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MEMORANDUM FOR RENEE BROTMAN

FROM: George Baker
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SUBJECT: Rev. Rul. 99-7 Issues

This Chief Counsel Advice follows up on our memorandum to you dated May 10, 2000, regarding the tax treatment of employer-reimbursed transportation expenses, and it provides additional guidance regarding "temporary" and "regular" work locations for purposes of Rev. Rul. 99-7, 1999-5 I.R.B. 4. This memorandum may be shared with field offices. Chief Counsel Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be relied upon or otherwise cited as precedent.

Background

As discussed in our earlier memorandum, business expense reimbursements paid by employers to employees generally are wages subject to income tax and employment taxes unless the expenses are **deductible** business expenses reimbursed pursuant to an accountable plan. Rev. Rul. 99-7 provides rules for determining whether daily transportation expenses (that is, transportation expenses incurred in going between the employee's residence and a work location) are deductible business expenses.

In our discussions with you, we have assumed that the pertinent rule in Rev. Rul. 99-7 is holding 2, which states:

If a taxpayer has one or more regular work locations away from the taxpayer's residence, the taxpayer may deduct daily transportation expenses incurred in going between the taxpayer's residence and a *temporary* work location in the same trade or business, regardless of the distance.

Generally an employee's regular work location is a location at which the employee works or performs services on a regular basis. An employee may be considered as working or performing services on a regular basis whether or not the employee works or performs services at that location every week or on a set schedule. See Rev. Rul. 90-23, 1990-1 C.B. 28 (obsoleted on other grounds by Rev. Rul. 99-7). Rev. Rul. 90-23 provides as an example that daily transportation expenses incurred by a doctor in going

WTA-N-109776-00

between the doctor's residence and one or more offices, clinics, or hospitals at which the doctor works or performs services on a regular basis are nondeductible commuting expenses.

On the other hand, a temporary work location is a location at which the employee works or performs services on a temporary basis. Rev. Rul. 99-7 provides a 1-year standard for determining whether employment with respect to any particular work location is temporary rather than regular:

- If employment at a work 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 at a work 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 not temporary, regardless of whether it actually exceeds 1 year.
- If employment at a work location initially is realistically expected to last for 1 year or less, but at some later date the employment at that location 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 realistic expectation changes, and will be treated as not temporary after that date.

Determining whether employment at a particular work location is temporary or regular depends on applying the rules set forth above to the facts and circumstances of that employment.

We have provided below additional guidance, illustrated by examples, in which we assume that the employees each have a regular work location away from the residence.

Break In Service

You have asked about the effect a break in service at a particular location will have on determining whether an employee's employment at the location is temporary. The issue arises when an employee is instructed to work at a certain client's office for a specified period, then work at another site, and then work again at the client's office for another specified period. The question is whether the break in service at the particular location is so significant that the employer may treat employment at the location as 2 separate periods of employment rather than 1 continuous period of employment.

WTA-N-109776-00

Because of the highly individual nature of the factual inquiry involved, the IRS has not issued general guidance in this area. The determination whether a break is so significant that it warrants treating the two periods of employment as separate periods or constitutes a hiatus in one continuous period of employment is made by taking into account all facts and circumstances.

While there is no general guidance on what is considered a significant break, we believe that a break of 3 weeks or less is not significant and will not “stop the clock” in applying the 1-year limitation. On the other hand, for employers administering transportation expense reimbursements under an accountable plan, we believe that it is reasonable to treat a break of at least 7 months as significant, thereby treating two work segments separated by a 7-month break as separate periods of employment for applying the 1-year limitation. In our view, this would be the case regardless of the nature of the employee’s work activities or the nature of the break, and regardless of whether the subsequent employment at the work location was anticipated. For the 7-month break to be considered a significant break, we believe there must be at least a 7-month continuous period during which the employee is absent from the work location in question.

This interpretation of what is a significant break period can be illustrated by the following examples:

- **Example 1 (expected break of 3 weeks):** On January 1, Employee Blue receives the following work assignments: work at Client DEF’s office for an 8-month period (January 1 -August 31), work exclusively at Client GHI’s office for 3 weeks (September 1 - September 21), and then work again at DEF’s office for a 4-month period (September 22 - January 22).

Because the 3-week break in service at DEF’s office is inconsequential, on January 1 there is a realistic expectation that Employee Blue will be employed at DEF’s office for a period exceeding 1 year (January 1 through January 22 of the following year). Employee Blue’s employment at DEF’s office is not temporary, and any reimbursements of his transportation expenses between his residence and DEF’s office are taxable wages.

- **Example 2 (expected break of 7 months):** The facts are the same as in Example 1, except the interim assignment at Client GHI’s office will last for 7 months (September 1 - March 31 of the following year), followed by the 4-month assignment to DEF’s office (April 1 - July 31) .

Because on January 1 there is a realistic expectation that Employee Blue will work at Client DEF’s office for 2 discrete periods of employment, separated by a period of 7 or more months during which Employee Blue will be absent from DEF’s offices, and each of these periods will last for 1 year or less, Employee

WTA-N-109776-00

Blue's employment at DEF's office is considered temporary for each of these periods, and reimbursements of his transportation expenses between his residence and DEF's office, paid under an accountable plan, are not taxable wages. This would be the case even if Employee Blue had spent some of the interim 7-month period on vacation or at training rather than working at GHI's office.

- **Example 3 (unexpected reassignment after 3 weeks):** Employee Yellow is instructed to work at client JKL's office for an 8-month period (January 1 - August 31). At the end of this assignment, she is assigned to work at Client MNO's office for a 10-month period (September 1 - June 30 of the following year). However, on September 22, 3 weeks into the MNO assignment, Employee Yellow is reassigned to work at JKL's office, due to unforeseen complications, for a 4-month period (September 22 - January 22 of the following year).

Here, upon commencing service at JKL's office, there was a realistic expectation that the employment at that location would last for 1 year or less, and that expectation did not change during the initial 8-month assignment. However, because the 3-week break is insignificant, the reassignment to JKL's office constitutes a change in Employee Yellow's expectation. As mentioned above, Rev. Rul. 99-7 provides:

If employment at a work 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, and will be treated as not temporary after that date.

Therefore, when Employee Yellow returns to Client JKL's office on September 22, she has the expectation that her employment there will last for more than 1 year (that is, beginning with the initial January 1 assignment and ending January 22 of the following year). Her employment at JKL's office is not temporary as of September 22, and any reimbursements of her transportation expenses between her residence and JKL's office during the reassignment are taxable wages.

- **Example 4 (unexpected reassignment after 7 months):** The facts are the same as in Example 3, except the unexpected reassignment to Client JKL's office (which will, as in Example 3, last for 4 months) occurs 7 months after Employee Yellow started her assignment at Client MNO's office.

As in Example 3, the initial 8-month assignment at JKL's office is considered employment at a temporary work location. Because the break following the initial assignment is significant, the reassignment is considered a separate period of

WTA-N-109776-00

employment rather than a change in expectation regarding the duration of the initial assignment. Accordingly, Employee Yellow's employment at JKL's office is considered temporary for each of these periods, and reimbursements of her transportation expenses between her residence and JKL's office, paid under an accountable plan, are not taxable wages. This would be the case even if Employee Yellow had spent some of the interim 7-month period on vacation or at training rather than working at MNO's office.

Infrequent Work Locations

You have also asked whether an employer may treat an employee's transportation expenses as deductible business expenses under Rev. Rul. 99-7 when the employee performs services at the location on a recurring, but infrequent or sporadic, basis for a period of more than one year.

We believe that, in certain situations, employment of this nature may be so infrequent or sporadic that it would be impractical or unreasonable to focus solely on the expectation of the total span of employment at the location in applying the 1-year limitation established in Rev. Rul. 99-7. In these particular cases, rather, we believe that the realistic expectation surrounding the infrequent or sporadic nature of the employment at that other location may be treated as satisfying the 1-year limitation on employment at a temporary work location.

As in the "break in service" area, because of the highly individual nature of the factual inquiry involved, the IRS has not issued general guidance to define when an assignment is so infrequent or sporadic that it may be treated as if it were temporary under the 1-year limitation. For employers administering transportation expense reimbursements under an accountable plan, we believe that, if there is an initial realistic expectation that an employee will perform services at a work location for a period exceeding 1 year, but for no more than 35 workdays (or partial workdays) during each of the calendar years within that period, then employment at that location may be treated as temporary (rather than nontemporary) for a calendar year in which the employee actually works no more than 35 workdays (or partial workdays) at that location. We also believe, however, that if employment at a work location initially may be treated as temporary under the above interpretation of infrequent work at a location, but at some point this expectation changes, then the assignment at that location will not be considered temporary for at least the remainder of that calendar year.

This interpretation of infrequent employment at a work location can be illustrated by the following examples:

- **Example 5:** On January 1, Employee Green, who has a regular office at her employer's headquarters, is assigned by her employer to manage 5 projects, each of which is expected to last 18 months. Projects 1 and 2 each require her

WTA-N-109776-00

presence at least once a week, but Employee Green only visits the other project sites on an “as needed” basis (35 times or fewer within a calendar year for each project).

Project sites 1 and 2 are not temporary work locations because Employee Green goes to each site for more than 1 year, and not on an infrequent basis. However, project sites 3, 4, and 5 are temporary work locations, even though the employment is expected to span more than 1 year at each site, because she expects to go to each of these project sites no more than 35 times during each calendar year.

- **Example 6:** The facts are the same as in Example 5, except that, on October 1, Employee Green is instructed by her employer to spend all of her working hours during October and November at project site 5 (while other employees fill in for her on the other projects). On December 1 she resumes her previous schedule, and each of the projects is completed on time.

As of October 1 and for the rest of the calendar year, project site 5 is no longer considered a temporary work location because at that point there is a realistic expectation that Employee Green will spend more than 35 days at the site during that calendar year. Beginning January 1 of the second year, however, project site 5 is again a temporary work location because the realistic expectation of the number of visits to that site in the second calendar year did not change.