Wages May Not Be Wages: the Sixth Circuit Addresses Supplemental Unemployment Compensation Benefits, Part III.

If you read the Sixth Circuit's opinion in *Quality Stores* in a vacuum, it is highly persuasive: it is logical to believe that Congress wanted wages to be construed the same way for both FICA and withholding, since it used essentially identical definitions. Similarly, when you learn that Congress put a provision into the Code indicating that supplemental unemployment compensation benefits (SUB payments) are to be *treated as if they were wages* for withholding, it makes sense to conclude that it added that provision because it thought they were not wages, as the Sixth Circuit reasons. *See In re Quality Stores, Inc.*, 2012 U.S. App. LEXIS 18820, slip op. at *14 (6th Cir. Sept. 7, 2012). If you accept those two propositions, it seems hard to argue with the Court's conclusion that SUB payments are not "wages" for FICA either.

Sometimes, however, things are not as simple as they seem: in *CSX Corp. v. United States*, 518 F.3d 1328 (Fed. Cir. 2008), the Federal Circuit identified one key reason why Section 3402(o) should not be construed to imply that SUB payments are not wages for purposes of FICA: Congress said so.

The plain language of Section 3402(o) of the Code says that it applies "[f]or purposes of *this chapter* (*and so much of subtitle F as relates to this chapter*) . . . ." I.R.C. § 3402(o)(1) (emphasis added); *see CSX Corp. v. United States*, 518 F.3d at 1341. Why is this significant? Two reasons stand out:

- Section 3402(o) is contained in Chapter 24, which is part of Subtitle C. FICA is contained in Chapter 21 of the Code, which is also part of Subtitle C. By referencing "this chapter" Congress restricted the impact of Section 3402(o) to Chapter 24.
- If Congress had intended Section 3402(0) to have an impact on the definition of wages for FICA purposes, it could easily have said so by indicating that Section 3402(o) applied for purposes of Subtitle C or for purposes of "this chapter" and Chapter 24. After all, it knew how to reference Subtitle F of the Code to assure that SUB payments would be treated as "wages" for various procedural purposes relating to withholding.

In the view of the Federal Circuit the language of the section restricting its scope was dispositive: "Congress's decision to restrict the scope of the rule set forth in section 3402(o) to chapter 24 suggests that Congress did not intend that rule, or any implication that might be drawn from that rule, to be applied outside the context of income tax withholding." 518 F.3d at 1341. Moreover, the Court reasoned that not all SUB payments were non-wages for purposes of withholding; some were and some were not. *Id.* at 1342. Consequently, the Federal Circuit concluded that the correct approach to the problem was to apply a multifactor test developed through Revenue Rulings and ruled that the payments at issue were wages for purposes of FICA. *Id.* at 1345.

My reaction is that the government's position that SUB payments should be treated as wages for purposes of FICA appears to have a lot more substance to it than the Sixth Circuit's opinion might suggest. While the use of the same basic definition of "wages" in two different portions of the Code does generally support a consistent construction of that term, that is simply a convention that lawyers and courts use to construe a statute. Congress remains free treat similar concepts in a different way for policy reasons.

Jim Malone is a tax lawyer in Philadelphia.