Internal Revenue Service

memorandum

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Br2:DASchneider

date: MAY - 4 1995

to: Chief, Resourcing and Core Business System Reengineering (M:R:CBS)

from: Assistant Chief Counsel (Income Tax & Accounting)

subject: Energy Policy Act of 1992 - Taxability of Travel Reimbursements for Indefinite Travel Assignments

[redacted] we will briefly summarize the applicable legal authorities. Section 162(a)(2) allows a deduction for all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on a trade or business, including traveling expenses while away from home in the pursuit of a trade or business. Section 1938 of the Energy Policy Act of 1992 (Act) amended § 162(a) of the Code to provide that "the taxpayer shall not be treated as being temporarily away from home during any period of employment if such period exceeds 1 year." The amendment is effective for costs paid or incurred after December 31, 1992. Thus, in general, no deduction is allowed for travel expenses paid or incurred after December 31, 1992, with respect to a period of employment away from home in a single location in excess of 1 year.

Revenue Ruling 93-86, 1993-2 C.B. 71, holds that if employment away from home in a single location is realistically expected to last, and does in fact last, for 1 year or less, the employment will be considered temporary (in the absence of facts and circumstances indicating otherwise). If employment away from home in a single location is realistically expected to last for more than 1 year, or there is no realistic expectation that the employment will last for 1 year or less, the employment is indefinite, regardless of whether it actually exceeds 1 year. If employment away from home in a single location initially is realistically expected to last for 1 year or less, but at some later date the employment is realistically

expected to exceed 1 year, that employment will be treated as temporary (in the absence of facts and circumstances indicating otherwise) until the date that the taxpayer's realistic expectation changes. Thereafter, the employment is considered indefinite.

Section 61 provides that gross income includes all income from whatever source derived, including compensation for services, unless otherwise excluded by law.

Generally, employer-provided reimbursements of deductible employee business travel expenses may be excluded from the employee's gross income if the reimbursements are paid under an "accountable plan" arrangement as defined in § 1.62-2 of the Income Tax Regulations. However, if the expenses are nondeductible (for example, because of the 1-year rule), Reg. § 1.62-2(c)(5) provides that any reimbursement of the nondeductible expenses must be reported on the employee's Form W-2 as wages ~~and is subject to withholding and payment of employment taxes~~ (FICA, FUTA, and income tax).

Our comments are as follows:

[redacted]

DP

[redacted] DP

[redacted] The legislative history of the Energy Policy Act states (and Rev. Rul. 93-86 confirms) that the 1-year rule is limited to employment away from home in "a single location".

This limitation gives rise to several issues, one of which is relevant to the last two paragraphs on page 1 of the memorandum. Those paragraphs provide an example of an employee who is employed away from home "for periods of time," but is also required to work at least part of the time in the employee's regular post of duty (POD). The memorandum suggests that all of the days spent in the away-from-home location must be tallied to determine if they exceed 365. If that is the case, and it was initially realistically expected that the assignment away from home would exceed 1 year, the memorandum concludes that the assignment is indefinite under the 1-year rule.

We believe the focus of the inquiry is slightly different. First, assuming that the employee is employed away from home "in a single location," Rev. Rul. 93-86 (Situation 2) makes clear that, if the employment is realistically expected to last for more than 1 year, it is indefinite regardless of whether it actually exceeds 1 year. In that event, it would not matter that the assignment actually ended, and the employee returned home, before 1 full year had elapsed.

Second, again assuming that the employee is employed away from home in a single location, the assignment will exceed 1 year on its anniversary date, rather than on the 366th day of the employee's actual presence in the away-from-home location.

If one of your personnel accepts an assignment away from home, but also works regularly in his or her POD, or another away-from-home location, we believe the focus of the inquiry should be whether that individual is employed away from home "in a single location." We believe that employees who are required to work regularly, and for a significant amount of time, in more than 1 location (at least one of which is away from home) are not employed away from home in a single location. Thus, it is possible for the employee you describe in the example to be employed in multiple locations (i.e., the

away-from-home location and the POD), with the result that the employment away from home would be considered temporary even if it exceeds 1 year. [redacted]

[redacted]

DP

[redacted]

We are grateful for the opportunity to comment on your memorandum and hope that our comments are helpful to you. If you have any questions regarding this memorandum or the 1-year rule, you may contact David A. Schneider at (202) 622-4920. Further, you are welcome to provide Mr. Schneider's name and telephone number to your personnel.

Sincerely yours,

Assistant Chief Counsel
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