



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

OFFICE OF
CHIEF COUNSEL

May 18, 2005

Number: **INFO 2005-0108**
Release Date: 6/30/05
UIL: 274.12-00
61.09-36
7702B.32-01

GENIN-117436-05
CC:ITA

Reference: IRS Per Diem Requirements

Dear _____ :

The Service has received your inquiry about whether it is reasonable to utilize meals and incidental expense (M&IE) rates calculated by an independent travel service provider for determining daily meal locality rates. Additionally, you inquired as to whether there is taxable income provided to the employee if the independently provided daily M&IE rates exceed the published daily federal M&IE rate for the same locality. Generally a taxpayer may establish its own daily M&IE rate or employ another to calculate it. Assuming the employee substantiates to the taxpayer the time, place, and business purpose, the daily M&IE rate paid to the employee, to the extent it exceeds the federal M&IE rate for the locality of travel for that day contained in Rev. Proc. 2005-10, 2005-3 I.R.B. 341 (or the current applicable revenue procedure), is includible in the income of the employee.

Facts

Taxpayer hires an independent contractor to calculate an amount the taxpayer will pay its employees for travel away from home. The contractor calculates an amount for meals that the employee is reasonably likely to incur, but which amount (plus \$3 for incidental expenses) exceeds the federal M&IE rate.

Analysis

Generally, the taxpayer may deduct reimbursed expenses for travel away from home under §§ 162 and 274 of the Internal Revenue Code if the person reimbursed can

substantiate the amount, time, place, and business purpose for meals and incidental expenses. If the taxpayer pays a M&IE allowance in lieu of reimbursing actual meal and incidental expenses incurred or to be incurred by an employee for travel away from home, the person reimbursed can substantiate an amount, up to the amount that is the Federal M&IE rate set for the locality to which the person travels, for a day of meals and incidental expenses, so long as the person actually substantiates the time, place, and business purpose. Rev. Proc. 2005-10, sections 4.02 and 7.01.

An employee is not required to include in gross income the portion of a M&IE allowance received from a payor that is less than or equal to the maximum amount deemed substantiated under Rev. Proc. 2005-10. See *generally* § 1.274-5(f)(2)(i) of the Income Tax Regulations. In addition, that portion of the allowance received that is less than or equal to the amount of a meals and incidental expense allowance under section 4.02 or 4.03 of Rev. Proc. 2005-10, 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).

An employee is required to include in gross income only the portion of the M&IE allowance received from a payor that exceeds the amount of the federal M&IE rate for the locality of travel for that day under Rev. Proc. 2005-10. See *generally* § 1.274-5(f)(2)(ii). In addition, the payor must report the excess portion of the allowance 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).

Conclusion

The payor may select any rate reasonably calculated not to exceed the amount of the expenses or the anticipated expenses. The taxpayer may either calculate the rate itself or hire an independent contractor to calculate the rate. Any rate reasonably calculated not to exceed the amount of the expenses or the anticipated expenses is acceptable. The taxpayer must report the amount that exceeds the applicable federal M&IE rate for the locality of travel for that day as wages or other compensation on its employee's Form W-2, and is subject to withholding and payment of employment taxes.

To inquire how the law applies to a specific set of facts, you would need to pursue a letter ruling. The procedures for requesting this type of ruling are contained in Rev. Proc. 2005-1, 2005-1 I.R.B. 1. There is a fee associated with this type of request of \$6,000 unless your gross income is less than \$250,000; then the fee is reduced to \$500. See Appendix A, Rev. Proc. 2005-1.

Sincerely,

George Baker
Branch Chief, Branch 7
(Income Tax & Accounting)