

Application of the General Welfare Exclusion to Indian Tribal Government Programs That Provide Benefits to Tribal Members

Notice 2015-34

PURPOSE

The Tribal General Welfare Exclusion Act of 2014 (the Act), Pub. L. No. 113-168, 128 Stat. 1883 (2014), added § 139E to the Internal Revenue Code. This notice provides guidance to taxpayers about the effect of the Act on Rev. Proc. 2014-35, 2014-26 I.R.B. 1110. Taxpayers may continue to rely on Rev. Proc. 2014-35, which provides safe harbors under which certain benefits provided under Indian tribal government programs may be excluded from income under the general welfare exclusion.

This notice also requests comments about the interpretation and application of § 139E.

BACKGROUND

Under § 61(a), except as otherwise provided in subtitle A, gross income means all income from whatever source derived. Indians are citizens subject to the payment of income taxes as are other citizens. *Squire v. Capoeman*, 351 U.S. 1, 6 (1956), 1956-1 C.B. 605, 607. The Internal Revenue Service (IRS) has consistently concluded, however, that certain payments made to or on behalf of individuals by governmental units under governmentally provided social benefit programs for the promotion of general welfare are not included in a recipient's gross income (general welfare exclusion). To qualify under the general welfare

exclusion the payments must (1) be made pursuant to a governmental program; (2) be for the promotion of general welfare (that is, based on need); and (3) not represent compensation for services.

Rev. Proc. 2014-35 provides safe harbors under which the IRS will conclusively presume that the need requirement of the general welfare exclusion is met for benefits provided under Indian tribal government programs described in sections 5.02 or 5.03 of the revenue procedure, and will not assert that benefits provided under programs described in section 5.03 of the revenue procedure represent compensation for services.

New § 139E(a) provides that gross income does not include the value of any Indian general welfare benefit. Section 139E(b) defines “Indian general welfare benefit” as any payment made or service provided to or on behalf of a member of an Indian tribe (or a spouse or dependent of a member) under an Indian tribal government program but only if (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 the program are available to any tribal member who meets the guidelines, are for the promotion of general welfare, are not lavish or extravagant, and are not compensation for services.

Section 139E(c)(3) provides that the Secretary shall, in consultation with the Tribal Advisory Committee (established under section 3(a) of the Act), create guidelines for what constitutes lavish or extravagant benefits in the context of Indian tribal government programs.

Section 139E(c)(4) provides that an Indian tribal government program may be established by tribal custom or government practice.

Section 139E(c)(5) provides that any items of cultural significance, reimbursement of costs, or cash honoraria for participation in cultural or ceremonial activities for the transmission of tribal culture are not treated as compensation for services.

APPLICATION

Section 139E codifies (but does not supplant) the general welfare exclusion for certain benefits provided under Indian tribal government programs. *Compare* Rev. Rul. 2003-12, 2003-1 C.B. 283 (§ 139(b)(4) codifies but does not supplant the general welfare exclusion for certain governmental disaster relief payments). Taxpayers may continue to rely on Rev. Proc. 2014-35, which is broader than § 139E in some respects, and which provides certainty that the need requirement is satisfied for the benefits described in section 5.02 or 5.03 of the revenue procedure and that the benefits described in section 5.03 of the revenue procedure are not compensation for services.

Other exclusions from income, such as § 139D (Indian health care benefits), continue to apply to benefits provided under Indian tribal governmental programs independently of whether the benefits qualify for exclusion under § 139E or the general welfare exclusion.

REQUEST FOR COMMENTS

The Treasury Department and the IRS request comments on the following issues arising under § 139E that may be addressed in future published guidance:

(1) What guidelines would be helpful to Indian tribal governments in determining whether benefits provided under governmental programs are lavish or extravagant?

(2) What tribal customs or government practices may establish an Indian tribal government program administered through specific guidelines under § 139E(b)(1) and § 139E(c)(4)? How may programs established by tribal custom or government practice be identified?

(3) How should items of cultural significance, cash honoraria, and cultural or ceremonial activities for the transmission of tribal culture under § 139E(c)(5) be defined?

The Treasury Department and the IRS also invite comments on other issues pertaining to § 139E or other provisions of the Act.

Comments may be submitted in writing on or before October 14, 2015. Comments should be mailed to Internal Revenue Service, CC:PA:LPD:PR (Notice 2015-34), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044, or sent electronically to Notice.Comments@irs.counsel.treas.gov. Please include "Notice 2015-34" in the subject line of any electronic communications. Alternatively, comments may be hand delivered Monday through Friday between the hours of 8:00 a.m. and 4:00 p.m. to CC:PA:LPD:PR (Notice 2015-34), Courier's Desk, Internal Revenue Service, 1111 Constitution Ave., NW, Washington, DC. All comments will be available for public inspection and copying.

DRAFTING INFORMATION

The principal author of this notice is Sheldon Iskow of the Office of Associate Chief Counsel (Income Tax and Accounting). For further information regarding this notice, please contact Mr. Iskow at (202) 317-4718 (not a toll-free call).