



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

OFFICE OF THE CHIEF COUNSEL

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The Honorable John Cornyn
United States Senator
Providence Tower
5001 Spring Valley Road
Suite 1125E
Dallas, Texas 75224

Attention:

Dear Senator Cornyn:

I am responding to your letter dated June 2, 2009, on behalf of your constituent, . wrote about the taxation of payments made under the Department of Defense Housing Assistance Program (HAP), as expanded by the American Recovery and Reinvestment Act of 2009 (ARRA 2009).

The Department of Defense HAP provides payments to certain employees and members of the Armed Forces to offset the adverse effects on housing values that result from military base realignment or closure (Title 42 of the United States Code (U.S.C.) section 3374). Section 132(n) of the Internal Revenue Code (Code) provides an income tax exclusion for payments under HAP "as in effect on the day of enactment of this subsection." The Congress enacted subsection 132(n) on November 11, 2003. Thus, section 132(n) only provides an income tax exclusion for payments made under HAP as in effect on November 11, 2003.

Section 1001 of ARRA 2009 expanded the statute that authorizes the Department of Defense to make HAP payments (42 U.S.C. section 3374). Under the AARA 2009 amendments, the Department of Defense can make HAP payments to additional categories of eligible individuals, including those adversely affected by the 2005 round of defense base closures and realignments, certain wounded members of the Armed Forces and their spouses, and certain members of the Armed Forces permanently reassigned during the mortgage crisis.

Unless specifically excluded from income under some provision of the Code, gross income for federal income tax purposes includes all income from whatever source derived (Code section 61(a)). The exclusion from income in Code section 132(n) that

applies to HAP payments that were in effect on November 11, 2003, does not apply to the additional categories of HAP payments that the Congress enacted as part of ARRA 2009. When Congress expanded the categories of payments that the Department of Defense can make under HAP, it did not make a corresponding amendment to Code section 132(n) to expand the categories of HAP payments that individuals can exclude from income. Because no other Code provision excludes these HAP payments from income, individuals receiving those payments must include them in income to the extent such payments exceed the fair market value of the property relinquished in exchange for such payments. Moreover, because individuals receive HAP payments for the performance of services, they must include these amounts in income as compensation for services. Additionally, these payments are wages for Federal Insurance Contributions Act tax purposes.

 said he cannot pay the taxes associated with the HAP payment that he is eligible to receive from the Department of Defense. He believes that HAP benefits, as expanded by ARRA 2009, should not be subject to taxation. While we are sympathetic to plight, to exclude these benefits from taxation would require legislative action by the Congress.

I hope this information is helpful. If we may be of further assistance, please contact me or of my staff at .

Sincerely,

Lynne Camillo
Branch Chief, Employment Tax Branch 2 (Exempt
Organizations/Employment Tax/Government
Entities)
(Tax Exempt & Government Entities)