

**Internal Revenue Service**

Department of the Treasury

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Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:

CC:TE/GE:EB:HW-PLR 115510-00

Date:

January 23, 2001

Attn:

Legend

Fund =

Statute =

Dear

This is in reply to your letter dated July 24, 2000, requesting rulings on behalf of the Fund concerning whether certain disability and survivor benefits received under the Statute are excludable from gross income under section 104(a)(1) of the Internal Revenue Code (the Code).

Section 6 of the Statute sets forth the disability benefits paid under the Fund and states:

(a) If the board determines that a member has suffered an on-duty disability, the member is entitled to an on-duty disability pension as provided by this section in lieu of any other benefit under this article.

(b) If the board determines that a member is not capable of performing the usual and customary duties of the member's classification or position because of a member's on-duty disability, the member is entitled to receive a monthly disability pension, beginning on the effective date of the member's termination of active service, in an amount equal to the greater of:

(1) 50 percent of the member's average monthly salary; or

(2) the service pension the member would have been entitled to receive under Section 4 of this article based on years of participation as of the effective date of the member's termination of active service.

(c) If the board determines that a member is not capable of performing

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any substantial gainful activity because of the member's on-duty disability, the member is entitled to receive a monthly disability pension, beginning on the effective date of the member's termination of active service, in an amount equal to the greater of:

- (1) 75 percent of the member's average monthly salary; or
- (2) the service pension the member would have been entitled to receive under Section 4 of this article based on years of participation on the effective date of the member's termination of active service.

(d) If a full-time active member with at least six years of service becomes disabled or dies from heart or lung disease or cancer, and the member successfully passed a physical examination before the claimed disability or death or on beginning employment as a firefighter, and the examination failed to reveal any evidence of the heart or lung disease or cancer, that condition will be presumed to have caused an on-duty disability for purposes of determining eligibility for disability benefits under this section, and the amount of the disability benefit is presumed to constitute, unless the presumption is rebutted, the pension amount that shall be used to determine the death benefit payable with respect to that member. The on-duty disability presumption may be rebuttable only by clear and convincing evidence. Another statutory presumption regarding the cause of illnesses or conditions does not affect any benefit payable under the article.

(e) If the board determines that a member is not capable of performing the usual and customary duties of the member's classification or position because of the member's off-duty disability, the member is entitled to an off-duty disability pension in lieu of any other benefit under this article. If the board makes that determination, the member is entitled to receive a monthly disability pension, beginning on the effective date of the member's termination of active service, in an amount equal to the greater of:

- (1) 25 percent of the member's average monthly salary, plus 2½ percent of the member's average monthly salary for each full year of participation in the fund, except that the total monthly disability pension under this subdivision may not exceed 50 percent of the member's average monthly salary; or
- (2) the service pension the member would have been entitled to receive under Section 4 this article based on years of participation on the effective date of the member's

termination of active service.

Section 7 of the Statute sets forth the death benefits paid under the Fund as follows:

(a) If a member dies who is eligible to receive service pension under Section 4 of this article, a disability pension under section 6 of this article, or a deferred pension under Section 8(a) of this article, or who is receiving those benefits, the member's eligible survivors are entitled to death benefits as follows:

(1) If the member is survived by both an eligible spouse and one or more eligible children, the eligible spouse is entitled to receive a monthly death benefit equal to one-half of the amount the member would have been entitled to receive, and the surviving eligible children are entitled to receive a monthly death benefit equal to the remainder of the amount the member would have been entitled to receive, divided equally among the eligible children;

(2) If the member is not survived by an eligible child, or if at any time after the death of the member an eligible child is not entitled to a benefit, the monthly death benefit to be paid the eligible spouse is equal to the full amount the member would have been entitled to receive;

(3) If the member is not survived by an eligible spouse, or if the member's eligible spouse dies after being entitled to a death benefit under this section, the surviving eligible children are entitled to receive a monthly death benefit equal to the full monthly pension benefit the member would have been entitled to receive, divided equally among the member's eligible children then living; and

(4) If the member is not survived by an eligible spouse or an eligible child, a monthly death benefit equal to the full monthly pension benefit the member would have been entitled to receive shall be divided among the eligible parents of the deceased member.

\* \* \* \* \*

(c) Notwithstanding any other provision of this section, if a member dies in the course of the performance of the member's duties as a firefighter or suffers an on-duty disability and dies as a result of the bodily injuries that caused the on-duty disability, death benefits based on the member's service shall be computed on the basis of a benefit equal to 100 percent

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of the deceased member's average monthly salary.

The Statute also contains a deferred retirement arrangement which is available for up to a 10-year period to members who have completed at least 20 years of participation service and who decide to continue active employment as firefighters.

Section 5 of the Statute sets forth the provisions of the Statute applicable to the deferred retirement arrangement and, provides as follows:

(l) Except as otherwise provided by this subsection, a member who participates in [deferred retirement arrangement] is ineligible for disability benefits described by Section 6 of this article, and the member's survivors are ineligible to receive enhanced death benefits described by Section 7(c) of this article. A ... participant who is determined under Section 6(c) of this article to be incapable of performing any substantial gainful employment because of an on-duty disability may retroactively revoke the member's ... election if the revocation occurs before the member receives a distribution from the member's ... account or retirement benefits. If a ... participant dies in the course of the performance of the member's duty or dies as a result of an on-duty disability described by Section 6(c) of this article, the ... participant's eligible survivors under Section 7 of this article and the member's eligible ... beneficiaries under Subsection (j) of this section may, by unanimous agreement, retroactively revoke the member's ... election if the revocation occurs before receipt of a distribution from the member's ... account, service pension benefits under Section 4 of this article, or death benefits under Section 7 of this article. For purposes of this subsection, an on-duty disability must have occurred after the effective date of a member's election to participate in the [deferred retirement arrangement]. If a ... election revocation is made as prescribed by this subsection, the member's ... account is not distributed, and the member or the member's beneficiary, as applicable, is entitled to benefits under this article as if a ... election had not been made.

The Statute contains provisions for cost-of-living adjustments applicable to pension benefits, including disability and/or death benefits, paid to former members and/or their eligible survivors:

Sec. 4(d) The total monthly benefit payable to a retired or disabled member, other than a deferred retiree or active member who has elected the [deferred retirement arrangement] under Section 5(b) of [the Statute], or each eligible survivor of a deceased member, shall be increased by \$100, beginning with the monthly payment made for July 1999. That additional benefit may not be increased under Section 11(c) of the [Statute].

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Sec. 11(c) The benefits, including survivor benefits, payable based on the service of a member who completed 30 or more years of participation, is or would have been at least 50 years old, or received or is receiving an on-duty disability pension under Section 6(c) of the [Statute] shall be increased by three percent in October of each year and, if the benefit had not previously been subject to that adjustment, in the month of the member's 50<sup>th</sup> birthday.

The Statute also contains a contingent annual benefit adjustment that may be paid, to, or with respect to, a member who is eligible for disability and/or death benefits under the Fund if certain actuarial requirements are met.

Sec.10A(a) The board shall pay supplemental benefits under this section to retired members, not including deferred retirees, and to eligible survivors, not including eligible survivors of deferred retirees, if the requirements of Subsection (b) of this section are met. The board shall pay the supplemental benefits in January following a fiscal year of the fund in which the requirements of Subsection (b) of this section are met.

\* \* \* \* \*

(k)(2) The amount of payments under this section will be paid to the eligible survivors in the same manner as payments under Section 7(a) and (b) of the the Statute are made.

The Statute contains a provision that allows for a supplemental lump sum benefit payable to all members.

Sec.10B(a) The board shall pay the following people a \$4,000 lump-sum payment from the fund, in addition to any other benefits, as soon as administratively practicable after the date of the person's retirement, if the person's retirement occurs or occurred after June 30, 1998:

(1) each member who retires or retired after completing 20 years of service and is eligible to receive service pension benefits under Section 4 of the Statute; and

(2) each member who retires or retired and is eligible to receive disability benefits under Section 6 of the Statute.

(b) The board shall pay a \$4,000 lump-sum payment from the fund, in addition to any other benefits, to an eligible survivor of a member:

(1) whose death occurs or occurred after June 30, 1998;

(2) who had not terminated active service; and

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(3) who was ineligible to receive service pension benefits under Section 4 of the Statute or disability benefits under Section 6 of the Statute.

Section 61(a) of the Code provides that, except as otherwise provided by law, gross income means all income from whatever source derived, including compensation for services.

Section 104(a)(1) of the Code provides that gross income does not include amounts received under workmen's compensation acts as compensation for personal injuries or sickness.

Section 1.104-1(b) of the Income Tax Regulations states that section 104(a)(1) of the Code excludes from gross income amounts received by an employee under a workmen's compensation act or under a statute in the nature of a workmen's compensation act that provides compensation to the employee for personal injury or sickness incurred in the course of employment. Section 104(a)(1) also applies to compensation which is paid under a workmen's compensation act to the survivor or survivors of deceased employees. Section 104(a)(1) does not apply to a retirement pension or annuity to the extent it is determined by reference to the employee's age or length of service, or the employee's prior contributions, even though the employee's retirement is occasioned by an occupational injury or sickness. Section 104(a)(1) also does not apply to amounts which are received as compensation for a non-occupational injury or sickness nor to amounts received as compensation for an occupational injury or sickness to the extent that they are in excess of the amount provided in the applicable workmen's compensation act or acts.

In Rev. Rul. 80-44, 1980-1 CB 34, a statute provided for an allowance for work-related disabilities of the greater of 60 percent of the individual's average final compensation or the amount to which the individual would be entitled under the normal, years of service, retirement plan. The ruling concluded that the benefits under the statute were excludable under section 104(a)(1) of the Code to the extent that they did not exceed 60 percent of final average compensation. Any excess over 60 percent of final average compensation was attributable to length of service and therefore, not excludable from gross income.

Rev. Rul. 85-105, 1985-2 C.B. 53, considered whether amounts received by a disabled firefighter under a state statute that created a rebuttable presumption that the disability was service-connected were excludable from gross income under section 104(a)(1) of the Code. The revenue ruling stated that a rebuttable presumption did not eliminate the necessity of demonstrating that the disability was work-related but merely shifted the burden of proof concerning the cause of disability to the pension board, which was required to make a finding, based on medical evidence, as to whether the disability was service connected. The revenue ruling concluded that the statute, which authorized benefits to a class restricted to employees with service-incurred disabilities,

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was a statute in the nature of a workmen's compensation act.

Section 3402 of the Code provides for the collection of income tax at the source of the income. Except as otherwise provided, every employer making payment of wages must deduct and withhold income tax determined in accordance with tables or computational procedures prescribed by the Secretary of the Treasury upon such wages.

Based on the information submitted, representations made and authorities cited, we conclude as follows:

(1) Sections 6(b) and (c) of the Statute limit benefits to a class of employees with service-incurred injuries or disease. Accordingly, sections 6(b) and (c) of the Statute are statutes in the nature of a workmen's compensation act. The minimum benefits payable under sections 6(b) and (c), (50 percent and 75 percent of the member's average monthly salary respectively) are not determined by reference to the member's age, length of service, or prior contributions. Accordingly, monthly benefits payable under sections 6(b) and (c) are excludable under section 104(a)(1) of the Code to the extent they do not exceed 50 percent and 75 percent of the member's average monthly salary respectively. Any amounts in excess of these minimum benefits are determined by reference to the member's age, length of service or prior contributions and are not excludable under section 104(a)(1).

(2) Section 6(d) of the Statute provides a rebuttable presumption of work-relatedness with respect to certain illnesses. Because the presumption is rebuttable, benefits received under section 6(d) of the Statute are excludable from gross income under section 104(a)(1) of the Code to the same extent the benefits are excludable under sections 6(b) and (c). Rev. Rul. 85-105. Prior to an amendment to the Statute that was effective in 1999, some members' benefits were not excludable under section 104(a)(1) of the Code, because they were subject to an irrebuttable presumption of work-relatedness. *See, Take v. Commissioner*, 804 F.2d 553, 558 (9<sup>th</sup> Cir. 1986), affg. 82 T.C. 630 (1984). As amended, the presumption may be rebutted by clear and convincing evidence. It is represented that the Board administering the Fund will review all benefit payments based on the previously irrebuttable presumption to determine whether the member's injury or sickness is work-related under the Statute as amended. Accordingly, benefits that are received under the Statute for periods that postdate such review and are determined to be on account of an injury or sickness that is work-related, will be excludable from the recipient's gross income under section 104(a)(1) to the extent that they are not determined by reference to the member's age, length of service, or prior contribution.

(3) Section 6(e) of the Statute provides a disability benefit to members who incur off-duty disabilities. The benefits under this section are not provided to a class of members with service-connected injuries or sickness. Accordingly, section 6(e) of the Statute does not constitute a statute in the nature of a workmen's compensation act and benefits payable under Section 6(e) of the Statute are not excludable from the members' gross incomes under section 104(a)(1) of the Code.

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(4) Section 7(a) of the Statute provides benefit payments to eligible survivors of a deceased member which are directly attributable to the deceased member's benefits. To the extent a deceased member was eligible to receive an excludable benefit under Section 6 of the Statute, the benefit under Section 7(a) is a continuation of the Section 6 benefit. Accordingly, payments under Section 7(a) of the Statute to survivors of members who were eligible for excludable benefits under Section 6 of the Statute at the time of their death, are also excludable from the gross income of the survivor under section 104(a)(1) of the Code in the same proportions as the deceased member would have been permitted to exclude the Section 6 benefits

(5) Amounts received under Section 7(c) of the Statute by the survivors are limited to survivors of members who die in the line of duty. Benefits paid under Section 7(c) of the Statute are paid under a statute in the nature of a workmen's compensation act, not determined by reference to the member's age, length of service, or prior contributions and excludable from the gross income of the eligible survivors or beneficiaries under section 104(a)(1) of the Code.

(6) Section 5 of the Statute provides that in the event of a work-related disability or death a deferred retirement arrangement participant or his or her survivors may revoke the election in favor of disability benefits under Section 6(c) or death benefits under Section 7(c) of the Statute. Benefits payable after revocation of the election under Sections 6(c) or 7(c) of the Statute will be excludable under section 104(a)(1) of the Code to the same extent they would have been excludable if no election had been made.

(7) Sections 4(d) and 11(c) of the Statute provide for a cost-of-living adjustment to benefits payable under the Statute. Any cost-of-living adjustments under Section 4(d) or 11(c) attributable to benefits that are excludable under section 104(a)(1) of the Code, are excludable in the same proportions as the benefit to which they relate.

(8) Section 10A(a) of the Statute provides for a contingent annual supplemental benefit to members and eligible survivors receiving benefits under the Statute. Any supplemental benefit paid to a member or survivor who is receiving benefits that are excludable under section 104(a)(1) of the Code will also be excludable in the same proportion.

(9) Supplemental payments under Sections 10B(a) and 10B(b) of the Statute are not limited to a class of members with service-connected injuries or sickness. Accordingly, supplemental payments pursuant to Sections 10B(a) and 10B(b) of the Statute are not statutes in the nature of a workmen's compensation act and benefits are not excludable from gross incomes under section 104(a)(1) of the Code solely by virtue of being paid under these provisions. However, Section 10B(a)(2) provides an additional benefit to members who are eligible to receive disability benefits under Section 6. To the extent that an individual receiving benefits under Section 6 becomes eligible for a benefit under Section 10B(a)(2), that benefit is an extension of the member's 104(a)(1) excludable benefit and is therefore excludable in the same proportion as the 104(a)(1) benefit.

(10) To the extent that benefits received under the Statute are not subject to income tax

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under section 104(a)(1) of the Code, they are not subject to withholding of income under section 3402 of the Code.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayer(s) requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,  
Felix J. Zech  
Assistant Chief, Health & Wealth Branch  
Office of Division Counsel / Associate Chief  
Counsel (Tax Exempt & Government Entities)

Enclosure:

Copy for section 6100 purposes