



ISLAGIATT (It Seemed Like a Good Idea at the Time): Self-Employment Tax for Partners

Bob Keatinge

33rd Annual LLCs, LPs and Partnerships Conference July 11, 2024

 Holland & Hart

1

The Long Strange Trip (Pre I.R.C. §1402(a)(13))

Year	Event
3000 BCE	First collaborative businesses created (Sumerian trading families). Micklethwait & Wooldrige, <i>The Company</i> , Modern Library (2003)
1612 CE	<i>Sutton's Hospital</i> "a corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of the law." English Reports Full Reprint Vol. 77 - King's Bench (1378-1865) 960 (1612).
1855	British Limited Liability Act (18 & 19 Victoria Cap).
1890	British Partnership Act (1890)
1909	Corporate Tax Act of 1909 36 Stat. 112 ; U.S. v. Acorn Roofing Co. 204 F. 157 (E.D. NY 1912) Excise tax measured by profits.
1913	16th Amendment Ratified.
1914	Uniform Partnership Act (1914) adopted by NCCUSL.
1916	Uniform Limited Partnership Act (1916) adopted by NCCUSL.
1918	Internal Revenue Code adopted 40 Stat. 1057.
1919	T.D. 2943 19-1 C.B. 9 classifying a Virginia limited partnership as a corporation (first three rulings in the C.B. related to classification).
1935	Employer and employee each subject FICA (OASDI) tax up to contribution and benefit base. Pub. L. 74-271. <i>Morrissey v. Commissioner</i> , 296 U.S. 344.
1950	Self-employed individual subject to SECA (OASDI) tax up to contribution benefit base. Pub. L. 81-734.
1960	<i>Kintner</i> Regulations released. T.D. 6503, 25 Fed. Reg. 10928.
1965	HI added to amount of OASDI and SECA up to contribution benefit base. Pub. L. 89-97
1969	Rev. Rul. 69-184 (holding a partner cannot be an employee of the partnership).
1976	Uniform Limited Partnership Act (1976) adopted by NCCUSL.

2

 Holland & Hart

2



The Long Strange Trip (I.R.C. §1402(a)(13))

Year	Event
1977	I.R.C. §1402(a)(13) [then known as 1402(a)(12)] enacted P.L. 95-216.
1985	RULPA Revised Uniform Partnership Act of 1976 (with 1985 Amendments) adopted by NCCUSL.
1988	Rev. Rul. 88-76 issued recognizing that LLCs could be taxed as partnerships under the <i>Kintner</i> regulations.
1990	Colorado adopts LLC Act. Contribution and benefit base applicable to HI Tax raised.
1991	Texas adopts LLC Act.
1992	First University of Texas Partnership Institute
1993	HI tax no longer limited to contribution and benefit base. Pub. L. 103-66 §13207.
1994	1994 Proposed IRC §1042(a)(13) Regulations 59 Fed. Reg. 67253
1995	Priv. Ltr. Rul. 9525058 (first private letter ruling to rule that LLC had NESE). Notice 95-14 (IRS to reconsider <i>Kintner</i> regs.)
1997	1997 proposed IRC §1402(a)(13) regulations (62 Fed. Reg. 1702). Moratorium adopted (Pub. L. 105-34 §935) (No temporary or final regulation defining 'limited partner' may be issued or made effective before July 1, 1998).
1998	Check-the-box regulations issued. T.D. 9012 67 Fed. Reg. 49862.
2011	<i>Renkemeyer, Campbell & Weaver, LLP</i> , 136 T.C. 137 (2011).
2013	HI tax on NESE and wages is raised by 0.9% and new NII tax of 3.8% imposed on other income. Pub. L. 111-152 §1402.
2015	Bipartisan Budget Act of 2015 (Pub. L. 114-74) changes partnership audit regime (effective after 2017).
2017	<i>Castigliola v. Commissioner</i> , T.C. Memo. 2017-62.
2018	IRS announces SECA Tax Compliance Program https://www.irs.gov/businesses/irs-lbi-compliance-campaigns-mar-13-2018 .
2022	<i>Soroban</i> (New York, 7/21), <i>Sirius Solutions L.L.P.</i> (Texas, 9/4 and 9/21)
2023	<i>Denham Capital Management LP</i> (Mass. 6/22), <i>Point72 Asset Management, L.P.</i> (Conn. 8/11); IRS puts "Guidance under IRC §1402(a)(13)" on the 2023-2024 Priority Guidance Plan
2024	<i>Soroban</i> 161 T.C. No. 12. <i>Sirius</i> docketed in the 5 th Cir.

 Holland & Hart

3

3



Income Subject to HI Tax

- Employees and self-employed persons are subject to tax (Federal Insurance Contributions Act (**FICA**) or Self-Employment Contributions Act (**SECA**)). The FICA tax was initially limited to an Old-Age Survivors and Disability (**OASDI**) tax on wages up to the contribution and benefits base (the "Benefit Base") starting in 1935. Pub. L. 74-271. The SECA tax was an initially limited to and OASDI tax on NESE up to the Benefit Base starting in 1950. to and Hospital Insurance tax (**HI**). The OASDI portion of FICA and SET is collected as a percentage of compensation paid by an employer to an employee (**wages**) or net earnings from self-employment (**NESE**) up to the contribution and benefits base (the **Benefit Base**). From 1966 to 1990, HI taxes were limited to the Benefits Base. The Benefit Base for HI tax was \$125,000, \$130,200, and \$135,000 for 1991-1993, respectively. After 1993, there has been no limitation on HI-tax. P.L. 101-508 §11331. The following chart also shows the increase in the HI tax starting in 2013 as a result of the Affordable Care Act (all of which is collected from the employee).
- Wages includes "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash" with certain exclusions. IRC §3121(a).
- NESE is "gross income derived by an individual from any trade or business carried on by such individual, less the deductions allowed by this subtitle which are attributable to such trade or business, plus his distributive share (whether or not distributed) of income or loss described in section 702(a)(8) from any trade or business carried on by a partnership of which he is a member" with certain exclusions. IRC §1402(b).

 Holland & Hart

4

4

Income Subject to OASDI and HI Tax

Calendar year	Tax rates as a percent of taxable earnings (wages or NESE)					
	Rate for employees and employers, each (0.900% increase on HI taxes in 2013 is collected entirely from employee)			Rate for self-employed workers		
	OASDI	HI	Total	OASDI	HI	Total
1937-49	1.000	--	1.000	--	--	--
1950	1.500	--	1.500	--	--	--
1951-53	1.500	--	1.500	2.250	--	2.250
1954-56	2.000	--	2.000	3.000	--	3.000
1957-58	2.250	--	2.250	3.375	--	3.375
1959	2.500	--	2.500	3.750	--	3.750
1960-61	3.000	--	3.000	4.500	--	4.500
1962	3.125	--	3.125	4.700	--	4.700
1963-65	3.625	--	3.625	5.400	--	5.400
1966	3.850	0.350	4.200	5.800	0.350	6.150
1967	3.900	0.500	4.400	5.900	0.500	6.400
1968	3.800	0.600	4.400	5.800	0.600	6.400
1969-70	4.200	0.600	4.800	6.300	0.600	6.900
1971-72	4.600	0.600	5.200	6.900	0.600	7.500
1973	4.850	1.000	5.850	7.000	1.000	8.000
1974-77	4.950	0.900	5.850	7.000	0.900	7.900
1978	5.050	1.000	6.050	7.100	1.000	8.100
1979-80	5.080	1.050	6.130	7.050	1.050	8.100
1981	5.350	1.300	6.650	8.000	1.300	9.300
1982-83	5.400	1.300	6.700	8.050	1.300	9.350
1984	5.700	1.300	7.000	11.400	2.600	14.000
1985	5.700	1.350	7.050	11.400	2.700	14.100
1986-87	5.700	1.450	7.150	11.400	2.900	14.300
1988-89	6.060	1.450	7.510	12.120	2.900	15.020
1990-2013	6.200	1.450	7.650	12.400	2.900	15.300
2013-2024	6.200	2.350	8.550	12.400	3.800	16.200

Holland & Hart

5

5

I.R.C. §1402(a)(13) (1977)

The term "net earnings from self-employment" means . . . his distributive share (whether or not distributed) of income or loss described in section 702(a)(8) from any trade or business carried on by a partnership of which he is a member; except that in computing such gross income and deductions and such distributive share of partnership ordinary income or loss—

... there shall be excluded the distributive share of any item of income or loss of a limited partner, as such, other than guaranteed payments described in section 707(c) to that partner for services actually rendered to or on behalf of the partnership to the extent that those payments are established to be in the nature of remuneration for those services;"

Holland & Hart

6

6

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Self-Employment Tax for Partners

Also available as part of the eCourse

[Self-Employment Tax for Partners](#)

First appeared as part of the conference materials for the
33rd Annual LLCs, LPs and Partnerships session

"Self-Employment Tax for Partners"