp. v. Commissioner*, 144 F.2d 110, 113 (1st Cir. 1944), *aff’g* 1 T.C. 952 (1943). The fact that a suit ends in a compromise settlement does not change the nature of the recovery; the determining factor is the nature of the underlying claim. *Raytheon Production Corp.* at 114. Therefore, although the United States admits no liability in the Tribal Trust cases, *Raytheon Production Corp.* requires an examination of the underlying *claims* asserted by the tribes. The Tribal Trust case settlements described in this notice resolve claims, in relevant part, that the Department of the Interior and the Department of the Treasury mismanaged trust accounts, lands, and natural resources. The tribes assert that, absent this mismanagement of their trust funds and resources, their government-administered trust fund accounts would have substantially larger balances. See 25 C.F.R. §§ 115.002 and 115.702 (which define the trust fund accounts maintained and held by the Secretary of the Interior for federally recognized tribes and the types of payments that must be accepted into the trust account, which include those resulting from use of trust lands or restricted fee lands or

trust resources when paid directly to the Secretary of the Interior on behalf of the tribal account holder). The settlement proceeds from the Tribal Trust cases must be viewed as being in lieu of amounts that would have been held in a trust fund account for the tribe that is maintained by the Secretary of the Interior. Consequently, for federal income tax purposes, per capita payments that an Indian tribe makes from the tribe's Tribal Trust case settlement proceeds are treated the same as per capita payments from funds held in trust by the Secretary of the Interior under 25 U.S.C. § 117a. See *Raytheon Production Corp.* at 113-114; see also 25 U.S.C. § 1407 and H.R. Rep. No. 98-230 at 3 (1983).

FEDERAL INCOME TAX TREATMENT

Under 25 U.S.C. § 117b(a), per capita payments made from the proceeds of an agreement between the United States and an Indian tribe settling the tribe's claims that the United States mismanaged monetary assets and natural resources held in trust for the benefit of the tribe by the Secretary of the Interior are excluded from the gross income of the members of the tribe receiving the per capita payments. Per capita payments that exceed the amount of the Tribal Trust case settlement proceeds and that are made from an Indian tribe's private bank account in which the tribe has deposited the settlement proceeds are included in the gross income of the members of the tribe receiving the per capita payments under § 61. For example, if an Indian tribe receives proceeds under a settlement agreement, invests the proceeds in a private bank account that earns interest, and subsequently distributes the *entire* amount of the bank account as per capita payments, then a member of the tribe excludes from gross income that portion of the member's per capita payment attributable to the settlement proceeds and must include the remaining portion of the per capita payment in gross income.

LIMITATION

This notice applies only to per capita payments from proceeds of the Tribal Trust

case settlements that are described in this notice and that the United States has entered into with the Indian tribes listed in the Appendix to this notice or to proceeds of Tribal Trust case settlements that are subsequently identified as being subject to this notice on the Indian Tribal Governments page on the Internal Revenue Service website, www.irs.gov. The federal income tax treatment of other per capita payments made by the Secretary of the Interior or Indian tribes to members of Indian tribes is outside the scope of this notice and may be addressed in future guidance.

DRAFTING INFORMATION

The principal author of this notice is Sheldon Iskow of the Office of Associate Chief Counsel (Income Tax & Accounting). For further information, please contact Mr. Iskow at (202) 622-4920 (not a toll-free call).

Appendix Tribes That Have Entered into Settlement Agreements of Tribal Trust Cases

1. Assiniboine and Sioux Tribes of the Fort Peck Reservation
2. Bad River Band of Lake Superior Chippewa Indians
3. Blackfeet Tribe of the Blackfeet Indian Reservation
4. Bois Forte Band of Chippewa
5. Cachil Dehe Band of Wintun Indians of the Colusa Rancheria
6. Chippewa Cree Tribe of the Rocky Boy's Reservation
7. Coeur d'Alene Tribe
8. Confederated Salish and Kootenai Tribes
9. Confederated Tribes of Siletz Indians
10. Confederated Tribes of the Colville Reservation
11. Confederated Tribes of the Goshute Reservation
12. Crow Creek Sioux Tribe
13. Eastern Shawnee Tribe of Oklahoma
14. Hualapai Indian Tribe
15. Iowa Tribe of Kansas and Nebraska
16. Kaibab Band of Paiute Indians of Arizona
17. Kickapoo Tribe of Kansas
18. Lac Courte Oreilles Band of Lake Superior Chippewa Indians
19. Lac du Flambeau Band of Lake Superior Chippewa Indians
20. Leech Lake Band of Ojibwe
21. Lower Brule Sioux Tribe
22. Makah Indian Tribe of the Makah Reservation

23. Mescalero Apache Tribe
24. Minnesota Chippewa Tribe
25. Nez Perce Tribe
26. Nooksack Indian Tribe
27. Northern Cheyenne Tribe of Indians
28. Omaha Tribe of Nebraska
29. Passamaquoddy Tribe of Maine
30. Pawnee Nation
31. Prairie Band of Potawatomi Nation
32. Pueblo of Zia
33. Quechan Tribe of the Fort Yuma Reservation
34. Red Cliff Band of Lake Superior Chippewa Indians
35. Rincon Luiseño Band of Indians
36. Rosebud Sioux Tribe
37. Round Valley Indian Tribes
38. Salt River Pima-Maricopa Indian Community
39. Santee Sioux Tribe of Nebraska
40. Sault Ste. Marie Tribe
41. Shoshone-Bannock Tribes of the Fort Hall Reservation
42. Soboba Band of Luiseno Indians
43. Spirit Lake Dakota Nation
44. Spokane Tribe of Indians
45. Standing Rock Sioux Tribe
46. Stillaguamish Tribe of Indians
47. Summit Lake Paiute Tribe
48. Swinomish Indian Tribal Community
49. Te-Moak Tribe of Western Shoshone Indians
50. Tohono O'odham Nation
51. Tulalip Tribes
52. Tule River Indian Tribe
53. Ute Indian Tribe of the Uintah and Ouray Reservation
54. Ute Mountain Ute Tribe
55. Winnebago Tribe of Nebraska