



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

10/21/04

Number: **INFO 2004-0201**
Release Date: 12/31/04
GENIN-142253-04/CC:TEGE:EOEG:ET2
UIL: 9999.98-00

Dear _____ :

This is in response to your letter dated _____, requesting information regarding certain qualified parking plans.

As a preliminary matter, apart from the procedure for issuing a formal opinion as described in Revenue Procedure 2004-1, 2004-1 I.R.B. 1, the Internal Revenue Service is not able to provide binding legal advice applicable to particular taxpayers. In the absence of a request for formal guidance, we are only able to provide general information. Accordingly, in response to your request, we have reviewed the facts provided and set forth below general information, which we hope will be helpful to you.

Section 132(a)(5) of the Internal Revenue Code ("the Code") provides that any employer-provided fringe benefit that qualifies as a "qualified transportation fringe" is excluded from gross income. Section 132(f)(1) of the Code provides that the term "qualified transportation fringe" means (1) transportation between home and work in a commuter highway vehicle, (2) any transit pass, and (3) qualified parking. Under section 132(f)(5)(C) of the Code, the term "qualified parking" means parking provided by an employer to an employee on or near the employer's business premises.

Section 132(f)(4) of the Code provides that no amount shall be included in the gross income of an employee solely because the employee may choose between any qualified transportation fringe and compensation that would otherwise be includible in the gross income of such employee.

Section 132(f)(3) of the Code provides that a qualified transportation fringe includes a cash reimbursement by an employer to an employee for qualified parking expenses. Section 1.132-9(b) Q/A-16(a) of the Employment Tax Regulations ("the Regulations") provides that a reimbursement must be made under a bona fide reimbursement arrangement within the meaning of Regulations section 1.132-9(b) Q/A-16(c) in order to be excluded from gross income. Regulations section 1.132-9(b) Q/A-

16(a) provides that employers that make cash reimbursements must establish a bona fide reimbursement arrangement to establish that their employees have, in fact, incurred expenses for qualified parking. The employer must implement reasonable procedures to ensure that an amount equal to the reimbursement was incurred by the employee for qualified parking.

Code sections 3121(a) and 3306(b) define the term "wages" for FICA and FUTA purposes, respectively, as all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash, with certain specified exceptions. Section 3401(a) of the Code contains a similar definition for purposes of federal income tax withholding. Code sections 3121(a)(20), 3306(b)(16), and 3401(a)(19) provide for purposes of FICA, FUTA, and federal income tax withholding, respectively, that the definition of "wages" does not include any benefit provided to or on behalf of an employee if, at the time such benefit is provided, it is reasonable to believe that the employee will be able to exclude such benefit from income under Code section 132.

In your letter you provide an example of a parking plan being marketed in your area. The plan described in your letter appears to be the same type of plan addressed in Revenue Ruling 2004-98, 2004-42 I.R.B. 664. (Copy attached). The facts in that ruling involve an employer reducing employees' wages in return for the employer providing parking. The value of the parking was excludable from the employees' gross incomes under Code section 132(a)(5). The employer subsequently reimbursed the employees for some of the cost of the parking and excluded the reimbursements from the employees' gross incomes. Because the employees never actually incurred expenses for parking for which there could be a reimbursement, the exclusion from gross income under Code section 132(a)(5) did not apply to the reimbursed amounts and the ruling held that the purported reimbursements are includable in the employees' gross incomes and are wages subject to employment taxes under Code sections 3121(a), 3306(b) and 3401(a).

An employee may exclude from gross income employer reimbursements for qualified parking expenses, but only if those expenses were actually incurred by the employee. If an employee is given a choice between cash compensation or an employer-provided benefit under a statutory exception to the constructive receipt rules, such as section 132(f)(4) of the Code, or if an employer unilaterally reduces an employee's cash compensation for the purpose of providing a non-taxable benefit, the benefit is treated as provided directly by the employer rather than purchased by the employee with the amount of the compensation reduction. Otherwise, the value of the benefit would not be excluded from the employee's gross income. If the cost of providing the parking is incurred by the employer, not the employee, there is no expense incurred by the employee for the employer to reimburse, and therefore the "reimbursement" payments that the employer makes to the employee are not excluded from gross income under section 132(a)(5) of the Code, even though the value of the parking is excludable from the employee's gross income under section 132(a)(5) because the parking is on or near the employer's business premises, and the parking benefit is provided by the employer. The conclusion would be the same whether the compensation reduction was mandatory or elective. The conclusion would also be the same if the employer originally provided free parking to employees and then upon

implementing the payroll arrangement purported to impose a charge on employees for parking. See also, Rev. Rul. 2002-3, 2002-1 C.B. 316, which holds that a purported reimbursement of health insurance premiums paid by the employer, and not by employees, is not excludable from the gross income of employees under sections 106(a) and 105(b) of the Code.

Because the "reimbursement" payments described in Rev. Rul. 2004-98 were not reimbursements of expenses incurred by the employee for parking, the Internal Revenue Service held that it was unreasonable for the employer to believe at the time the "reimbursements" were paid to the employee that the employee would be able to exclude the payments from gross income under Code section 132(a)(5). Thus, the "reimbursement" payments were not excluded from wages for FICA, FUTA, or federal income tax withholding purposes under Code sections 3121(a)(20), 3306(b)(16), or 3401(a)(19), respectively.

If you have any further questions, please feel free to contact
(Internal Revenue Service Identification Number _____) of my staff at

Sincerely,

Lynne Camillo
Chief, Employment Tax Branch 2
Office of the Division Counsel/Associate
Chief Counsel
(Tax Exempt and Government Entities)