



# ITG News

Keeping First Nations Informed



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## Message From The Director



As the office of Indian Tribal Governments moves into its fifth year of existence, I want to reiterate my commitment to maintaining open communications with our customer base, America's First Nations. While tax issues are often complex and sometimes contentious, we are committed to ensuring that we do everything possible to assist in resolving federal tax concerns.

We continue to seek opportunities to dialogue with tribes and tribal associations. We have found these opportunities to be invaluable, not only for the ability it provides us to share current tax information, but also for the opportunity to listen to questions and concerns on the part of tribes. We welcome all invitations to meet with individual tribes, regional tribal groups, tribal tax associations, and tribal leadership councils.

We have continued to enhance our web site, by adding new products, such as Publication 4268 – an Employment Tax Guide for Tribes, to existing products such as our Frequently Asked Questions and Publication 3908 - the gaming tax guide. Because many tribes have told us that they have minimal Internet access, we have also created and distributed publications, along with common tax forms, via a CD-Rom. If you would like a copy of the CD-Rom please feel free to contact your ITG Specialist.

As many of you may be aware, several years ago the Tax Exempt Government Entities Division formed an outside stakeholder group to assist in identifying areas where the Service needed to undertake improvements to better meet customer needs. The Advisory Committee to the TEGE Commissioner (ACT) has 20 total members who each serve a multi-year term. I am pleased to announce that Robert Gips and Lenor Scheffler were recently appointed to fill vacancies on the ACT, and will be representing tribal interests. Both have extensive experience with tribal issues, and we look forward to their invaluable contributions.

Finally, I want to ensure that all of you feel free to contact me at any time with any concerns you may have that cannot be resolved by our field staff. I can be contacted at (202) 283-9800, or via e-mail at [christie.jacobs@irs.gov](mailto:christie.jacobs@irs.gov).

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**Christie Jacobs**



## An Incentive to Join EFTPS

The Internal Revenue Service has announced an incentive to encourage enrollment in and use of the Electronic Federal Tax Payment System (EFTPS). Approximately 1 million employers could qualify for a refund of a previously paid federal tax deposit (FTD) penalty.

The EFTPS-FTD penalty refund offer allows business taxpayers an opportunity to receive an automatic one-time penalty refund if they have been assessed a deposit penalty on a Form 941, Employer's Quarterly Federal Tax Return. The offer is available to employers who are not mandated to use EFTPS. To qualify for the offer, the employer must:

- use EFTPS for one year (four consecutive quarters),
- make all Form 941 payments on time and,
- have previously fully paid the penalty.

Using the electronic payment system is much more accurate and much less burdensome for taxpayers. At the same time, the government saves money because there are fewer errors, fewer notices and fewer problems.

Using EFTPS eliminates the vast majority of the errors found on paper submissions. These errors on paper coupons result in late or misapplied payments and an FTD penalty. Paying taxes using EFTPS means almost 20 times greater accuracy. Greater accuracy means fewer penalties. Beginning in 2005, the IRS will automatically determine which employers have achieved the four quarters of EFTPS compliance and reverse the most recent full-paid FTD penalty minus any outstanding taxes. No other action by the employer is necessary.

The IRS will look back up to four quarters prior to the four-quarter compliance period for a full paid FTD penalty to abate. Penalties paid earlier than one year prior to the four-quarter compliance period are not eligible for the automatic offer.

EFTPS is a free service provided by two bureaus of the U.S. Department of the Treasury, IRS and the Financial Management Service (FMS). EFTPS gives employers the ability to make federal tax payments electronically online, by phone or with batch provider software for professionals.

Employers can enroll in EFTPS by visiting [EFTPS.gov](http://EFTPS.gov) or by calling EFTPS Customer Service at 1-800-555-4477 to receive an enrollment form by mail.

EFTPS was introduced in 1996 and since that time more than 4.6 million employers have enrolled in the system to make their federal tax payments electronically. In fiscal year 2003, EFTPS processed more than 68.5 million transactions totaling more than \$1.5 trillion. Employers can make payments through a secure web site or by phone 24 hours a day, seven days a week from home or office; schedule payments up to 120 days in advance (for businesses) and 365 days in advance (for individuals); and review the last 16 months of tax payment history online or by calling Customer Service. In addition, taxpayers receive an immediate acknowledgement number for every EFTPS transaction for easy record keeping and as proof of the transaction.

### Web Links:

- Electronic Federal Tax Payment System -- <http://www.eftps.gov>
- Financial Management Service -- <http://fms.treas.gov>

If you are not already enrolled and need assistance, please contact your ITG Specialist.



## Section 501(c)(4) Entities and FUTA

Although the Consolidated Appropriations Act of 2000 allowed tribes the opportunity to be exempted from Federal Unemployment Tax, that provision did not automatically extend to entities that a tribe structured under Section 501(c)(4) of the Internal Revenue Code. As a result, advice was requested to clarify FUTA requirements for these entities, which can best be summarized through the following Questions and Answers:

Question: A Tribal government is a federally recognized tribe with its own EIN. They have a separate entity with a different EIN and an exemption under 501(c)(4). One or more of the tribal council members sit on the board, but the exempt organization makes its own decisions. The tribal government does not control it. Is the entity subject to FUTA?

Answer: Yes. The entity must file Form 940 and pay FUTA. The facts suggest this entity is wholly independent from the tribe. Although the tribal council may have some representation on the entity's board, the entity is structured so to be able to operate wholly independent of the tribe.

Question: If a Tribal government has only one entity for the tribe and has structured it under Section 501(c)(4), and the tribal council controls the exempt organization, is the entity liable for paying FUTA and filing Form 940?

Answer: No. The entity has no liability for FUTA. The facts suggest the entity could be seen as either operated directly by the tribe or wholly owned by the tribe.

Question: A Tribal government is a federally recognized tribe with its own EIN. They have a separate entity with a different EIN that is exempt from income tax under Section 501(c)(4). The board's members consist of the entire tribal council, and they control the entity. Is the 501(c)(4) entity subject to FUTA?

Answer: No. The entity has no liability for FUTA. Although there are two separate EINs, the facts suggest the entity is either operated directly by the tribe or wholly owned by the tribe, since the entire tribal council constitutes the Board of the entity.

In summary, a 501(c)(4) entity that is 100% controlled by the tribe and has no autonomy, yet does not exercise government authority on its own, will probably qualify for relief from FUTA. Other 501(c)(4) entities will normally be subject to FUTA.

## Consultation Policy Update

We continue to progress in the development of an IRS/Tribal Consultation Policy, following the outline provided by the Advisory Committee on Tax Exempt and Government Entities (ACT). The Office of Indian Tribal Governments held a series of 12 regional meetings and met with tribal representatives to listen to their input on the development of an IRS/Tribal Consultation Policy. A summary was compiled and posted to the ITG web site, and interested parties were offered an opportunity to comment on the input before April 30, 2004.

A joint IRS/Tribal group has now begun the process of developing an initial Consultation Policy draft, with further opportunities to review and comment as we proceed. We expect to have the initial draft posted to our web site by the fall of 2004.

We would like to thank everyone who has participated in the process to date, and we look forward to the continuing evolution of a Consultation Policy that will best meet the needs of all parties.



## Annual Reporting Requirements under TRDA and GITCA

Many tribes have entered into Tip Reporting agreements such as the Tip Rate Determination Agreement (TRDA) and the Gaming Industry Tip Compliance Agreement (GITCA). While these agreements assist both the tribe and the IRS in improving compliance, both also contain an annual reporting mechanism to assist in addressing noncompliance by non-participating employees. Section II(b) of the TRDA, and section 5(f) of the GITCA outline these requirements.

Many tribes have inquired about the process to be used to meet the reporting obligation. In order to assist, we will be contacting each entity with an existing agreement in order to determine the reporting process that will work best for both parties. In the interim, any questions concerning the annual reporting process can be directed to Julie Reese at (303) 231-5250, ext. 236.

## Private Letter Ruling Clarifies Reporting Requirements for Pow-Wow Prizes

IRS Counsel has issued Private Letter Ruling (PLR) 200420028 in response to questions regarding the taxability of powwow prizes. While the PLR was issued in response to a specific tribe's question, this information is an indication of the position the IRS would take in similar cases.

The question presented was whether the tribe is required to issue a Form 1099 to a pow-wow contest winner who receives \$600 or more as a cash prize. The tribe requesting the PLR raised three arguments – they are not subject to tax and by extension not subject to information reporting, that they are not a “person” under the meaning of Section 7701, and that a pow-wow is not a trade or business for the tribe thus further exempting them from reporting the prizes.

The PLR indicated that Form 1099 was required, and provided responses to each of the three positions raised by the tribe;

1. Although federally recognized tribes are not subject to income tax, they are subject to employment taxes and information reporting requirements in the same manner as all other governmental entities. Thus, the “not subject to tax” position was not applicable as there is no nexus to information reporting requirements.
2. In *Chickasaw Nation v. United States*, 208 F.3d 871, 879 (10th Cir. 2000), the court concluded that an Indian tribe is a “person” within the meaning of section 7701(a)(1). It explained that “Congress unambiguously intended for the word ‘person,’ as used in section 7701(a)(1), to encompass all legal entities, including Indian tribes and tribal organizations, that are the subject of rights and duties.” In Revenue Ruling 85-194, 1985-2 C.B. 301, the Service ruled that section 6041 applies to an Indian tribe.
3. The regulations state that “all persons engaged in a trade or business” includes not only those so engaged for gain or profit, but also organizations the activities of which are not for the purpose of gain or profit. As a result, the information reporting requirements of section 6041 are not limited to organizations that are engaged in activities for gain or profit.

Thus, the PLR ruled that Forms 1099 are required to be issued for pow-wow prizes of \$600 or more.

???Questions???

Contact your ITG Specialist, or our toll-free call site at 877-829-5500



## Per Capita Payments

Per capita payments are distributions made to tribal members by a tribe based solely on membership in the tribe. Per capita payments or “tribal distributions” are a very diverse topic and each situation must be looked at on a case by case basis. Distributions may be derived from gaming proceeds, logging and other natural resource proceeds, land leases, land claim settlements or judgments, etc. Treaties of the individual tribes also have impact on how the tribal distributions are handled. However, the following can be used as guidance in determining whether or not distributions to tribal members are taxable.

As a general rule, all income is taxable unless exempted by a treaty or statute. Indians are not exempt from federal income tax by reason of being Indian or because their income is earned in Indian country. Therefore, distributions or per capita payments made to individual tribal members are taxable unless it can be shown either in a treaty or by statute that the payment is nontaxable. This includes, but is not limited to, distributions derived from gaming proceeds or distributions from income derived from land held in trust for the tribe and not the individual. Tribal income that is not exempt from Federal income tax by treaty or statute becomes income to the individual tribal member when it is distributed or constructively received by the individual tribal member.

Are there nontaxable distributions or per capitas? In case law, it is well settled that, unless a provision of a statute or treaty expressly allows an exemption, Indians are subject to the federal income tax to the same extent as is any other citizen. Therefore, a distribution may only be nontaxable if it is exempted by statute or treaty. A distribution that Congress has elected not to tax is income directly derived from individually allotted land that remains held in trust by the Federal government. This income must be earned by the individual for whom the allotted land is held in trust for, otherwise it becomes a taxable distribution. This income applies to rents and royalties as well as income from the sale of crops or minerals from the land. Gain from the sale of livestock raised on allotted trust land has also been ruled exempt.

Distributions may also be nontaxable if they are part of a general welfare program. Certain “need”-based payments are not taxable. Although there is not express statutory exclusion for a welfare benefit, government disbursements promoting the general welfare of a tribe are not taxable. Grants received under social welfare programs that did not require recipients to establish *individual need* have not qualified for tax-exempt status. Individuals are required to establish “need.”

*(cont'd on p6)*

**To add your name or e-mail address to our mailing list, please contact us via e-mail at [Jeff.R.Clairmont@irs.gov](mailto:Jeff.R.Clairmont@irs.gov), or call Jeff Clairmont at (406)752-6149 ext 24**

### **Tribal Employment Tax Guide Now Available**

Publication 4268, our on-line Employment Tax Guide for Tribal Governments, is now available at our web site at [www.irs.gov/tribes](http://www.irs.gov/tribes).



*(cont'd from p5)*

Other nontaxable distributions would be those specifically excluded by treaties. Treaties that denote special tax treatment, or specifically exclude certain items of income from federal taxation, may pertain to oil and gas interests, timber, fishing rights, and mineral royalties.

Once it is determined that the distribution is taxable and if the distribution is made from the tribal government to the individual, the tribal government must report the total amount of taxable per capita payments made to each tribal member on Form 1099-MISC. The total amount for each individual is reported in box 3 as other income. Withholding is only required on per capita payments if the distribution is from gaming revenue or for purposes of backup withholding. Backup withholding occurs if the individual does not provide a Social Security number or if the IRS notifies the tribe that the Social Security number is incorrect. The withholding is reported in box 4 of the 1099-MISC.

Individual tribal members report taxable per capita distributions on line 21 of the Form 1040 with a description. The correct description will allow the return to process as quickly as possible. Please enter one of the following descriptions on line 21:

**Indian Gaming Proceeds**  
**Indian Tribal Distrib**  
**Native American Distrib**

For more information on these specific issues, contact the Indian Tribal Governments specialist in your area.

## **Tribal Governments are Ineligible to be Shareholders of S Corporations**

The IRS has issued Revenue Ruling 2004-50 in response to questions about whether an Indian tribal government can be an eligible S Corporation shareholder under section 1361. The facts of the Revenue Ruling are that the tribe is a federally recognized tribe and is a shareholder in a corporation formed under the laws of the state. The question was asked if the corporation could make an election to be an S corporation.

The Revenue Ruling indicates that under Section 1361, an S corporation cannot have as a shareholder a person who is not an individual. This rule is exempted for organizations under sections 401(a) and 501(c)(3). Section 401(a) organizations are qualified pension, profit-sharing and stock bonus plans. Section 501(c)(3) organizations are more commonly known as charitable organizations. Based on the law and guidance analyzed in the Revenue Ruling, because an Indian tribal government is not subject to tax as an individual under Section 1, it is not considered an individual under Section 1361, nor does it qualify under the exception for Section 401(a) and 501(c)(3) organizations. As a result, an Indian tribal government is not an eligible S corporation shareholder and the corporation cannot make an election to be an S corporation.

Thus, a federally recognized Indian tribal government is not an eligible S corporation shareholder for purposes of Section 1361.

# Federal Tax Calendar for Third Quarter 2004

## July 2004

SUN	MON	TUE	WED	THU	FRI	SAT
				1	2 * Payroll date 6/26-6/29	3
4	5	6	7	8 * Payroll date 6/30-7/2	9 * Payroll date 7/3-7/6	10
11	12 Employees report tips from June	13	14 * Payroll date 7/7-7/9	15 ** Monthly Deposit for June	16 * Payroll date 7/10-7/13	17
18	19	20	21 * Payroll date 7/14-7/16	22	23 * Payroll date 7/17-7/20	24
25	26	27	28 * Payroll date 7/21-7/23	29	30 * Payroll date 7/24-7/27	31

## August 2004

SUN	MON	TUE	WED	THU	FRI	SAT
1	2	3	4 * Payroll date 7/28-7/30	5	6 * Payroll date 7/31-8/3	7
8	9	10 Employees report tips from July	11 * Payroll date 8/4-8/6	12	13 * Payroll date 8/7-8/10	14
15	16 ** Monthly Deposit for July	17	18 * Payroll date 8/11-8/13	19	20 * Payroll date 8/14-8/17	21
22	23	24	25 * Payroll date 8/18-8/20	26	27 * Payroll date 8/21-8/24	28
29	30	31				

\* = Make a Payroll Deposit if you are under the semi-weekly deposit rule. \*\* = Make a Monthly Deposit if you qualify under that

7 NOTE: Deposits made through EFTPS are due one day prior to the dates listed.

# September 2004

SUN	MON	TUE	WED	THU	FRI	SAT
			1 * Payroll date 8/25-8/27	2	3 * Payroll date 8/28-8/31	4
5	6	7	8	9 * Payroll date 9/1-9/3	10 * Payroll date 9/4-9/7 Employees report tips from August	11
12	13	14	15 * Payroll date 9/8-9/10 ** Monthly Deposit for August	16	17 * Payroll date 9/11-9/14	18
19	20	21	22 * Payroll date 9/15-9/17	23	24 * Payroll date 9/18-9/21	25
26	27	28	29 * Payroll date 9/22-9/24	30		

\*= Make a Payroll Deposit if you are under the semi-weekly deposit rule.

\*\*= Make a Monthly Deposit if you qualify under that rule.

NOTE: Deposits made through EFTPS are due one day prior to the dates listed

## Return Filing Dates

### July 1st

File Form 11-C to register and pay the annual Occupational tax if you are in the business of taking wagers

### August 2nd

File Form 941 for the quarter ended June 30, 2004. If the tax was deposited in full and on time, file by August 10th.

File Form 730 and pay the tax on applicable wagers accepted during June

### August 31st

File Form 730 and pay the tax on applicable wagers accepted during July

### September 30th

File Form 730 and pay the tax on applicable wagers accepted during August