

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. 2010-39

SECTION 1. PURPOSE

This revenue procedure updates Rev. Proc. 2009-47, 2009-42 I.R.B. 524, 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.

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 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 substantiation of the amount of a business expense in accordance with rules prescribed under the authority of ■ 1.274-5(g) is treated as substantiating the amount 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. 2009-47 as follows:

(1) Sections 3.02(1)(a), 4.04(6), and 5.06 provide transition rules for the last 3 months of calendar year 2010.

(2) Section 5.03 contains the list of high-cost localities and section 5.04 describes changes to the list of high-cost localities for purposes of section 5.

.14 The Internal Revenue Service is evaluating the continuing need for the high-low method provided in section 5 of this revenue procedure, and requests public comments on this issue. Comments should be submitted by December 31, 2010, to: Internal Revenue Service, CC:PA:LPD:PR (Rev. Proc. 2010-XX), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Comments may be hand delivered between the hours of 8:00 a.m. and 4:00 p.m. Monday to Friday to CC:PA:LPD:PR (Rev. Proc. 2010-XX), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, D.C. Comments also may be transmitted electronically to Notice.Comments@irs.counsel.treas.gov, indicating Rev. Proc. 2010-XX in the subject line. All comments will be available for public inspection and copying.

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 meal and incidental expense (M&IE) rate for the day and locality of travel.

(a) CONUS rates. The rates for localities in the continental United States (CONUS) are provided in Appendix A to 41 C.F.R. ch. 301. However, 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 2010 for expenses of all CONUS travel away from home that are paid or incurred during calendar year 2010 instead of the updated GSA rates. A taxpayer must consistently use either these rates or the updated rates for the period October 1, 2010, through December 31, 2010.

(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), and are published in the Per Diem Supplement to the Standardized Regulations (Government Civilians, Foreign Areas) (updated on a monthly basis).

(c) Internet access to the rates. The CONUS and OCONUS rates may be found on the internet at www.gsa.gov.

(2) Locality of travel. The term "locality of travel" means the locality where an employee 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 (2010). The Federal Travel Regulations currently include as incidental expenses 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.

.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 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).

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).

.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).

.03 Optional 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 incidental expenses that employees or self-employed individuals who do not pay or incur meal expenses may use.

.04 Special rules for 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) regularly requires travel away from home which, during any single trip away from home, usually involves travel to 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 treat \$59 as the federal M&IE rate for any CONUS locality of travel and \$65 as the

federal M&IE rate for any OCONUS locality of travel. 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 4.04(6) 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 the 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 16 days (including partial 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 and the method of proration described in section 6.04(2) of this revenue procedure.

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 \$944 (16 days 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 drives, Taxpayer’s employer pays an allowance of \$500 for the 10 days of business travel. 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 (ten days away from home at \$59 per day).

(6) Transition rules. Under the calendar-year convention provided in section 4.04(3), a taxpayer who used the federal M&IE rates during the first 9 months of calendar year 2010 to substantiate the amount of an individual's travel expenses under sections 4.02 or 4.03 of Rev. Proc. 2009-47 may not use, for that individual, the special transportation industry rates provided in this section 4.04 until January 1, 2011.

Similarly, a taxpayer who used the special transportation industry rates during the first 9 months of calendar year 2010 to substantiate the amount of an individual's travel expenses may not use, for that individual, the federal M&IE rates until January 1, 2011.

.05 Optional 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 computed at the rate of \$5 per day for any CONUS or OCONUS locality of travel. 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 4.03 of this revenue procedure for a method that may be used by employees or self-employed individuals who pay or incur meal expenses. The method authorized by this section 4.05 may not be used by payors that use 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. 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.

SECTION 5. HIGH-LOW SUBSTANTIATION METHOD

.01 In general. If a payor pays a per diem allowance in lieu of reimbursing actual lodging, meal, and incidental expenses an employee incurs or will incur for travel away from home and the payor uses the high-low substantiation method described in this section 5 for travel within CONUS, 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 rate provided in section 5.02 of this revenue procedure for the locality of travel for that day or partial day (see section 6.04 of this revenue procedure). Except as provided in section 5.06 of this revenue procedure, this high-low substantiation method may be used in lieu of the per diem substantiation method provided in section 4.01 of this revenue procedure, but may not be used instead of the meal and incidental expenses only per diem substantiation method provided in section 4.02 of this revenue procedure.

.02 Specific high-low rates. Except as provided in section 5.06 of this revenue procedure, the per diem rate set forth in this section 5.02 is \$233 for travel to any "high-cost locality" specified in section 5.03 of this revenue procedure, and \$160 for travel to any other locality within CONUS. The high or low rate, as appropriate, applies as if it were the federal per diem rate for the locality of travel. For purposes of applying the high-low substantiation method and the ■ 274(n) limitation on meal expenses (see section 6.05(3) of this revenue procedure), the amount of the high and low rates that is treated as paid for meals is \$65 for a high-cost locality and \$52 for any other locality within CONUS.

.03 High-cost localities. The following localities have a federal per diem rate of \$196 or more, and are high-cost localities for all of the calendar year or the portion of the calendar year specified in parentheses under the key city name:

Key city

County or other defined location

Arizona	
Phoenix/Scottsdale (January 1-May 31)	Maricopa
Sedona (March 1-April 30)	City limits of Sedona
California	
Monterey	Monterey
Napa (October 1-November 30 and April 1-September 30)	Napa
San Diego	San Diego
San Francisco	San Francisco
Santa Barbara	Santa Barbara
Santa Monica	City limits of Santa Monica
South Lake Tahoe	El Dorado
Yosemite National Park	Mariposa
Colorado	
Aspen (December 1-March 31 and June 1–August 31)	Pitkin
Denver/Aurora	Denver, Adams, Arapahoe, and Jefferson
Silverthorne/Breckenridge (December 1-March 31)	Summit
Steamboat Springs (December 1-March 31)	Routt
Telluride (December 1-March 31)	San Miguel
Vail (December 1-August 31))	Eagle
District of Columbia	
Washington D.C. (also the cities of Alexandria, Falls Church, and Fairfax, and the counties of Arlington and Fairfax, in Virginia; and the counties of Montgomery and Prince George's in Maryland) (See also Maryland and Virginia)	
Florida	
Fort Lauderdale (January 1-May 31)	Broward
Fort Walton Beach/De Funiak Springs (June 1-July 31)	Okaloosa and Walton
Key West	Monroe
Miami (December 1-March 31)	Miami-Dade

Naples (January 1-April 30)	Collier
Illinois Chicago	Cook and Lake
Louisiana New Orleans (October 1-June 30)	Orleans, St. Bernard, Jefferson and Plaquemine Parishes
Maine Bar Harbor (July 1-August 31)	Hancock
Maryland Baltimore City (October 1-November 30 and March 1-September 30) Cambridge/St. Michaels (June 1-August 31) Ocean City (June 1-August 31) Washington, DC Metro Area	Baltimore City Dorchester and Talbot Worcester Montgomery and Prince Georges
Massachusetts Boston/Cambridge Falmouth (July 1-August 31) Martha's Vineyard (July 1-August 31) Nantucket (June 1-September 30)	Suffolk, City of Cambridge City limits of Falmouth Dukes Nantucket
New Hampshire Conway (July 1-August 31)	Carroll
New York Floral Park/Garden City/Great Neck Glens Falls (July 1-August 31) Lake Placid (July 1-August 31)	Nassau Warren Essex

Manhattan (includes the boroughs of Manhattan, Brooklyn, the Bronx, Queens and Staten Island)	Bronx, Kings, New York, Queens, Richmond
Riverhead/Ronkonkoma/Melville (June 1-August 31)	Suffolk
Saratoga Springs/Schenectady (July 1-August 31)	Saratoga and Schenectady
Tarrytown/White Plains/New Rochelle	Westchester
North Carolina	
Kill Devil (June 1-August 31)	Dare
Pennsylvania	
Philadelphia	Philadelphia
Rhode Island	
Jamestown/Middletown/Newport (October 1-October 31 and May 1-September 30)	Newport
Utah	
Park City (January 1-March 31)	Summit
Vermont	
Stowe (October 1-March 31 and June 1-September 30)	Lamoille
Virginia	
Washington, DC Metro Area	Cities of Alexandria, Fairfax, and Falls Church; counties of Arlington and Fairfax
Virginia Beach (June 1-August 31)	City of Virginia Beach
Washington	
Seattle	King
Wyoming	
Jackson/Pinedale (July 1-August 31)	Teton and Sublette

.04 Changes in high-cost localities. The list of high-cost localities in section 5.03 of this revenue procedure differs from the list of high-cost localities in section 5.03 of Rev. Proc. 2009-47 (changes listed by key cities).

(1) The following localities have been added to the list of high-cost localities: Yosemite National Park, California; Silverthorne/Breckenridge, Colorado; New Orleans, Louisiana; Falmouth, Massachusetts; Riverhead/Ronkonkoma/Melville, New York; Kill Devil, North Carolina; Stowe, Vermont; and Virginia Beach, Virginia.

(2) The portion of the year for which the following are high-cost localities has been changed: South Lake Tahoe, California; Aspen, Colorado; Telluride, Colorado; Vail, Colorado; Fort Lauderdale, Florida; Miami, Florida; and Martha's Vineyard, Massachusetts.

(3) The following locality has been removed from the list of high-cost localities: Hershey, Pennsylvania.

.05 Specific limitation.

(1) Except as provided in section 5.05(2) of this revenue procedure, 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. See section 5.06 of this revenue procedure for transition rules.

(2) For an employee described in section 5.05(1) of this revenue procedure, the payor may reimburse actual expenses, use the meal and incidental expenses only per diem substantiation method described in section 4.02 of this revenue procedure, or use

the per diem substantiation method described in section 4.01 of this revenue procedure for any OCONUS travel away from home.

.06 Transition rules. A payor who used the substantiation method of section 4.01 of Rev. Proc. 2009-47 for an employee during the first 9 months of calendar year 2010 may not use the high-low substantiation method in section 5 of this revenue procedure for that employee until January 1, 2011. A payor who used the high-low substantiation method of section 5 of Rev. Proc. 2009-47 for an employee during the first 9 months of calendar year 2010 must continue to use the high-low substantiation method for the remainder of calendar year 2010 for that employee. A payor described in the previous sentence may use the rates and high-cost localities published in section 5 of Rev. Proc. 2009-47, instead of the updated rates and high-cost localities provided in section 5 of this revenue procedure, for travel on or after October 1, 2010, and before January 1, 2011, if those rates and localities are used consistently during this period for all employees reimbursed under this method.

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 301-11 (2010), 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 under section 4.01 or 5.01 of this revenue procedure. See section 7.01 of this revenue procedure for the

requirement that the employee substantiate the time, place, and business purpose of the expense.

.03 Federal per diem or M&IE rate. 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 under section 4.03 or 4.05 of this revenue procedure for partial days of travel away from home. For purposes of determining the amount deemed substantiated 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. Currently the Federal Travel Regulations allow three-fourths of the applicable federal M&IE rate for each partial day during which an employee or self-employed individual is traveling away from home performing services as an employee

or self-employed individual. A payor may apply the same ratio to prorate the allowance for incidental expenses described in section 4.05 of this revenue procedure; 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), 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 an 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, 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 lodging, meal, and incidental expenses, or 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 a per diem allowance to cover the cost of the employee's meals, 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 ($2 \text{ days} \times \$30 (\$180 - \$150) + 4 \text{ days} \times \$26 (\$156 - \$130)$). 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 \square 62(c), \S 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 \square \S 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, 2010, for travel away from home on or after October 1, 2010. 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, 2010.

SECTION 10. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 2009-47 is superseded.

DRAFTING INFORMATION

The principal author of this revenue procedure is Karla M. Meola of the Office of Associate Chief Counsel (Income Tax and Accounting). For further information regarding this revenue procedure, contact Ms. Meola at (202) 622-4930 (not a toll-free call).