



DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
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OFFICE OF THE CHIEF COUNSEL

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The Honorable Scott Rigell  
Member, U.S. House of Representatives  
4772 Euclid Road, Suite E  
Virginia Beach, VA 23462

Attention:

Dear Representative Rigell:

I am responding to your inquiry dated November 30, 2015, on behalf of your constituent, . raised a question involving the application of the 80/50 rule found in Internal Revenue Code (Code) section 132(f)(5)(B)(ii) to private van pools. states that his employer imposes the 80/50 rule on the van pool of which he is a member. He wrote that he is a member of a van pool owned by a private vendor. He believed such a van pool should not be subject to the 80/50 rule, and the rule only applies to government-owned and -operated van pools.

refers to a letter issued to Senator Jack Reed (copy enclosed) stating “[t]he 80/50 rule does not apply to private or public transit operated van pools.”

As a general matter, we cannot provide binding legal advice to taxpayers unless they request a private letter ruling as described in Revenue Procedure 2016-1, 2016-1 Internal Revenue Bulletin 1. However, I may provide the following general information.

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
  - 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)]

We sometimes refer to these requirements as “the 80/50 rule.” The 80/50 rule does not include a requirement that the employee use the van pool at least 50 percent of the time--rather that riders in the van pool fill at least 50 percent of the adult seating capacity, not including the driver.

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)].

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 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 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)].

If a van pool is either an employer-operated van pool or an 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.

On the other hand, 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, but the 80/50 rule does not apply to private or public transit-operated van pools.

concluded that because his van is owned by a private vendor, he is a member of a private transit-operated van pool. This is not necessarily the case. To establish a private or public transit-operated van pool, either public transit authorities or a person in the business of transporting persons for compensation or hire must own and operate the van pool.

Conversely, in an employee-operated van pool, the employees, independent of their employer, operate a van to commute to their places of employment.

The term "operate" is not specifically defined in Code section 132 or the regulations. However, the Merriam-Webster Dictionary definition of "operate" includes "to use and control (something); to have control of (something, such as a business, department, program, etc.)."

Thus, in determining whether a van pool is "operated" by an employer, an employee, or by a private or public transit authority, factors such as who drives the van, who determines the route, who determines the pick-up and drop-off locations and times, and who is responsible for administrative details would all be relevant factors.

Whether your constituent's van pool is a private transit-operated van pool is a factual question. His employer may have concluded that the van pool is an employee-operated van pool and, as such, is subject to the 80/50 rule. In addition, while section 132(f) does list the requirements necessary for employer-provided transit benefits to be excluded

from income and employment taxes, employers are free to impose additional restrictions [See Regulation section 1.132-9 Q/A 19].

The fact that \_\_\_\_\_ receives a transit benefit from his employer, however, does not necessarily mean the van pool is a public or private transit-operated van pool.

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

Sincerely,

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

Enclosure