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Technical Advice Memoranda

Technical Advice Memorandum 9146003, IRC Sec(s). 3121

UIL No. 3121.01-07; 3306.02-00; 3401.01-00

Headnote:

Reference(s): Code Sec. 3121;

DRIVERS' PER DIEM ALLOWANCES ARE SUBJECT TO WITHHOLDING.

A trucking company maintains approximately 70 truck tractors, has 100 employees, and serves clients in 48 states. The company has one office where all dispatching and paperwork is performed.

Before mid-1987, the company paid its drivers on a cents-per- mile basis. The payments did not include any portion for lodging, meals, or other incidental expenses. In mid-1987, one of the company's owners attended an industry convention where he heard about meal allowances and per diem arrangements. On his return, he instituted a per diem reimbursement plan for the company. Under the plan, after a driver's gross compensation was determined, the dispatcher reviewed the driver's weekly trip report and determined how many days the driver was away from home overnight. That number of days, reduced by one or two nights, was multiplied by the appropriate per diem rate, and the product was subtracted from the driver's gross compensation for the week. The driver's gross compensation minus the per diem allowance was reported as wages on the driver's Form W-2; the amount designated as a per diem allowance was not reported on the form. The driver's weekly pay statement provided a breakdown of the amount paid.

The tractors provided by the company are equipped with sleepers. The company contended, however, that the sleepers are too small and uncomfortable to provide the drivers with the necessary refreshing sleep

they require. Because of that, the company claimed to have “reasonably anticipated” that the drivers would use motels each night they were away from home.

The Service has ruled in technical advice that, for purposes of FICA, FUTA, and income tax withholding, a driver's weekly compensation may not be reduced by amounts designated as a per diem allowance for lodging. The Service determined that the company had no reasonable basis for believing that the drivers were incurring lodging expenses.

On the other hand, the Service also ruled that the exceptions of sections 3121(a)(20), 3306(b)(16), and 3401(a)(19) are available to the company to the extent of the value of meals and incidental expenses. The Service said it was reasonable to believe that the drivers incurred expenses for meals and incidental expenses while on the road overnight, and that the company provided the drivers with a working condition fringe benefit to the extent of the value of those meals and incidental expenses.

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Taxpayer's Name:

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Taxpayer's Address:

***

Taxpayer's Identification No.:

***

Years Involved:

***

Conference Date:

***

This memorandum is in response to your request of technical advice dated April 9, 1991, concerning whether amounts paid to truck drivers are excludable from wages for purposes of the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA), and income tax withholding. The Taxpayer determined that it could reasonably anticipate that its drivers would incur lodging, meal and/or incidental expenses for travel away from home. The Taxpayer argues that because it could reasonably anticipate these expenses would be incurred, these amounts should be excluded from wages under sections 31.3121(a)-1(h) and 31.3401(a)-1(b)(2) of the Employment Tax Regulations.

Issue

Whether a driver's weekly compensation, earned on a cents-per- mile basis, may be reduced by amounts designated as a per diem allowance, under sections 3121(a), 3306(b), and 3401(a) of the Internal Revenue Code for purposes of the FICA, FUTA, and income tax withholding?

Facts

The Taxpayer commenced operations as an unincorporated business in 1968 and incorporated in the mid-1970's. All stock of the Taxpayer is owned by A, B, and C. The Taxpayer maintains approximately 70 tractors, employs 100 employees, and serves clients in 48 states. The Taxpayer has one office located at D where all dispatching and paperwork is performed. On most mornings, management meets to discuss the happenings of the prior business day. A and C attend these daily meetings.

Prior to mid-1987, the Taxpayer paid its drivers x or y cents- per-mile. These amounts did not include any portion for lodging, meals, or other incidental expenses. In mid-1987, A attended a trucking industry convention where he heard about meal allowances and per diem arrangements. Upon his return, A instituted a per diem reimbursement plan for the Taxpayer. Under the new plan, the drivers continued to be paid x cents per mile for revenue miles and y cents per mile for nonrevenue miles. The driver's gross compensation is determined by multiplying the number of each type of miles driven during a week by the appropriate rate, x or y. To this amount is added all other types of compensation such as layover pay, unloading pay, etc. After gross compensation is determined, the dispatcher reviews the driver's weekly trip report and determines how many days the driver was away from home overnight. The number of days on the road overnight for the week, reduced by one or two nights, was multiplied by the appropriate per diem rate, $58.00 or $67.00, and the product was subtracted from the driver's gross compensation for the week. The driver's gross compensation minus the per diem allowance was reported as wages on the driver's Form W-2. The amount designated per diem allowance was not reported on the driver's Form W-2. The driver's weekly pay statement provides the driver with a breakdown of the amount paid.

The tractors provided by the Taxpayer are equipped with sleepers. The Taxpayer contends, however, that the sleepers are too small and uncomfortable to provide the drivers with the necessary refreshing sleep they require. Because of this, the Taxpayer claims to have “reasonably anticipated” that the drivers would use motels each night they were away from home overnight.

There are instances when the Taxpayer uses “team drivers.” The purpose of using two drivers is to keep the truck on the road at all times. The payroll records disclose that even when team drivers are used, both

drivers receive a full per diem allocation for each day on the road, even though it is common knowledge that the team driver concept precludes stops for rest in a motel.

A similar situation exists for newly hired drivers. The Taxpayer assigns a trainer to each new driver. The two drive as a team until the new driver learns the Taxpayer's procedures. It is common practice in this situation for the trainer and trainee to use one motel room each night while away from home overnight. The Taxpayer reimburses the trainee for the cost of motels and the trainer receives a full per diem allocation even though the two shared a room.

The per diem rates established by the Taxpayer follow:

Lodging M & IE* Total

_____ _____ _____

Prior to mid-1987 $ None $ None $ None

Mid-1987 through Feb. 1989 44.00 14.00 58.00

After Feb. 1989 41.00 26.00 67.00

* Meals and incidental expenses

Prior to mid-1987, a driver's gross compensation was subject to federal employment taxes. Drivers who incurred employee travel expenses deducted substantiated amounts in accordance with sections 162 and 274 of the Code. Commencing in mid-1987, however, the Taxpayer reclassified a large portion of the driver's gross compensation as a per diem and now treats as “wages” this reduced compensation figure. The amount of compensation reclassified by the Taxpayer was E in 1988 and F in 1989.

Applicable Law

The present case involves calendar years 1988 and 1989. Not all law, regulations, revenue rulings, and revenue procedures concerning the employment tax treatment to be accorded the present fact pattern are pertinent for both years.

Section 61 of the Code provides that gross income means all income from whatever source derived, including compensation for services, including fees, commissions, fringe benefits, and similar items.

Section 3402(a) of the Code provides that every employer making payments of wages is required to withhold federal income tax from such amounts paid to its employees. Similarly, sections 3101, 3102(a), 3111, and 3301 provide that every employer making payments of wages is required to withhold and pay FICA and FUTA taxes.

Section 3401(a) of the Code provides that, for income tax withholding purposes, “wages” includes all remuneration for services performed by an employee for his employer unless otherwise excepted. Sections 3121(a) and 3306(b) contain similar exceptions from the definitions of the term “wages” for FICA and FUTA respectively.

Section 3121(a)(20) of the Code provides that, for FICA purposes, “wages” does not include any benefit provided to or on behalf of an employee if, at the time such benefit is provided, it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74(c), 117, or 132. Sections 3401(a)(19) and 3306(b)(16) provide similar exceptions from the definition of wages for purposes of income tax withholding and FUTA. If, for example, the benefit is a section 132 benefit, in order for the exclusion from wages to apply, the employer must have reason to believe, at the time the cash advance or reimbursement is paid (since that is the point at which the employment tax determinations must be made by the employer), that the amount would be excludable from income under section 132.

Section 31.3121(a)-1(h) of the regulations provides that for FICA purposes “Amounts paid specifically -- either as advances or reimbursements -- for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages. Traveling and other reimbursed expenses must be identified either by making a separate payment or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment.” Sections 31.3401(a)-1(b)(2) and 31.3306(b)-1(h) of the regulations provide similar exceptions from wages for purposes of income tax withholding and FUTA tax.

Rev. Rul. 55-196, 1955-1 C.B. 492, holds that a provision in an oral or written contract of employment or in a collateral agreement (either express or implied), to the effect that any payments made or advanced against earned commissions are first to be applied to reimburse the traveling salesman for traveling or other bona fide ordinary and necessary expenses, will satisfy the first requirement of the regulations that the amount be paid specifically as an advance or reimbursement. It is further necessary that the portion thereof that represents reimbursement for expenses be properly identified at the time of payment.

When section 132 was added to the Code by the Tax Reform Act of 1984, that section substituted a statutory approach for the prior law compensatory/noncompensatory approach in determining which employer- provided benefits should be excluded from income. A corresponding change was made to the employment tax provisions by the addition of sections 3121(a)(20), 3306(b)(16), and 3401(a)(19).

Section 132(a) of the Code provides, in part, that gross income shall not include any fringe benefit that qualifies as a working condition fringe. A “working condition fringe” is defined in section 132(d) as “any property or services provided to an employee of the employer to the extent that, if the employee paid for such property or services, such payment would be allowable as a deduction under section 162 or 167.”

In order to exclude such amounts now, the employer must have a reasonable belief that such amounts would fall within the definition of a working condition fringe benefit under section 132 of the Code. Therefore, unless the expense allowance falls within the parameters of section 132, such allowance cannot be excepted from the definition of “wages” for employment tax purposes.

Section 1.132-5T(c)(1) of the Temporary Income Tax Regulations provides that the value of property or services provided to an employee may not be excluded from the employee's gross income as a working condition fringe, by either the employer or the employee, unless the applicable substantiation requirements of either section 274(d) of the Code or section 162 (whichever is applicable) and the regulations thereunder are satisfied.

Section 1.132-5T(c)(2) provides that the substantiation requirements of section 274(d) are satisfied by adequate records or sufficient evidence corroborating the employee's own statement. [1] Therefore, if such deductions would have been allowable under section 162 only if certain substantiation requirements were satisfied, the exclusion for the working condition fringe benefit is available only if such substantiation requirements are satisfied.

Rev. Rul. 84-164, 1984-2 C.B. 63, holds that in the case of expenses for travel away from home (other than costs of transportation to or from the destination) in the pursuit of a trade or business, an employer reimburses its employees for meal expenses, or provides its employees with a per diem allowance in lieu of meal expenses in the amount of (a) $14.00 per day for such travel that requires a stay of less than 30 days, or (b) $9.00 per day for such travel that requires a stay of 30 days or more, these reimbursements and allowances shall be deemed substantiated within the meaning of section 1.274-5(c) of the regulations if (1) the employer reasonably limits payment of these meal expenses to those that are ordinary and necessary in the conduct of the employer's trade or business, and (2) the elements of time, place, and business purpose of travel are substantiated in accordance with paragraphs (b)(2) and (c) of section 1.274-5.

Rev. Rul. 84-164 is superseded by Rev. Proc. 89-67, 1989-2 C.B. 795, for per diem allowances for business meal and incidental expenses for travel away from home if the allowances are paid to an employee in taxable years of the employee beginning on or after January 1, 1989, with respect to meal and incidental expenses paid or incurred in taxable years beginning on or after January 1, 1989. Section 4.02 of Rev. Proc. 89-67, provides that if a payor pays a per diem allowance only for meal and incidental expenses in lieu of reimbursing actual expenses for meal and incidental expenses incurred or to be incurred by an employee for travel away from home, the amount of the expenses that is deemed substantiated is equal to the lesser of the per diem allowance or the amount computed at the Federal M & IE rate for the locality of travel for the period the employee is away from home. A per diem allowance is treated as paid only for meal and incidental expenses if (1) the payor provides the lodging in-kind, (2) the payor pays the cost of the lodging directly to the provider of the lodging, or (3) the payor does not have a reasonable belief that lodging expenses were or will be incurred by the employee.

Under Rev. Proc. 89-67, the term “per diem allowance” means a payment under a reimbursement or other expense allowance arrangement that meets the requirements specified in section 1.62-2T(c)(1) of the temporary regulations and that (1) is paid with respect to ordinary and necessary business expenses incurred, or which the payor reasonably anticipates will be incurred, by an employee for lodging, meal, and/or incidental expenses for travel away from home in connection with the performance of services as an employee, (2) is reasonably calculated not to exceed the amount of the expenses or the anticipated expenses, and (3) is paid at the applicable Federal per diem rate, a flat rate or stated schedule, or in accordance with any other service-specified rate or schedule. An allowance is paid at a flat rate or stated schedule if it is provided on a uniform and objective basis with respect to the expenses described in section 3.01 of Rev. Proc. 89-67. Such allowances may be paid with respect to the number of days away from home in connection with the performance of services as an employee or on any other basis that is consistently applied and in accordance with reasonable business practice. Thus, for example, a payment based on the number of miles traveled (e.g., cents per mile) to cover meal and incidental expenses paid to an over-the-road truck driver who is traveling away from home in connection with the performance of

services as an employee is an allowance paid at a flat rate or stated schedule. Rev. Proc. 89-67 is amplified by Rev. Proc. 90-15, 1990-1 C.B. 476 and is clarified, amplified, and modified by Rev. Proc. 90-38, I.R.B. 13.

Section 62(c) of the Code provides that an arrangement shall in no event be treated as a reimbursement or other expense allowance arrangement if (1) such arrangement does not require the employee to substantiate the expenses covered by the arrangement to the person providing the reimbursement, or (2) such arrangement provides the employee the right to retain any amount in excess of the substantiated expenses covered under the arrangement. The substantiation requirements of the preceding sentence shall not apply to any expense to the extent that substantiation is not required under section 274(d) for such expense by reason of the regulations prescribed under the 2nd sentence thereof.

Section 62(c) of the Code was enacted by the Family Support Act of 1988 (1988 Act), Pub. L. 100-485, October 13, 1988. Through enactment of section 67 of the Code by section 132 of the Tax Reform Act of 1986, (1986 Act), Pub. L. 99-514, 1986-3 C.B. (Vol 1) 30, the Congress sharpened the distinction between the tax treatment of unreimbursed and reimbursed employee business expenses. Among other changes, unreimbursed employee expenses plus other miscellaneous itemized deductions generally were made subject to a two-percent floor. At the same time, the Congress decided to retain the above- the-line-deduction treatment for reimbursements received by an employee pursuant to a reimbursement arrangement. This rationale for allowing the employee an above-the-line deduction to offset true reimbursement amounts does not apply in the case of nonaccountable plans. Since the employer does not require substantiation of any employee business expenses actually paid out of the amount received by the employee under the nonaccountable plan, or does not require the employee to return amounts received that are not spent for business purposes, “allowance” amounts under the plan more nearly resemble salary payments than true reimbursement amounts. [2]

Section 1.62-2(d)(1) of the regulations provides that, with certain exceptions, an arrangement meets the requirements of this paragraph if it provides advances, allowances (including per diem allowances, allowances only for meals and incidental expenses, and mileage allowances), or reimbursements only for business expenses that are allowable as deductions by Part VI (section 161 and the following), subchapter B, chapter 1 of the Code, and that are paid or incurred by the employee in connection with the performance of services as an employee of the employer. The payment may be actually received from the employer, its agent or a third party for whom the employee performs a service as an employee of the employer, and may include amounts charged directly or indirectly to the payor through credit card systems or otherwise. In addition, if both wages and the reimbursement or other expense allowance are combined in a single payment, the reimbursement or other expense allowance must be identified either by making a separate payment or by specifically identifying the amount of the reimbursement or other expense allowance.

Section 1.62-2(d)(3)(ii) of the regulations states that an arrangement providing a per diem allowance for travel expenses of a type described in paragraph (d)(1) of this section that is computed on a basis similar to that used in computing the employee's wages or other compensation (e.g., the number of hours worked, miles traveled, or pieces produced) meets the requirements of paragraph (d) only if, on December 12, 1989, the per diem allowance was identified by the payor either by making a separate payment or by specifically

identifying the amount of the per diem allowance, or a per diem allowance computed on that basis was commonly used in the industry in which the employee is employed.

ANALYSIS

Under sections 31.3121(a)-1(h), 31.3306(b)-1(h), and 31.3401(a)- 1(b)(2) of the regulations, the first requirement for exception from "wages" is that the amounts be paid specifically (either as advances or reimbursements) for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the taxpayer. Rev. Rul. 55-196 indicates that a provision in an oral or written contract of employment or in a collateral agreement (either express or implied) may satisfy this first requirement of the regulations.

Sections 31.3121(a)-1(h), 31.3306(b)-1(h), and 31.3401(a)- 1(b)(2) of the regulations further require that, to be excepted from wages, an amount paid specifically as an advance or reimbursement for traveling or other reimbursed expenses must be identified by the taxpayer either by making a separate payment or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment. Under Rev. Rul. 55-196, that portion of a payment that represents reimbursement for expenses must be properly identified at the time of payment. Thus, if proper identification is not made at the time of payment, cents-per-mile amounts that a taxpayer treated as wages at the time of payment may not later be recharacterized as "reimbursements" or "expense allowances."

In this case, a breakdown of a driver's weekly earnings is provided in a weekly pay statement. The statement, however, indicates that the driver received one amount for driving and a separate amount for traveling expenses characterized as a per diem. This is not borne out in the furnished documentation. In actuality, the driver's gross weekly earnings is based on the number of miles driven times the appropriate rate per mile. From this gross weekly compensation, the Taxpayer deducts a per diem amount for lodging, meals and incidental expenses.

Under sections 3121(a)(20), 3306(b)(16), and 3401(a)(19) of the Code, "wages" does not include any benefit provided to or on behalf of an employee if, at the time the benefit is provided, it is reasonable to believe that the employee will be able to exclude the value of such benefit from income under section 132. For example, if an employer has reason to believe, at the time a fringe benefit is provided, that the amount will be excludable from income as a working condition fringe benefit under section 132(a)(3), the amount is not wages for purposes of the FICA and income tax withholding. In this case, the Taxpayer reclassified, as per diem, each driver's weekly compensation to the extent of the number of nights (less one or two) each driver spent away from home overnight times the per diem amounts for lodging and meals and incidental expenses.

Section 2.03 of Rev. Proc. 89-67 states that the Commissioner may prescribe rules under which arrangements or allowances, if in accordance with reasonable practice, will be regarded (1) as equivalent to substantiation, by adequate records or other sufficient evidence, of the amount of such travel expenses for purposes of section 1.274-5T(c), and (2) as satisfying the requirements of an adequate accounting to the employer of the amount of such travel expenses for purposes of section 1.274-5T(f).

The term “per diem allowance” is defined in section 3.01 of Rev. Proc. 89-67 as a payment under a reimbursement or other expense allowance arrangement that meets the requirements specified in section 1.62-2T(c)(1) of the temporary regulations AND that:

> (1) is paid with respect to ordinary and necessary business expenses incurred, or which the payor reasonable anticipates will be incurred, by an employee for lodging, meal, and/or incidental expenses for travel away from home in connection with the performance of services as an employee,
>
> (2) is reasonably calculated not to exceed the amount of the expenses or the anticipated expenses, and
>
> (3) is paid at the applicable federal per diem rate, a flat rate or stated schedule, or in accordance with any other Service-specified rate or schedule.

Section 3.01(2) above presupposes that an employer will establish a per diem rate based on rate information obtained from various sources, especially from its employee-drivers who presumably use and pay for motel stays. Not only is there no reference to inquiries made of drivers by the Taxpayer in the file, there is ample suggestion that the per diem arrangement was not even satisfactorily explained to the employees. Further, the employees were unaware of the impact a “per diem” label on part of their gross compensation would have. The Taxpayer simply reclassified, as per diem, that part of a driver's gross compensation that the Taxpayer contends was spent for lodging. The facts indicate that the Taxpayer neither requested lodging receipts from its drivers nor made inquiry about the actual use of lodging facilities by its drivers. If it had, it would have discovered that its drivers seldom incurred lodging expenses; rather, for a variety of reasons, they opted to sleep in their vehicles.

Our analysis of the facts did not reveal the presence of an allowance, advance, or reimbursement arrangement with regard to lodging. Of course, the Taxpayer's incentive is substantial. It has lessened, to a substantial degree, its own FICA and FUTA taxes. [3] The decision by the Taxpayer to reclassify gross compensation through this type of “lodging per diem arrangement” does not equate to the prerequisite “reasonable business practice” requirement. Prior to the arrangement, the drivers were paid x or y for each mile driven and they paid for whatever lodging expenses they incurred. Under the current arrangement, they continue to be paid x or y for each mile driven and they continue to pay their own lodging expenses.

The documentation received from the District Director discloses that the employees were not made aware of the Taxpayer's stated policy of wanting all drivers to use motel rooms for sleep while away from home overnight. Interviews with the drivers reveal that the drivers did not stay in motels while on the road but slept in their trucks. In fact, drivers believe they need prior approval from the Taxpayer if they are to be reimbursed for a motel room. The drivers related instances when they requested permission to use a motel room and were summarily refused because their truck was outfitted with a sleeper. The documentation further discloses that the drivers were quite confused upon receiving their first pay stub that referred to “per diem.” Their requests for an explanation did little to eliminate their confusion. The Taxpayer explained that that was the way it accounted for the payroll, and it was to the driver's benefit. There appears from the facts only one circumstance when the Taxpayer paid for motel rooms. It was a well established policy of the Taxpayer that newly-hired employees were assigned a trainer, and the two acted as a team. The two would always use a motel room when away from home overnight. The Taxpayer would reimburse the trainee for

the cost of the room and reclassify the trainer's compensation as per diem to the extent of that nights lodging. Thus, even though the trainer did not incur lodging expense, the payroll records showed that the trainer's compensation was reduced to the extent of the appropriate per diem.

The Taxpayer, through its officers/shareholders A and C, claims that it “reasonably anticipated” that its drivers were using motel rooms each night while away from home. In support of this claim, it states that, since the per diem arrangement was instituted, not a single driver gave any indication that motel rooms were not being used while the drivers were away from home overnight. To further support its claim, the Taxpayer presented prepared statements to groups of drivers for their signatures during December of 1990, a time following the commencement of the current examination. The statements were read to the drivers and the drivers were instructed to sign. Paragraph numbered 3 of the statement provides, in part, as follows:

> I was paid for each trip I made on a mileage basis. A portion of the payment I received was per diem for meals and per diem for lodging to reimburse me for food and for motel expenses for each night that I was on the road during the trip. This arrangement for paying per diem was communicated to me both orally and in writing in 1987 when the Company first began paying per diem. The written explanation was enclosed with the first pay check which I received after the Company changed its policy regarding per diem.

Paragraph numbered 4 of the statement provides, in part, as follows:

> As a trucker, the only time I would feel obliged to use the sleeper-berth in the truck for overnight accommodations is when two (2) drivers are assigned to one trip, and one could sleep while the other drove. Since the Company had communicated its expectations regarding its drivers staying in motels while on long distance trips to me and paid me per diem for lodging expenses, in my opinion it was reasonable for the Company to believe and expect that I would stay in a motel on overnight trips, and I never indicated anything to the contrary to the Company. In addition, due to the size of the sleeper-berth cabs, and the driving-time rules under the DOT Regulations, The Company would have had no reason to believe that I would not stay in a motel room on overnight trips.

In an affidavit furnished the Internal Revenue Service by a driver that had signed the Taxpayer's statement, the following is stated:

> I was coerced by *** to sign the statement by their telling me it was for my protection, when actually it was for their own benefit. I contend that paragraph 4 is an outright “lie.” This statement was the first information that *** gave me in writing about the per diem. The forms were presented to groups of drivers for signature. *** read the statement to us & if we had questions, we were brow beat to the point no further questions would be asked.

In another affidavit furnished the Internal Revenue Service, a driver states that, in December 1990, he was required to sign the Taxpayer's statement in order to receive his Christmas bonus. He was led to believe that refusal to sign the statement would preclude his receiving the bonus.

We view the Taxpayer's prepared statement as self-serving and contrary to its actual lodging policy as expressed by the drivers.

The exclusion from wages based on a reasonable anticipation is not triggered merely by an employer's assertion that it applies. If an employer seeks to rely on the exclusion, it is obligated to have, at a minimum, an understanding of the law and to apply the law to the particular facts. In this way, the existence of a reasonable belief for excluding the benefits is based on a reasoned judgment.

It is our understanding that drivers keep in close touch with their dispatcher and, if they had been using motels, the dispatcher would have been aware of, and could have verified, this fact. Further, A and C attended most of the daily morning management meetings. It is unreasonable to assume that management would not have had knowledge concerning the drivers' sleeping arrangements, especially considering that over the course of the two year period covered by this examination, the amount converted from compensation to per diem for lodging and meals, and incidental expenses amounted to E plus F. A and C needed only to ask the dispatcher to become aware of the actual practices of the drivers.

The Taxpayer, through its representative, was offered its conference of right. When the offer was rejected, we suggested that the representative provide us with the documentation available to support the Taxpayer's contention that the drivers were aware of the motel policy. We also requested the basis upon which the Taxpayer “reasonably anticipated” that its drivers were incurring motel expenses. The representative declined to provide either.

Conclusion

Our analysis of the facts presented by the Taxpayer and the District Director failed to disclose the granting by the Taxpayer of an allowance, an advance, a reimbursement, or a fringe benefit to the drivers with respect to the lodging expenses incurred by them. Under the laws of the various years involved, we find no reasonable basis upon which the Taxpayer could believe that the drivers were incurring lodging expenses, except in those isolated instances involving trainee/driver teams. The amounts designated as lodging per diem should have been treated as wages subject to employment taxes and income tax withholding. On those occasions when drivers do incur lodging expenses, those expenses may be considered employee business expenses, which may be deductible by them as itemized deductions subject to the 2 percent floor.

Accordingly, a driver's weekly compensation, earned on a cents- per-mile basis, may not be reduced by amounts designated as a per diem allowance for lodging, $44.00 or 41.00 for each day away from home overnight, under sections 3121(a), 3306(b), and 3401(a) of the Code for purposes of the FICA, FUTA, and income tax withholding.

In this case, it is reasonable to believe that the drivers incurred expenses for meals and incidental expenses while on the road overnight and that the Taxpayer provided the drivers with a working condition fringe benefit to the extent of the value of those meals and incidental expenses. Therefore, the exceptions of sections 3121(a)(20), 3306(b)(16), and 3401(a)(19) of the Code are available to the Taxpayer only to the extent of the value of the meals and incidental expenses. Further, sections 31.3121(a)-1(h), 31.3306(b)- 1 (h), and 31.3401(a)-1(b)(2) of the regulations, which require that amounts be paid specifically as an advance or reimbursement for traveling expenses, were complied with only with respect to meals and incidental expenses.

Accordingly, a driver's weekly compensation, earned on a cents- per-mile basis, may be reduced by amounts designated as per diem for meals and incidental expenses, $14.00 or 26.00 for each day away from home overnight.

A copy of this technical advice memorandum is to be given to the Taxpayer. Under section 6110(j)(3) of the Code, this memorandum may not be used or cited as precedent.

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[1] Pursuant to section 1.132-1(g) of the regulations, section 1.132-5T is in effect for benefits received from January 1, 1985, to December 31, 1988. Parallel provisions are contained in section 1.132-5(c) of the final fringe benefit regulations that are effective as of January 1, 1989.

[2] H.R. Conf. Rpt. No 100-998, 100th Cong., 2d Sess. 202.

[3] The Taxpayer may have also reduced its workmen's compensation and unemployment compensation expenses.

END OF DOCUMENT -