



National Association of State Auditors, Comptrollers and Treasurers

September 3, 2009

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Internal Revenue Service
Attn: CC:PA:LPD:PR
(Notice 2009-46), Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Dear Jeffrey T. Rodrick:

On behalf of the National Association of State Auditors, Comptrollers and Treasurers, we appreciate the opportunity to respond to the Internal Revenue Service's proposal, *Substantiating Business Use of Employer-Provided Cell Phones*.

As requested, we offer the following feedback and comments in response to the IRS's proposals:

General Comments

While we appreciate the fact that the IRS is reviewing the taxability of employer-provided cell phones, we believe that the current recommendations for simplification of substantiation of business use does not address the main issue in that cell phones and wireless devices are an integral part of today's business world. The advances in the cellular phone industry, the proliferation and availability of cellular phones, along with the multitude of available plans, has made the reporting of personal use of employer-provided cell phones a burdensome, time consuming, and outdated requirement in today's work environment.

The societal trend is to completely replace land-line phones with cell phones. We believe that cell phones should be removed from listed property and employers should be allowed to issue de minimis use policies similar to those applicable to land-line phones in order to remove the substantiation requirement completely.

A. Simplified Substantiation Methods

1. *Minimal Personal Use Method*

Under the first option, we believe that gathering records to establish that an employee maintains a personal cell phone would be overly burdensome. The proposal does not specify how often the employer would need to re-verify, and any ongoing reliable proof of ownership would be onerous. This is essentially the regimen under which we operate today by requiring employees to carry their own phones and to ensure zero usage of employer-issued phones for personal purposes. If this proposal is selected, we would recommend that the employer be allowed to verify the availability of a private phone with no additional documentation required.

For the second proposal under this option, the examples cited for this definition are impracticable because many cell phone billings are no longer based on per minute charges, and there is no way to monitor types of personal use. As a result, this suggestion would be difficult or impossible to implement and more difficult to monitor.

2. Safe Harbor Substantiation Method

We believe that this method could potentially be unfair to an employee who is required to use an employer-provided cell phone, but who does not use it for personal calls. Employees will object to the inequity of being taxed on income related to deemed personal usage if their business usage is routinely more than the safe harbor amount. Therefore, we do not feel it is appropriate to assume some level of personal use when, in some instances, none exists.

3. Statistical Sampling Method

We believe that it is likely that many employees will experience personal use amounts different from the statistically determined mean level. This method could also be potentially unfair to an employee who must utilize an employer-provided cell phone, but does not use it for personal calls. The proposal does not specify if, and how often, the employer would have to perform a statistical sample again.

B. Simplified Fair Market Value Determination

Some examples of methods currently used by the states to arrive at the fair market value to an employee for an employer-provided cell phone include the following:

- Only issuing a cell phone to an individual with a demonstrated, specific business need for a phone. In such instances, the cell phone plan is designed to fit the particular employee's need, and the monthly billing statement is reviewed by a supervisor. Billings with minutes of usage in excess of the plan limit that are not business related are collected from the employee. If the plan is properly assigned, monitored and overcharges collected from the employee, the market value to the employee's personal use is minimal.
- Only allowing personal phone calls to be placed or received from state-owned cellular telephones in an emergency. When personal calls are placed, the employee reimburses the state within five working days of receipt of the bill from the department. The employee is reimbursed by the state for the cost of all state business calls placed from a personal cell phone. The state does not reimburse any portion of the monthly service charges associated with personal cell phones nor does the state accept any fiscal or legal liability for a personal cellular telephone used for business. Agencies may develop policies limiting or prohibiting employees from making business calls on personal cellular telephones.
- Some states do not permit the private use of state-supplied cell phones or they are not currently determining the fair market value.

We believe that the cost to implement the substantiation requirements is seriously out of line with the fair market value of the fringe benefit provided.

We do believe that a simplified valuation method would be helpful and appropriate to determine fair market value. Our members offered suggestions that included using a percentage of the basic monthly charge or using a flat fee. Suggestions also included establishing fair market value by determining the total cost of operation, which includes the initial capital cost plus the monthly contract cost to reflect the true fair market value of the device.

Other Comments

We continue to seek a legislative remedy to eliminate this outdated and burdensome rule and ask the IRS to halt enforcement until such time as Congress can eliminate the tax consequences of the personal use of cell phones provided by employers. Attempts to simplify and clarify the regulations are commendable, but the proposed changes will not eliminate the confusion and misunderstanding associated with this issue.

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Additionally, the manner in which business is conducted today is much different than when these devices were first included as listed property. Cell phones, PDAs and other such devices have become integral to the way in which business activities are conducted. They are no longer a "perk" for executives. They are basic tools for getting the job done.

We appreciate the opportunity to provide our comments. Should you have any questions or need additional information regarding our response, please contact Kim O'Ryan of NASC at (859) 276-1147 or me at (304) 558-2251.

Sincerely,

A handwritten signature in black ink, appearing to read "Glen B. Gainer, III". The signature is written in a cursive style with a horizontal line at the end.

Glen B. Gainer, III
NASACT President