

**Office of Chief Counsel  
Internal Revenue Service  
memorandum**

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subject: Tax Treatment of Retroactive Transit Benefits

This is in response to inquiries on the on the income and employment tax treatment of cash transit reimbursement paid to employees to compensate them for the retroactive increase in transit benefits.

Employers have inquired regarding the taxability of the retroactive increases in transit benefits.<sup>1</sup> Employers have indicated that they provided employees with a transit pass which complied with the requirements of Internal Revenue Code (Code) § 132(f). The amount of the transit pass did not exceed the statutory limit at the time the transit pass was provided (“pre-amendment statutory limit”). However, for calendar years 2012, 2014 and 2015, Congress retroactively amended § 132(f) to raise the amount of a transit pass subsidy that could be excluded from an employee’s monthly gross income (“post-amendment statutory limit”). Employers indicate that some of their employees

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<sup>1</sup> On January 2, 2013, the American Taxpayer Relief Act of 2012 (ATRA), amended § 132(f) to provide that the limitation on the amount of the excludible fringe benefit in § 132(f)(2)(A) would be applied as if such amount were the same as the limitation in § 132(f)(2)(B). This had the effect of increasing the amount of a transit pass subsidy that could be excluded from an employee’s monthly gross income from \$125 to \$240 for 2012.

On December 19, 2014, the Tax Increase Prevention Act of 2014 (TIPA), amended §132(f) to provide that the limitation on the amount of the excludible fringe benefit in § 132(f)(2)(A) would be applied as if such amount were the same as the limitation in § 132(f)(2)(B). This had the effect of increasing the amount of a transit pass subsidy that could be excluded from an employee’s monthly gross income from \$130 to \$250 for 2014.

On December 18, 2015, the Consolidated Appropriations Act, 2016 amended § 132(f) to provide that the amount in §§ 132(f)(2)(A) and 132(f)(2)(B) are the same. This had the effect of increasing the amount of a transit pass subsidy that could be excluded from an employee’s monthly gross income from \$130 to \$250 for 2015.

incurred transit expenses in excess of the pre-amendment statutory limit in one or more of the calendar years 2012, 2014 and 2015. Employers have provided or are considering providing each such employee a lump sum cash payment in an amount equal to the monthly amount they can substantiate that they spent on transit passes in one or more of 2012, 2014 and 2015 in excess of the pre-amendment statutory limit, but not to exceed the monthly post-amendment statutory limit. Employers have inquired whether such a payment is includible in the employees' income as wages or excludible under § 132(f).

Section 132(a)(5) provides that any fringe benefit that is a qualified transportation fringe is excluded from gross income. Section 132(f)(1)(B) provides that the term "qualified transportation fringe" includes any transit pass.

Under § 132(f)(5)(A), a "transit pass" is defined in part, as any pass, token, farecard, voucher, or similar item that entitles a person to transportation on mass transit facilities whether or not publicly owned.

Section 132(f)(2) provides a monthly limit for the amount of the fringe benefit provided by the employer which may be excluded from the employee's gross income under § 132(a)(5). Prior to January 1, 2016, the base monthly limit in §132(f)(2)(A) for the aggregate of transportation in a commuter highway vehicle and transit passes was \$100. This base monthly limit is adjusted annually for inflation under § 132(f)(6). Accordingly, after adjustment for inflation, the pre-amendment statutory limit of the fringe benefit which could be excluded from gross income and wages for 2012 was \$125 per month for the aggregate of transportation in a commuter highway vehicle and transit passes. After adjustment for inflation, the pre-amendment statutory limit of the fringe benefit which could be excluded from gross income and wages for 2014 and 2015 was \$130 per month for the aggregate of transportation in a commuter highway vehicle and transit passes.

Section 1.132-9 Q/A 9(b) of the Income Tax Regulations provides that in the case of transit passes provided to an employee, the applicable statutory monthly limit applies to the transit passes provided by the employer to the employee in a month for that month or for any previous month in the calendar year. For transit passes distributed in advance for more than one month, the applicable statutory monthly limit may be calculated by taking into account the monthly limits for all months for which the transit passes are distributed.

Section 1.132-9 Q/A 8(a) provides that an employee must include in gross income the amount by which the fair market value of the benefit exceeds the sum of the amount, if any, paid by the employee and any amount excluded from gross income under § 132(a)(5).

Section 1.132-9 Q/A 22(c) provides that qualified transportation fringes exceeding the applicable monthly limit are wages for purposes of the Federal Insurance Contributions

Act (FICA), the Federal Unemployment Tax Act (FUTA) and federal income tax withholding and are reported on the employee's Form W-2, Wage and Tax Statement.

Section 132(f)(3) provides that a qualified transportation fringe includes a cash reimbursement by an employer to an employee for transit benefits, only if a voucher or similar item that may be exchanged only for a transit pass is not readily available for direct distribution by the employer to the employee.

A voucher or similar item is readily available for direct distribution by an employer to employees if and only if the employer can obtain it from a voucher provider that does not impose fare media charges greater than 1 percent of the average annual value of the voucher for a transit system, and does not impose other restrictions causing the voucher not to be considered readily available [Section 1.132-9(b) Q/A-16(b)(4)].

If transit passes are readily available in the employer's area, the Code does not provide an income or employment tax exclusion for transit benefits paid to employees in cash. We understand that in many cases transit passes are readily available in the areas about which employers are asking questions. In such cases, any distribution of cash to employees would be wages to the employee and subject to federal income tax withholding and reporting, including distributions provided due to the retroactive increase in the maximum amount of the excludable transit benefit.

If transit passes were not readily available in an area such that employers were permitted to provide transit benefits in the form of cash reimbursements, such benefits must be provided under a bona fide reimbursement arrangement for expenses actually incurred and substantiated by employees, as described in § 1.132-9 Q/A 16(c).

Furthermore, as noted above, § 132(f)(2) limits the amount that can be provided by an employer to an employee per month on a tax-free basis. That amount is \$255 for 2016. Any amount an employer provides in excess of that statutory monthly limit is not excludable under § 132, even if provided due to the increase in the monthly excludable amount for 2012, 2014 or 2015. Such excess amounts in 2016 would be wages to the employee and subject to employment tax withholding and reporting.

Some employers have pointed out language in various Joint Committee reports regarding the retroactive increase in transit passes.<sup>2</sup> For the 2012 amendment, which

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<sup>2</sup> For the 2012 amendment, employers point to the JCT's General Explanation of Tax Legislation Enacted in the 112<sup>th</sup> Congress. (JCS 2-13) They also point to Senate Report 112-208 which contains nearly identical language. Senate Report 112-208 was prepared in connection with a transit parity provision in S. 3521 (Family and Business Tax Cut Certainty Act of 2012). S. 3521 was not enacted into law.

For the 2014 amendment, employers point to the Joint Committee on Taxation's General Explanation of Tax Legislation Enacted in the 113th Congress (JCS-1-15) and Senate Report 113-154 which contains similar language. Senate Report 113-154 was prepared in connection with a transit parity provision in S. 2260 (Expiring Provisions Improvement and Efficiency (EXPIRE) Act). The EXPIRE Act was not enacted into law.

is representative of language for the later statutory amendments, the JCT's General Explanation of Tax Legislation Enacted in the 112th Congress provides:

*In order for the extension to be effective retroactive to January 1, 2012, expenses incurred during 2012 by an employee for employer-provided vanpool and transit benefits may be reimbursed (under a bona fide reimbursement arrangement) by employers on a tax-free basis to the extent they exceed \$125 per month and are less than \$240 per month. Congress intends that the rule that an employer reimbursement is excludible only if vouchers are not available to provide the benefit shall continue to apply, except in the case of reimbursements for vanpool or transit benefits between \$125 and \$240 for months during 2012. Further, Congress intends that reimbursements for expenses incurred for months during 2012 may be made in addition to the provision of benefits or reimbursements of up to \$245 per month for expenses incurred during 2013. (JCS-2-13)*

Employers have asked whether this language supports the conclusion that any reimbursement would be excludible under § 132(f).

Rules of statutory construction provide that the relevant inquiry is the language of the statute. See, Exxon Mobil Corporation v. Allapattah Services, Inc., 125 S. Ct. 2611, 2626 (2005) ("As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms"). See also, Ratzlaf v. United States, 114 S. Ct. 665, 662 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear").

In this case, the statutory text is clear. Congress changed the amount of the monthly statutory limit but did not change any other requirements of § 132. There is no need to look to the legislative history. In addition, neither the Joint Committee on Taxation's General Explanation of Tax Legislation, nor the Joint Committee on Taxation's Technical Explanation of the Protecting Americans from Tax Hikes Act of 2105, while they may be of value, are considered to be legislative history.<sup>3</sup>

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For the 2015 amendment, employers point to the Joint Committee on Taxation's Technical Explanation of the Protecting Americans from Tax Hikes Act of 2105, House Amendment #2 to the Senate Amendment to H.R. 2029 (Rules Committee Print 114-40) (JCX-144-15) and Senate Report 114-118 which contains similar language. Senate Report 114-118 was prepared in connection with a transit parity provision in S. 1946 (Tax Relief Extension Act of 2015). S. 1946 was not enacted into law.

<sup>3</sup> The same can be said of the language in Senate Report 113-154 and Senate Report 114-118, each of which was drafted in connection with a bill that was not enacted into law.