

Contribution Act (“FICA”) taxes). For federal employment tax purposes, remuneration arising from the employer-employee relationship constitutes wages even though at the time of payment the individual is no longer an employee. *See* Treas. Reg. § 31.3401(a)-1(a)(5) (FITW); Treas. Reg. § 31.3121(a)-1(i) (FICA); Treas. Reg. § 31.3306(b)-1(i) (FUTA); *see also* Social Security Board v. Nierotko, 327 U.S. 358 (1946) (holding that back pay provided by an employer under the National Labor Relations Act to an illegally terminated employee for a period during which the individual performed no services for the employer was wages for social security benefit purposes). Thus, any debt-discharge income of the executives would constitute wages for federal employment tax purposes. Consistent with the Service’s position in Rev. Rul. 2004-37, federal income tax and the employee share of FICA taxes should be withheld with respect to the deemed payment of the wage amount, and the employer’s share of FICA taxes and FUTA taxes should be paid with respect to

the same amount. *See, e.g.*, I.R.C. § 3402(a) and Treas. Reg. § 31.3402(a)-1(c) (requiring employers to deduct and withhold Federal income tax even if the wages are paid in a form other than money); I.R.C. §§ 3101 and 3111 (imposing FICA taxes on wages) and Treas. Reg. § 31.3102(a)-1(a) (requiring employers to deduct and withhold FICA tax regardless of the fact that the wages are paid in a form other than money); I.R.C. §§ 3301, 3306(b), and 3306(c) (combining to impose FUTA taxes on employers regardless of the fact that wages are paid in a form other than money).

Distributing is in a difficult position with respect to withholding and employment taxes arising from the debt discharge in a situation like this because although Distributing did not actually employ the executives (its subsidiary, Controlled, was the employer), Distributing was the party that exercised control over the “payment” of the wages in question (the debt discharge), and it will therefore be treated as the employer for withholding purposes. Section 3401(d)(1)

provides that if the person (service recipient) for whom the individual performs or performed services does not have control of the payment of the wages for such services, the term “employer” means the person having control over the payment of such wages. Under case law, a similar result would be reached for FICA and FUTA tax purposes. *See, e.g.*, *Otte v. United States*, 419 U.S. 43 (1974); *In re Armadillo Corp.*, 561 F.2d 1382 (10th Cir. 1977); *Cencast Services, L.P. v. United States*, 62 Fed. Cl. 159 (2004). In this case, then, Distributing will be treated as the employer for withholding and employment tax purposes because Controlled, the actual employer, did not control the payment of the wages attributable to the debt discharge. Distributing would thus be liable for FITW (most likely at supplemental rates of either 25 or 35 percent, as circumstances require) and FICA tax withholding in addition to paying the employer’s share of Federal employment taxes for individuals whom it did not actually employ.

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2005-2006 **NOMINEES**

In accordance with sections 6.1 and 6.3 of the Section of Taxation Bylaws, the following nominations have been submitted by the Nominating Committee for terms beginning at the conclusion of the 2005 Annual Meeting in August. Under the Section Bylaws, the current Chair-Elect, Dennis B. Drapkin of Dallas, TX will become Chair at the conclusion of the 2005 Annual Meeting. ■

CHAIR-ELECT:

Susan Serota

New York, NY

VICE CHAIRS:

Jerald August
Charles Egerton
Gregory Jenner
William Paul
Elinore Richardson
Sylvan Siegler

West Palm Beach, FL
Orlando, FL
Washington, DC
Washington, DC
Toronto, Canada
Kansas City, MO

SECRETARY:

Christine Agnew

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ASSISTANT SECRETARY:

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COUNCIL DIRECTORS:

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Richard Gallagher
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