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Part III

Administrative, Procedural, and Miscellaneous

26 CFR 601.105: Examination of returns and claims for refund, credit, or abatement; determination of correct tax liability.

(Also: Part I, §§ 62, 162, 267, 274; 1.62-2, 1.162-17, 1.267(a)-1, 1.274-5.)

Rev. Proc. 2011-47

SECTION 1. PURPOSE

This revenue procedure updates Rev. Proc. 2010-39, 2010-42 I.R.B. 459, and provides rules for using a per diem rate to substantiate, under § 274(d) of the Internal Revenue Code and 1.274-5 of the Income Tax Regulations, the amount of ordinary and necessary business expenses paid or incurred while traveling away from home. Taxpayers are not required to use a method described in this revenue procedure. A taxpayer may substantiate actual allowable expenses if the taxpayer maintains adequate records or other sufficient evidence.

This revenue procedure provides rules for using a per diem rate to substantiate the amount of an employee's expenses for lodging, meal, and incidental expenses, or for meal and incidental expenses only, that a payor (an employer, its agent, or a third

party) reimburses. Employees and self-employed individuals that deduct unreimbursed expenses for travel away from home may use a per diem rate for meals and incidental expenses, or incidental expenses only, under this revenue procedure. This revenue procedure does not provide rules for using a per diem rate to substantiate the amount of lodging expenses only.

Announcement 2011-42, 2011-32 I.R.B. 138, advised taxpayers that the Internal Revenue Service intends to discontinue the high-low substantiation method. Subsequently a number of taxpayers commented that they use the high-low substantiation method and asked that the Service retain it. Accordingly, this revenue procedure continues to authorize the high-low substantiation method.

Beginning with the rates for 2011-2012, the Service will publish an annual notice that provides the special per diem rates for purposes of sections 4.04, 4.05, and 5 of this revenue procedure and the list of high-cost localities for purposes of section 5 of this revenue procedure and will update this revenue procedure only as necessary.

SECTION 2. BACKGROUND AND CHANGES

.01 Section 162(a) allows a deduction for ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including expenses for travel away from home. However, under ' 262, a taxpayer may not deduct personal travel or living expenses.

.02 Section 274(n) generally limits the amount allowable as a deduction under ' 162 for any expense for food, beverages, or entertainment to 50 percent of the otherwise allowable amount. For an individual during, or incident to, a period of duty subject to the

hours of service limitations of the Department of Transportation, ' 274(n)(3) provides that, for taxable years beginning in 2008 or thereafter, the deductible percentage for these expenses is 80 percent.

.03 To deduct expenses for travel away from home, a taxpayer must substantiate the expenses under § 274(d), which also authorizes the Secretary to prescribe that some or all of the substantiation requirements do not apply to an expense that does not exceed a particular amount.

.04 Section 1.274-5(g) authorizes the Commissioner to prescribe rules under which reimbursement arrangements or per diem allowances are regarded (1) as equivalent to substantiation, by adequate records or other sufficient evidence, of the amount of travel expenses for purposes of ' 1.274-5(c), and (2) as satisfying the requirements of an adequate accounting to the employer of the amount of travel expenses for purposes of ' 1.274-5(f).

.05 For purposes of determining adjusted gross income, ' 62(a)(2)(A) allows an employee to deduct business expenses the employee pays or incurs in performing services under a reimbursement or other expense allowance arrangement with a payor.

.06 Section 62(c) provides that an arrangement is not treated as a reimbursement or other expense allowance arrangement for purposes of ' 62(a)(2)(A) if it (1) does not require the employee to substantiate the expenses covered by the arrangement to the payor, or (2) allows the employee to retain any amount in excess of the substantiated expenses covered under the arrangement. Section 62(c) further provides, however,

that substantiation is not required for the expense to the extent provided in regulations under § 274(d).

.07 Under ' 1.62-2(c), a reimbursement or other expense allowance arrangement satisfies the requirements of ' 62(c) if it meets the requirements of business connection, substantiation, and returning amounts in excess of expenses. In that case, all amounts paid under the arrangement are treated as paid under an accountable plan and are excluded from income and wages. If an arrangement does not meet one or more of these requirements, all amounts paid under the arrangement are treated as paid under a nonaccountable plan and are included in an employee's gross income, must be reported as wages or compensation on the employee's Form W-2, and are subject to the withholding and payment of employment taxes.

.08 Section 1.62-2(e)(2) provides that the amount of a business expense substantiated under ' 1.274-5(g) is treated as substantiated for purposes of ' 1.62-2.

.09 Under ' 1.62-2(f)(2), the Commissioner may prescribe rules for treating an arrangement providing per diem allowances as satisfying the requirement of returning amounts in excess of expenses if the arrangement requires the employee to return amounts that relate to unsubstantiated travel days, even though the arrangement does not require the employee to return the portion of the allowance that relates to substantiated travel days but that exceeds the deemed substantiated amount for those days. The allowance must be reasonably calculated not to exceed the amount of the employee's expenses or anticipated expenses and the employee must be required to return within a reasonable period of time any portion of the allowance that relates to

unsubstantiated travel days. Under § 1.62-2(h)(2)(i)(B), the portion of the allowance that relates to substantiated travel days but exceeds the substantiated amount for those days and that the employee is not required to return is subject to withholding and payment of employment taxes. See §§ 31.3121(a)-3, 31.3231(e)-1(a)(5), 31.3306(b)-2, and 31.3401(a)-4 of the Employment Tax Regulations.

.10 Under § 1.62-2(h)(2)(i)(B)(4), the Commissioner may prescribe special rules for the timing of withholding and paying employment taxes on per diem allowances.

.11 Section 1.274-5(j)(1) authorizes the Commissioner to establish a method allowing a taxpayer to treat a specific amount as paid or incurred for meals while traveling away from home instead of substantiating the actual cost.

.12 Section 1.274-5(j)(3) authorizes the Commissioner to establish a method allowing a taxpayer to treat a specific amount as paid or incurred for incidental expenses while traveling away from home in lieu of substantiating the actual cost.

.13 This revenue procedure includes modifications to Rev. Proc. 2010-39 as follows:

(1) The special per diem rates are now published in a separate annual notice.

The notice provides (1) the special transportation industry meal and incidental expenses rates (M&IE rates), (2) the rate for the incidental expenses only deduction, and (3) the rates and list of high-cost localities for purposes of the high-low substantiation method.

The Service plans to discontinue publishing this revenue procedure annually but will publish modifications as required. This revenue procedure remains in effect until superseded.

(2) Section 3.04 clarifies that partners and volunteers who receive reimbursements from payors may use the methods allowed under this revenue procedure to substantiate their expenses.

(3) Under section 5, taxpayers may now use the high-low substantiation method in lieu of the meal and incidental expenses only per diem substantiation method provided in section 4.02 for travel within the continental United States.

(4) Transition rules for the last 3 months of each calendar year are moved from sections 3.02(1)(a) and 4.04(6) to new section 4.06 and from section 5.05 to section 5.04.

SECTION 3. DEFINITIONS

.01 Per diem allowance. The term "per diem allowance" means a payment under a reimbursement or other expense allowance arrangement that is --

(1) Paid for ordinary and necessary business expenses incurred, or that the payor reasonably anticipates will be incurred, by an employee for lodging, meal, and incidental expenses, or for meal and incidental expenses, for travel away from home performing services as an employee of the employer,

(2) Reasonably calculated not to exceed the amount of the expenses or the anticipated expenses, and

(3) Paid at or below the applicable federal per diem rate, a flat rate or stated schedule, or in accordance with any other Service-specified rate or schedule.

.02 Federal per diem rate and federal M&IE rate.

(1) In general. The federal per diem rate is equal to the sum of the applicable federal lodging expense rate and the applicable federal M&IE rate for the day and locality of travel.

(a) CONUS rates. The General Services Administration (GSA) publishes the rates for localities in the continental United States (CONUS), as noted in Appendix A to 41 C.F.R. ch. 301. The GSA rates are available on the internet at www.gsa.gov.

(b) OCONUS rates. The rates for localities outside the continental United States (OCONUS) are established by the Secretary of Defense (rates for non-foreign localities, including Alaska, Hawaii, Puerto Rico, the Northern Mariana Islands, and the possessions of the United States) and by the Secretary of State (rates for foreign localities). These rates are published in the Per Diem Supplement to the Standardized Regulations (Government Civilians, Foreign Areas) (updated on a monthly basis) and are available on the internet at www.defensetravel.dod.mil and www.state.gov.

(2) Locality of travel. The term "locality of travel" means the locality where an employee or self-employed individual traveling away from home stops for sleep or rest.

(3) Incidental expenses. The term "incidental expenses" has the same meaning as in the Federal Travel Regulations, 41 C.F.R. 300-3.1 (fees and tips given to porters, baggage carriers, bellhops, hotel maids, stewards or stewardesses and others on ships, and hotel servants in foreign countries; transportation between places of lodging or business and places where meals are taken, if suitable meals can be obtained at the temporary duty site; and the mailing cost associated with filing travel vouchers and payment of employer-sponsored charge card billings). Future changes to the definition

of incidental expenses in the Federal Travel Regulations will be announced in the annual notice providing the special per diem rates.

.03 Flat rate or stated schedule.

(1) In general. Except as provided in section 3.03(2) of this revenue procedure, an allowance is paid at a flat rate or stated schedule if it is provided on a uniform and objective basis for the expenses described in section 3.01(1) of this revenue procedure. The allowance may be paid for the number of days away from home performing services as an employee or on any other basis that is consistently applied and in accordance with reasonable business practice. Thus, for example, an hourly payment to cover meal and incidental expenses paid to a pilot or flight attendant who is traveling away from home performing services as an employee is an allowance paid at a flat rate or stated schedule. Likewise, a payment based on the number of miles traveled (such as cents per mile) to cover meal and incidental expenses paid to an over-the-road truck driver who is traveling away from home performing services as an employee is an allowance paid at a flat rate or stated schedule.

(2) Limitation. An allowance that is computed on a basis similar to that used in computing an employee's wages or other compensation (such as the number of hours worked, miles traveled, or pieces produced) does not meet the business connection requirement of § 1.62-2(d), is not a per diem allowance, and is not paid at a flat rate or stated schedule, unless, as of December 12, 1989, (a) the allowance was identified by the payor either by making a separate payment or by specifically identifying the amount

of the allowance, or (b) an allowance computed on that basis was commonly used in the industry in which the employee performed services. See ' 1.62-2(d)(3)(ii).

.04 Partners and volunteers. Individuals subject to the rules of Subchapter K (partners) and individuals performing services without remuneration (volunteers) who receive reimbursements from payors may use the methods allowed under this revenue procedure to substantiate their expenses. The rules of sections 3, 4, 5, and 6 (except section 6.06) of this revenue procedure apply to reimbursements from payors to partners or volunteers.

SECTION 4. PER DIEM SUBSTANTIATION METHOD

.01 Per diem allowance. If a payor pays a per diem allowance in lieu of reimbursing actual lodging, 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 for each calendar day is equal to the lesser of the per diem allowance for that day or the amount computed at the federal per diem rate (see section 3.02 of this revenue procedure) for the locality of travel for that day (or partial day, see section 6.04 of this revenue procedure). See section 4.06(1) of this revenue procedure for transition rules.

.02 Meal and incidental expenses only per diem allowance. If a payor pays a per diem allowance only for meal and incidental expenses in lieu of reimbursing actual 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 for each calendar day is equal to the lesser of the per diem allowance for that day or the amount computed at the federal M&IE rate for the locality of travel for that day or partial day. A per diem

allowance is treated as paid for meal and incidental expenses only if (1) the payor pays the employee for actual expenses for lodging based on receipts submitted to the payor, (2) the payor provides the lodging in kind, (3) the payor pays the actual expenses for lodging directly to the provider of the lodging, (4) the payor does not have a reasonable belief that the employee will or did incur lodging expenses, or (5) the allowance is computed on a basis similar to that used in computing an employee's wages or other compensation (such as the number of hours worked, miles traveled, or pieces produced). See section 4.06(1) of this revenue procedure for transition rules.

.03 Method for meal and incidental expenses only deduction. Instead of the actual expense amount, employees and self-employed individuals may substantiate the amount of deductible meal expenses by using an amount computed at the federal M&IE rate for the locality of travel for each calendar day or partial day the employee or self-employed individual is traveling away from home. This amount is deemed substantiated for purposes of § 1.274-5T(b)(2)(i) and (c), provided the employee or self-employed individual substantiates the elements of time, place, and business purpose of the travel for that day or partial day in accordance with those regulations. See section 6.05(1) of this revenue procedure for rules related to the application of the § 274(n) limitation to amounts determined under this section 4.03. See section 4.05 of this revenue procedure for a method for substantiating the deductible amount of incidental expenses that employees or self-employed individuals who do not pay or incur meal expenses may use. See section 4.06(1) of this revenue procedure for transition rules.

.04 Special rules for the transportation industry.

(1) In general. This section 4.04 applies to (a) a payor that pays a per diem allowance only for meal and incidental expenses for travel away from home to an employee in the transportation industry and computes the amount under section 4.02 of this revenue procedure, or (b) an employee or self-employed individual in the transportation industry who computes the deductible amount for meal and incidental expenses for travel away from home under section 4.03 of this revenue procedure.

(2) Transportation industry defined. For purposes of this section 4.04, an employee or self-employed individual is in the transportation industry only if the employee's or self-employed individual's work (a) is of the type that directly involves moving people or goods by airplane, barge, bus, ship, train, or truck, and (b) involves regularly traveling away from home and stopping during a single trip at localities with differing federal M&IE rates. For purposes of the preceding sentence, a payor must determine that an employee or a group of employees is in the transportation industry by using a method that is consistently applied and in accordance with reasonable business practice.

(3) Rates. A taxpayer described in section 4.04(1) of this revenue procedure may use the CONUS and OCONUS special M&IE rates (published in an annual notice) for the transportation industry. A payor that uses either or both of these special rates for an employee must use the special rate(s) for all amounts deemed substantiated under section 4.02 of this revenue procedure paid to that employee for travel away from home within CONUS and/or OCONUS during the calendar year. Similarly, an employee or self-employed individual who uses either or both of these special rates must use the

special rate(s) for all amounts deemed substantiated under section 4.03 of this revenue procedure for travel away from home within CONUS and/or OCONUS during the calendar year. See section 4.06(2) of this revenue procedure for transition rules.

(4) Periodic rule. A payor described in section 4.04(1) of this revenue procedure may compute the amount of an employee's expenses that is deemed substantiated under section 4.02 of this revenue procedure periodically (not less frequently than monthly) rather than daily by comparing the total per diem allowance paid for the period to the sum of the amounts computed either at the federal M&IE rate(s) for the localities of travel, or at the special rate described in section 4.04(3), for the days or partial days the employee is away from home during the period.

(5) Examples.

(a) Example 1. Taxpayer, an employee in the transportation industry, travels away from home on business within CONUS for 10 days during a calendar month. A payor pays Taxpayer a per diem allowance for meal and incidental expenses only that the payor computes using section 4.04(3) of this revenue procedure. The CONUS special M&IE rate is \$59 per day. The amount deemed substantiated under section 4.02 of this revenue procedure is equal to the lesser of the total per diem allowance paid for the month or \$590 (10 days away from home at \$59 per day).

(b) Example 2. Taxpayer, a truck driver employee in the transportation industry, is paid a "cents-per-mile" allowance that qualifies as an allowance paid under a flat rate or stated schedule as defined in section 3.03 of this revenue procedure. Taxpayer travels away from home on business for 10 days. Based on the number of

miles Taxpayer is expected to drive per day, Taxpayer's employer pays an allowance of \$500 for the 10 days of business travel. The CONUS special M&IE rate is \$59 per day. Taxpayer actually drives for 8 days, and does not drive for the other 2 days Taxpayer is away from home. Taxpayer is paid under the periodic rule used for transportation industry employers and employees in accordance with section 4.04(4) of this revenue procedure. The amount deemed substantiated is the full \$500 because that amount does not exceed \$590 (10 days away from home at \$59 per day).

.05 Method for incidental expenses only deduction. Instead of using actual expenses in computing the amount allowable as a deduction for ordinary and necessary incidental expenses paid or incurred for travel away from home, employees and self-employed individuals who pay or incur incidental expenses but do not pay or incur meal expenses for a calendar day or partial day of travel away from home may use, for each calendar day or partial day the employee or self-employed individual is away from home, an amount that the Service publishes in an annual notice. This amount is deemed substantiated for purposes of § 1.274-5T(b)(2)(i) and (c), provided the employee or self-employed individual substantiates the elements of time, place, and business purpose of the travel for that day or partial day in accordance with those regulations. The method authorized by this section 4.05 may not be used by payors that reimburse expenses under section 4.01, 4.02, or 5.01 of this revenue procedure, or by employees or self-employed individuals who use the method described in section 4.03 of this revenue procedure to substantiate the amount of deductible meal and

incidental expenses. See section 6.05(5) of this revenue procedure for rules related to the application of the § 274(n) limitation to amounts determined under this section 4.05.

.06 Transition rules.

(1) In general. In applying section 4.01, 4.02, or 4.03 of this revenue procedure, taxpayers may continue to use the CONUS rates in effect for the first 9 months of the calendar year, instead of the updated GSA rates, for expenses of all CONUS travel away from home that are paid or incurred during the last 3 months of the calendar year. A taxpayer must use either the rates for the first 9 months of the calendar year or the updated rates for the period October 1 through December 31 of each calendar year consistently.

(2) Special transportation industry rates. Under the calendar-year convention provided in section 4.04(3) of this revenue procedure, a taxpayer who uses the federal M&IE rates during the first 9 months of the calendar year to substantiate the amount of an individual's travel expenses under sections 4.02 or 4.03 of this revenue procedure may not use, for that individual, the special transportation industry rates published in an annual notice until January 1 of the next calendar year. Similarly, a taxpayer who uses the special transportation industry rates during the first 9 months of the calendar year to substantiate the amount of an individual's travel expenses may not use, for that individual, the federal M&IE rates until January 1 of the next calendar year.

SECTION 5. HIGH-LOW SUBSTANTIATION METHOD

.01 In general. A payor that pays a per diem allowance in lieu of reimbursing actual expenses an employee pays or incurs or will pay or incur for travel away from home

may use the high-low substantiation method described in this section 5 in lieu of the per diem substantiation method described in section 4.01 of this revenue procedure or the meal and incidental expenses only method described in section 4.02 of this revenue procedure. If a payor uses the high-low substantiation method, the amount of the expenses that is deemed substantiated for each calendar day is equal to the lesser of the actual per diem allowance for that day or the amount computed under section 5.02 of this revenue procedure. Employees and self-employed individuals may not use the high-low substantiation method in lieu of the meal and incidental expenses only deduction method described in section 4.03 of this revenue procedure.

.02 Application of high-low method. Under the high-low substantiation method, a high rate applies to localities designated as high-cost localities and a low rate applies to every other locality within CONUS (one high rate and one low rate for lodging, meal, and incidental expenses and one high rate and one low rate for meal and incidental expenses only). The high or low rates, as appropriate, apply as if they were the federal per diem rate or the federal M&IE rate for the locality of travel. The high and low rates, amounts treated as meal expenses for purposes of § 274(n), and a list of high-cost localities are published in an annual notice.

.03 Limitation. A payor that uses the high-low substantiation method for an employee must use that method for all amounts paid to that employee for travel away from home within CONUS during the calendar year. The payor may use any permissible method (actual expenses, the per diem substantiation method described in section 4.01 of this revenue procedure, or the meal and incidental expenses only per

diem substantiation method described in section 4.02 of this revenue procedure) to reimburse that employee for any OCONUS travel away from home.

.04 Transition rules. For travel in the last 3 months of a calendar year--

(1) A payor must continue to use the same method (per diem method under sections 4.01 or 4.02 of this revenue procedure, or high-low method) for an employee as the payor used during the first 9 months of the calendar year; and

(2) A payor may use either the rates and high-cost localities in effect for the first 9 months of the calendar year or the updated rates and high-cost localities in effect for the last 3 months of the calendar year if the payor uses the same rates and localities consistently for all employees reimbursed under the high-low method.

.05 Examples.

(1) Example 1. Employer pays a per diem allowance for lodging, meal, and incidental expenses to Employee for travel away from home using the high-low substantiation method. Employee travels away from home for 5 full days to City A within CONUS. City A is listed as a high-cost locality. Employer reimburses employee at a rate of \$225 per day for each of employee's 5 days of travel. The per diem rate for a high-cost locality is \$250. The amount deemed substantiated under section 5 of this revenue procedure is \$225 per day (the lesser of the per diem allowance for each day (\$225) or the per diem rate for a high-cost locality (\$250)).

(2) Example 2. Employer pays a per diem allowance for meal and incidental expenses only to Employee for travel away from home using the high-low substantiation method. Employee travels away from home to City B (within CONUS) each month of

Year 1. For all of Year 1, Employer reimburses Employee at a rate of \$50 per day for meal and incidental expenses only. For the first 9 months of Year 1, City B is listed as a high-cost locality. The M&IE rate is \$60 for a high-cost locality and \$45 for all other localities. For the last 3 months of Year 1, City B is not listed as a high-cost locality, and the M&IE rate for City B is \$48. Employer chooses to use the rates and list of high-cost localities in effect during the first 9 months of Year 1 for the last 3 months of Year 1 (instead of the updated rates for the last 3 months of Year 1). If Employer uses the rates and high-cost localities in effect during the first 9 months of Year 1 for the last 3 months of Year 1 consistently for all employees, the amount deemed substantiated for Employee's travel to City B during the last 3 months of Year 1 is \$50, the lesser of the M&IE rate for a high-cost locality (\$60) or the employee's per diem allowance for each day (\$50).

SECTION 6. LIMITATIONS AND SPECIAL RULES

.01 In general. The federal per diem rate and the federal M&IE rate described in section 3.02 of this revenue procedure for the locality of travel apply in the same manner as they apply under the Federal Travel Regulations, 41 C.F.R. Part 301, except as provided in sections 6.02 through 6.04 of this revenue procedure.

.02 Federal per diem rate. A receipt for lodging expenses is not required in determining the amount of expenses deemed substantiated at the federal per diem rate (including lodging, meal, and incidental expenses in one rate) under section 4.01 or 5.01. See section 7.01 of this revenue procedure for the requirement that an employee substantiate the time, place, and business purpose of the expense.

.03 Meals provided in kind. A payor is not required to reduce the federal per diem rate or the federal M&IE rate for the locality of travel for meals provided in kind, provided the payor has a reasonable belief that the employee incurred or will incur meal and incidental expenses during each day of travel.

.04 Proration of the federal per diem or M&IE rate. Under the Federal Travel Regulations, in determining the federal per diem rate or the federal M&IE rate for the locality of travel, the full applicable federal M&IE rate is available for a full day of travel from 12:01 a.m. to 12:00 midnight. A taxpayer must use the method described in section 6.04(1) of this revenue procedure for purposes of determining the amount deemed substantiated for meal and incidental expenses or for incidental expenses only under section 4.03, 4.05, or 5 of this revenue procedure for partial days of travel away from home. For purposes of determining the amount deemed substantiated for a reimbursement for lodging, meal, and incidental expenses under section 4.01, 4.02, or 5 of this revenue procedure for partial days of travel away from home, a payor may use either of the following methods to prorate the federal M&IE rate to determine the federal per diem rate or the federal M&IE rate for the partial days of travel:

(1) The rate may be prorated using the method prescribed by the Federal Travel Regulations for meal and incidental expenses for partial days, see 41 C.F.R. 301-11.101, by allocating three-fourths of the applicable rate to each partial day of travel; or

(2) The rate may be prorated using any method that is consistently applied and is consistent with reasonable business practice. For example, if an employee travels away from home from 9 a.m. one day to 5 p.m. the next day, a method of proration that

results in an amount equal to two times the federal M&IE rate is consistent with reasonable business practice (even though the Federal Travel Regulations allow only one and a half times the federal M&IE rate).

.05 Application of the appropriate ' 274(n) limitation on meal expenses. Except as provided in section 6.05(5) of this revenue procedure, all or part of the amount of an expense deemed substantiated under this revenue procedure is subject to the appropriate limitation under ' 274(n) (see section 2.02 of this revenue procedure) on the deductibility of food and beverage expenses.

(1) A taxpayer must treat the entire amount computed for meal and incidental expenses under section 4.03 of this revenue procedure as an expense for food and beverages.

(2) If a per diem allowance is paid for meal and incidental expenses only, a payor must treat an amount equal to the lesser of the allowance or the federal M&IE rate for the locality of travel for each day or partial day (see section 6.04 of this revenue procedure) as an expense for food and beverages.

(3) If a per diem allowance is paid for lodging, meal, and incidental expenses for each calendar day or partial day an employee is away from home at a rate equal to or in excess of the federal per diem rate for the locality of travel, a payor must treat an amount equal to the federal M&IE rate for the locality of travel for each calendar day or partial day as an expense for food or beverages.

(4) If a per diem allowance is paid for lodging, meal, and incidental expenses for each calendar day or partial day an employee is away from home at a rate less than the federal per diem rate for the locality of travel, a payor must:

(a) Treat an amount equal to the federal M&IE rate for the locality of travel for each calendar day or partial day or, if less, the amount of the allowance, as an expense for food or beverages; or

(b) Treat an amount equal to 40 percent of the allowance as an expense for food or beverages.

(5) None of the amount for incidental expenses computed under section 4.05 of this revenue procedure is subject to limitation under ' 274(n).

.06 No double reimbursement or deduction. If a payor pays a per diem allowance in lieu of reimbursing actual lodging, meal, and incidental expenses, or meal and incidental expenses only, under section 4 or 5 of this revenue procedure, and the amount is treated as paid under an accountable plan, any additional payment for those expenses is treated as paid under a nonaccountable plan, is included in an employee's gross income, is reported as wages or other compensation on the employee's Form W-2, and is subject to withholding and payment of employment taxes. Similarly, if an employee or self-employed individual computes the amount allowable as a deduction for meal and incidental expenses for travel away from home under section 4.03 or 4.04 of this revenue procedure, no other deduction is allowed to the employee or self-employed individual for those expenses. For example, an employee receives a per diem allowance from a payor for meal and incidental expenses incurred while traveling away

from home and the amount is treated as paid under an accountable plan. During that trip, the employee pays for dinner for the employee and two business associates. The payor reimburses as a business entertainment meal expense the meal expense for the employee and the two business associates. Because the payor also pays the employee a per diem allowance for meal and incidental expenses, the amount paid for the employee's portion of the business entertainment meal expense is treated as paid under a nonaccountable plan, is reported as wages or other compensation on the employee's Form W-2, and is subject to withholding and payment of employment taxes.

.07 Related parties. Sections 4.01 and 5 of this revenue procedure do not apply if a payor and an employee are related within the meaning of ' 267(b), but for this purpose the percentage of ownership interest referred to in ' 267(b)(2) is 10 percent.

SECTION 7. APPLICATION

.01 An employee satisfies the adequate accounting and substantiation requirements of § 1.274-5(c) and (f)(4) and § 1.274-5T(c) if—

(1) The employee uses this revenue procedure to substantiate to a payor the amount of the employee's travel expenses, and

(2) Within a reasonable period of time, the employee also substantiates to the payor the elements of time, place, and business purpose of the travel in accordance with ' 1.274-5T(b)(2) and (c) and § 1.274-5(c) (other than ' 1.274-5(c)(2)(iii)(A)).

.02 An arrangement providing per diem allowances is treated as satisfying the requirement of ' 1.62-2(f)(2) of returning amounts in excess of expenses if an employee

is required to return within a reasonable period of time (as defined in § 1.62-2(g)) any portion of the allowance that relates to unsubstantiated travel days, even though the arrangement does not require the employee to return the portion of the allowance that relates to substantiated travel days and that exceeds the amount of the employee's expenses deemed substantiated. For example, a payor provides an employee an advance per diem allowance for meal and incidental expenses of \$250, based on an anticipated 5 days of business travel at \$50 per day to a locality for which the federal M&IE rate is \$46, and the employee substantiates 3 full days of business travel. The requirement to return excess amounts is treated as satisfied if the employee is required to return within a reasonable period of time (as defined in § 1.62-2(g)) the portion of the allowance that is attributable to the 2 unsubstantiated days of travel (\$100), even though the employee is not required to return the portion of the allowance (\$12) that exceeds the amount of the employee's expenses deemed substantiated under section 4.02 of this revenue procedure (\$138) for the 3 substantiated days of travel. However, the \$12 excess portion of the allowance is treated as paid under a nonaccountable plan as discussed in section 7.04 of this revenue procedure.

.03 An employee is not required to include in gross income the portion of a per diem allowance received from a payor that is less than or equal to the amount deemed substantiated under the rules provided in section 4 or 5 of this revenue procedure if the employee substantiates the business travel expenses covered by the per diem allowance in accordance with section 7.01 of this revenue procedure. See § 1.274-5T(f)(2)(i). If the remaining requirements for an accountable plan provided in

§ 1.62-2 are satisfied, that portion of the allowance is treated as paid under an accountable plan, is not reported as wages or other compensation on the employee's Form W-2, and is exempt from the withholding and payment of employment taxes. See § 1.62-2(c)(2) and (c)(4).

.04 An employee is required to include in gross income only the portion of the per diem allowance received from a payor that exceeds the amount deemed substantiated under the rules provided in section 4 or 5 of this revenue procedure if the employee substantiates the business travel expenses covered by the per diem allowance in accordance with section 7.01 of this revenue procedure. See § 1.274-5T(f)(2)(ii). In addition, the excess portion of the allowance is treated as paid under a nonaccountable plan, is reported as wages or other compensation on the employee's Form W-2, and is subject to withholding and payment of employment taxes. See § 1.62-2(c)(3)(ii), (c)(5), and (h)(2)(i)(B).

.05 If the amount of the expenses that is deemed substantiated under the rules provided in section 4.01, 4.02, or 5 of this revenue procedure is less than the amount of an employee's business expenses for travel away from home, an employee may claim an itemized deduction for the amount by which the business travel expenses exceed the amount that is deemed substantiated, provided the employee substantiates all the business travel expenses (not just the excess over the federal per diem rate), includes on Form 2106, "Employee Business Expenses," the deemed substantiated portion of the per diem allowance received from the payor, and includes in gross income the portion (if any) of the per diem allowance received from the payor that exceeds the

amount deemed substantiated. See ' 1.274-5T(f)(2)(iii). However, for purposes of claiming this itemized deduction for meal and incidental expenses, substantiation of the amount of the expenses is not required if the employee is claiming a deduction that is equal to or less than the amount computed under section 4.03 of this revenue procedure minus the amount deemed substantiated under sections 4.02 and 7.01 of this revenue procedure. The itemized deduction is subject to the appropriate limitation (see section 2.02 of this revenue procedure) on meal and entertainment expenses in ' 274(n) and the 2-percent floor on miscellaneous itemized deductions in ' 67.

.06 An employee who pays or incurs meal expenses and does not receive a per diem allowance for meal and incidental expenses may deduct an amount computed under section 4.03 of this revenue procedure only as an itemized deduction. This itemized deduction is subject to the appropriate limitation on meal and entertainment expenses in ' 274(n) and the 2-percent floor on miscellaneous itemized deductions in ' 67.

.07 An employee who does not pay or incur amounts for meal expenses and does not receive a per diem allowance for incidental expenses may deduct an amount computed under section 4.05 of this revenue procedure only as an itemized deduction. This itemized deduction is subject to the 2-percent floor on miscellaneous itemized deductions in ' 67.

.08 A self-employed individual who pays or incurs meal expenses for a calendar day or partial day of travel away from home may deduct an amount computed under section

4.03 of this revenue procedure in determining adjusted gross income under ' 62(a)(1), subject to the appropriate limitation on meal and entertainment expenses in ' 274(n).

.09 A self-employed individual who does not pay or incur meal expenses for a calendar day or partial day of travel away from home may deduct an amount computed under section 4.05 of this revenue procedure in determining adjusted gross income under ' 62(a)(1).

SECTION 8. WITHHOLDING AND PAYMENT OF EMPLOYMENT TAXES

.01 The portion of a per diem allowance, if any, that relates to the days of business travel substantiated and that exceeds the amount deemed substantiated for those days under section 4.01, 4.02, or 5 of this revenue procedure is treated as paid under a nonaccountable plan and is subject to withholding and payment of employment taxes. See ' 1.62-2(h)(2)(i)(B).

.02 In the case of a per diem allowance paid as a reimbursement, the excess described in section 8.01 of this revenue procedure is subject to withholding and payment of employment taxes in the payroll period in which a payor reimburses the expenses for the days of travel substantiated. See ' 1.62-2(h)(2)(i)(B)(2).

.03 In the case of a per diem allowance paid as an advance, the excess described in section 8.01 of this revenue procedure is subject to withholding and payment of employment taxes no later than the first payroll period following the payroll period in which the days of travel for which the advance was paid are substantiated. See ' 1.62-2(h)(2)(i)(B)(3). If an employee does not substantiate some or all of the days of

travel for which the advance was paid within a reasonable period of time or does not return the portion of the allowance that relates to those days within a reasonable period of time, the portion of the allowance that relates to those days is subject to withholding and payment of employment taxes no later than the first payroll period following the end of the reasonable period. See ' 1.62-2(h)(2)(i)(A).

.04 In the case of a per diem allowance only for meal and incidental expenses for travel away from home paid to an employee in the transportation industry by a payor that uses the rule in section 4.04(4) of this revenue procedure, the excess of the per diem allowance paid for the period over the amount deemed substantiated for the period under section 4.02 of this revenue procedure (after applying section 4.04(4) of this revenue procedure), is subject to withholding and payment of employment taxes no later than the first payroll period following the payroll period in which the excess is computed. See ' 1.62-2(h)(2)(i)(B)(4).

.05 For example, an employer pays an employee a per diem allowance under an arrangement that otherwise meets the requirements of an accountable plan to cover business expenses for meals and lodging for travel away from home at a rate of 120 percent of the federal per diem rate for the localities to which the employee travels. The employer does not require the employee to return the 20 percent by which the reimbursement for those expenses exceeds the federal per diem rate. The employee substantiates 6 days of travel away from home: 2 days in a locality where the federal per diem rate is \$150 and 4 days in a locality where the federal per diem rate is \$130. The employer reimburses the employee \$984 for the 6 days of travel away from home

$(2 \times (120\% \times \$150) + 4 \times (120\% \times \$130))$, and does not require the employee to return the excess payment of \$164 (2 days x \$30 (\$180-\$150) + 4 days x \$26 (\$156-\$130)). For the payroll period in which the employer reimburses the expenses, the employer must withhold and pay employment taxes on \$164. See section 8.02 of this revenue procedure.

.06 All payments to an employee under a per diem allowance arrangement are treated as paid under a nonaccountable plan if the reimbursement arrangement evidences a pattern of abuse. An arrangement evidences a pattern of abuse if, for example, it has no process to determine when an allowance exceeds the amount that may be deemed substantiated and the arrangement routinely pays allowances in excess of the amount that may be deemed substantiated without requiring actual substantiation or repayment of the excess amount, or treating the excess allowances as wages for employment tax purposes. See ' 62(c), § 1.62-2(k), and Rev. Rul. 2006-56, 2006-2 C.B. 874. Thus, these payments are included in the employee's gross income, are reported as wages or other compensation on the employee's Form W-2, and are subject to withholding and payment of employment taxes. See ' § 1.62-2(c)(3), (c)(5), and (h)(2).

SECTION 9. EFFECTIVE DATE

This revenue procedure is effective for per diem allowances for lodging, meal and incidental expenses, or for meal and incidental expenses only that are paid to an employee on or after October 1, 2011, for travel away from home on or after October 1, 2011. For purposes of computing the amount allowable as a deduction for travel away

from home, this revenue procedure is effective for meal and incidental expenses or for incidental expenses only paid or incurred on or after October 1, 2011.

SECTION 10. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 2010-39 is modified and amplified and, as modified and amplified, is superseded.

DRAFTING INFORMATION

The principal author of this revenue procedure is Eric D. Brauer of the Office of Associate Chief Counsel (Income Tax & Accounting). For further information regarding this revenue procedure contact Mr. Brauer at (202) 622-4970 (not a toll-free call) or the individual identified in the most recent annual per diem notice.