

## MEMO

To: Iowa Tribe of Oklahoma  
Tribal Assistance

From: David McCullough

cc: Renee Hagler

Date: January 12, 2016

Re: Household Assistance May Not Be Used for Payment to Prison and Jail Commissary

---

The Iowa Tribe of Oklahoma has a Tribal Household Assistance Program that was created to “supplement the cost of household expenses”. Specifically, the Iowa Tribe defined Household Assistance as “personal/property taxes, property/rental insurance, auto insurance, utilities and rent/mortgage payments.” In the past, the Household Assistance application stated that “Incarcerated Tribal Members may apply and have assistance placed thin their commissary account.” Whether this policy was in compliance with federal laws and regulations is not a part of the current analysis. This analysis will only focus on the new regulations published by the Internal Revenue Service.

In June 2014, the Internal Revenue Service issued its Rules and Regulations for Application of the General Welfare Exclusion to Indian Tribal Government Programs that Provide Benefits to Tribal Members. See 26 CFR 601.601 (Rev. Pro. 2014-35) (“IRS Procedure”).

As a general proposition, payments made in cash to Native American citizens are subject to payment of income taxes. These payments are included in the definition of gross income unless an exclusion applies. The IRS Procedure states that to qualify for the exclusion, the cash payments from the tribe must be (1) made pursuant to a governmental program of the tribe, **(2) for the promotion of the general welfare (that is, based on individual or family need)**, and (3) not compensation for services.” IRS Procedure Section 2.03. Our examination is focused on part (2) of this definition. The Tribal Household Assistance program qualifies under part (1) of the definition and there is no question that the assistance program is not compensation for services under part (3).

Section 5.01 of the IRS Procedure provides that benefits provided by the Tribe to its members will be considered excluded from gross income of the individual if certain criteria are met. Section 5.03 of the IRS Procedure sets out specifically the requirements for housing programs and lists various examples of needs that are considered to meet the needs of an

individual or family. Section 5.03 and the criteria listed in the Tribal Household Assistance form are very similar.

Because household funds are, by definition, designed to meet the needs of the individual associated with maintaining his or her own property, Section 5.03 would preclude payment of household funds to the incarcerated person because no individual household need exists. If the individual had a domestic partner who was maintaining the incarcerated person's principal residence, then payments could be made for the home (including repairs and utility bills) but it would have to be incarcerated person's home—a home that the incarcerated person either owns or has a lease/rental agreement in the incarcerated person's name. But direct payments that are not for payments for use of the property or incidental to the use of the property do not meet the requirements for payment of household expenses set forth in Section 5.03 and the Tribal Household Assistance application. Under the regulations, monies given to the incarcerated person where a need does not exist results in the money being taxable to the person and subjects the Tribe to potential exposure of making a wrongful benefits payment.

There are examples which do appear to support eligibility of an incarcerated person for the household assistance. First, if the person was engaged in an educational program in prison that required some payments on behalf of that person, then education funds may be used for that. Second, if medication is required that has to be paid by the person, then funds could be used for that. Finally, if the incarcerated person owned a vehicle, the household assistance program authorizes the payment of the insurance on the vehicle owned by the incarcerated individual. Otherwise, there is no need of the individual being met.