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Revenue Ruling 90-23

Trade or Business Expenses

ISSUES

For a taxpayer with one or more regular places of business:

(1)

Are daily transportation expenses paid or incurred by the taxpayer in going between the taxpayer's residence and a temporary work location of the taxpayer deductible business expenses under section 162 (a) of the Internal Revenue Code?

(2)

Are amounts paid as a reimbursement or other expense allowance for such daily transportation expenses excludable from the employee's gross income pursuant to section 62 (a) (2)-(A) of the Code and section 1.62-2T of the temporary Income Tax Regulations?

(3)

Is an employer required to report on an employee's Form W-2, or to withhold and pay employment taxes on, amounts paid as a reimbursement or other expense allowance for such daily transportation expenses?

LAW AND ANALYSIS

Issue (1)

Section 162 of the Code allows a deduction for all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. Under this provision, a taxpayer may deduct the daily transportation expenses paid or incurred in the taxpayer's trade or business.

Section 262 of the Code, however, provides that no deduction is allowed for personal, living, or family expenses. Commuting expenses are specifically treated as nondeductible personal expenses under sections 1.162-2 (e) and 1.262-1 (b) (5) of the Income Tax Regulations.

Section 67 (a) of the Code provides that miscellaneous itemized deductions for any taxable year may be deducted only to the extent that the aggregate amount of such deductions exceeds 2 percent of adjusted gross income under section 62. Section 67 (b) provides that the term "miscellaneous itemized deductions" means itemized deductions other than those specifically listed therein. A business expense deduction under section 162 (a) is a miscellaneous itemized deduction because it is not one of the deductions specifically listed in section 62 (b).

Daily transportation expenses paid or incurred by a taxpayer in going between the taxpayer's residence and one or more regular places of business or employment are nondeductible personal commuting expenses under section 262 of the Code. However, daily transportation expenses paid or incurred by a taxpayer in going between two specific business locations (whether in the same business or different businesses) are deductible business expenses. See Rev. Rul. 55-109, 1955-1 C.B. 261.

Rev. Rul. 190, 1953-2 C.B. 303, provides a limited exception to the general rule of commuting expense nondeductibility. It holds that, for a taxpayer who ordinarily works in a particular metropolitan area but who is not regularly employed at any specific work location, daily transportation expenses are deductible business expenses when paid or incurred by the taxpayer in going between the taxpayer's residence and a temporary work site outside that metropolitan area. However, such expenses are not deductible when paid or incurred in going between the taxpayer's residence and a temporary work site within such metropolitan area because that area is considered the taxpayer's regular place of business.

A taxpayer who pays or incurs daily transportation expenses on trips between the taxpayer's residence and one or more regular places of business is like the taxpayer described in Rev. Rul. 190 who pays or incurs daily transportation expenses on trips between the taxpayer's residence and temporary work sites within the metropolitan area that is considered the taxpayer's regular place of business. Such daily transportation expenses are nondeductible commuting expenses. On the other hand, a taxpayer who has one or more regular places of business and who pays or incurs daily transportation expenses for trips between the taxpayer's residence and temporary work locations is like the taxpayer described in Rev. Rul. 190 who pays or incurs deductible daily transportation expenses for trips, between the taxpayer's residence and temporary work sites outside the metropolitan area that is considered the taxpayer's regular place of business. Thus, for a taxpayer who has one or more regular places of business, daily transportation expenses paid or incurred in going between the taxpayer's residence and temporary work locations are deductible business expenses under section 162 (a) of the Code regardless of the distance.

For purposes of determining whether daily transportation expenses within the metropolitan area are deductible business expenses or nondeductible commuting expenses, a regular place of business is any location at which the taxpayer works or performs services on a regular basis, and a temporary place of business is any location at which the taxpayer performs services on an irregular or short-term (i.e., generally a matter of days or weeks) basis. A taxpayer may be considered as working or performing services at a particular location on a regular basis whether

or not the taxpayer works or performs services at that location every week or on a set schedule. Thus, for example, daily transportation expenses incurred by a doctor in going between the doctor's residence and one or more offices, clinics, or hospitals at which the doctor works or performs services on a regular basis are nondeductible commuting expenses. However, daily transportation expenses incurred by the doctor in going between a clinic and a hospital or between the doctor's residence and a temporary work location are deductible business expenses.

If it is determined upon examination that there is a clear pattern of abuse by the taxpayer in claiming a business expense deduction for daily transportation expenses paid or incurred in going between the taxpayer's residence and asserted temporary work locations without proof of a valid business purpose, the Service will disallow any deduction for such expenses and impose appropriate penalties.

Issues (2) and (3)

For purposes of determining "adjusted gross income," section 62 (a) (2) (A) of the Code allows an employee a deduction from gross income for expenses allowed by Part VI (section 161 and following), sub-chapter B, chapter 1 of the Code, paid by an employee, in connection with the performance of services as an employee, under a reimbursement or other expense allowance arrangement with a payor (the employer, its agent, or a third party).

Section 62 (c) of the Code provides that an arrangement will not be treated as a reimbursement or other expense allowance arrangement for purposes of section 62 (a) (2) (A) if (1) such arrangement does not require the employee to substantiate the expenses covered by the arrangement to the payor, or (2) such arrangement provides the employee the right to retain any amount in excess of the substantiated expenses covered under the arrangement.

Under section 1.62-2T (c) (1) of the temporary regulations, a reimbursement or other expense allowance arrangement satisfies the requirements of section 62 (c) of the Code if it meets the requirements of business connection, substantiation, and returning amounts in excess of expenses as specified in the regulations. If an arrangement meets these requirements, all amounts paid under the arrangement are treated as paid under an "accountable plan," except that any amounts retained in excess of the amounts substantiated are treated as paid under a "nonaccountable plan." See section 1.62-2T (c) (2) and (c) (3) (ii). If an arrangement does not satisfy one or more of these requirements, all amounts paid under the arrangement are treated as paid under a "nonaccountable plan." See section 1.62-2T (c) (3).

Section 1.62-2T (c) (4) of the temporary regulations provides that amounts treated as paid under an accountable plan are excluded from the employee's gross income, are not required to be reported on the employee's Form W-2, and are exempt from the withholding and payment of employment taxes (FICA, FUTA, RRTA, RUTA, and income tax). Section 1.62-2T (c) (5) provides that amounts treated as paid under a non-accountable plan are included in the employee's gross income, must be reported to the employee, and are subject to withholding and payment of employment taxes. For withholding and payment of employment tax requirements, see sections 31.3121 (a)-2T, 31.3231 (e)-3T, 31.3306 (b)-2T, and 31.3401 (a)-2T of the Employment Tax Regulations, which apply to payments made under reimbursement or other expense allowance arrangements received by an employee on or after July 1, 1990, with respect

to expenses paid or incurred on or after July 1, 1990. For reporting requirements, see section 1.6041-3 (i), which generally applies to payments made under reimbursement or other expense allowance arrangements received by an employee on or after January 1, 1989, with respect to expenses paid or incurred on or after January 1, 1989.

Consistent with the position in this revenue ruling on Issue (1) providing for the deductibility of daily transportation expenses paid or incurred by a taxpayer with one or more regular places of business in going between the taxpayer's residence and a temporary work location, an employee is not required to include in gross income the portion of a reimbursement or other expense allowance for such daily transportation expenses that is treated as paid under an accountable plan pursuant to section 1.62-2T (c) (2) and (c) (4) of the temporary regulations. In addition, such portion of the reimbursement or allowance is not required to be reported on the employee's Form W-2 and is exempt from the withholding and payment of employment taxes. For purposes of meeting the accountable plan requirements, an employee may use any of the Service-specified deemed substantiation procedures (e.g., the business standard mileage rate) to substantiate the amount of the daily transportation expenses paid or incurred. See Rev. Proc. 89-66, 1989-2 C.B. 792.

An employee is required to include in gross income only the portion of a reimbursement or other expense allowance for such daily transportation expenses that is treated as paid under a nonaccountable plan pursuant to section 1.62-2T (c) (3) and (c) (5) of the temporary regulations. In addition, the excess portion of the reimbursement or allowance is required to be reported on the employee's Form W-2 and is subject to withholding and payment of employment taxes.

HOLDINGS

For a taxpayer with one or more regular places of business:

(1)

Daily transportation expenses paid or incurred by the taxpayer in going between the taxpayer's residence and a temporary work location of the taxpayer are deductible business expenses under section 162 (a) of the Code. If the taxpayer is an employee, the taxpayer may deduct such daily transportation expenses only as a miscellaneous itemized deduction subject to the 2-percent floor provided in section 67 of the Code. However, see Holding (2) below for the treatment of those expenses reimbursed under an accountable plan.

(2)

An employee is not required to include in gross income the portion of amounts paid as a reimbursement or other expense allowance for such daily transportation expenses that is treated as paid under an accountable plan pursuant to section 1.62-2T (c) (2) and (c) (4). An employee is required to include in gross income the portion of amounts paid as a reimbursement or other expense allowance for such daily transportation expenses that is treated as paid under a nonaccountable plan pursuant to section 1.62-2T (c) (3) and (5). The employee may claim a

miscellaneous itemized deduction for the amount by which the deductible daily transportation expenses exceed the portion of the amounts paid as a reimbursement or other expense allowance for such expenses that is treated as paid under an accountable plan, but such deduction is subject to the 2-percent floor provided in section 67 of the Code.

(3)

An employer is not required to report on the employee's Form W-2, or to withhold and pay employment taxes on, the portion of amounts paid as a reimbursement or other expense allowance for such daily transportation expenses that is treated as paid under an accountable plan pursuant to section 1.62-2T (c) (2) and (c) (4). An employer is required to report on the employee's Form W-2, and to withhold and pay employment taxes on, the portion of amounts paid as a reimbursement or other expense allowance for such daily transportation expenses that is treated as paid under a nonaccountable plan pursuant to section 1.62-2T (c) (3) and (5).

EFFECT ON OTHER REVENUE RULINGS

Rev. Rul. 190 is distinguished because the employees in that revenue ruling were not regularly employed at any specific work location. The federal income tax treatment of taxpayers within the scope of Rev. Rul. 190 (i.e., those who are not regularly employed at any specific work location and who travel to temporary jobs outside the metropolitan area) remains unchanged.

Rev. Rul. 59-371, 1959-2 C.B. 236, which in part sets forth rules concerning what is "temporary" employment for purposes of Rev. Rul. 190, is distinguishable.

Rev. Rul. 55-109, which in part provides for the deductibility of daily transportation expenses paid or incurred by a taxpayer who is a member of an Armed Forces reserve unit in going between the taxpayer's residence and the regular meetings of the reserve unit that are held at a location outside the metropolitan area in which the taxpayer is regularly employed, is hereby modified to provide for the nondeductibility of such expenses paid or incurred on or after January 1, 1990.

Rev. Rul. 55-109 also states that the regular place of business of a taxpayer is not limited to the office or building at which the taxpayer regularly works or performs services but includes the entire metropolitan area in which such site is located. Rev. Rul. 55-109 is hereby further modified by deleting such statement.