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

OFFICE OF
CHIEF COUNSEL

OCT 22 1998

MEMORANDUM FOR JOHN LAFAVER
DEPUTY COMMISSIONER MODERNIZATION
Attn: Amy Goudey

FROM: Jody J. Brewster
Assistant Chief Counsel, Income Tax and Accounting

SUBJECT: D.C. Income Tax Withholding

This is in reference to a question submitted by your office regarding whether it would be appropriate for you to sign a Form D-4-A, Certificate of Non-Residence in the District of Columbia (copy attached), that would exempt you from D.C. income tax withholding.

The facts, as we understand them, are that you began your employment with the IRS here in Washington, D.C., on September 6, 1998, and have been temporarily living in a hotel in the District since that date. Your intention is to relocate to Maryland or Virginia within the next couple of months, and you have no intention of making the District of Columbia your home or place of residence for other than this short period of time. D.C. income tax has been withheld from your IRS salary and you ask whether it would be appropriate for you to execute a D.C. certificate of non-residence that would exempt you from this withholding tax.

Although we do not administer the D.C. income tax and cannot speak for the District of Columbia, we have obtained the following general information from [redacted] an employee in the D.C. Department of Finance and Revenue. Individual "residents" of the District are subject to D.C. income tax. A "resident" is any individual who either is a domiciliary of the District of Columbia at any time during the taxable year, or maintains a place of abode in the District for an aggregate of 183 days or more during the taxable year. In determining domicile, there must be an intention to reside in the District permanently or at least indefinitely. Based upon your facts (particularly your planned move to Maryland or Virginia), it appears that you will not be considered a D.C. resident who is liable for D.C. income tax, unless your temporary stay in D.C. is for 183 days or more during [redacted]

However, the test for executing a D.C. certificate of nonresidence is more strict than the test for whether you are a D.C. resident or domiciliary who will ultimately be liable for D.C. income tax. To execute that certificate, an applicant must also represent that he or she does not maintain a place of abode within the District. Thus, although you may not "reside" in the District for 183 days or more during the taxable year and you are not "domiciled" in the District because you do not intend to reside there indefinitely, the question is whether your living in a hotel in the District constitutes maintaining a "place of abode" within the District for purposes of the D.C. certificate on nonresidence.

If you would like the D.C. Department of Finance and Revenue to specifically consider your factual situation and issue a private letter ruling to you regarding whether you may be exempted from D.C. income tax withholding, you may request such a ruling from the following address: Government of District of Columbia, Audit Division, Review and Conference Section, 441 4th Street, N.W., Suite 570, Washington, D.C. 20001. The request may also be faxed to (202) 727-6885. Such a ruling is generally issued within 15 days after the request is received and there is no user fee. Any questions may be referred to [redacted] extension 3559. Based on our informal discussions with [redacted] it would appear that you probably would be treated as maintaining a place of abode in D.C. during your temporary hotel stay in D.C. Thus, D.C. income taxes would continue to be withheld from your salary until you move to Maryland or Virginia and it would not be appropriate for you to execute a D.C. certificate of nonresidence.

Assuming that you are subject to D.C. income tax withholding until you actually do move to Maryland or Virginia (and that you do not reside in D.C. for 183 days or more in [redacted], you will have to request a refund of your withheld D.C. income taxes. You should also contact the [redacted] state income tax authorities to ascertain whether you are liable for [redacted] income tax on your IRS salary.

Your office staff indicates that in connection with your hotel stay here in Washington, you are currently receiving per diem payments for meals and lodging. It was suggested that this per diem reimbursement arrangement might have a bearing on the D.C. income tax withholding question. We believe that the D.C. income tax withholding question can be resolved without reference to your per diem reimbursements. However, it should be noted that, under the federal income tax rules, per diem reimbursements are includible in gross income when they are received for meal and lodging expenses incurred after the commencement of an indefinite work assignment. Those reimbursements are treated as being paid for nondeductible personal living expenses rather than for deductible travel-away-from-home expenses. See Rev. Rul. 93-86, 1993-2 C.B. 71 (copy attached).

If a moving expense reimbursement is received in connection with a move to a new indefinite work assignment, that reimbursement is excludable from gross income to the extent that it is a qualified moving expense reimbursement for moving expenses that would be deductible. See §§ 82, 132(a)(6), and 217 of the Internal Revenue Code.

We hope this information is helpful to you. If we can be of further assistance, please contact me or Alan Fraser, a member of my staff, at (202) 622-4800.

Attachments:
Form D-4-A
Rev. Rul. 93-86

Part V.—Deductions for Personal Exemptions

Section 151.—Allowance of Deductions for Personal Exemptions

26 CFR 1.151–4: Amount of deduction for each exemption under section 151.

The Service is providing inflation adjustments to the personal exemption and to the threshold amounts of adjusted gross income above which the exemption amount phases out for taxable years beginning in 1994. See Rev. Proc. 93–49, page 581.

Part VI.—Itemized Deductions for Individuals and Corporations

Section 162.—Trade or Business Expenses

26 CFR 1.162–2: Traveling expenses. (Also Section 262; 1.262–1.)

Away from home temporarily. Guidelines are provided for determining whether taxpayers are away from home temporarily for purposes of deducting travel expenses under section 162(a)(2) of the Code as amended by the Energy Policy Act of 1992. Rev. Rul. 83–82 obsoleted in part and Notice 93–29 amplified.

Rev. Rul. 93–86

ISSUE

What effect does the 1-year limitation on temporary travel, as added by section 1938 of the Energy Policy Act of 1992, Pub. L. No. 102–486, have on the deductibility of away from home travel expenses under section 162(a)(2) of the Internal Revenue Code?

FACTS

Situation 1. Taxpayer *A* is regularly employed in city *CI–1*. In 1993, *A* accepted work in city *CI–2*, which is 250 miles from *CI–1*. *A* realistically expected the work in *CI–2* to be completed in 6 months and planned to return to *CI–1* at that time. In fact, the employment lasted 10 months, after which time *A* returned to *CI–1*.

Situation 2. The facts are the same as in *Situation 1*, except that Taxpayer *B* realistically expected the work in *CI–2* to be completed in 18 months, but in fact it was completed in 10 months.

Situation 3. The facts are the same as in *Situation 1*, except that Taxpayer *C* realistically expected the work in *CI–2* to be completed in 9 months. After 8 months, however, *C* was asked to remain for 7 more months (for a total actual stay of 15 months).

LAW AND ANALYSIS

Section 162(a)(2) of the Code allows a deduction for all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on a trade or business, including travel expenses (including amounts expended for meals and lodging other than amounts that are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business. Under section 262(a), no deduction is allowed for personal, living, or family expenses, unless expressly provided by law.

For travel expenses to be deductible under section 162(a)(2) of the Code, they must satisfy the following three conditions: (1) they must be ordinary and necessary, (2) they must be incurred while away from home, and (3) they must be incurred in pursuit of a trade or business. *See Commissioner v. Flowers*, 326 U.S. 465 (1946), 1946–1 C.B. 57, and Rev. Rul. 60–189, 1960–1 C.B. 60.

A taxpayer's "home" for purposes of section 162(a)(2) of the Code is generally considered to be located at (1) the taxpayer's regular or principal (if more than one regular) place of business, or (2) if the taxpayer has no regular or principal place of business, then at the taxpayer's regular place of abode in a real and substantial sense. If a taxpayer comes within neither category (1) nor category (2), the taxpayer is considered to be an itinerant whose "home" is wherever the taxpayer happens to work. Rev. Rul. 73–529, 1973–2 C.B. 37, and Rev. Rul. 60–189. Travel expenses paid or incurred in connection with an indefinite or permanent work assignment are generally nondeductible.

Travel expenses paid or incurred in connection with a temporary work assignment away from home are deductible under section 162(a)(2) of the Code. *See Peurifoy v. Commissioner*, 358 U.S. 59 (1958), 1958–2 C.B. 916. The courts and the Service have held that employment is temporary for this purpose only if its termination can be foreseen within a reasonably short period of time. *See Albert v. Commissioner*, 13 T.C. 129 (1949), and Rev. Rul. 75–432, 1975–2 C.B. 60.

Employment that is initially temporary may become indefinite due to changed circumstances. *See Norwood v. Commissioner*, 66 T.C. 467 (1976), *Bark v. Commissioner*, 6 T.C. 851 (1946), Rev. Rul. 73–578, 1973–2 C.B. 39, and Rev. Rul. 60–189. In Rev. Rul. 73–578, a citizen of a foreign country comes to the U.S. under a 6-month nonimmigrant visa to work for a U.S. employer, intending to resume regular employment in the foreign country after this period. After 4 months, however, the individual agrees to continue the employment for an additional 14 months. Rev. Rul. 73–578 holds that the individual may deduct ordinary and necessary travel expenses paid or incurred during the first 4 months of the employment. However, the individual may not deduct travel expenses paid or incurred thereafter, unless the expenses are paid or incurred in connection with temporary employment away from the location of the individual's regular employment with the U.S. employer.

Revenue Ruling 83–82, 1983–1 C.B. 45, provides that, for purposes of the deduction for travel expenses under section 162(a)(2) of the Code, if the taxpayer anticipates employment away from home to last less than 1 year, then all the facts and circumstances are considered to determine whether such employment is temporary. If the taxpayer anticipates employment to last (and it does in fact last) between 1 and 2 years, Rev. Rul. 83–82 provides a rebuttable presumption that the employment is indefinite. The taxpayer may rebut the presumption by demonstrating certain objective factors set forth in the revenue ruling. For employment with an anticipated or actual stay of 2 years or more, Rev. Rul. 83–82 holds that such employment is indefinite, regardless of any other facts or circumstances. All the factual situations in Rev. Rul. 83–82 involve employment in a single location for more than 1 year.

Section 1938 of the Energy Policy Act of 1992, Pub. L. No. 102–486, amended section 162(a)(2) of the Code to provide that a taxpayer shall not be treated as being temporarily away from home during any period of employment

if such period exceeds 1 year. This amendment applies to any period of employment in a single location if such period exceeds 1 year. *See* H.R. Conf. Rep. No. 102–1018, 102d Cong., 2d Sess. 429, 430 (1992). Thus, section 162(a)(2), as amended, eliminates the rebuttable presumption category under Rev. Rul. 83–82 for employment lasting between 1 and 2 years, and shortens the 2-year limit under that ruling to 1 year. The amendment is effective for costs paid or incurred after December 31, 1992.

Accordingly, if employment away from home in a single location is realistically expected to last (and does in fact last) for 1 year or less, the employment will be treated as temporary in the absence of facts and circumstances indicating otherwise. If employment away from home in a single location is realistically expected to last for more than 1 year or there is no realistic expectation that the employment will last for 1 year or less, the employment will be treated as indefinite, regardless of whether it actually exceeds 1 year. If employment away from home in a single location initially is realistically expected to last for 1 year or less, but at some later date the employment is realistically expected to exceed 1 year, that employment will be treated as temporary (in the absence of facts and circumstances indicating otherwise) until the date that the taxpayer's realistic expectation changes.

In *Situation 1*, *A* realistically expected that the work in *CI–2* would last only 6 months, and it did in fact last less than 1 year. Because *A* had always intended to return to *CI–1* at the end of *A*'s employment in *CI–2*, the *CI–2* employment is temporary. Thus, *A*'s travel expenses paid or incurred in *CI–2* are deductible.

In *Situation 2*, *B*'s employment in *CI–2* is indefinite because *B* realistically expected that the work in *CI–2* would last longer than 1 year, even though it actually lasted less than 1 year. Thus, *B*'s travel expenses paid or incurred in *CI–2* are nondeductible.

In *Situation 3*, *C* at first realistically expected that the work in *CI–2* would last only 9 months. However, due to changed circumstances occurring after 8 months, it was no longer realistic for *C* to expect that the employment in *CI–2* would last for 1 year or less. Therefore, *C*'s employment in *CI–2* is temporary for 8 months, and indefinite for the remaining 7 months. Thus, *C*'s travel expenses paid or incurred in *CI–2* during the first 8 months are deductible, but *C*'s travel expenses paid or incurred thereafter are nondeductible.

HOLDING

Under section 162(a)(2) of the Code, as amended by the Energy Policy Act of 1992, if employment away from home in a single location is realistically expected to last (and does in fact last) for 1 year or less, the employment is temporary in the absence of facts and circumstances indicating otherwise. If employment away from home in a single location is realistically expected to last for more than 1 year or there is no realistic expectation that the employment will last for 1 year or less, the employment is indefinite, regardless of whether it actually exceeds 1 year. If employment away from home in a single location initially is realistically expected to last for 1 year or less, but at some later date the employment is realistically expected to exceed 1 year, that employment will be treated as temporary (in the absence of facts and circumstances indicating otherwise) until the date that the taxpayer's realistic expectation changes.

EFFECT ON OTHER DOCUMENTS

Rev. Rul. 83–82 is obsoleted for costs paid or incurred after December 31, 1992, because all the factual situations in that ruling involve employment in a single location for more than 1 year. Notice 93–29, 1993–1 C.B. 311, is amplified.

EFFECTIVE DATE

This revenue ruling is effective for costs paid or incurred after December 31, 1992.

---

26 CFR 1.162–17: Reporting and substantiation of certain business expenses of employees.

The rules for substantiating the amount of a deduction or expense for lodging, meal, and/or incidental expenses incurred while traveling away from home that most nearly represents current costs are set forth. See Rev. Proc. 93–50, page 586.

---

26 CFR 1.162–17: Reporting and substantiation of certain business expenses of employees.

The rules for substantiating the amount of a deduction or expense for business use of an automobile that most nearly represents current costs are set forth. See Rev. Proc. 93–51, page 593.

Section 163.—Interest

26 CFR 1.163–1: Interest deduction in general.
(Also Section 469; 1.469–2T.)

Interest properly allocable to the purchase of stock. Interest incurred by an individual in connection with the purchase of stock in a C corporation is investment interest for purposes of the section 163(d) of the Code investment interest deduction limitation, unless the individual is a dealer or a trader in stock or securities.

Rev. Rul. 93–68

ISSUE

If an individual who is neither a dealer nor a trader in stock or securities borrows money to purchase the stock of a C corporation to protect the individual's employment with the corporation, is the interest on the loan "investment interest" for purposes of the section 163(d) investment interest deduction limitation?

FACTS

A, an individual, is an employee of X, a C corporation. A borrows money to purchase 100 percent of the stock of X. A is neither a dealer nor a trader in stock or securities. A's sole motive for purchasing and holding the X stock is to protect A's employment with X. X has never paid a dividend.

LAW AND ANALYSIS

Section 163(d)(1) of the Code limits the amount of investment interest that a taxpayer other than a corporation may deduct for any taxable year to the amount of the taxpayer's net investment income for the taxable year. Section 163(d)(2) provides that amounts not deducted by reason of section 163(d)(1) are carried forward indefinitely to succeeding taxable years.

Section 163(d)(3)(A) of the Code defines "investment interest" as any