



# INDIAN TRIBAL TAX DEVELOPMENTS IRS GUIDANCE AND FEDERAL COMPLIANCE INITIATIVES

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## Speakers:

- **John Saltmarsh (Program Manager, ITG, Internal Revenue Service)**
- **Dante Desiderio (Executive Director, Native American Finance Officers Association)**
- **John Dossett (General Counsel, National Congress of American Indians)**
- **Wendy S. Pearson (Tax Attorney, Pearson Law Offices, PS)**



# I. Agenda

- Recent IRS Guidance on Tribal General Welfare Programs (Revenue Procedure 2014-35)
- H.R. 3043—Overview and Impact on IRS Guidance
- Pending IRS Guidance on Distributions from Trust Accounts under Per Capita Act (Notice 2014-17)
- New Developments: (1) Tribal-IRS consultation on policy and compliance, (2) Low-Income Housing Tax Credit parity for tribal projects, (3) Forthcoming IRS guidance on casino tax reporting issues, (4) IRS Closing Agreements.



## II. Revenue Procedure 2014-35

- Development and Background
- General Criteria
- Safe Harbors
- Benefits not Considered Compensation for Services



## Background: General Welfare Exclusion

- Administrative Doctrine
- Three part test
  1. Must be made pursuant to a governmental program of the tribe
  2. Must be for the promotion of general welfare
  3. Must not be compensation for services.



## Background (continued)

- Voluminous guidance – need to articulate exclusion for Tribes
  - Revenue Procedures, Revenue Rules, Tax Court Decisions, Chief Counsel Memos & Private Letter Rulings
- “Promotion of general welfare” frequently defined by IRS as involving a determination of individual or family need (focused on financial need)



## Purpose of Rev. Proc. 2014-35

- The general purpose - provide safe harbors where the “need” requirement is presumed to be met.
- Under Rev. Proc., the traditional three-part General Welfare Exclusion test (which includes a need requirement) is still applicable if a safe harbor does not apply.



## **Purpose of Rev. Proc. 2014-35 (continued)**

If five general criteria are met, and a payment falls within the 5 safe harbors (23 program categories), then the “need” element is presumed to be met





# General Criteria

1. Specific Indian tribal government program
2. Program has written guidelines regarding how to qualify
3. Available to any tribal member, qualified nonmember, or identified group of tribal members/qualified non members
4. Does not discriminate
5. Not compensation for services
6. Not lavish or extravagant



# Safe Harbor Categories

- Housing programs
- Educational programs
- Elder and disabled programs
- Other qualifying assistance programs
- Cultural and religious programs



## Exclusive List or Illustrative?

- List is of Categories is exclusive,  
but...
- Examples (e.g., ....) are only illustrative



## Books and Records

- Keep records!
- See IRS regulations, section 1.6001-1



### III. H.R. 3043

- Codifies Tribal General Welfare doctrine
- Contains special provision for amounts paid in cash or in kind for certain ceremonial activities
- Establishes Tribal Advisory Committee and IRS Training Mandates
- Suspends certain IRS audits and gives IRS authority to waive penalties and interest



## Codification of Indian GWE

- `(a) In General- Gross income does not include the value of any Indian general welfare benefit.
- `(b) Indian General Welfare Benefit- For purposes of this section, the term `Indian general welfare benefit' includes any payment made or services provided to or on behalf of a member of an Indian tribe (or any spouse or dependent of such a member) pursuant to an Indian tribal government program, but only if--



## Codification of Indian GWE (cont.)

- `(1) the program is administered under specified guidelines and does not discriminate in favor of members of the governing body of the tribe, and
- `(2) the benefits provided under such program--
  - `(A) are available to any tribal member who meets such guidelines,



## **Codification of Indian GWE (cont.)**

(B) are for the promotion of general welfare,

(C) are not lavish or extravagant, and

(D) are not compensation for services.





## Special Rule for Ceremonial Payments

“(5) CEREMONIAL ACTIVITIES- Any items of cultural significance, reimbursement of costs, or cash honorarium for participation in cultural or ceremonial activities for the transmission of tribal culture shall not be treated as compensation for services.”



## Special Definitions and Rules

- “Statutory Construction- Ambiguities in section 139E of such Code, as added by this Act, shall be resolved in favor of Indian tribal governments and deference shall be given to Indian tribal governments for the programs administered and authorized by the tribe to benefit the general welfare of the tribal community.”



## Special Definitions and Rules

- “Indian tribal government’ includes any agencies or instrumentalities of an Indian tribal government and any Alaska Native regional or village corporation....”
- “A program shall not fail to be treated as an Indian tribal government program solely by reason of the program being established by tribal custom or government practice.”
- Dependent is defined using a modified version of the Tax Code definition (as found in Section 152)
- Does not define “tribal member” or “spouse”



## Special Definitions and Rules

- Does not define for the promotion of general welfare
- But legislative history (floor statements and colloquy) establishes that Congress intends IRS to apply this phrase “no less favorable” than its approach in Rev. Proc. 2014-35 and not as requiring “individualized determinations of financial need”
- Does not define “lavish or extravagant,” but directs that IRS establish guidelines in consultation with Advisory Committee



## IV. IRS Guidance on Per Capita Distributions from Tribal Trust Revenue

**March 10, 2014**- IRS Notice 2014-22 issued, allowing comments until *September 17, 2014*

**Rule:** Per Capita Act protects per capita distributions of tribal trust revenue from taxation

**Exceptions:** Addressing “rare” abuses-not exclusive

- 1) Disguised Compensation
- 2) Disguised Business Profits
- 3) Disguised Gaming Per Capita



# Compensation Exception

If it is compensation, it cannot be a trust per capita

## Indicia of compensation

- Recipients were previously paid wages, now only trust “per capita”
- Recipients receive disparate share 15:1 ratio
  - Smaller disparate distributions ok – elders 2:1
- Received for services as Directors



# Business Profits Exception

**Cannot use trust account to make distributions of business profits on a tax-exempt basis**

**Indicia of abuse:**

- Tribe charges its tribal enterprise “rent” equal to the net profits of the enterprise
- Trust per capita paid to enterprise owners equal to net profits



# Gaming Per Capita Exception

- Distribution of gaming revenue is taxable
- Indicia of disguised gaming revenue
  - 1) “Rent” paid by casino equal to 50% of net gaming revenue
  - 2) “Rent” deposited into trust and distributed as exempt trust per capita payments to all members





## IV. New Developments

- Tribal-IRS Consultation on Policy and Compliance
- Low-Income Housing Tax Credit Parity
- Future IRS Guidance on Casino Tax Reporting
- IRS Website on ITG Closing Agreements



## Any Questions?

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