

CELL PHONE USAGE UPDATE

IRS proposes simplified substantiation rules on cell phone use

The Internal Revenue Service is seeking comments on proposed methods for simplifying the substantiation requirements for employee use of an employer-provided cell phone. The simplified proposed methods include disregarding minimal personal use, a 25% "safe harbor" and a statistical sampling method. Comments are due by Sept. 4. JournalofAccountancy.com

SOURCE: CPA Letter Daily 6/9/09

IRS notice proposes simplified substantiation methods for cell phone use

The IRS recently published a notice (Notice 2009-46) discussing several proposed simplified procedures for employers to substantiate an employee's business use of an employer-provided cell phone.

The notice requests public comments on the proposed substantiation methods and invites suggestions for alternative substantiation methodologies relating to employee usage of employer-provided cell phones. The notice emphasizes the fact that none of the proposed substantiation methodologies would be effective until the IRS and Treasury Department consider public comments and publish guidance on such procedures.

Section 274(d)(4) provides that no deduction shall be allowed under Section 162 with respect to any listed property under Section 280F(d)(4) unless the taxpayer substantiates by adequate records or by sufficient evidence corroborating the taxpayer's own statement: (a) the amount of the expense, (b) the use of the property, (c) the business purpose and (d) the business relationship to the taxpayer of persons using the property. Treas. Reg. Sec. 1.274-5T(b)(6) provides that, with respect to listed property, a taxpayer must substantiate the: (i) amount - including (a) the amount of each separate expenditure with respect to an item of listed property, (b) the amount of each business use and (c) the amount of total use of the listed item; (ii) time (date of the expenditure); and (iii) business purpose. A cell phone is considered "listed property" under Section 280F(d)(4).

Section 61 generally provides that gross income includes the fair market value of fringe benefits in excess of: (a) any amount paid for that benefit by the employee and (b) any amount properly excluded under the Code. Section 132 excludes from gross income amounts related to working condition fringe benefits. The regulations under Section 132 provide that if, under Section 274 and its regulations, substantiation is required in order for the employer to deduct an item, then that same substantiation requirement must be met in order for the fringe benefit to qualify as a working condition fringe benefit.

An employee who receives and uses an employer-provided cell phone receives a fringe benefit. The fair market value of the use of such phone is excludible from the employee's gross income

and is deductible by the employer only to the extent that the substantiation requirements of Section 274(d) are met.

The IRS notice provides a brief description of three simplified substantiation methods that the IRS and Treasury Department are currently considering. The notice states that the IRS and Treasury Department contemplate that an employer who would like to use a simplified substantiation method relating to cell phones would have to implement a written policy (relating to cell phone usage) requiring employees to carry and use the employer-provided cell phone and that prohibits personal use of employer-provided cell phones (except for minimal personal use). The three proposed simplified substantiation methodologies are:

- 1. Minimal Personal Use Method** - The "Minimal Personal Use" method proposal includes two alternative proposals that would allow an employer to treat all of an employee's cell phone use as business usage. The first alternative would require an employee to substantiate to an employer that the employee has a separate cell phone (available during work hours) that the employee uses for personal purposes. The second alternative under Minimal Personal Use would allow an employer to effectively ignore a certain minimal amount of personal cell phone usage.
- 2. Safe Harbor Substantiation Method** - Under this safe harbor approach, an employer can treat a certain percentage (75 percent is the proposed amount) of cell phone usage as business related, regardless of the actual amount of personal and business use.
- 3. Statistical Sampling Method** - Under the statistical sampling method, the employer would be required to employ a statistical sampling method (similar to the one contained in Rev. Proc. 2004-29) in order to measure an employee's personal use of an employer-provided cell phone.

To the extent that an employer cannot comply with the substantiation requirements contained in Section 274(d), the employer-provided cell phone does not qualify as a working condition fringe benefit. Therefore, the fair market value of the employee's cell phone usage would be includible in the employee's gross income. The IRS is considering whether a simplified valuation method (to determine the fair market value of the cell phone usage) would be helpful and appropriate.

SOURCE: Grant Thornton – Tax Hot Topics 6/18/09

IRS seeks comments on simplified substantiation methods for employer provided cell phones

Notice 2009-46, 2009-23 IRB 1068

In a recent article (see Federal Taxes Weekly Alert 05/28/2009), we reported that IRS is looking to make it easier for taxpayers to comply with recordkeeping requirements for employer-provided cell phones. A new notice confirms this in requesting comments on several IRS proposals to simplify the procedures under which employers substantiate an employee's business use of employer-provided cellular telephones or other similar telecommunications equipment (collectively "cell phones"). The notice also requests suggestions for alternative approaches.

RIA observation: In 2008, two identical bills—H.R. 5450 and S. 2668, both entitled "Modernize Our Bookkeeping In the Law for Employee's Cell Phone Act

of 2008” —were introduced in the House and Senate to remove cell phones and similar telecommunications equipment from the category of listed property (see Federal Taxes Weekly Alert 07/24/2008). These measures, which had bipartisan support, and were backed by a number of companies and business associations, were never enacted. Perhaps that is why IRS is taking the matter into its own hands.

Background. Under Code Sec. 132, an employee may exclude from gross income the business use of an employer-provided cell phone as a working condition fringe benefit. However, because cell phones are listed property in Code Sec. 280F, strict substantiation requirements must be satisfied for business cell phone usage to qualify for the Code Sec. 132 exclusion. Moreover, any personal usage of an employer-provided cell phone is a taxable fringe benefit. Thus, the current rules require documentation of the business and personal use of the cell phone.

Three methods under consideration. IRS is considering three alternative methods to simplify the substantiation requirements applicable to employee usage of employer-provided cell phones: a minimal personal use method, a safe harbor substantiation method, and a statistical sampling method (or a combination of the foregoing). Any simplified cell phone substantiation method will be optional.

Minimal personal use method. IRS is considering two proposals that would allow an employer to deem all of an employee's usage of an employer-provided cell phone as business usage. Under the first proposal, the entire amount of an employee's use of an employer-provided cell phone would be deemed to be for business purposes if the employee can account to the employer with sufficient records to establish that the employee maintains and uses a personal (non-employer-provided) cell phone for personal purposes during the employee's work hours. Alternatively, the second proposal would define a specified amount or type of “minimal” personal use that would be disregarded in determining usage of an employer-provided cell phone.

Safe harbor substantiation method. IRS is considering a safe harbor method under which an employer would treat a percentage (proposed to be 75%) of each employee's use of an employer-provided cell phone as business usage and the balance as personal use.

Statistical sampling method. IRS is considering a proposal that would allow employers to use statistical sampling techniques to measure an employee's personal use of an employer-provided cell phone. In general, an employer could use an approved statistical sampling methodology similar to that provided in Rev Proc 2004-29, 2004-1 CB 918 for substantiating meals and entertainment (see Federal Taxes Weekly Alert 05/06/2004), to determine the percentage of personal use of employer-provided cell phones. The employer would multiply that percentage times the value of each employee's total usage to determine the value of personal usage. The remaining portion of the employee's usage would be deemed to be for business purposes.

Comments sought. IRS seeks comments on the methods described above and on alternative suggestions. It is particularly interested in comments on the following:

- The specific provisions that should be required to be included in an employer's written policy prohibiting personal use of employer-provided cell phones;
- The types of employee records sufficient to establish that the employee maintains and uses a personal cell phone for purposes of the first proposed minimum personal use method described above;
- How to define a specified amount or type of "minimal" personal use that should be disregarded in determining usage of an employer-provided cell phone for purposes of the second proposed minimum personal use method described above.
- The business use percentage that should be applied in the proposed safe harbor substantiation method and the data and rationale upon which it is based;
- The methods currently used by employers to determine the fair market value (FMV) of an employee's use of an employer-provided cell phone; and
- Whether a simplified method of determining the FMV of an employee's use of an employer-provided cell phone would be appropriate, and, if so, suggested simplified methodologies for determining such fair market value.

RIA Research References: For listed property, see FTC 2d/FIN ¶ L-10002; United States Tax Reporter ¶ 280F4; TaxDesk ¶ 267,616.

SOURCE: Federal Tax Updates on Checkpoint Newsstand tab 6/8/09

Repeal of cell phone tax backed by Obama administration

An unpopular and difficult-to-enforce tax on personal use of cell phones provided by employers should be repealed, Obama administration policymakers said. Doug Shulman, the commissioner of the Internal Revenue Service, said he and Treasury Secretary Timothy Geithner are asking Congress to change the law. "They are under a lot of heat to close the tax gap," said Abe Schneier, senior manager at AICPA. "Maybe they thought they had come up with something that would gain a little revenue and at the same time simplify the paperwork. It didn't work out that way." [The Wall Street Journal](#) (6/17) , [Reuters](#) (6/17)

SOURCE: CPA Letter Daily 6/18/09

IRS looking to Congress to update antiquated employer-provided cell phone law [Commissioner Shulman Statement, 6/16/09]:

In response to recent IRS proposed changes to the employer-provided cell phone substantiation requirements, IRS Commissioner Doug Shulman has issued a statement emphasizing that the IRS is only attempting to clarify the current cell phone substantiation law.

Under IRC §132, an employee may exclude from gross income the business use of an employer-provided cell phone as a working condition fringe benefit. However, because cell phones are listed property in IRC §280F, strict substantiation requirements must be satisfied for business cell phone usage to qualify for the IRC §132 exclusion. Moreover, any personal usage of an employer-provided cell phone is a taxable fringe benefit. Thus, current law requires documentation for both the business and personal use of the cell phone.

Shulman says that the current law is “burdensome, poorly understood by taxpayers, and difficult for the IRS to administer consistently.” Shulman and Treasury Secretary Geithner have asked Congress “to make clear that there will be no tax consequence to employers or employees for personal use of work-related devices such as cell phones provided by employers. The passage of time, advances in technology, and the nature of communication in the modern workplace have rendered this law obsolete”

RIA observation: In 2008, two identical bills—H.R. 5450 and S. 2668, both entitled “Modernize Our Bookkeeping In the Law for Employee's Cell Phone Act of 2008”—were introduced in the House and Senate to remove cell phones and similar telecommunications equipment from the category of listed property. These measures, which had bipartisan support, and were backed by a number of companies and business associations, were never enacted. Perhaps that is why IRS is taking the matter into its own hands.

SOURCE: RIA Newsstand 6/17/09

Statement of IRS Commissioner Doug Shulman

This month, the Internal Revenue Service asked for comments on ways to simplify compliance with rules related to employer-provided cellular telephones. The current law, which has been on the books for many years, is burdensome, poorly understood by taxpayers, and difficult for the IRS to administer consistently. Some have incorrectly implied that the IRS is "cracking down" on employee use of employer-provided cell phones. To the contrary, the IRS is attempting to simplify the rules and eliminate uncertainty for businesses and individuals.

Although some of the proposed changes would add clarity, the current law will inevitably leave widespread confusion among employees and businesses. **Therefore, Secretary Geithner and I ask that Congress act to make clear that there will be no tax consequence to employers or employees for personal use of work-related devices such as cell phones provided by employers.** The passage of time, advances in technology, and the nature of communication in the modern workplace have rendered this law obsolete. [Link to IRS Article](#)

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