Bond Case Briefs

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Elected Constables Are Employees for Tax Purposes; County Is Employer.

In partially redacted field attorney advice, the IRS concluded that a state's elected constables aren't subject to self-employment tax, are employees for FICA and income tax withholding purposes, and that the county is the statutory employer for employment tax purposes because it controls payment to the constables.

This memorandum responds to your request for advice dated June 13, 2012, regarding the above taxpayer. This advice may not be used or cited as precedent in other cases. This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney-client privilege. If disclosure becomes necessary, please contact this office for our views.

ISSUES

1. Are the elected constables serving * * * ("constables") covered under a section 218 agreement?

2. Are the constables considered fee-based public officials for purposes of I.R.C. § 1402(c)(1) and therefore subject to self-employment tax?

3. Are the constables employees for the purposes of the Federal Insurance Contributions Act ("FICA")?

4. Are the constables employees for the purposes of federal income tax withholding ("ITW") requirements?

5. If constables are employees, who is the employer for federal employment tax purposes?

SUMMARY CONCLUSIONS

1. The constables are covered by a section 218 agreement, as established by the letter you received from the Social Security Administration. * * *

2. The constables are not solely fee-based as required by section 1402(c)(1), and therefore they are not fee-based public officials. The constables are not subject to self-employment tax.

3. The constables are employees based on the common law employee analysis and are therefore employees for purposes of FICA.

4. The constables are employees for the purposes of ITW pursuant to I.R.C. § 3401(c) because they are elected officials.

5. The employer of the constables for employment tax purposes is the County. The County controls the payment to the constables and is therefore the statutory employer under I.R.C. § 3401(d)(1).

FACTS

Background

Both the State and the County have section 218 agreements1. In order to determine whether the constables are covered under the State or County 218 agreements, you requested a determination from the Social Security Administration ("SSA") regarding whether the constables were covered under either 218 agreement. * * *, you received a letter from SSA which stated that the constable position is covered under the State 218 agreement. * * *

The County made payments to approximately * * * constables totaling approximately $* * * during the years at issue. The constables perform various services such as prisoner transport, service of summonses and warrants, court protection within the Magisterial Courts of Pennsylvania, and services relating to landlord/tenant disputes and resolutions.

Constables are elected officials within a local government in the State. The constables are required to take an oath of office and undergo a background check. They must also receive State-provided training and certification prior to performing services as a constable. Constables must provide proof to the clerk of courts that they hold professional liability insurance in amounts set by statute in order to maintain certification. Once constables are certified by the State, they have statewide authority and jurisdiction enabling him to perform services throughout the state, not just in the local area in which they were elected. Therefore, the constables may perform services for and receive payment from multiple counties. In some counties, constables serve as the primary means of law enforcement.

Constables are covered by quasi-judicial immunity. See e.g. Berg v. Allegheny County, 219 F.3d 261 (3d Cir. 2000). However, upon election, a constable must post a bond between $500 and $3000 as directed by the court to be held in trust for the use and benefit of persons who may sustain injury by reason of neglect of duty. 44 Pa C.S.A. § 7114(c).

Enacted in October of 2009, Part IV of Title 44 of the Pennsylvania Code, titled "Other Officers," sets out the provisions of State statute relating to constables. Part IV contains one chapter, Chapter 71 titled "Constables." Chapter 71 includes subchapters outlining election, appointment, conflicts, training, powers and duties, compensation, and penalties and remedies.2 A constable is elected for a term of six years. 44 Pa. C.S.A. § 7111 (2009). Constables can be re-elected for an unlimited number of terms. Per your interviews, many constables have a continuing and ongoing relationship with the County. Some of the constables in the County have held office for between 20 and 30 years. When a constable vacancy occurs, the court of common pleas for the county where there is a vacancy must appoint an individual to serve as a constable for the remainder of the term. Id. § 7121. The constable has sole power to appoint deputy constables, subject to approval of the court of common pleas. Id. § 7122.

State statute provides "[w]hile a constable or deputy constable is performing duties other than judicial duties, regardless of whether or not he is certified under this subchapter, he shall not in any manner hold himself out to be active as an agent, employee, or representative of any court, magisterial district judge or judge." Id. § 7142(f) (emphasis added). Prior to 2009, State statute provided that a constable was an independent contractor and not an employee of the Commonwealth, the judiciary, the township, or the county in which he works. This provision appears to follow a ruling of the Supreme Court of Pennsylvania which held unconstitutional as a violation of separation of powers a provision attempting to make constables employees of the State judiciary because constables perform functions of the executive branch. In re Act 147 of 1990, 528 A.2d 985, 990. (Pa. 1991).

Constable Training and Certification

State statute provides for the establishment of a board responsible for establishing, implementing and administering a constable education and training program. 44 Pa. C.S.A. § 7144 (2009). The board also certifies constables and deputy constables who have completed training requirements. Id. The constables must complete a total of 80 hours of initial training and comply with a mandatory continuing education program which may include no more than 40 required hours per year. Id. §§ 7145, 7146. Constables interviewed stated they must also attend an additional 40 hours of training for required firearms certification. The mandatory curriculum for the training consists of topics including: role of the constable in the justice system; professional development; civil law process; criminal law process; mechanics of arrest; prisoner transport and custody; and court security. State statute establishes an account to provide funds for the constable training program; the account is funded by a surcharge collected by constables as a court cost and turned over to the Department of Revenue. Id. § 7149.

Constable Powers and Duties

State statute also sets out the powers and duties of the constables. Constables are required to serve at all elections by preserving the peace at polling places. Id. § 7152. The statute directs constables to arrest individuals without a warrant for various offenses. Id. § 7158. Constables may serve as coroner; collect taxes under a warrant issued by the tax collector; and arrest a person trespassing upon any forest. Id. §§ 7154-7156.

Constables must impound trespassing livestock and notify owner to collect livestock and pay the constable for the cost of damage, care and fee for the constable. Id. § 7159. If the owner fails to pay, the livestock shall be sold at a public sale and the all money realized from the sale will be turned over to the magisterial district judge. Id. § 7159.1. The magisterial district judge then distributes payment to the landowner for damages and the constable for his services. Id.

Some other duties which constables may perform include, but are not limited to, the following: transporting defendants to arraignments and hearings; carrying out sales and ejectments in landlord-tenant disputes; serving complaints, summonses and notices; providing courtroom security; executing warrants of arrest; serving notice of election to township or borough officers; seizing registration plates and drivers' licenses. Id. §§ 7161, 7165. Criminal subpoenas can be served by police officers or constables. Sheriff's deputies are also permitted to transport prisoners.

Constables generally set their own hours of work. The magisterial district judges assign work to the constables. The constables interviewed indicated that they can turn down work but do so at the risk of not getting future assignments from that judge. The constables interviewed stated that the judges are the bosses and make the rules. A constable must be present in the courtroom when a magisterial district judge is present in court. Therefore the magisterial district courts cannot function without the services of the constable. The constables view themselves as "officers of the court." Police officers in the county do not provide courtroom or courthouse security. Sheriff's deputies perform courtroom security for the "major" courts.

Constables must provide some of the supplies necessary for the performance of their duties. For example, they must provide their own vehicles for prisoner transport, clothing, guns, ammunition and handcuffs. Some judges require a constable to be in uniform when providing courtroom security, while others simply require the constables dress professionally. There is no state-mandated uniform for constables. The court provides metal detectors and wands. Some courts also provide constables with desk space or an office. The State issues the constables ID badges with the title "PA State Constable."

* * *. Constables are not prohibited from performing services for private entities, * * *. Constables must carry an additional liability insurance policy if he performs private work.

Constable Guidelines and Discipline

* * *. * * *. A State constable handbook is in the process of being drafted * * *. During the required constable training, the constables must abide by a State-issued classroom code of conduct. The constables you interviewed stated that the State regulates how they do their job.

State statute provides for discipline of constables through Subchapter H, Penalties and Remedies. A court of common pleas may inquire into the official conduct of the constable and remove the constable from office if it determines the constable is incompetent. Id. § 7172. A constable's compensation may be withheld if he defaults on remittance of collected tax. Id. § 7173. A constable may also be subject to fines and criminal penalties for neglecting or refusing to perform duties. Id. §§ 7175, 7178. As public officials, constables are required to file Statements of Financial Interests annually with the State Ethics Commission.

Constable Payment

Constables are paid according to schedules set by statute. Where the constable is performing a service on behalf of a litigant, for example, the litigant is required to pay the constable fees in advance to the court for services desired to be performed. Id. § 7161(d). According to State statute, the court is to turn the fees over to the constable as soon as possible. Id. § 7161(e). In criminal cases, the constable fees are charged to the defendant; however, if the defendant is discharged or indigent, the fee is assessed to the county. Id. § 7161(g)(16). * * *.

Constables are reimbursed for actual mileage traveled. Id. § 7161. In certain cases when transporting prisoners, the constable may, at his discretion, be accompanied by a second constable or deputy constable; in these cases each constable shall receive payment for the transportation. Id. For services performed relating to elections, constable compensation is paid by the county. Id. § 7163. The Department of Motor Vehicles pays the constables for seizing registrations and drivers' licenses. Id. § 7165.

Constables are permitted by statute to collect monies from the public for certain items, including outstanding fines and constable fees and surcharges. Amounts collected by the constable must be turned over entirely to the court within time frames set by statute. The court then distributes payment to the constables. * * *.

* * *. Payments for election day services are paid from a separate fund by the Board of Elections.

LAW AND ANALYSIS

1. Coverage Under a Section 218 Agreement

The SSA determines whether the workers are employees within the meaning of section 210(j) of the Social Security Act, which applies the common law rules. If the SSA determines that an individual worker is covered under the section 218 agreement, the Service then has jurisdiction over the liability for FICA taxes with respect to wages paid to such individual. See I.R.C. section 3121(d)(4).

The determination of who is covered under the terms of a section 218 agreement is under the jurisdiction of the SSA. See Sec 3 (page 3) of the attached 2002 IRS-SSA MOU. The final determination of federal tax liability is under the jurisdiction of the Service. The enforcement mechanism with respect to section 218 agreements is also with the Service because the payments

under the agreements are treated as FICA taxes.

The SSA (Regional Office III, Philadelphia) has determined that the constables are covered under the State 218 agreement. * * *.

2. Fee-Based Public Officials Subject to Self-Employment Tax

Before we apply the common law employee analysis, we must determine whether the constables are fee-based public officials for the purposes of the Self-Employment Contributions Act ("SECA"). If the constables are fee-based public officials, they are subject to SECA rather than FICA ("fee-based public official exception"). SECA is imposed on the self-employment income derived by an individual from any trade or business carried on by such individual. I.R.C. §§ 1401, 1402(a).

The general rule is that the performance of the functions of a public office does not constitute a trade or business. I.R.C. § 1402(c)(1), Treas. Reg. § 1.1402(c)-2(a). However, when those functions are compensated solely on a fee basis, the performance of those functions does constitute a trade or business. I.R.C. § 1402(c)(1).

The statute provides that a trade or business does not include "the performance of the functions of a public office, other than the functions of a public office or of a State or political subdivision thereof with respect to fees received in any period in which the functions are performed in a position compensated solely on a fee basis". I.R.C. § 1402(c)(1). Treas. Reg. § 1.1402(c)-2(a)(2) provides:

If an individual receives fees after 1967 for the performance of the functions of a public office of a State or a political subdivision thereof for which he is compensated solely on a fee basis, and if the service performed in such office is eligible for (but is not made the subject of) an agreement between the State and the Secretary of Health, Education, and Welfare pursuant to section 218 of the Social Security Act to extend social security coverage thereto, the service for which such fees are received constitutes a trade or business within the meaning of section 1402(c) and § 1.1402(c)-1. If an individual performs service for a State or a political subdivision thereof in any period in more than one position, each position is treated separately for purposes of the preceding sentence.

Therefore, "fee-based public officials" are public officials — (1) who receive fees; (2) whose positions are compensated solely on a fee basis; and (3) who are not subject to a 218 agreement. Fee-based public officials are subject to SECA rather than FICA. A public office includes any elective or appointive office of a State or its political subdivision. Treas. Reg. § 1.1402(c)-2(b). Examples include a county commissioner, a judge, a marshal, a sheriff, a constable or a notary public. Id. The constables in the County are elected and are therefore public officials.

Next we must determine whether the constables are compensated solely on a fee basis. The IRS position on what constitutes a fee is clarified in Revenue Ruling 74-608. In Rev. Rul. 74-608, State statute required an elected tax collector to account for and turn over all tax collections to the treasurer of each taxing authority. State statute also authorized the taxing authority to set a salary, wage, or commission, not to exceed 5% of the tax collected, as remuneration for the tax collector. His remuneration for his term in office was a fixed percentage of the amounts collected and turned over for each taxing authority; specifically, 3 percent from the county, 4 percent from the township and 2.8 percent from the school district. The revenue ruling finds that the tax collector is not a fee-based public official because his remuneration was a salary from a government fund rather than fees collected directly from the public. Rev. Rul. 74-608 provides.

When a public official receives his remuneration in the form of fees directly from the members of the public with whom he does business, such remuneration is 'fees' within the meaning of section

1402(c)(1) of the Act. When, however, a public official receives his remuneration or salary from a government fund and no portion of the monies collected by him belongs to or can be retained by him as compensation, the remuneration is not 'fees' under section 1402(c)(1).

In Rev. Rul. 74-608, not only was the tax collector turning over what he collected from the public to the taxing authority, but also the taxing authority had the authority to determine what his remuneration would be and paid with general government funds.

For some of their duties, the constables serving this County collect monies from the public and turn them over to the County. The County then pays then constables an amount set by statute. Often the amount collected is equal to the amount due to the constable by statute. The constables also receive other payments for their services that do not come directly from the public. For example, they receive payments directly from the County for their services on Election Day. In addition, they receive a payment directly from the judge for the sale of livestock. Therefore, the constables are not solely fee-based for the purposes of SECA, as required by the clear statutory language of section 1402(c)(1).

In addition, as noted above, according to SSA, the constables are covered under the State 218 agreement. Coverage under a 218 agreement also removes the constables from the provisions of SECA pursuant to section 1402(c)(1). Therefore, the constables do not qualify for the fee-based public official exception.

3. Employees for the Purposes of FICA

The definition of employee for purposes of FICA includes "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee" and "any individual who performs services that are included in an agreement entered into pursuant to section 218 of the Social Security Act." I.R.C. § 3121(d). Since SSA has determined that constables are included in the State's section 218 agreement, they must be treated as employees for purposes of FICA. * * *.Whether an employer-employee relationship exists in a particular situation is a factual question to which common law principles apply. See Weber v. Commissioner, 103 T.C. 378, 386, aff'd. 60 F.3d 1104 (4th Cir. 1995); Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318, 323 (1992). Factors which are considered include: (1) the degree of control exercised by the principal; (2) which party invests in work facilities used by the individual; (3) the opportunity of the individual for profit or loss; (4) whether the principal can discharge the individual; (5) whether the work is part of the principal's regular business; (6) the permanency of the relationship; and (7) the relationship the parties believed they are creating. Weber v. Commissioner at 387. See also, Avis Rent A Car System v. United States, 503 F.2d 423 (2d Cir. 1974); Ewens & Miller, Inc. v. Commissioner, 117 T.C. 263, 270 (2001).

The Treasury Regulations also offer guidance in making a determination as to whether workers are employees or independent contractors:

Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who

performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

Treas. Reg. § 31.3121(d)-1(c)(2).

Additionally, Rev. Rul. 87-41 identifies twenty factors, based on an examination of cases and rulings, which indicate whether sufficient control is present to establish an employer-employee relationship. These twenty factors are to be used as a guide in determining employment status; however, special scrutiny may be required to ensure that formalistic aspects of an arrangement do not obscure its substance. The factors are (1) instructions, (2) training, (3) integration (whether the worker's services are so integrated into business operations that success of continuation of business depend upon those services, (4) services rendered personally, (5) hiring, supervising and paying assistants, (6) continuing relationship, (7) set hours of work, (8) full time required, (9) doing work on employer's premises, (10) order or sequence set (worker must perform services in the order or sequence determined by the person for whom services are performed), (11) oral or written reports, (12) payment by hour, week, month, (13) payment of business and/or travel expenses, (14) furnishing of tools and materials, (15) significant investment (if worker invests in facilities, this is an indication of independent contractor status; however, if there is a lack of investment on the part of the worker, it indicates a status of employee), (16) realization of profit or loss (if worker can realize a profit or loss, it indicates independent contractor status), (17) working for more than one firm at a time, (18) making service available to the general public, (19) right to discharge, and (20) right to terminate.

More recently the Service considers the issue under three primary categories of evidence — behavioral control, financial control, and relationship of the parties. Refer to IRM 4.23.5-1 and Independent Contractor or Employee? Training Materials, Training 3320-102 (10-96). Facts that illustrate behavioral control, or whether there is a right to direct or control how the worker performs the specific task for which he or she is hired, are (1) instructions and (2) training. Facts that illustrate financial control, or whether there is a right to direct or control how the business aspects of the worker's activities are conducted, are (1) significant investment, (2) unreimbursed expenses, (3) services available to the public, (4) method of payment, and (5) opportunity for profit or loss. Facts that illustrate the relationship of the parties are (1) employee benefits, (2) intent of parties/written contracts, (3) permanency, (4) discharge/termination, and (5) regular business activity.

The facts regarding behavioral control indicate that the constables are employees. The constables must undergo 80 hours of initial training plus up to 80 hours of additional training each year. * * *. These facts indicate that the State and/or the County have control over how the constables perform their duties.

The facts regarding financial control are mixed. The constables must turn over all monies collected to the County and then only receive payment if they properly submit forms according to the County's procedures and a judge signs off on those forms. This indicates control over the finances at the County and State level. The constables are reimbursed for their mileage and are provided some tools (metal detectors, desk). However, the constables must provide some of the tools needed themselves (cars, guns, ammunition, etc.). The constables also make an investment by posting a bond upon

election. However, the constables have a minimized financial loss because in some cases they are able to collect payment regardless of whether they are successful in their services or not. While it is legally possible for constables to provide services for the public, according to your interviews, it is rare.

The facts regarding the relationship of the parties are also mixed. The County has been treating the constables as independent contractors and reporting payments made to them on Forms 1099. In addition, they do not provide any employee benefits to the constables. However, the constables have an ongoing relationship with the County as some of them have served for more than 20 years. In addition, the constables are completely integrated into the County business; the magisterial district court cannot function without them and the County relies on them to serve notices and execute warrants because they do not have enough police officers or sheriffs to do so. The constables can be terminated by a judge for failure to perform their duties pursuant to the statute.

As in most worker classification cases, the facts are not all indicative of an employee or an independent contractor. However, on balance, it appears that the constables are employees. The State's ability to control how the constables perform their services through state statute, required training and the * * * constable handbook is an especially strong factor that indicates they are employees subject to the control of an employer.

The County maintains that the constables are not its employees. It relies, in part, on State case law which holds that the constables are independent contractors and not employees. For example, the Supreme Court of Pennsylvania held that legislation designed to bring constables within the control and direction of the judiciary was in violation of the State's constitution because it attempted to place constables, whose central functions and activities consist of exercising executive powers, within the supervisory authority of the judicial branch, thereby violating the doctrine of separation of powers. In re Act 147 of 1990, 528 A.2d 985, 990. (Pa. 1991). The court cited an earlier case that held a constable is not an employee of the Commonwealth, the judiciary, the township, or the county in which he works. Id. at 986, citing Rosenwald v. Barbieri, 462 A.2d 644 (Pa. 1983). State case law is not binding for federal income tax purposes. In addition, the court in these cases did not apply the common law employee analysis used to determine coverage under FICA. Finally, there do not appear to be any cases classifying the constables as independent contractors since the enactment of Chapter 71 to the Pennsylvania Code in 2009, discussed above. These amendments and consolidation appear to make significant changes to the law regarding constables and may change the analysis under state law. Thus, the County's reliance on state case law is unfounded.

4. Employees for the Purposes of Income Tax Withholding

I.R.C. § 3402 obligates any employer making a payment of wages to deduct and withhold tax as prescribed by the Secretary. I.R.C. § 3401(a) defines wages as all remuneration (other than fees paid to a public official) for services performed by an employee for his employer. I.R.C. § 3401(c) provides that for the purposes of income tax withholding ("ITW") requirements, an employee includes "an officer, employee, or elected official of the United States, a State or any political subdivision thereof . . ." Because the constables are elected officials of the County, they are employees for the purpose of ITW.

5. Who is the Employer?

Section 3401(d)(1) provides, that for purposes of income tax withholding, the term employer means the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person, except that if the person for whom the individual performs or performed the services does not have control of the payment of the wages for such services, the term

“employer” (except for purposes of the definition of wages) means the person having control of the payment of such wages. Neither FICA nor FUTA contains a definition of employer similar to the definition contained in section 3401(d)(1), relating to income tax withholding. However, Otte v. U.S., 419 U.S. 43 (1974), holds that a person who is an employer under section 3401(d)(1), relating to income tax withholding, is also an employer for purposes of FICA withholding under section 3102. Otte involved a trustee in bankruptcy who was an employer under section 3401(d)(1) by virtue of having control over the payment of wages owed by the bankrupt. The Court stated, “The fact that the FICA withholding provisions of the Code do not define ’employer’ is of no significance, for that term is not to be given a narrower construction for FICA withholding than for income tax withholding.” Otte, 419 U.S. at 51. The Otte decision has been extended to provide that the person having control of the payment of wages is also an employer for purposes of section 3111, which imposes the FICA tax on employers, and for purposes of section 3301, which imposes the FUTA tax on employers.3 In re Armadillo Corp., 410 F. Supp. 407 (D. Col. 1976), aff’d, 561 F.2d 1382 (10th Cir. 1977), In re Laub Baking Co., 642 F.2d 196 (6th Cir. 1981), and STA of Baltimore — ILA Container Royalty Fund v. U.S., 621 F. Supp. 1567 (D.C. Md. 1985), aff’d, 804 F.2d 296 (4th Cir. 1986) reached similar conclusions.

The constables primarily perform services for the courts, which are part of the State judiciary system. They also perform various services the County by serving on election day, executing warrants, and impounding livestock. They also perform services for private litigants, including carrying out ejectments in landlord-tenant disputes. However, the constables’ payment for all of these services is controlled by the County, as the funds come from County checking accounts and the County Manager of Constable Services verifies all submissions for payments. Even if the County is not the common law employer, the County is the employer for purposes of ITW and FICA because it controls the payments.

CONCLUSION

Based on the facts you have gathered, we agree that the constables are employees under the common law standard. Further, SSA has determined that the constables are covered under the State’s 218 agreement. Finally, we believe the County is liable for employment taxes for the constables.

Please call * * * if you have any further questions.

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(Tax Exempt & Government Entities)

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