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MEMORANDUM FOR RENEE BROTMAN

FROM: George Baker  
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Branch 2

SUBJECT: Rev. Rul. 99-7 Issues

This Chief Counsel Advice follows up on, and incorporates matters discussed in, our memorandum to you dated April 26, 2000, regarding the tax treatment of employer-reimbursed transportation expenses. This memorandum 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.

**Background**

Generally, amounts paid by employers to employees are wages subject to income tax and employment taxes unless a specific exception applies. Section 62 of the Internal Revenue Code and the regulations thereunder provide an exception for amounts paid pursuant to an accountable plan to reimburse deductible business expenses. Thus, if an employer reimburses a deductible business expense pursuant to an accountable plan, the payment is not a payment of wages to the employee and the payment is not subject to income tax or employment taxes. However, if the employer reimburses nondeductible business expenses – even if they are bona fide expenses related to the employer's business – the payment is a payment of wages to the employee, subject to income tax and employment taxes.

An employee's transportation expenses incurred in going between the employee's residence and a work location not involving overnight travel generally are nondeductible personal commuting expenses rather than deductible business expenses. Therefore, an employer's reimbursement of these transportation expenses (even if the employer otherwise maintains an accountable plan for such expenses) is a payment of taxable wages unless the rules in Rev. Rul. 99-7, 1999-5 I.R.B. 4, provide that the expenses are deductible business expenses. Accordingly we wish to stress the following:

An employer's reimbursement of an employee's expenses of going between the employee's residence and a work location must be treated as wages unless, under a proper interpretation of Rev. Rul. 99-7, the employee's expenses are

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deductible and the employer reimburses those expenses pursuant to an accountable plan.

If an employer treats employee reimbursements as wages solely because the transportation expenses do not seem to be deductible under Rev. Rul. 99-7, but then later within the calendar year the employer determines that the expenses are deductible (for example, by reason of an IRS interpretation), there are procedures that allow the employer, in most cases, to adjust the income tax withholding and FICA withholding to account for the change in treatment of the reimbursements.

In our discussions with you, we have assumed that your questions relate only to employees who have a regular work location away from the residence (such as an office of the employer where the employee regularly works and not merely an assigned “post of duty”). In that case, the pertinent rule in Rev. Rul. 99-7 is holding 2, which states:

If a taxpayer has one or more regular work locations away from the taxpayer’s residence, the taxpayer may deduct daily transportation expenses incurred in going between the taxpayer’s residence and a *temporary* work location in the same trade or business, regardless of the distance.

Generally a regular work location is a location at which the taxpayer works or performs services on a regular basis. A taxpayer may be considered as working or performing services on a regular basis whether or not the taxpayer works or performs services at that location every week or on a set schedule. See Rev. Rul. 90-23, 1990-1 C.B. 28 (obsoleted on other grounds by Rev. Rul. 99-7). Rev. Rul. 90-23 provides as an example that 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.

On the other hand, a temporary work location is a location at which the taxpayer works or performs services on a temporary basis. Rev. Rul. 99-7 provides a 1-year standard for determining whether employment with respect to any particular work location is temporary rather than regular:

- If employment at a work 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 at a work 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 not temporary, regardless of whether it actually exceeds 1 year.

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- If employment at a work 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, and will be treated as not temporary after that date.

Determining whether employment at a particular work location is temporary or regular depends on applying the rules set forth above to the facts and circumstances of that employment.

Following is a discussion of certain issues that arise in analyzing Rev. Rul. 99-7.

### **Overnight Travel v. Daily Trips**

Rev. Rul. 99-7 deals only with “daily” transportation expenses – that is, transportation expenses incurred by an employee in going from the residence to a work location, and back to the residence, within a day; it does **not** deal with **overnight** travel expenses. The tax treatment of overnight travel expenses is governed by Rev. Rul. 93-86, 1993-2 C.B. 71, and involves an analysis of the employee’s “tax home.” One of the aspects of the analysis under Rev. Rul. 93-86 is whether the employment away from home is in a “single location.” The “single location” inquiry has no bearing on the 1-year limitation in Rev. Rul. 99-7.

- Example 1: Employee Red works in both City A and City B, which are 250 miles apart, on an ongoing basis. He works in City A from Monday through Wednesday, and then he goes to City B to work on Thursday and Friday. When in City B, Employee Red rents a hotel room and incurs meal expenses. Employee Red’s employer reimburses the expenses related to the travel to City B under an accountable plan.

The tax treatment of Employee Red’s automobile, lodging, and meal expense reimbursements depends on where his “tax home” is located. This determination is governed by Rev. Rul. 93-86 rather than Rev. Rul. 99-7.

- Example 2: Employee Black works for her employer as a manager at 4 different project sites (each of which is expected to last 18 months). She spends approximately 1 workday each week at each of the sites, and goes to the employer’s office 1 workday each week to attend meetings, file reports, and perform miscellaneous work-related activities. Her employer reimburses her automobile expenses incurred between her residence and the project sites.

Employee Black’s employment at each of the worksites is regular and not temporary, as employment at each of the worksites is realistically expected to

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last for more than 1 year. Although there are multiple locations involved rather than a single location, the “single location” rule only applies in applying the 1-year limitation in the overnight travel context. Accordingly, her transportation expenses between the worksites and her residence are nondeductible commuting expenses, and the reimbursements of these expenses are taxable wages.

### **Worksite-to-Worksite Trips and Flexiplace**

Rev. Rul. 99-7 does not alter the general rule that the costs of going between one business location and another business location are deductible business expenses. This rule applies regardless of whether either of the work locations is a temporary work location. Thus, reimbursements for trips by an employee between work locations away from the employee’s residence continue to be nontaxable.

However, this general rule does not apply where one of the business locations is the employee’s residence. The applicable rule in that case is stated in holding (3) of Rev. Rul. 99-7, which requires that an office-in-the-home meet the “principal place of business” criteria under § 280A(c)(1)(A) and that the trip be to a work location in the same trade or business as that of the office-in-the-home.

Whether an office-in-the-home meets the requirements of § 280A(c)(1)(A) depends on the particular facts, and the IRS has not published general guidance on this issue with respect to traditional “flexiplace” arrangements. We note, however, that an employee’s office-in-the-home expenses are not deductible under § 280A(c)(1)(A) unless the office is the employee’s principal place of business, is used regularly and exclusively, and is for the convenience of the employer. This is inherently a factual determination.

If an employee maintains an office-in-the-home that does not meet the requirements of § 280A(c)(1)(A), then trips between the residence and other work locations are nondeductible commuting expenses unless the temporary work location rules in Rev. Rul. 99-7 apply.

- Example 3: Employee Blue’s employer allows her to work at her residence, but she goes into the employer’s office every Monday to attend meetings, file reports, receive assignments, and perform other miscellaneous work-related activities. Her work requires her to make occasional in-person calls on clients. Her employer does not require her to maintain a part of her residence for regular and exclusive use as a “home office,” and the employer maintains a policy that an employee’s principal duty station is at the employer’s office. The employer reimburses all of her work-related automobile expenses under an otherwise accountable plan.

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For trips between a client's location and the employer's office, the expenses are deductible under the general worksite-to-worksite rule, and the reimbursements are not taxable wages. However, because the employer does not treat Employee Blue's residence as meeting the standards under § 280A(c)(1)(A):

- reimbursements for trips between her residence and a client's location are taxable wages unless the client's location is a temporary work location, and
- reimbursements for trips between the residence and the employer's office are taxable wages.

### **Location of Employment v. Nature of Assignment**

Questions have been raised concerning whether the nature of an employee's duties with respect to an assignment has any effect on the taxability issue. Generally the nature of the duties is irrelevant; the focus in Rev. Rul. 99-7 is on the taxpayer's "employment at a work location" – that is, the taxpayer's physical presence performing services at a particular location. An employee's job classification is irrelevant in determining whether the employee is performing services at a location for a temporary period.

- Example 4: Employee Yellow is assigned to provide assistance on a large-scale project that is expected to last for 18 months. Employee Yellow plans to spend 2 months at his regular office doing preliminary research and preparation, followed by 10 months at one "on site" work location and then 4 months at a second "on site" work location.

Although the project is expected to last for 18 months, and although Employee Yellow's "on site" visits are expected to last for 16 months, the "clock" on the 1-year limitation does not start ticking until he commences employment at a particular location. Because the employment at each of the "on site" work locations is expected to last (and does in fact last) for 1 year or less, the employment at each of the sites is temporary.

### **Metropolitan Area**

Questions have arisen about whether there is a special rule for non-overnight assignments to work locations outside of the metropolitan area in which the employee lives and normally works.

The general rule is that the expenses of trips between an individual's residence and a work location are nondeductible commuting expenses, regardless of the distance, unless otherwise provided. The exceptions provided in holdings 1 and 2 of Rev. Rul. 99-7 refer specifically to trips only to **temporary** work locations. Accordingly,

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reimbursements of expenses of trips between an employee's residence and any **nontemporary** work location are wages includible in income, **regardless of the distance**.

The issue of "outside the metropolitan area" work locations arises in holding 1 of Rev. Rul. 99-7, which provides a less generous rule than that in holding 2. Holding 1 reflects the longstanding IRS position that, for a taxpayer who has no regular work location (and works only at temporary worksites), transportation expenses with respect to temporary work locations are nondeductible commuting expenses except for those temporary work locations that are located outside the metropolitan area where the individual lives and normally works. See Aldea v. Commissioner, T.C.M. 2000-136. On the other hand, under holding 2, transportation expenses to **any** temporary work location, regardless of the distance, are deductible business expenses for a taxpayer with one or more regular work locations (which we have assumed to be the case for purposes of this discussion).

- Example 5: Employee Green is assigned to a 2-year project working "on site" at a client's office that is outside of the metropolitan area in which Employee Green's regular office and residence are located. It is expected that Employee Green will use her automobile for daily round-trip transportation between her residence and the client's office when she works "on site," and she is also expected to report to her regular office periodically during the assignment for meetings, to file reports, and to perform other work-related tasks.

Employment at the client's office is not temporary, as it is realistically expected to last for more than 1 year. Accordingly, any employer reimbursements of these expenses are taxable wages. The fact that the assignment is outside of the metropolitan area in which she lives and normally works is irrelevant.

### **Realistic Expectation**

Rev. Rul. 99-7 provides that if work is realistically expected to be temporary, but at some later date the employment is realistically expected to exceed 1 year, the employment must be treated as not temporary at the point the expectation changes.

- Example 6: Employee Gray is assigned to work on a project at a client's office. Employee Gray is expected to work for 10 months at the site. In the 6<sup>th</sup> month, Employee Gray's term is extended by 8 months (for a total of 18 months).

For Employee Gray, the site is considered a temporary work location until the point at which the expectation changes (during the 6<sup>th</sup> month), but it is a nontemporary work location after that point.

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### **Breaks in Service and Infrequent Trips**

You have asked about the effect a break in service at a particular location will have on determining whether employment at the location is temporary. The issue arises when an employee is instructed to work at a certain client's office for a specified period, then work at another site, and then work again at the client's office for another specified period (whether unexpected or planned at the outset). The question is whether the break in service at the particular location is so significant that employment at the location should be treated as 2 separate periods of employment rather than 1 continuous period of employment.

Because of the highly individual nature of the factual inquiry involved, the IRS has not issued general guidance in this area. It is clear, however, that a short break of 2 or 3 weeks is inconsequential in this regard, but that a break of more than 1 year is significant.

- Example 7: Employee Orange is given a 6-month assignment on a long-term project, and, more than a year after completing the 6-month assignment, he is unexpectedly reassigned to the project for a 7-month period.

Since the initial 6-month assignment is realistically expected to last for 1 year or less, the employee's employment with respect to that phase of the project is temporary. Employee Orange's expenses of going between his residence and this location are deductible business expenses.

A break exceeding 1 year is clearly significant enough to "restart the clock" when Employee Orange begins the 7-month reassignment. Employee Orange's expenses of going between his residence and this location are deductible business expenses since the reassignment is realistically expected to last for 1 year or less.

You have also asked, in connection with the "break rule" issue, whether short-term assignments to work at a particular site that recur from year to year should be treated as separate periods of temporary employment rather than regular employment. The issue arises where an employee performs services at a location on a recurring basis for a period of more than one year, but on an infrequent or sporadic basis in relation to the duration and nature of the employee's performance of services at other work locations.

Because of the highly individual nature of the factual inquiry involved, the IRS has not issued general guidance in this area. It is clear, however, that a location where an employer directs an employee to work only five days during a calendar year is a temporary, rather than a regular, work location.

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- Example 8: Employee White regularly works at his employer's office, but the employer expects all employees to attend annual 1-week (5 workdays) training at the office of Z Training Consultants, an independent contractor. Employee White annually attends this training but does not go to the Z office at any other time. Each year's training session reflects work methods and technologies used by Employee White's employer, and each annual session has a unique agenda. The dates of the annual training session vary according to the availability of Z's training staff.

Under the facts described, the training sessions should be treated as employment at a temporary work location. It should be noted, however, that if the training sessions were conducted in the office building where Employee White regularly works, any reimbursement of transportation expenses between Employee White's residence and the training session would be taxable wages.

This office is considering providing additional guidance with respect to the "break rule" and "infrequent trip" issues in the near future.