Office of Chief Counsel
Internal Revenue Service
memorandum

CC:DOM:IT&A:2
GCHorton - WTA-N-106447-98

date: AUG - 6 1998

to: Mr. Steve Goldberg
Travel Ombudsman/Chief
Office of Travel Management & Relocation CFO:S:T

from: Assistant Chief Counsel CC:IT&A

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subject: Reimbursed Travel Expenses of WAE Employee

This is in response to your memorandum dated March 5, 1998, to Robert Berkovsky, Chief, Branch 2 CC:DOM:IT&A, concerning the tax treatment of employer-provided traveling expense reimbursements under the circumstances described below.

The information submitted indicates that the Service recently hired [redacted], as a when-actually-employed (WAE) staff member of the Service (under 41 CRF 301-1.3(c)(2)) to help with the Service's modernization effort. [redacted] is retired from the [redacted] It is anticipated that [redacted] will travel from his home in Connecticut to Washington, D.C. approximately three days each week. [redacted] will not receive a salary or other benefits. He will, however, be reimbursed by the Service for his traveling expenses in the same manner as any other employee. [redacted] agreed to serve in his present position temporarily, but we currently lack facts on which we could conclude how long his employment is realistically expected to last. We assume, however, that his employment is realistically expected to last less than two years.

In a discussion with Mr. George Baker of this office on [redacted], [redacted] indicated that although he retired [redacted], he has worked as needed as a consultant for the [redacted] In addition, he works without pay a few days each week out of his home in Connecticut on his duties as a member of the board of trustees for two private schools described in § 170(c) of the Code. For purposes of the travel expenses considered in this memorandum, we assume that [redacted] is not in a trade or business related to the services that he is providing to the Service, that [redacted] accounts for his expenses in a manner that satisfies § 274(d) of the Internal Revenue Code, and that the reimbursements do not exceed the expenses [redacted] accounts for.

You have asked whether the reimbursed travel expenses of a WAE employee of the Service should be treated as paid under an accountable plan, i.e., excluded from the employee's gross income, not reported as wages or other compensation on the employee's W-2, and exempted from withholding and payment of employment taxes.

Accordingly, this memorandum addresses the following four issues:

(1) Does this WAE's rendering of gratuitous services to the United States as a bona fide volunteer with no profit motive affect the determination of his tax home?

(2) how long can the WAE employee be "away from home" and deduct, under § 170, meals and lodging as out-of-pocket expenses?

(3) are any expenses the WAE employee pays in excess of reimbursements deductible?

(4) are reimbursements not in excess of such expenses includible in income or may the payor (the Service) treat the reimbursement as not includible in income?

Issue 1

To be deductible under § 162(a)(2), an individual's traveling expenses must be: (1) ordinary and necessary, (2) incurred in the pursuit of a trade or business, and (3) incurred while away from home on business. Commissioner v. Flowers, 326 U.S. 465 (1946), 1946-1 C.B. 57. For purposes of § 162, an individual's "tax home" is generally considered to be located at, or in the vicinity of, the individual's place of business. Ellwein v. United States, 778 F.2d 506, 509 (8th Cir. 1985). While performing services at, or in the vicinity of, his or her place or business an individual may **not** deduct the cost of meals and lodging, even if the individual maintains a permanent residence elsewhere. Rev. Rul. 73-529, 1973-2 C.B. 37; Rev. Rul. 60-189, 1960-1 C.B. 60. Congress did not intend to allow a deduction for expenses that are caused not by the exigencies of the business but by the action of the individual in having a residence, for the individual's convenience, at a distance from the business. Such expenses are not essential for the conduct of the business and were not within the contemplation of Congress, which proceeded on the assumption that a person would live within reasonable proximity of the place of business.

If an individual has two or more regular places of business, the tax home is considered located at the principal place of business. Rev. Rul. 93-86. Thus, expenses of travel incurred

while discharging duties at a location that is removed from the principal post of duty (incurred at the non-principal place of business) are deductible if the other requirements of § 162(a)(2) are met (i.e., the expense is ordinary and necessary and incurred in the pursuit of a trade or business).

If the individual has no regular or principal place of business, then the individual's tax home is the individual's abode in a real and substantial sense. Rev. Rul. 73-529, 1973-2 C.B. 37; Rev. Rul. 60-189.

[redacted], who is retired, resides in [redacted] and will travel from his home to Washington, D.C., approximately three days each week to help with the Service's modernization effort. He will work without salary or other benefits of employment, but will be reimbursed by the Service for his traveling expenses. [redacted] incurs these traveling expenses while rendering gratuitous services to the United States as a bona fide volunteer with no profit motive. Accordingly, since the facts do not indicate either a principal or regular place of business in Washington, D.C., these services do not affect the determination of his tax home.

Because the services [redacted] renders to the Service do not affect the determination of his tax home for purposes of § 162(a)(2), the Service, based on the facts as contained in this memorandum, may consider [redacted] to have a tax home away from Washington, D.C., presumably at his abode in a real and substantial sense. When performance of his duties requires that he stay in Washington, D.C., for sleep or rest, the Service may conclude that he is away from home. Rev. Rul. 75-432, 1975-2 C.B. 60; United States v. Correll, 389 U.S. 299 (1967), 1968-1 C.B. 64.

Issue 2

Under § 170, a deduction is allowed for any charitable contribution made within the taxable year. A contribution or a gift to or for the use of the United States, a qualified donee, is a charitable contribution if the contribution is made for exclusively public purposes (§ 170(c)(1)).

Section 1.170A-1(g) of the Income Tax Regulations provides that no deduction is allowable under § 170 for a contribution of services. However, unreimbursed expenditures made incident to the rendition of services to an organization, contributions to which are deductible, may constitute a deductible contribution. Out-of-pocket transportation expenses necessarily incurred in performing donated services are deductible. Reasonable expenditures for meals and lodging necessarily incurred while away from home in the course of performing donated services also

are deductible. According to the regulation, the phrase "while away from home" has the same meaning for purposes of § 170 as for purposes of § 162.

Travel expenses paid or incurred in connection with an indefinite work assignment are generally nondeductible; if the work assignment is indefinite, the individual's tax home **shifts** to that location. However, travel expenses paid or incurred in connection with a temporary work assignment away from home are deductible under § 162(a)(2) of the Code. See Peurifoy v. Commissioner, 358 U.S. 59 (1958).

Previously, the rules for determining whether employment was temporary or indefinite were summarized in Rev. Rul. 83-82, 1983-1 C.B. 45, obsoleted by Rev. Rul. 93-86, 1993-2 C.B. 71. If employment was anticipated to last for less than one year, the determination was made on the basis of the facts and circumstances. If employment was anticipated to last and did in fact last for one year or more, there was a presumption that the employment was not temporary. If, however, the employment lasted less than two years, this presumption could be rebutted if the taxpayer clearly demonstrated (by objective factors) that the employment in issue was realistically expected to last less than 2 years, that the taxpayer would return to the claimed tax home after the job terminated, and that the claimed tax home was the taxpayer's regular place of abode.

After December 31, 1992, a taxpayer cannot be treated as temporarily away from home under § 162 if the employment period exceeds one year. This change was made by section 1938 of the Energy Policy Act of 1992, Pub. L. No. 102-486. However, the conference report states that the change was "not intended to alter the present law with respect to volunteer individuals providing volunteer services to charities described in § 501(c)(3)." H.R. Conf. Rep. No. 1018, 102d Cong., 2d Sess. 430 (1992). A footnote in the report confirms that the present law referred to is Rev. Rul. 83-82. Thus, it appears that Congress' intent was to have the facts and circumstances inquiry of Rev. Rul. 83-82 continue to apply to volunteer positions lasting more than one year but less than two. For this reason, a deduction for [redacted] expenses will not be disallowed simply because he may volunteer services for a period of greater than one year.

Issue 3

The second issue concerns the deductibility of the taxpayer's unreimbursed expenses. As noted above, unreimbursed expenditures made incident to the rendition of services to an organization, contributions to which are deductible, may constitute a deductible contribution (§ 1.170A-1(g)). Rev. Rul. 67-30, 1967-1 C.B. 9, addresses a retired executive who performs

gratuitous services for an organization described in § 170(c) and receives a per diem allowance to cover his reasonable travel expenses including meals and lodging while away from home in the performance of such services. To the extent that travel expenditures necessarily incurred incident to the rendition of the donated services exceed the per diem, a charitable contribution deduction is allowable. See also, Rev. Rul. 68-133, 1968-1 C.B. 36. Thus, [redacted] reasonable expenses may be deductible under § 170 to the extent they exceed the reimbursement, provided that he complies with the charitable contribution substantiation rules and other rules of § 170. See 1.170A-13(f)(10) for the substantiation rules for out-of-pocket expenses. See also, Rev. Rul. 97-59, 1997-52 I.R.B. 31, § 7.05, which requires a taxpayer to include in income the entire reimbursement if the taxpayer deducts expenses in excess of the reimbursed expenses.

Issue 4

Section 61(a) and the regulations thereunder provide that gross income means all income from whatever source derived unless specifically excluded by law. In Commissioner v. Glenshaw Glass, 348 U.S. 426 (1955), the Supreme Court broadly defined the term "gross income" as used in the Code to include all accessions to wealth that are clearly realized and over which the taxpayer has complete dominion.

Nevertheless, if a volunteer's expenses are reimbursed, the reimbursement is excludible from gross income. Rev. Rul. 80-99, 1980-1 C.B. 10, considers whether a reimbursement received by an individual is includible in gross income. The individual, employed by a state government in an appointive position, was invited to attend and address a fundraising event sponsored by a political organization. The organization reimbursed the individual for expenses incurred in attending the event in an amount not exceeding the individual's actual expenditures for the reasonable costs of traveling away from home to and from the event, including meals and lodging.

The ruling states the well-established rule that reimbursements (other than those specifically excluded by law) for personal expenses of the taxpayer are includible in gross income. It also states as a well-established position of the Service that reimbursements for expenses incurred by a taxpayer on behalf of another in a nonemployment context are not includible in the taxpayer's gross income. Thus, the ruling holds that the reimbursement is not includible in the individual's gross income under § 61 because the reimbursement was made in a nonemployment context for the reasonable expenses incurred by the individual in traveling away from home on behalf of the political organization and such reimbursement did not

exceed the individual's actual expenses for such travel. See also Rev. Rul. 67-30, 1967-1 C.B. 9 (holding that a per diem is includible in gross income only to the extent it exceeds the taxpayer's actual expenses).

[redacted] expenses are incurred incident to the rendition of services to the government. Under Rev. Rul. 80-99 to the extent that the expenses are incurred in a nonemployment context and the reimbursement does not exceed his actual expenses, the reimbursement will not be includible in gross income.

For the reasons set forth below, the treatment of [redacted] reimbursed expenses would be the same in an employment context.

Under § 62(a)(2)(A) an employee is allowed an "above-the-line" deduction under part VI of the Code (§ 161 and following, including § 170) in computing adjusted gross income for expenses paid by the employee, in connection with the performance of services as an employee, under a reimbursement or other expense allowance arrangement with the employer.

In order for an arrangement to be treated as a reimbursement or other expense allowance arrangement under § 62(a)(2)(A), the arrangement must qualify as an "accountable plan" under § 62(c), which sets forth three requirements.

First, under § 62(c) the expenses for which the employer is making payment must be expenses that would be allowable as deductions for expenses paid or incurred in connection with the performance of services as an employee. This business connection requirement is satisfied if the expenses are deductible under § 170.

Second, the substantiation requirements of § 1.62-2(e) of the regulations must be met. This requirement is met if, as we have assumed, [redacted] "accounts" to the Service for his expenses in a manner that satisfies § 274(d).

Third, the employee must be required to return, within a reasonable period of time, any amounts received in excess of those that have been substantiated. For purposes of this memorandum, we have also assumed that [redacted] reimbursements do not exceed the expenses [redacted] accounts for.

Accordingly, whether [redacted] expenses are treated as reimbursed in an employment context under an arrangement that qualifies as an accountable plan under § 62(c), or as reimbursed

in a nonemployment context incident to rendering services to the government, his reimbursed travel expenses would be excluded from his gross income, not reported as wages or other compensation on his W-2, and exempted from withholding and payment of employment taxes.

By George Baker
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Branch 2