

A Native American dancer in traditional regalia, including a large feathered headdress and a red tunic, performing a dance. The background shows a hazy landscape with mountains under a blue sky.

IRS, GWE, and Everything Related

September 28, 2021

Agenda

- Introduction
- IRS Update – Telly Meier
- TTAC and GWE – Ken Parsons
- SSI and GWE – F. Michael Willis and Renee Ferguson
- Questions and Answers

General Welfare Exclusion

- The IRS has long recognized an income tax exclusion for tribal members who receive tribal government program benefits for the promotion of general welfare.
- Disagreements over where the line is between taxable per capita and non-taxable general welfare led to IRS guidance and legislation, both coming in 2014.
- Revenue Procedure 2014-35 (IRS Safe Harbor)
 - Programs for housing, education, elder, disabled, cultural and religious
- Tribal General Welfare Exclusion Act of 2014
 - Intended to be broader than IRS Safe Harbor

General Welfare Exclusion

- Under both Safe Harbor and Act, no income/no 1099 if program meets certain requirements, including:
 - Benefits available to all members
 - Distribution of benefits does not discriminate
 - Benefits are not compensation
 - Benefits are not lavish or extravagant
- The Act imposed a moratorium on IRS audits involving general welfare issues. This moratorium remains in effect, and will likely not end until after 2021 (or beyond).
- The moratorium cannot be lifted until the Secretary of the Treasury, in consultation with the Tribal Treasury Advisory Committee (“TTAC”), establishes and requires training and education for IRS field agents on general welfare and other tribal tax issues.

Treasury Tribal Advisory Committee (TTAC)

- The Treasury Tribal Advisory Committee (TTAC) was established by the Tribal General Welfare Exclusion Act of 2014.
- The purpose of TTAC is to advise the Treasury Secretary and Internal Revenue Service on matters relating to the taxation of Indians, the training of Internal Revenue Service field agents, and the provision of training and technical assistance to tribal financial officers.



TTAC Subcommittees

- In 2019, the TTAC established three subcommittees:
 - Implementation of the Tribal General Welfare Exclusion Act (GWE Subcommittee)
 - Tribal Pensions; and
 - Dual Taxation.
- The GWE Subcommittee is organized as follows:
 - Co-Chairs
 - Chairman W. Ron Allen (Jamestown S’Klallam)
 - Councilwoman Sharon Edenfield (Confederated Tribes of Siletz Indians)
 - Subcommittee Members:
 - Lawrence Stafford, Councilmember, Federated Indians of Graton Rancheria.
 - Robyn Delfino, Tribal Treasurer, Pechanga Band of Luiseño Indians
 - Sam Cohen, In-House Counsel, Santa Ynez Band of Chumash Indians
 - Wendy Pearson, Of Counsel, Hobbs Strauss Dean & Walker
 - Robert Yoder, Attorney, Yoder & Langford
 - Kenneth Parsons, Partner, Holland and Knight

GWE Subcommittee's Work

- The GWE Subcommittee is charged with providing the TTAC a recommendation on:
 - (1) implementation of the substantive provisions of the General Welfare Exclusion Act; and
 - (2) implementation of the training provisions set forth in the Act.
- Due to this broad responsibility, the Subcommittee chose to begin this work in steps and developed a work plan which was approved at the May 2020 TTAC meeting.
 - The work plan is focused on providing recommendations on the implementation of the GWEA, with a specific emphasis on undefined and/or ambiguous provisions.
- To ensure their work is informed by tribal input and captures practical considerations, the Subcommittee developed a solicitation letter seeking feedback from tribal leaders and the public. The letter sought input on two categories of items:
 - set of core GWE principles; and
 - key GWE program design issues.

Part 1: GWE Core Principles

- The GWE Subcommittee has developed the following seven core principles that it believes will be helpful in developing future GWE guidance.
 - **Flexibility:** In accordance with federal tribal self-determination principles, GWE guidance must recognize tribal jurisdiction, sovereign discretion, and exclusive authority to budget for general welfare benefits and determine such programs and benefit levels in the design, development and administration of programs according to the unique circumstances, needs, customs, culture, traditions and government practices of Tribal governments. GWE definitions must not be used to narrow or restrict tribal rights otherwise provided under the Act.
 - **Deference:** GWE guidance must reflect the canon of construction set forth in Section 2(c) of the Tribal General Welfare Exclusion Act (“TGWEA” or the “Act”): that ambiguities in Code Section 139E shall be resolved in favor of Tribal governments and deference shall be given to Tribal governments for the programs administered and authorized by the Tribe to benefit the distinctive general welfare needs of each tribal community.

Part 1: GWE Core Principles (cont.)

- **Continued:**

- **Purpose:** GWE guidance must reflect the Act's purpose in promoting tribal traditions, culture, custom and government practices, as well as the promotion of self-determination and self-governance. Tribal budget dollars reserved for promoting the general welfare shall not be diminished by the payment of taxes or costs of compliance.
- **Expansion of the Common Law:** GWE guidance must reflect the Act's intent to build upon rather than supplant the common law. Thus, Tribes should be able to continue to rely upon the common law as reflected in Revenue Procedure 2014-35 as well as Code Section 139E

Part 1: GWE Core Principles (cont.)

- **Continued:**

- **Prospective Enforcement:** GWE guidance must confirm that it will be applied prospectively and that Tribes and Tribal citizens who have developed and administered programs in good faith will not be audited retroactively once the temporary suspension is lifted.
- **“Lavish or Extravagant” is Relative:** GWE guidance must recognize that “lavish or extravagant” is a relative term that depends on the unique circumstances of each tribal community
- **Use of “Safe Harbors”:** GWE guidance must confirm that the use of “safe harbors” is optional and not a limitation on the statutory rights that Tribes have under the Act or Code Section 139E.

Part 2: Specific Concepts

- The Subcommittee is seeking additional information on nine key program design issues to ensure that future guidance reflects the types of features that Tribal governments have found helpful in developing GWE programs in practice.
 - **GWE versus gaming per capita.** Benefits designed to address special purposes or needs should not be presumed or taxed as “per capita.”
 - **Minor Trusts.** When Tribes pay benefits from an IGRA trust, they should be entitled to structure those payments to comply with the GWE.
 - **Substantiating GWE Expenses.** Determining substantiation is a sovereign function of the Tribe. Substantiation should be presumed when a Tribe can show that (a) GWE benefits are reasonably calculated to meet general welfare needs/purposes; and (b) the method of distribution is reasonably expected to achieve program goals.
 - **Code Section 139E versus Rev Proc 2014-35.** Confirm that Tribes may continue to rely on both 139E and Rev Proc 2014-35 as 139E is a statutory benefit and Rev Proc 2014-35 reflects the “common law.” Consider guidance confirming that 139E expands rather than supplants the common law.

Part 2: Program Design Features Con't

- **Flexible “Safe Harbor” Plans.** Confirm that the “safe harbors” in Rev. Proc. 2014-35 are not exclusive and that Tribal Governments can establish their own “safe harbors.”
- **Compensation for Services.** Assistance that includes, but is not limited to, training, community service, cultural and traditional practices and ceremonial activities shall not be considered compensation for services.
- **Prospective Enforcement.** Confirm that the GWE guidance, once developed, will be applied prospectively only, not retroactively. Establish a grace period of not less than one year for Tribes to comply with the new guidance before it applies.
- **Lavish and Extravagant.** GWE guidance must recognize that “lavish or extravagant” is a relative term that depends on the unique circumstances of each tribal community and the type of benefit provided (e.g., one-time down payment vs. monthly utility assistance).

Part 2: Program Design Features Con't

- **Wellness and Health-Related Programs.** Confirm that wellness and health-related programs, including wellness incentive programs, qualify under GWE.
- **Accumulated or Deferred GWE Benefits.** Consider guidance confirming that GWE benefits can be deferred to future dates and allow accumulation of GWE benefits prior to distribution.
- **SSI/Needs-Based Assistance Limits.** Treasury must engage in inter-agency assistance to educate other federal departments that tribal general welfare benefits are not income and should not be included in eligibility determinations for assistance like Supplemental Social Security Income or Supplemental Nutrition Assistance.
- **Items of Cultural Significance, Reimbursement of Costs, and Honorariums. Other GWE programs.** IRS must defer to tribal determinations on what it means to participate in cultural or ceremonial activities for the transmission of tribal culture. A Tribe's determination of the proper amount of honorarium should be presumptively reasonable and fair value.
- **Disaster Relief and Similar Assistance.** Expressly recognize disaster relief and similar assistance as a presumed GWE benefit.
- **Rules of Construction.** Add regulatory requirements for IRS to comply with the TGWEA special rule of construction.

Next Steps

- Treasury received the GWE Subcommittee's report and proposed regulations in June 2021.
- GWE Subcommittee anticipates an opportunity for tribal consultation before Treasury finalizes rules and a grace period before rules are effective.
- In the meantime, tribes should use their reasonable judgment when designing and administering general welfare programs.
 - **ASSERTIVE APPROACH!**

Questions?

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Tribal General Welfare Exclusion Act

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Tribal General Welfare Exclusion Act (TGWE Act)

- Ensures tribal government general welfare assistance payments to members are not subject to federal tax
- Recognizes that tribal governments have a unique status in the federal system -- tribal programs address the general welfare needs of their entire communities
 - For tribal programs, individual need is “conclusively presumed” and NOT based on individualized determinations of members’ financial need

The TGWE Act and SSI Benefits

- The TGWE Act does not address whether tribal payments are counted when determining a member's eligibility for federal assistance, such as the Supplemental Security Income (SSI) program.
- For the SSI program, SSA excludes from eligibility determinations any governmental assistance that is furnished to an individual **based on need**
 - SSA: "Based on need" = individualized **income-based** need
- Tribal programs generally do not require income-based means testing
- Result: In some parts of Indian country, tribal members have lost SSI benefits due to their receipt of tribal general welfare benefits

Tribal Interests Affected by the SSA Policy

- In SSA's recent consultation, tribal representatives pointed out concerns regarding the misalignment of SSA policy and the TGWE Act.
 - Tribal general welfare programs support efforts to rebuild tribal nations
 - These efforts are undermined by SSA policy.
 - Comments encouraged SSA to follow the IRS approach – “individual need is conclusively presumed” (and exclude tribal payments from SSI eligibility determinations)

Proposed Legislative Language

Congress can also resolve the issue. Proposed legislation:

26 U.S.C. § 139E is amended by adding at the end a new subsection (d) as follows:

(d) COORDINATION WITH CERTAIN FEDERAL ASSISTANCE PROGRAMS. For purposes of eligibility under Title XVI of the Social Security Act (Supplemental Security Income for the Aged, Blind and Disabled), any amount excluded from gross income under this section shall not be treated as income or resources.



Social Security Administration -- Action

- Hosted national Tribal consultations in April and June 2021
- Disaster Payments impact on Tribe members, feedback and course correction
- Suggestions for TGWE for process consideration
- Invitation for panel members for National Disability Forum to represent Indian Country



TGWE Act – Impact on SSI benefits

- Hosted national Tribal consultation in June on GWE with Department of Treasury
- General Welfare Payments are counted as income/resources for SSI benefits
- SSA requires an “assistance based on need” plan to request to exclude the payments
- The plan must include *income as an eligibility factor* to qualify for an SSI exclusion



Resources

<https://www.ssa.gov/people/aian/>

- Tribal Call to Action Plan
- Tribal Benefit Coordinator Guide
- Disaster Payments Policy Spotlight
- Tribal Social Security Fairness Act 2018

Questions and Answers

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