

[4830-01-u]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 31

[REG-209769-95]

RIN 1545-AT56

Exception From Supplemental Annuity Tax on Railroad Employers

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations that provide guidance to employers covered by the Railroad Retirement Tax Act. The Railroad Retirement Tax Act imposes a supplemental tax on those employers, at a rate determined by the Railroad Retirement Board, to fund the Railroad Retirement Board's supplemental annuity benefit. These proposed regulations provide rules for applying the exception from the supplemental tax with respect to employees covered by a supplemental pension plan established pursuant to a collective bargaining agreement and for applying a related excise tax with respect to employees for whom the exception applies. This document also provides notice of a public hearing on these proposed regulations.

DATES: Comments must be received by December 22, 1998. Requests to speak and outlines of topics to be discussed at the public hearing scheduled for January 20, 1999, must be received by December 30, 1998.

ADDRESSES: Send submissions to: CC:DOM:CORP:R (REG-209769-95), room 5228, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC

20044. Submissions may be hand delivered between the hours of 8 a.m. and 5 p.m. to CC:DOM:CORP:R (REG-209769-95), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the "Tax Regs" option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at [http://www.irs.ustreas.gov/prod/tax\\_regs/comments.html](http://www.irs.ustreas.gov/prod/tax_regs/comments.html). The public hearing will be held in Room 2615, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Linda S. F. Marshall, (202) 622-6030; concerning submissions and the hearing, Michael Slaughter, (202) 622-7190 (not toll-free numbers).

**SUPPLEMENTARY INFORMATION:**

**Background**

This document contains proposed amendments to the Employment Tax Regulations (26 CFR Part 31) under section 3221(d). These proposed regulations provide guidance regarding the section 3221(d) exception from the tax imposed under section 3221(c) with respect to employees covered by a supplemental pension plan of the employer established pursuant to an agreement reached through collective bargaining.

Under the Railroad Retirement Act of 1974, as amended (RRA), an employee of a railroad employer generally is entitled to receive a supplemental annuity paid by the Railroad Retirement Board (RRB) at retirement. An employee is entitled to receive a

supplemental annuity only if the employee has performed at least 25 years of service with the railroad industry, including service with the railroad industry before October 1, 1981. The monthly amount of the supplemental annuity ranges from \$23 to \$43, based on the employee's number of years of service. See 45 U.S.C. 231b(e). Under section 2(h)(2) of the RRA, an employee's supplemental annuity is reduced by the amount of payments received by the employee from any plan determined by the RRB to be a supplemental pension plan of the employer, to the extent those payments are derived from employer contributions.

Section 3221(c) imposes a tax on each railroad employer to fund the supplemental annuity benefits payable by the Railroad Retirement Board. The tax imposed under section 3221(c) is based on work-hours for which compensation is paid. The rate of tax under section 3221(c) is established by the RRB quarterly, and is calculated to generate sufficient tax revenue to fund the RRB's current supplemental annuity obligations.

Under section 3221(d), the tax imposed by section 3221(c) does not apply to an employer with respect to employees who are covered by a supplemental pension plan established pursuant to an agreement reached through collective bargaining between the employer and employees. However, if an employee for whom the employer is relieved of any tax under the section 3221(d) exception becomes entitled to a supplemental annuity from the RRB, the employer is subject to an excise tax equal to the amount of the supplemental annuity paid to the employee (plus a percentage

determined by the RRB to be sufficient to cover administrative costs attributable to those supplemental annuity payments).

Section 3221(d) was enacted by Public Law 91-215, 84 Stat. 70, which amended the Railroad Retirement Act of 1937 and the Railroad Retirement Tax Act. The legislative history to Public Law 91-215 indicates that the exception under section 3221(d) from the tax imposed under section 3221(c) was "directed primarily at the situation existing on certain short-line railroads which are owned by the steel companies. The employees of these lines are, for the most part, covered by other supplemental pension plans established pursuant to collective bargaining agreements between the steel companies and the unions representing the majority of their employees. ... [T]hese railroads will no longer be required to pay a tax to finance the supplemental annuity fund, but will be required to reimburse the Railroad Retirement Board for any supplemental annuities that their employees may be paid upon retirement." S. Rep. 91-650, 91st Cong., 2d Sess. 6 (February 3, 1970).

#### Summary of Regulations

These proposed regulations provide rules for determining whether a plan is a supplemental pension plan established pursuant to an agreement reached through collective bargaining. Under these proposed regulations, a plan is a supplemental pension plan only if the plan is a pension plan within the meaning of §1.401-1(b)(1)(i). Under this definition, a plan is a pension plan only if the plan is established and maintained primarily to provide systematically for the payment of definitely determinable benefits to employees over a period of years, usually for life, after

retirement. Thus, for example, a plan generally is not a supplemental pension plan if distributions from the plan that are attributable to employer contributions may be made prior to a participant's death, disability, or termination of employment. See Rev. Rul. 74-254 (1974-1 C.B. 90); Rev. Rul. 56-693 (1956-2 C.B. 282).

These proposed regulations also require that the RRB determine that a plan is a private pension under its regulations in order for the plan to be a supplemental pension plan under section 3221(d) and these proposed regulations. This requirement is included because the section 3221(d) exception to the section 3221(c) tax is based on the assumption that any participant for whom the exception applies will receive a reduced supplemental annuity because of the supplemental pension plan on account of which the section 3221(c) tax is eliminated.

The IRS requests comments regarding other appropriate requirements for a supplemental pension plan within the meaning of section 3221(d).

These proposed regulations also provide rules for determining whether a plan is established by collective bargaining agreement with respect to an employer. These rules generally follow the rules applicable to qualified plans for this purpose.

Section 3221(d) imposes an excise tax equal to the amount of the supplemental annuity paid to any employee with respect to whom the employer has been excepted from the section 3221(c) tax under the section 3221(d) exception. These proposed regulations include rules applying this excise tax under section 3221(d).

### **Proposed Effective Date**

These proposed regulations are proposed to be effective October 1, 1998.

### **Special Analyses**

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations and, because these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

### **Comments and Public Hearing**

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely (in the manner described under the ADDRESSES caption) to the IRS. All comments will be available for public inspection and copying.

A public hearing has been scheduled for January 20, 1999, at 10 a.m. in Room 2615, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC. Because of access restrictions, visitors will not be admitted beyond the Internal Revenue Building lobby more than 15 minutes before the hearing starts.

The rules of 26 CFR 601.601(a)(3) apply to the hearing.

Persons that wish to present oral comments at the hearing must submit comments and an outline of topics to be discussed and the time to be devoted to each

topic (in the manner described under the ADDRESSES caption of this preamble) by December 30, 1998.

A period of 10 minutes will be allotted to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

### **Drafting Information**

The principal author of these regulations is Linda S. F. Marshall, Office of the Associate Chief Counsel (Employee Benefits and Exempt Organizations). However, other personnel from the IRS and the Treasury Department participated in their development.

### **List of Subjects in 26 CFR Part 31**

Employment taxes, Fishing vessels, Gambling, Income taxes, Penalties, Pensions, Railroad retirement, Reporting and recordkeeping requirements, Social security, Unemployment compensation.

### **Adoption of Amendments to the Regulations**

Accordingly, 26 CFR part 31 is proposed to be amended as follows:

#### **PART 31--EMPLOYMENT TAXES AND COLLECTION OF INCOME AT SOURCE**

Paragraph 1. The authority citation for part 31 continues to read in part as follows:

Authority: 26 U.S.C. 7805 \* \* \*

Par. 2. Section 31.3221-4 is added under the undesignated center heading "Tax on Employers" to read as follows:

§31.3221-4 Exception from supplemental tax.

(a) General rule. Section 3221(d) provides an exception from the excise tax imposed by section 3221(c). Under this exception, the excise tax imposed by section 3221(c) does not apply to an employer with respect to employees who are covered by a supplemental pension plan, as defined in paragraph (b) of this section, that is established pursuant to an agreement reached through collective bargaining between the employer and employees, within the meaning of paragraph (c) of this section.

(b) Definition of supplemental pension plan--(1) In general. A plan is a supplemental pension plan covered by the section 3221(d) exception described in paragraph (a) of this section only if it meets the requirements of paragraphs (b)(2) through (4) of this section.

(2) Pension benefit requirement. A plan is a supplemental pension plan within the meaning of this paragraph (b) only if the plan is a pension plan within the meaning of §1.401-1(b)(1)(i) of this chapter. Thus, a plan is a supplemental pension plan only if the plan provides for the payment of definitely determinable benefits to employees over a period of years, usually for life, after retirement. A plan need not be funded through a qualified trust that meets the requirements of section 401(a) or an annuity contract that meets the requirements of section 403(a) in order to meet the requirements of this paragraph (b)(2). A plan that is a profit-sharing plan within the meaning of §1.401-1(b)(1)(ii) of this chapter or a stock bonus plan within the meaning of §1.401-1(b)(1)(iii)

of this chapter is not a supplemental pension plan within the meaning of this paragraph (b).

(3) Railroad Retirement Board determination with respect to the plan. A plan is a supplemental pension plan within the meaning of this paragraph (b) with respect to an employee only during any period for which the Railroad Retirement Board has made a determination under 20 CFR 216.42(d) that the plan is a private pension, the payments from which will result in a reduction in the employee's supplemental annuity payable under 45 U.S.C. 231a(b). A plan is not a supplemental pension plan for any time period before the Railroad Retirement Board has made such a determination, or after that determination is no longer in force.

(4) Other requirements. [Reserved]

(c) Collective bargaining agreement. A plan is established pursuant to a collective bargaining agreement with respect to an employee only if, in accordance with the rules of §1.410(b)-6(d)(2) of this chapter, the employee is included in a unit of employees covered by an agreement that the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and one or more employers, provided that there is evidence that retirement benefits were the subject of good faith bargaining between employee representatives and the employer or employers.

(d) Substitute section 3221(d) excise tax. Section 3221(d) imposes an excise tax on any employer who has been excepted from the excise tax imposed under section 3221(c) by the application of section 3221(d) and paragraph (a) of this section with respect to an employee. The excise tax is equal to the amount of the supplemental

annuity paid to that employee under section 2(b) of the Railroad Retirement Act of 1974 (88 Stat. 1305), plus a percentage thereof determined by the

Railroad Retirement Board to be sufficient to cover the administrative costs attributable to such payments under section 2(b) of that Act.

(e) Effective date. This section is effective October 1, 1998.

Michael P. Dolan

Deputy Commissioner of Internal Revenue