

Q: Is the “Per Capita” payment taxable and is withholding required?

A1: YES. IGRA expressly provides that “per capita payments” are subject to federal taxes and requires tribes to notify members of such tax liability when per capita payments are made. 25 U.S.C. § 2710(b)(3)(D).

A2: In addition, IGRA’s regulations require a tribe’s revenue allocation plan to specify the withholding of taxes for all recipients in accordance with IRS regulations. 25 C.F.R. § 290.12(b)(4). Internal Revenue Code Section 3402(r) specifically imposes the withholding requirement on per capita distributions of gaming revenue, providing that, in general, every person, including an Indian tribe making a payment to a member of an Indian tribe from the net revenues of any class II or class III gaming activity conducted or licensed by such tribe shall deduct and withhold from such payment a tax in an amount equal to such payment’s proportionate share of the annualized tax. The IRS requires a tribe to file a 1099-MISC for each tribal member receiving a distribution, with the amount of the distribution and the amount withheld shown appropriately, in addition to properly paying and reporting the tax to the IRS. Further, the tribal member who receives the distribution must file an IRS form 1040 which reflects the per capita payment as other income.