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

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The Honorable Peter Welch
Member, U.S. House of Representatives
128 Lakeside Avenue, Suite 235
Burlington, VT 05401

Attention:

Dear Congressman Welch:

I am responding to your inquiry dated January 22, 2014, on behalf of your constituent. She added health coverage for a same-sex spouse under her employer's health plan in November 2013. The value of health coverage for the same-sex spouse was included in the constituent's gross income on her Form W-2, Wage and Tax Statement, for 2013. The constituent asked how she can subtract the value of this spousal coverage when filing her 2013 tax return.

The U.S. Supreme Court declared Section 3 of the Defense of Marriage Act, which had prohibited the recognition of same-sex couples as spouses for purposes of federal law, unconstitutional on June 26, 2013 (*United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675 (2013)). We subsequently issued two guidance items interpreting the effect of this decision on the tax treatment of same-sex spouses under the Internal Revenue Code (the Code). Revenue Ruling 2013-17, 2013-38 Internal Revenue Bulletin (I.R.B.) 201, generally provides that a same-sex spouse will be treated as a spouse for federal tax purposes provided that the couple is lawfully married under state law. Notice 2014-1, 2014-2 I.R.B. 270, provides additional guidance on the effect of this decision and addresses the application of the rules under section 125 of the Code to participation by same-sex spouses in employer health plans.

Under Code sections 106 and 125 as further interpreted by Notice 2014-1, the employer-paid portion of health coverage for a same-sex spouse is excludable from your constituent's gross income. If the employer offers the health coverage through a cafeteria plan that permits employees to pay the employee portion of the cost of

coverage through pre-tax salary reduction, and if your constituent paid for the cost of her own health coverage on a pre-tax basis, then any amounts paid on an after-tax basis for spousal coverage would also be excludable from the constituent's income.

Accordingly, your constituent may be entitled to a refund of any federal income taxes paid on the value of spousal health coverage under the employer's health plan, provided that the spouse is the constituent's legal spouse under Revenue Ruling 2013-17.

Your inquiry states that the value of the spousal health coverage was reported as taxable wages to the constituent on Form W-2. To exclude such amounts, the constituent should take the following steps:

- First, contact the employer and request a corrected Form W-2 that does not include the value of any excludable spousal health coverage in taxable wages.
- If the employer issues a corrected Form W-2, your constituent can then use the amounts reported on the corrected Form W-2 when filing a tax return.
- If the employer does not issue a corrected Form W-2, the constituent should file Form 1040, U.S. Individual Income Tax Return, using the original Form W-2 from the employer and should also attach Form 4852, Substitute for Form W-2, Wage and Tax Statement, or [for] Form 1099-R, Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc., which I am enclosing with this letter. Your constituent should also take the following steps when completing Form 4852 and Form 1040:
 - On Form 4852, check the box indicating that the taxpayer received an incorrect Form W-2 for 2013.
 - Subtract the value of any excludable spousal health coverage from the taxable wages reported in Box 1 of Form W-2 and list this result on line 7(a) of Form 4852.
 - Subtract the value of any excludable spousal health coverage that was included in Medicare wages reported in Box 5 of Form W-2 and list this result on line 7(c) of Form 4852.
 - If your wages were subject to social security tax, as a general rule, list on line 7(b) of Form 4852 the lesser of \$113,700 or the amount listed on line 7(c) of Form 4852. If your wages were not subject to social security tax, list on line 7(b) of Form 4852 the amount of social security wages reported in Box 3 of Form W-2.
 - Copy the amounts reported on Form W-2 to the appropriate places on lines 7(d) through (j) of Form 4852.
 - Complete line 9 of Form 4852 explaining that the amounts reported on Form W-2 included the value of excludable spousal health coverage and that these amounts have been excluded on Form 4852 as permitted by Rev. Rul. 2013-17 and Notice 2014-1. Also explain how the value of

- excludable spousal health coverage was determined (for instance, by referring to the amount reported as taxable health coverage on paystubs).
- Complete line 10 of Form 4852 explaining all steps taken to request a corrected Form W-2 from the employer.
 - When completing Form 1040, use the amounts listed on Form 4852 instead of the amounts listed on Form W-2.
 - Sign and date Form 4852 and Form 1040.
 - Attach Form 4852 and Form W-2 to Form 1040 in accordance with the instructions for Form 4852.

Your constituent may also be entitled to a refund of federal employment taxes (social security and Medicare) paid on the value of excludable spousal health coverage provided that the spouse is the constituent's legal spouse under state law. Your constituent might wish to contact the employer to determine if the employer will seek a refund of these amounts on your constituent's behalf.

If the employer will not seek a refund, your constituent may file Form 843, Claim for Refund and Request for Abatement, and include all necessary attachments listed in the instructions for Form 843.

I hope this information is helpful. If you have any questions, please contact me at () or at () .

Sincerely,

Harry Beker, Chief
Health and Welfare Branch
Office of Division Counsel/
Associate Chief Counsel
(Tax Exempt and Government Entities)

Enclosure