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The Honorable Dennis Moore
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Moore:

I am responding to your letter dated May 16, 2007, on behalf of your constituent, , about the tax treatment of employer provided cellular telephones. He also asked about the treatment of vehicles provided by counties to emergency medical service and emergency management employees who use the vehicles to commute to work. I hope the following information is helpful.

Cellular Telephones

Government employers frequently provide their employees with cellular telephones for business purposes. This can raise special tax issues because, under section 280F(d)(4)(A)(v) of the Internal Revenue Code (the Code) cellular telephones are listed property. “Listed property” includes items obtained for use in a business but designated by the Code as lending themselves easily to personal use. Congress expanded the definition of listed property to include cellular telephones in 1989 based on the belief that cellular telephones and other similar telecommunications equipment are “often used primarily for personal or investment use rather than in the conduct of a trade of business.” H.R. Rep. 101-247, at 1359 (September 20, 1989).

An employer can exclude the value of an employee’s use of an employer-provided cell phone from the employee’s gross income, if the employer has some method of requiring the employee to keep records that distinguish business from personal phone charges. If the employee uses the telephone exclusively for business, the value of all use is excluded from the employee’s income (as a working condition fringe benefit). The employer must include the value of any personal use of the cell phone in the employee’s wages. Personal use includes individual personal calls, as well as a pro rata share of monthly service charges.

To ensure that an employee’s business use of an employer-provided cell phone is excludable from gross income, section 274(d) of the Code requires the employee to keep a record of each call and its business purpose. If the employee receives a monthly itemized statement, the employee should identify each call as personal or business. If the employee does not use the cell phone to make personal calls, or has only minimal personal use of the cell phone, the business use of the phone is not taxable to the employee. Section 274(d) of the Code and section 1.274-5 of the Treasury Regulations contain guidance on the recordkeeping necessary to adequately substantiate the business use of listed property.

<u>Qualified Nonpersonal Use Vehicles</u>

Generally, employees must include the value of an employer-provided vehicle used for commuting purposes in income (section 132 of the Code). However, the Code and Treasury Regulations provide certain exclusions for qualified nonpersonal use vehicles. Employees can exclude 100 percent of the value of the use of a qualified nonpersonal use vehicle from gross income as a working condition fringe. (Section 1.132-5(h) of the Treasury Regulations).

A qualified nonpersonal use vehicle is any vehicle which, by reason of its nature, an employee is not likely to use more than a minimum amount for personal purposes. (Section 274(i) of the Code). Cement mixers, moving vans, and forklifts are examples of the types of vehicles exempt from taxation as qualified nonpersonal use vehicles. Passenger automobiles such as sedans are generally not exempt from taxation because by design they can easily be used for personal purposes. However, as noted, the regulations provide that nonpersonal use vehicles include clearly marked police and fire vehicles and unmarked law enforcement vehicles used by law enforcement officers.

suggested that EMS (emergency medical service) and EM (emergency management) vehicles are similar to police vehicles in ways that are relevant to the Code section 132 exception for qualified nonpersonal use vehicles. Presently the regulations do not include county-owned automobiles driven by emergency medical service personnel and emergency management personnel as qualified nonpersonal use vehicles. However, the regulations do provide that the Commissioner can designate other vehicles as qualified nonpersonal use vehicles. This authority is consistent with the legislative history on this issue which provides that Treasury and the IRS can issue guidance expanding the list of vehicles and identify other appropriate qualified nonpersonal use vehicles where that can be done while preserving the basic requirement that the exception be limited to vehicles that by their nature employees are not likely to use more than a minimum amount for personal purposes.

You asked for our help in resolving this problem. This is the time of year when the IRS and the Treasury Department determine what issues should be addressed in the coming year through the issuance of new regulations and other forms of published guidance. I have raised the issues in letter with our counterparts at the Treasury Department and I speak for that office as well as ours in assuring you that the IRS and the Treasury Department will carefully consider and evaluate whether we can and should open a guidance project on this issue as part of our upcoming guidance plan.

We hope this information is helpful. If you have questions or need further assistance in these matters, please contact me or of my staff at .

Sincerely,

Lynne Camillo
Branch Chief, Employment Tax Branch 2 (Exempt Organizations/Employment Tax/Government Entities)
(Tax Exempt & Government Entities)