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Editor: Robert P. Achenbach, Jr. esq.

Contributing Editor Dr. Neil E. Harl, esq.

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PAYING WAGES IN KIND: PROPOSED REPEAL OF THE PROVISION

— by Neil E. Harl*

Tucked away in a remote corner of the Revenue Act of 1992¹ lies the long-expected Congressional challenge to the practice of payment of wages in kind to agricultural labor.² Barring a major lobbying effort, the provision is likely to be aboard the next major tax bill to pass the Congress.

Current Law

Since 1950, the payment of wages in kind rather than in cash to agricultural labor has not been subject to FICA³ or FUTA⁴ taxes. Moreover, payments to agricultural labor are exempt from income tax withholding⁵ except as the payments constitute "wages."⁶ Wages paid "in any medium other than cash for agricultural labor" are exempt from the term "wages."⁷

In recent years the Internal Revenue Service has frequently objected to use of the provision involving FICA tax on the ground that the payment is in a form readily converted to cash and so should be considered as a cash wage payment⁸ or on the ground that the employee lacked dominion and control over the in-kind payment before sale.⁹

Proposed amendment

The Revenue Act of 1992 would amend the in-kind wage provision, effective for wages paid after December 31, 1992¹⁰ by expanding the definition of social security covered wages to include non-cash wages paid to agricultural labor.¹¹ Exceptions would be provided for meals or lodging furnished on the premises of the employer to the employee, the employee's spouse, or any of the employee's dependents¹² and, in the case of seasonal workers, temporary lodging in reasonable proximity to the premises which is furnished to the employee, the employee's spouse, or any of the employee's dependents. Moreover, non-cash wages would be subject to the tax thresholds now applicable to agricultural cash wages which are the lesser of \$150 per worker or \$2500 for the employer.¹³

The House Ways and Means Committee report states:

"In addition, provisions of existing law would exclude certain other non-cash remuneration from social security tax: (1) payments to sharecroppers would be unaffected since sharecroppers are treated as self-employed; (2) small amounts of non-cash remuneration for which

record keeping would be "unreasonable or administratively burdensome" would be excluded as de minimis fringe benefits by section 132 of the Internal Revenue Code; and (3) fringe benefits related to job performance--for example, a vehicle, fuel, or special clothing--would be excluded as working-condition fringe benefits under section 132."¹⁴

It is noted that the amendment would only apply to wages paid after 1992¹⁵ and would not apply to wages paid before 1993. In-kind wages paid before 1993 would continue to be subject to I.R.S. audit under rules applicable before enactment of the Revenue Act of 1992. Moreover, it is important to note that the amendment is only in the proposal stage. However, with strong I.R.S. and Treasury backing, the provision is likely to be enacted unless a great deal of resistance materializes.

FOOTNOTES

- ¹ H.R. 11, 102d Cong., 2d Sess. (1992).
- ² See Harl "Paying Wages in Kind", 3 Agric. L. Dig. 81 (1992).
- ³ I.R.C. § 3121(a)(8).
- ⁴ I.R.C. § 3306(b)(11).
- ⁵ I.R.C. § 3401(a)(2).
- ⁶ See I.R.C. § 3121(a).
- ⁷ I.R.C. § 3121(a)(8).
- ⁸ Rev. Rul. 79-207, 1979-2 C.B. 351.
- ⁹ See Ltr. Rul. 9136001, May 14, 1991 (spouse paid \$200 per month in cash and 3,000 pounds of live hogs per month; entire payment received equivalent of cash). Compare Ltr. Rul. 8252018, Sept. 17, 1982 (wages paid in form of percentage of milk produced, calves and grain production held valid in-kind payment).
- ¹⁰ H.R. 11, Sec. 7005, 102d Cong., 2d Sess. (1992).
- ¹¹ *Id.*
- ¹² *Id.*, Sec. 7005(a)(i).
- ¹³ H.R. 11, Sec. 7005, 102d Cong., 2d Sess. (1992).
- ¹⁴ Report 102-631, 102d Cong., 2d Sess. 354. (1992).
- ¹⁵ H.R. 11, Sec. 7005(c), 102d Cong., 2d Sess. (1992).

* Charles F. Curtiss Distinguished Professor in Agriculture and Professor of Economics, Iowa State University; member of the Iowa Bar.