DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, DC 20224

OFFICE OF CHIEF COUNSEL

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MEMORANDUM FOR CLEM GROSS
OFFICE OF TRAVEL MANAGEMENT & RELOCATION

FROM: Lewis J. Fernandez by George Baker
Deputy Assistant Chief Counsel (Income Tax & Accounting)

SUBJECT: Travel Questions

This Chief Counsel Advice is in response to your email inquiry dated December 15, 1999, and it may be shared with field offices. Chief Counsel Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be relied upon or otherwise cited as precedent.

LEGEND:

X =

ISSUE:

What are the rules for determining the proper tax treatment of reimbursements that X provides to its personnel for travel expenses.

CONCLUSION:

This memorandum provides a general overview of the applicable law and Internal Revenue Service (IRS) position regarding the reimbursement of travel expenses, and it addresses the questions raised in your memorandum.

FACTS:

Your email asks for guidance in dealing with travel expense reimbursements. You have posed 2 questions to elicit more specific information about the rules in this area. Our response will specifically address each of your questions.

LAW:

Section 61(a)(1) of the Internal Revenue Code provides that compensation for services (including fees, commissions, fringe benefits, and similar items) is includible in gross income. In addition, remuneration for services paid by the employer to an employee are wages subject to employment taxes, which generally include income tax withholding and the Federal Insurance Contributions Act (FICA) taxes. Under § 6051 and the regulations thereunder, wages are reported on Form W-2.

Section 62(a)(2)(A) allows a deduction from gross income for reimbursed expenses of employees under a reimbursement or other expense allowance arrangement with the employer. Section 62(c) provides that an arrangement will not be treated as a "reimbursement or other expense allowance arrangement" if (1) the arrangement does not require substantiation of covered expenses, or (2) the employee may retain any amounts in excess of substantiated expenses.

Section 1.62-2 of the Income Tax Regulations sets forth rules for reimbursement or other expense allowance arrangements and for payments made under such arrangements. These rules provide that an amount paid by an employer to an employee under an arrangement that meets specified requirements is treated as paid under an "accountable plan." Amounts will be treated as paid under an accountable plan only if (1) the requirements of business connection, substantiation, and return of excess (set out in detail in the regulations) are met and (2) the amounts are provided for business expenses that are deductible under §§ 161 - 197 by the employee in connection with the performance of services as an employee of the employer. If one or more of the requirements of business connection, substantiation, and return of excess is not met, or if amounts are paid for nondeductible bona fide business expenses, the amounts will be treated as paid under a “nonaccountable plan.”

An amount treated as paid under an accountable plan is excluded from the employee's gross income, is not reported as wages, and is exempt from the withholding and payment of employment taxes. An amount treated as paid under a nonaccountable plan is included in the employee's gross income, is reported as wages, and is subject to the withholding and payment of employment taxes.

As discussed above, the advances, allowances, or reimbursements must be provided for business expenses that are deductible under §§ 161 - 197 in order to be treated as paid under an accountable plan. Section 162(a)(2) allows a deduction for ordinary and necessary business expenses paid or incurred in carrying on a trade or business, including traveling expenses (including amounts expended for meals and lodging other than amounts that are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business. Deductible expenses include business expenses paid or incurred by a taxpayer in connection with the performance of services as an employee. Primuth v. Commissioner, 54 T.C. 374 (1970).

Travel expenses are not deductible under § 162(a)(2) unless the expenses are incurred while "away from home" overnight.[1] See Commissioner v. Flowers, 326 U.S. 465 (1946), 1946-1 C.B. 57. Rev. Rul. 93-86, 1993-2 C.B. 71, provides that, for purposes of § 162(a)(2), a taxpayer's "home" is generally considered to be located at (1) the taxpayer's regular or principal (if more than 1 regular) place of business, or, (2) if the taxpayer has no regular or principal place of business, then at the taxpayer's abode in a real and substantial sense (that is, a residence where the taxpayer maintains certain personal and business connections, as discussed in Rev. Rul. 73-529, 1973-2 C.B. 37). If the taxpayer comes within neither of these categories, then the taxpayer is considered to be an itinerant whose "home" is wherever the taxpayer happens to work.

Travel expenses related to temporary employment in a single location away from home generally are deductible under § 162(a)(2). See Peurifoy v. Commissioner, 358 U.S. 59 (1958), 1958-2 C.B. 916. For most taxpayers, the flush language of § 162(a) provides a 1-year limitation on temporary employment: a taxpayer is not treated as being temporarily away from home during any period of employment if such period exceeds 1 year. Rev. Rul. 93-86 provides the following guidance regarding this provision:

> [I]f employment away from home in a single location is realistically expected to last (and does in fact last) for 1 year or less, the employment is temporary in the absence of facts and circumstances indicating otherwise. If employment away from home in a single location is realistically expected to last for more than 1 year or there is no realistic expectation that the employment will last for 1 year or less, the employment is indefinite, regardless of whether it actually exceeds 1 year. If employment away from home in a single location initially is realistically expected to last for 1 year or less, but at some later date the employment is realistically expected to exceed 1 year, that employment will be treated as temporary (in the absence of facts and circumstances indicating otherwise) until the date that the taxpayer's realistic expectation changes.

For a taxpayer who is employed at more than a single location for more than 1 year, the general rule in Rev. Rul. 93-86 provides that the taxpayer's "home" is the taxpayer's principal place of business. The more important factors to be considered in determining which place of business is the principal place are the total time ordinarily spent by the taxpayer at each of his business posts, the degree of business activity at each such post, and whether the financial return in respect of each post is significant or insignificant. See Rev. Rul. 54-147, 1954-1 C.B. 51. A taxpayer in this situation is

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[1]Generally the nature of the employment must be such that it is reasonable for the taxpayer to need and to obtain sleep or rest during release time on such trips in order to meet the demands of the job. See, for example, Rev. Rul. 75-168, 1975-1 C.B. 58, and Rev. Rul. 68-663, 1968-2 C.B. 71. The "sleep or rest" rule was upheld in United States v. Correll, 389 U.S. 299 (1967), 1968-1 C.B. 64, as it achieved ease and certainty of application and also substantial fairness, for the rule places all 1-day travelers on a similar tax footing.

considered to be “away from home” while at a minor post of duty, and business travel expenses with respect to that location are deductible under § 162(a)(2).

The IRS has not published guidance regarding whether, or to what extent, a break in service at a work location will affect the determination that a taxpayer is or is not employed in a single location for 1 year or less. See Blatnick v. Commissioner, 56 T.C. 1344, 1348 (1971) (Brief interruptions of work at a particular location do not, standing alone, cause employment which would otherwise be indefinite to become temporary.).

ANALYSIS:

Now we will address the specific questions that you posed in your email. Some of the questions have been modified to conform with the Chief Counsel Advice format. We will assume that all of the accountable plan rules have been met except as to the deductibility of the reimbursed expenses discussed in the following questions.

> Question (1). An employee of X from a branch office in California is assigned to X’s headquarters office in Washington, D.C., for an 8-month period. While on assignment, the employee accepts a 6-month assignment to work at a client’s office Washington, D.C., beginning after the first assignment ends. The employee takes long-term leave (more than a month) at the employee’s residence in California between the assignments. Are the travel expenses in Washington, D.C., deductible?

Rev. Rul. 93-86 provides that if employment away from home in a single location initially is realistically expected to last for 1 year or less, but at some later date the employment is realistically expected to exceed 1 year, that employment will be treated as temporary (in the absence of facts and circumstances indicating otherwise) until the date that the taxpayer's realistic expectation changes. Here, when the employee agrees to continue to work in Washington, D.C., there is a realistic expectation that the employment in a single location – Washington, D.C. – will last for more than 1 year. The employee is no longer temporarily away from home, and the travel expenses are no longer deductible, at the point the expectation changes. It is not relevant that the second assignment is for a different employer. See Sohaiby v. Commissioner, T.C.M. 1965-287.

Although the IRS has not published guidance regarding breaks in service, under these circumstances the break between the assignments in Washington should be ignored. The employee should not be treated as working in more than a single location during this period (because the employee is not working during the break), and the second assignment in Washington should be treated as extending the initial period of employment (because the break occurred after it was realistically expected that the employment would last more than 1 year).

> Question (2). Several employees of X from various branch offices around the country have been assigned to work in one of the departments at the

> headquarters office in Washington, D.C., for five months. During this period a selection process to fill permanent vacancies in that department is underway. When the 5-month period ends, two of the employees have been competitively selected for the positions. Pursuant to these positions, the employees will perform services for the department at the branch offices where they were originally employed, and they will also regularly travel Washington, D.C.

As discussed above, Rev. Rul. 93-86 provides that if employment away from home in a single location initially is realistically expected to last for 1 year or less, but at some later date the employment is realistically expected to exceed 1 year, that employment will be treated as temporary (in the absence of facts and circumstances indicating otherwise) until the date that the taxpayer's realistic expectation changes. Here, the assignment at the headquarters office in Washington, D.C., initially is expected to last for less than 1 year. Once it is determined that employment in Washington, D.C., is realistically expected to last for more than 1 year, the employment is no longer temporary within the meaning of Rev. Rul. 93-86 for these employees.

However, unlike the facts presented in your first question, once they are selected for the position, the employees are not employed in a single location, but rather they have more than 1 regular place of business. As stated in Rev. Rul. 93-86, a taxpayer's "home" for purposes of § 162(a)(2) is the taxpayer's principal place of business if the taxpayer has more than 1 regular place of business. Determining which location is the principal place of business is a question of fact. The more important factors to be considered in making this determination are the total time ordinarily spent by the taxpayer at each of his business posts, the degree of business activity at each such post, and whether the financial return in respect of each post is significant or insignificant. See Rev. Rul. 54-147, 1954-1 C.B. 51.

If it is determined that a selected employee's branch office location is the employee's principal place of business, then business travel expenses with respect to the Washington, D.C., headquarters office would be deductible under § 162(a)(2) as "away from home" business travel expenses.

This memorandum is for your general information and is advisory only. It is not intended to be conclusive as to the tax consequences for any specific taxpayer. If we can be of further assistance, please contact George Baker at (202) 622-4920.