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CONEX-153570-09

The Honorable Blanche Lincoln
912 West Fourth Street
Little Rock, AR 72201

Attention:

Dear Senator Lincoln:

This letter is in response to your inquiry, dated December 2, 2009, on the taxation of county vehicles and cell phones that county judges use. I hope the following information is helpful.

Employer-provided Cell Phones

Many employers, including governmental employers, provide their employees with cellular telephones for business purposes. Cellular telephones are "listed property" under section 280F(d)(4)(A)(v) of the Internal Revenue Code (the Code). The term listed property includes items obtained for use in a business but the Code designates as lending themselves easily to personal use. In 1989, the Congress expanded the definition of listed property to include cellular telephones based on the belief that they and other similar telecommunications equipment are "often used primarily for personal or investment use rather than in the conduct of a trade or business." House Report 101-247, at 1359 (September 20, 1989).

An employer can exclude the value of an employee's business use of an employer-provided cell phone from the employee's gross income. The employer, however, must have some method of requiring the employee to keep records that distinguish business use from personal cell phone use. If the employee uses the telephone exclusively for business, an employee can exclude the value of all use from the employee's income as a working condition fringe benefit under section 132(a)(3) of the Code. The employer must include the value of any personal use of the cell phone in the employee's wages. Personal use includes individual personal calls, as well as a pro rata share of monthly service charges.

Employees must keep a record of each call and its business purpose (section 274(d) of the Code). If the employee receives a monthly itemized statement, the employee should identify each call as personal or business. If the employee does not use the cell phone to make personal calls, the business use of the phone is not taxable to the employee. Employers and employees can find guidance on the recordkeeping necessary to adequately substantiate the business use of listed property in section 274(d) of the code and section 1.274-5 of the Treasury Regulations.

We recognize the difficulties employers encounter complying with the recordkeeping requirements for cell phone use. So, on June 8, 2009, we issued Notice 2009-46, 2009-23 Internal Revenue Bulletin 1068, requesting comments from the public on several proposals to simplify the procedures under which employers substantiate an employee's business use of employer-provided cell phones. Additionally, on October 13, 2009, legislation (H.R. 3802) was introduced in the House of Representatives that would remove cell phones from the definition of listed property and treat the use of employer-provided cell phones as a de minimis fringe benefit excludable from income. The Congress has not enacted this legislation and it remains in the first step of the legislative process.

Employer-provided vehicles

Generally, employees must include the value of the personal use of an employer-provided vehicle in income. Commuting to and from work in a vehicle an employer provides is a personal use of the vehicle. However, the Code and Treasury Regulations provide certain exclusions from income for "qualified nonpersonal use vehicles." Employees can exclude 100 percent of the value of the use of a qualified nonpersonal use vehicle from income as a working condition fringe (section 1.132-5(h) of the Treasury Regulations).

A qualified nonpersonal use vehicle is any vehicle which an employee is not likely to use more than a minimal amount for personal purposes (section 274(i) of the Code). Cement mixers, moving vans, and forklifts are examples of the types of vehicles exempt from taxation as qualified nonpersonal use vehicles. Passenger automobiles such as sedans are generally not exempt from taxation because an individual can easily use them for personal purposes. The regulations also provide that qualified nonpersonal use vehicles include clearly marked police and fire vehicles and unmarked law enforcement vehicles that law enforcement officers use. Presently, the regulations do not include county-owned automobiles that county judges drive as qualified nonpersonal use vehicles.

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I hope this information is helpful. If we can assist you further, please contact me or
at .

Sincerely,

LYNNE CAMILLO
Branch Chief, Employment Tax Branch 2
(Exempt Organizations/ Employment Tax/
Government Entities)
(Tax Exempt and Government Entities)