



## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 1

[TD 10046]

RIN 1545-BL61

### Treatment of Income from Indian Fishing Rights-Related Activity as Compensation

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Final Regulations.

**SUMMARY:** This document contains final regulations providing that amounts paid to a member of an Indian Tribe as remuneration for services performed in a fishing rights-related activity may be treated as compensation for purposes of applying the limits on qualified retirement plan benefits and contributions. These regulations affect participants, beneficiaries, sponsors, and administrators of Tribal plans.

**DATES:** *Effective Date:* These regulations are effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

*Applicability Date:* For date of applicability, see §1.415(a)-1(g)(5).

**FOR FURTHER INFORMATION CONTACT:** Jamie Dvoretzky at (202) 317-4102, or Pamela Kinard at (202) 317-6000 (not toll-free numbers).

#### **SUPPLEMENTARY INFORMATION:**

##### **Authority**

This Treasury Decision contains final regulations that amend the Income Tax Regulations (26 CFR part 1) under section 415, related to the definition of the term “compensation” for purposes of contribution and benefit limits applicable to qualified

retirement plans. These final regulations are issued under the authority granted by section 415(j) of the Internal Revenue Code (Code), which authorizes the Secretary of the Treasury or his delegate (Secretary) to prescribe such regulations as may be necessary to carry out the purposes of section 415. These final regulations are also issued under the authority granted by section 7805(a), which authorizes the Secretary to prescribe all needful rules and regulations for the enforcement of the Code.

## **Background**

This document contains amendments to regulations under section 415 of the Code, which generally imposes limitations on the annual amount that a qualified retirement plan may provide, with respect to a participant, in either benefit payments or in contributions and other additions to the plan. These limitations generally are based on a participant's compensation. Section 415(c)(3) provides that the term "participant's compensation" means the compensation of the participant from the employer for the year.

Section 1.415(c)-2(a) of the Income Tax Regulations generally provides that compensation from the employer within the meaning of section 415(c)(3) includes all items of remuneration described in §1.415(c)-2(b) to the extent that the amounts are includible in gross income, but excludes the items of remuneration described in §1.415(c)-2(c), such as contributions made by an employer to a plan of deferred compensation to the extent that the contributions are not includible in the gross income of the employee for the taxable year in which contributed.

Section 7873(a)(1) provides that no tax shall be imposed on income derived from a fishing rights-related activity of an Indian tribe by (A) a member of the Indian tribe directly or through a qualified Indian entity, or (B) a qualified Indian entity. Section 7873(a)(2) provides that no employment tax shall be imposed on remuneration paid for

services performed in a fishing rights-related activity of an Indian tribe by a member of such tribe for another member of such tribe or for a qualified Indian entity.

On November 15, 2013, proposed regulations under section 415 were published in the **Federal Register** (78 FR 68780). The proposed regulations would provide that income described in section 7873(a) (“fishing rights-related income”) is included in the definition of compensation under section 415. Specifically, the proposed regulations would provide that amounts paid to a member of an Indian tribe as remuneration for services performed in a fishing rights-related activity (as defined in section 7873(b)(1)) do not fail to be treated as compensation under §1.415(c)-2(b)(1) and (b)(2) (and are not excluded from the definition of compensation pursuant to §1.415(c)-2(c)(4)) merely because those amounts are not subject to income tax or employment taxes as a result of section 7873(a)(1) and (a)(2). Thus, the determination of whether an amount constitutes wages, salaries, or earned income for purposes of §1.415(c)-2(b)(1) or (b)(2) is made without regard to the exemption from income tax under section 7873(a)(1) or employment tax under section 7873(a)(2). In addition, by permitting fishing rights-related income to be treated as wages, salaries, or earned income under §1.415(c)-2(b)(1) and (b)(2), plans that accept contributions of fishing rights-related income would not be precluded from utilizing the safe harbor definitions of compensation under §1.415(c)-2(d)(2) and (d)(3).

Written comments on the proposed regulations were received and considered. The Department of the Treasury (Treasury Department) and the IRS did not receive any requests for a public hearing to address the proposed regulations, and, accordingly, no hearing was held. The Treasury Department held a Tribal consultation on this proposed rule on December 17, 2013. Additionally, on August 22, 2024, the Treasury Department met with the Treasury Tribal Advisory Committee, Subcommittee on Parity and Reform and received additional feedback on the proposed regulations. After consideration of

the comments received, the proposed regulations are adopted by this Treasury decision without material modification.

## **Summary of Comments and Explanation of Provisions**

### *A. Treatment of Fishing Rights-Related Income as Compensation under Section 415*

The proposed regulations were issued primarily in response to requests from the Tribal community that the Treasury Department and the IRS address whether contributions can be made to qualified retirement plans based on fishing rights-related income. Under the proposed regulations, fishing rights-related income would not fail to be treated as compensation under §1.415(c)-2(b)(1) and (b)(2) (and is not excluded from the definition of compensation pursuant to §1.415(c)-2(c)(4)) merely because those amounts are not subject to income tax or employment tax as a result of section 7873(a)(1) or (a)(2).

Commenters generally reacted favorably to this proposed rule, stating that the proposed regulations provided much needed clarity on how plans should treat fishing rights-related income paid to employees subject to section 7873 (Tribal employees) under section 415. The Treasury Department and the IRS also received comments stating that additional guidance is needed with respect to a variety of issues relating to fishing rights-related income in retirement plans. Many of these issues are outside the scope of these regulations, which are modifying the definition of compensation for purposes of section 415, and so the text of the final regulations does not address them. However, this preamble (under the headings “Taxation of Distributions,” “Treating Contributions as Roth Contributions,” and “Self-Employed Tribal Members” in this Summary of Comments and Explanation of Provisions) provides clarifying information relating to many of these issues.

### *B. Taxation of Distributions*

The preamble to the proposed regulations requested comments regarding the taxation of qualified plan distributions attributable to contributions based on fishing rights-related income, and the application of section 72(f)(2)<sup>1</sup> to such distributions. All of the comments received requested that distributions attributable to contributions based on fishing rights-related income should not be taxable to a Tribal employee.

Several of the commenters referred to *Hall v. Commissioner*, 76 T.C.M. 473 (1998), in which the petitioner was a full-time employee in a Tribal fish hatchery who received a choice between an employer contribution to a retirement account or an employer contribution to a health plan. In 1992, the petitioner elected the retirement benefit and the employer contributed a monthly amount to an individual retirement account (IRA). That same year, the petitioner received early distributions from the IRA attributable to those employer contributions and to income earned in the IRA. The Tax Court generally found that, under section 72 (as modified by section 408(d)(1) and (2)), the amount of the distributions attributable to contributions based on fishing rights-related income represents a nontaxable return of his investment in the contract, but added that the amount of distributions attributable to the earnings on the IRA contributions represents accrued income that is taxable to the petitioner.

In response to the requests to clarify the taxation of qualified plan distributions attributable to contributions based on fishing rights-related income, the Treasury Department and the IRS have determined that the holding in *Hall v. Commissioner* should apply to these distributions. Thus, consistent with *Hall*, any contribution to a qualified retirement plan that is attributable to remuneration for services performed by a Tribal employee in a fishing rights-related activity is treated as investment in the contract for a plan participant under the rules of section 72(f)(2). Therefore, any

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<sup>1</sup> Section 72(f)(2) treats employer contributions as investment in the contract if those amounts would not have been includible in income of the employee had they been paid directly to the employee.

distribution of such amounts is nontaxable to the participant. However, also consistent with *Hall*, the amount of the distribution attributable to earnings on those contributions is taxable.

Another commenter raised an issue regarding the ordering for determining the taxable and nontaxable amounts of a qualified retirement plan distribution. Referring to qualified retirement plan distributions attributable to fishing rights-related income, this commenter suggested that plan participants be allowed to elect the order in which the qualified retirement plan distributions are made so that the nontaxable amounts could be received first. This suggestion is not adopted because it is inconsistent with the basis recovery rules in section 72.<sup>2</sup> Tribal employees will have investment in the contract on contributions to the plan attributable to fishing rights-related income, and thus the general basis recovery rules of section 72 will apply.

The Treasury Department and the IRS also received comments concerning the treatment of earnings on contributions attributable to fishing rights-related income and the treatment of employer matching and profit-sharing contributions related to contributions attributable to fishing rights-related income. As explained in the preceding paragraph, section 72 provides basis recovery rules for determining the taxable and nontaxable portions of a distribution. Section 72(f) applies to amounts contributed by the employer and does not distinguish employer matching or employer profit-sharing contributions from employee elective deferrals (which are treated as employer contributions pursuant to section 402(e)(3)). Therefore, section 72(f)(2) applies not only to employee elective deferrals but also to employer matching and employer profit-sharing contributions attributable to remuneration for services performed by a Tribal employee in a fishing rights-related activity. As explained in *Hall v. Commissioner*,

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<sup>2</sup> Section 72(b) provides that gross income does not include that part of any amount received as an annuity which bears the same ratio to such amount as the investment in the contract bears to the expected return under the contract.

however, section 72(f)(2) does not apply to earnings. Therefore, qualified retirement plan distributions attributable to the earnings on contributions based on fishing rights-related income generally will be taxable to the participant and the basis recovery rules of section 72 will apply in determining the portion of a distribution that is includible in income.

### *C. Treating Contributions as Roth Contributions*

One commenter suggested that guidance be provided to allow a qualified retirement plan to treat contributions attributable to fishing rights-related income as either Roth contributions or after-tax contributions. The commenter added that the guidance could provide that, if the plan permits participants to make Roth contributions, then the employee's contributions attributable to fishing rights-related income would be treated as Roth contributions. If the plan does not provide for Roth contributions, then these contributions would be treated as after-tax contributions.

Section 1.401(k)-1(f)(2) provides that if an elective contribution would not have been includible in gross income if the amount had been paid directly to the employee (rather than being subject to a cash or deferred election), the elective contribution is nevertheless permitted to be a designated Roth contribution, provided the employee is entitled to treat the amount as an investment in the contract pursuant to section 72(f)(2). As previously stated in this preamble under the heading "Taxation of Distributions," any contributions attributable to remuneration for services performed in a fishing rights-related activity are treated as investment in the contract for the plan participant under the rules of section 72(f)(2). Therefore, contributions attributable to fishing rights-related income are permitted to be designated Roth contributions under a qualified retirement plan that permits participants to make those contributions.

### *D. Self-Employed Tribal Members*

Two commenters asked about the retirement plan options for Tribal members who earn fishing rights-related income but who may not be employed by an Indian tribe. Section 401(a) provides that a plan of an employer is a qualified plan only if it is created or organized for the exclusive benefit of the employer's employees or their beneficiaries. For these purposes, whether an individual is an employee of the employer maintaining a plan is generally determined under common law principles. See *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992). Self-employed individuals generally may not participate in a qualified retirement plan sponsored by another employer. Moreover, whether an individual earns fishing-rights related income is not determinative of whether that individual is an employee. However, an individual who is self-employed under section 401(c)(1) may nevertheless maintain his or her own qualified retirement plan, such as a section 401(k) plan.

#### *E. Additional Comments*

Commenters also requested guidance on several other issues, including guidance permitting rollover of contributions attributable to fishing rights-related income from a nonqualified plan to a qualified plan, guidance permitting Tribal employers to take retroactive action to permit Tribal employees to contribute fishing rights-related income to a qualified plan, and guidance on testing for contributions attributable to fishing rights-related income. These comments are all beyond the scope of these regulations and, in certain cases, the requested guidance may not be permissible under the Code (for example, rollover of amounts from a nonqualified plan into a qualified plan). However, the Treasury Department and IRS will continue to review comments that are beyond the scope of these regulations and consider if any further guidance is needed. If additional guidance is needed, the Treasury Department and the IRS will conduct Tribal consultation pursuant to Executive Order 13175.

#### **Applicability Date**

These final regulations apply for plan years ending on or after **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

## **Special Analyses**

### *I. Regulatory Planning and Review*

OMB's Office of Information and Regulatory Affairs has determined that this regulation is not significant and is not subject to review under section 6(b) of Executive Order 12866, as amended.

### *II. Regulatory Flexibility Act*

It is hereby certified that these final regulations will not have a significant economic impact on a substantial number of small entities within the meaning of section 601(6) of the Regulatory Flexibility Act (5 U.S.C. chapter 6). This certification is based on the fact that only 5,000 to 6,000 employees nationwide are estimated to earn fishing rights-related income. Therefore, a regulatory flexibility analysis under the Regulatory Flexibility Act is not required.

Pursuant to section 7805(f) of the Code, the proposed regulations that preceded these final regulations were submitted to the Chief Counsel for the Office of Advocacy of the Small Business Administration for comment on their impact on small business, and no comments were received.

## **Consultation and Coordination With Tribal Governments**

In addition to written comments responding to the proposed regulations, these final regulations reflect comments provided in a Tribal consultation held on December 17, 2013, as well as comments provided in a meeting with members of the Treasury Tribal Advisory Committee Subcommittee on Parity and Reform on August 22, 2024.

## **Drafting Information**

The principal author of these regulations is Jamie Dvoretzky, Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes).

However, other personnel from the Treasury Department and the IRS participated in the development of these regulations.

### **List of Subjects in 26 CFR Part 1**

Income taxes, Reporting and recordkeeping requirements.

### **Adoption of Amendments to the Regulations**

Accordingly, the Treasury Department and the IRS amend 26 CFR part 1 as follows:

#### **PART 1--INCOME TAXES**

**Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

**Authority:** 26 U.S.C. 7805 \* \* \*

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**Par. 2.** Section 1.415(a)-1 is amended by adding paragraph (g)(5) to read as follows:

**§1.415(a)-1 General rules with respect to limitations on benefits and contributions under qualified plans.**

\* \* \* \* \*

(g) \* \* \*

(5) *Special effective date.* Section 1.415(c)-2(g)(9) applies for plan years ending on or after **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**Par. 3.** Section 1.415(c)-2 is amended by adding paragraph (g)(9) to read as follows:

**§1.415(c)-2 Compensation.**

\* \* \* \* \*

(g) \* \* \*

*(9) Income derived by Indians from exercise of fishing rights-related activities.*

Amounts paid to a member of an Indian tribe directly or through a qualified Indian entity (within the meaning of section 7873(b)(3)) as compensation for services performed in a fishing rights-related activity (as defined in section 7873(b)(1)) of the tribe do not fail to constitute compensation under paragraphs (b)(1) and (2) of this section (and are not excluded from the definition of compensation pursuant to paragraph (c)(4) of this section) merely because those amounts are not subject to income or employment taxes as a result of section 7873(a)(1) and (a)(2). Thus, the determination of whether an amount constitutes wages, salaries, or earned income for purposes of paragraph (b)(1) or (2) of this section is made without regard to the exemption from taxation under section 7873(a)(1) and (a)(2).

**Frank J. Bisignano,**

*Chief Executive Officer, IRS.*

**Approved:** April 1, 2026.

**Kenneth J. Kies,**

*Assistant Secretary of the Treasury (Tax Policy).*