



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

OFFICE OF THE CHIEF COUNSEL

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The Honorable Jack Reed  
United States Senate  
Washington, DC 20510

Attention:

Dear Senator Reed:

I am responding to your inquiry dated June 26, 2014, on behalf of one of your constituents. Your constituent wrote that his employer has a program to provide subsidies to offset employee commuting costs. Your constituent, who commutes by a van pool, questions whether his employer is correctly interpreting the 80/50 rule found in Internal Revenue Code (Code) section 132(f)(5)(B)(ii).

The Code does not require that an employer provide any fringe benefits to its employees. However, it does provide for the federal income and employment tax consequences if an employer chooses to provide a fringe benefit to its employees. The application of the 80/50 rule varies depending on whether the van-pool is an employer-operated van pool, an employee-operated van pool, or a private or public transit-operated van pool. We do not know which type of van pool is used in this situation. Therefore, we are providing the following general information which we hope will be helpful to you.

### **Qualified transportation fringes**

Gross income means all income from whatever source derived, including compensation for services, including fees, commissions, fringe benefits, and similar items [Section 61(a)(1) of the Code]. Consequently, we presume a fringe benefit provided by an employer to an employee to be income to the employee, unless another section of the Code specifically excludes it from gross income.

Gross income does not include any benefit that is a “qualified transportation fringe” [Section 132(a)(5) of the Code]. Qualified transportation fringes include transportation an employer provides to an employee in a commuter highway vehicle if the transportation is for travel between the employee’s residence and place of employment [Section 132(f)(1)(A)].

A commuter highway vehicle is any highway vehicle that meets the following conditions:

- Has a seating capacity of at least 6 adults (not including the driver)
- At least 80 percent of the mileage use can reasonably be expected to be
  - for transporting employees between their residences and their place of employment, and
  - used on trips during which the number of employees transported for such purposes is at least 50 percent of the adult seating capacity (not including the driver) [Code section 132(f)(5)(B)].

These requirements are sometimes referred to as “the 80/50 rule.” Note that the 80/50 rule does not include a requirement that the employee use the van pool at least 50 percent of the time.

Transportation in a commuter highway vehicle is provided by an employer if the transportation is furnished via a commuter highway vehicle operated by or for the employer [Code section 132(f)(5)(D)].

Qualified transportation fringes also include “transit passes” [Section 132(f)(1)(B)]. A transit pass includes any pass, token, farecard, voucher, or similar item entitling a person to transportation (or transportation at a reduced price) if the transportation is provided by any person in the business of transporting persons for compensation or hire if such transportation is provided in a vehicle in which the seating capacity is at least 6 adults (not including the driver) [Section 132(f)(5)(A)(ii)].

### **Qualified transportation fringe rules and van pools**

The Treasury regulations explain how the qualified transportation fringe rules apply to van pools. Employer and employee-operated vanpools, as well as private or public transit-operated van pools, may constitute qualified transportation fringes. The value of the van pool benefits that are qualified transportation fringes may be excluded up to the applicable statutory monthly limit for transportation in a commuter highway vehicle and transit passes [Treasury Regulation 1.132-9(b) Q/A-21(a)]. The 3 types of van pools are described below:

- In an employer-operated van pool, the employer either purchases or leases vans to enable employees to commute together to the employer’s place of business or

the employer contracts with and pays a third party to provide the vans and pays some or all of the costs of operating the vans. If an employer-operated van meets the definition of a commuter highway vehicle, then the value (up to the statutory monthly limit) of an employer-operated van pool used by an employee is a nontaxable qualified transportation fringe [Treasury Regulation section 1.132-9(b) Q/A-21(b)].

- In an employee-operated van pool, the employees, independent of their employer, operate a van to commute to their places of employment. If the van meets the definition of a commuter highway vehicle, then the employer's cash reimbursement to employees for expenses incurred in connection with an employee-operated van pool (up to the statutory monthly limit) is a nontaxable qualified transportation fringe [Treasury Regulation section 1.132-9(b) Q/A-21(c)]. The substantiation rules for cash reimbursements found in Treasury regulation 1.132-9(b) Q/A-16(c) apply.
- In a private or public transit-operated van pool, public transit authorities or a person in the business of transporting persons for compensation or hire owns or operates the van pool. The van must seat at least 6 adults (not including the driver). The 80/50 rule does not apply to private or public transit-operated van pools. The qualified transportation benefit exclusion for transit passes is available for passes, tokens, farecards, vouchers, or similar items entitling a person to transportation in private or public transit-operated van pools [Treasury regulation section 1.132-9(b) Q/A-21(d)]. An employer must distribute transit passes for van pool transportation in a private or public transit-operated van pool instead of providing cash reimbursements if transit passes are readily available for direct distribution by the employer to employees [Section 132(f)(3)]. Employer-provided transit passes for each month with a value not more than the statutory monthly limit do not require any certification from the employee regarding the use of the transit passes [Treasury regulation section 1.132-9(b) Q/A-18]. If an employer provides cash reimbursements, the special rules for cash reimbursement, including the substantiation requirements for cash reimbursements, apply [Treasury regulation section 1.132-9(b) Q/A-21(d)].

### **Taxation of transportation benefits for van pools**

Federal Insurance Contributions Act (FICA) taxes, Federal Unemployment Tax Act (FUTA) taxes, and federal income tax withholding are imposed on "wages." Wages do not include any benefits provided to an employee if at the time the benefit is provided it is reasonable to believe the employee could exclude the benefit under section 132 [Sections 3121(a)(20), 3306(b)(16), and 3401(a)(19) of the Code].

Generally, an employee must include in gross income the amount by which the fair market value of the benefit exceeds the amount paid by the employee, if any, and any

amount excluded from gross income as a qualified transportation fringe under section 132(a)(5). This amount is also included in the employee's wages for employment tax purposes [Regulation section 1.132-9(b) Q/A-8].

If a van pool is an employer-operated or employee-operated van pool, the van must comply with the 80/50 rule in order for the value of the benefit, or the employer's reimbursements of the employee's costs, to qualify as transportation fringes and be excluded from income and employment taxes.

If a van pool is a private or public transit-operated van pool, the van must seat at least 6 adults (not including the driver). The 80/50 rule does not apply to private or public transit-operated van pools. However, the employer must distribute transit passes for transportation in private or public transit-operated van pools if transit passes are readily available. If transit passes are not readily available, the employer may provide employees with cash reimbursement for their use of a private or public transit-operated van pool and the substantiation rules found in Treasury regulation 1.132-9(b) Q/A-16 apply.

I hope this information is helpful. If you have any additional questions, please contact me at \_\_\_\_\_ or \_\_\_\_\_ at \_\_\_\_\_.

Sincerely,

Victoria A. Judson  
Division Counsel/Associate Chief Counsel  
(Tax Exempt and Government Entities)