

III. Qualified Transportation Plans

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| <p>A. Overview</p> <p>B. Who Can Sponsor and Who Can Participate in a Qualified Transportation Plan?</p> <p>C. What Types of Transportation Fringe Benefits May Be Offered in General?</p> <p>D. Qualified Parking</p> <p>E. Transit Passes</p> <p>F. Vanpooling</p> <p>G. Bicycle Commuting Reimbursement</p> <p>H. How to Administer the Statutory Limits</p> <p>I. Plan Design Choices and Documents Needed to Establish and Administer a Plan</p> <p>J. Plan Design #1: Employer Gives Away Transportation Fringe Benefits; No Choice (the Giveaway Plan)</p> <p>K. Plan Design #2: Employees Have Choice Between Compensation and Transportation Fringe Benefits (the Pre-Tax Compensation Reduction Plan)</p> <p>L. Plan Design #3: A Combination Giveaway Plan With Pre-Tax Compensation Reductions and/or Cash-Outs</p> | <p>M. How Does a Pre-Tax Compensation Reduction Plan Compare With FSAs Offered Under a Pre-Tax Salary Reduction Plan?</p> <p>N. How Do Employees (and Employers) Save on Taxes With a Pre-Tax Compensation Reduction Plan?</p> <p>O. Compensation Reduction Elections</p> <p>P. Carryovers Allowed for Current Participants; Former Participants Cannot Have Unused Amounts Refunded</p> <p>Q. Expense Substantiation and Other Requirements for Cash Reimbursements</p> <p>R. Are There Any Reporting and Disclosure Obligations?</p> <p>S. How Are Other Benefits Affected by a Qualified Transportation Plan?</p> <p>T. What Laws (Other Than Code § 132) Apply to Transportation Fringe Benefit Plans?</p> <p>U. Consequences of Noncompliance</p> <p>V. Correcting Mistakes</p> <p>W. Other Special Design and Administration Issues</p> <p>X. Finding the Applicable Laws (and Other Useful Information) Regarding Transportation Fringe Benefits</p> |
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A. Overview

The purpose of this Section III is to discuss the tax treatment of qualified transportation fringe benefit plans that are made available to employees by their employers under Code § 132(f) (we call these “qualified transportation plans,” although a written plan is not always required).¹ Under general principles of taxation, all benefits provided to an employee by his or her employer (including transportation fringe benefits) are taxable to the employee unless the Code provides a specific exclusion for the benefit.² Since 1985, when Code § 132 first became effective,³ employers have been permitted to give the following transportation fringe benefits to employees on a tax-free basis:

- qualified parking;
- transit passes; and
- transportation in a commuter highway vehicle, if such transportation is in connection with travel between the employee’s residence and place of employment (also known as “vanpooling”).

For 2009 and later years, an amendment to Code § 132 also allows employers to reimburse certain bicycle commuting expenses on a tax-free basis.⁴

¹ See subsection I.

² For more on the general tax principles that govern fringe benefits, see Section II.

³ Pub. L. No. 98-369 (July 18, 1984).

⁴ Pub. L. No. 110-343 (October 3, 2008).

For most transportation fringe benefits, the maximum amount that employees can exclude from income is subject to a statutory limit that is periodically adjusted for inflation. The limit for parking is \$230 per month for 2009 and 2010. The limit for transit pass and vanpooling expenses combined was \$120 per month for January and February of 2009. For the remainder of 2009 and for 2010, the combined limit is the same as the limit for parking (\$230 per month).⁵ Bicycle commuting benefits are also subject to a statutory limit, but that limit is not adjusted for inflation. The limit equals the number of qualified bicycle commuting months during the calendar year times \$20 (resulting in a maximum benefit of \$240 per year). Unlike the monthly limit for other transportation fringe benefits, the limit for bicycle commuting benefits is applied on an annual basis.⁶

There are three primary types of qualified transportation plan designs, each of which represents a different employer choice about the method of funding:

- Giveaway plan, under which an employer “gives away” to its employees benefits up to specified maximum amounts. See subsection J for details. This was the only design available until 1998, when Congress created a safe harbor from the doctrine of constructive receipt (Code § 132(f)(4)) that opened the door for parking, vanpooling and transit pass benefits to be operated as pre-tax compensation reduction plans. As a result of that safe harbor, the pure giveaway design is no longer very common for those benefits, but it is the only design available for bicycle commuting benefits.
- Pre-tax compensation reduction plan, under which employees pay all of the costs on a pre-tax basis through the use of compensation reduction agreements. See subsection K for details. This is probably the most popular plan design—employers are not required to make any employer contributions in order to let their employees save taxes. This design is not available for bicycle commuting benefits, though.
- Giveaway plan that also includes pre-tax compensation reductions, after-tax contributions, cash-outs, or a combination of those features. This variation on the above two designs allows employers to provide a subsidy while giving employees other options too. See subsection L for details.

If a plan fails to comply with the Code’s requirements, the employer and the employee may lose the favorable tax treatment—instead of being tax-free, the benefit will be treated as taxable wages. See subsection U. Consequently, this Section III addresses a wide range of questions that would interest an employer involved in establishing or administering a plan. These include eligibility to sponsor and to participate, the plan designs described above, funding, elections, benefit limits, expense substantiation, plan documentation, reporting, disclosure, effect on other benefits and additional sources of information. For those that sponsor or administer qualified transportation plans, we have also included a variety of practical tools including lots of Q&As, a checklist of plan design choices (see subsection I) and a table that compares qualified transportation plans with health FSAs and DCAPs (see subsection M).

⁵ Rev. Proc. 2008-66, 2008-45 I.R.B. 1107 (setting inflation-adjusted rates for parking, vanpooling and transit passes for 2009); Rev. Proc. 2009-21, 2009-16 I.R.B. 860 (revising the vanpooling and transit pass limits for months beginning after February 17, 2009 and before January 1, 2011); Rev. Proc. 2009-50, 2009-45 I.R.B. 617 (setting rate for 2010). The American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 (Feb. 17, 2009), amended Code § 132(f)(2) to make the monthly limit for transit passes and vanpooling the same as the monthly limit for parking beginning March 2009. This parity rule expires at the end of 2010. While it remains in effect, the combined vanpooling/transit pass limit will automatically adjust to remain identical to the parking limit. For these limits in other years, see the Table of Plan Limits behind Appendix Tab 11.

⁶ Code § 132(f).

San Francisco Ordinance Requires Offer of Transportation Benefits. Generally, employers who are eligible to sponsor qualified transportation plans (see subsection B for a discussion of who can sponsor a qualified transportation plan) can choose whether or not to implement such a plan. However, air quality concerns (and possibly also concerns about congestion and the long-term price of gas) spurred the City of San Francisco in 2008 to go a step further and adopt an ordinance requiring employers to provide their San Francisco employees with at least one of the following benefits:

- the opportunity to pay transit or vanpooling expenses on a pre-tax basis under a qualified transportation plan consistent with Code § 132(f);
- employer-supplied transit passes or reimbursement for equivalent vanpool charges, up to the value of an adult San Francisco MUNI fast pass (\$55 in 2009); or
- free employer-provided transportation in a multi-passenger vehicle, such as a vanpool or bus.

Only employers with an average of at least 20 employees per week (including temps) are subject to the ordinance, but employees are counted whether they work in or outside San Francisco. Employees who must be offered the benefit are limited to persons who performed an average of at least 10 hours of service per week within San Francisco for the same employer in the previous month and who are subject to California's minimum wage law. Violation of the ordinance is an infraction that may trigger fines ranging from \$100 for the first infraction in a year, up to \$500 per infraction for the third and all subsequent infractions in a year.*

* S.F., Cal., Ordinance 199-08 (Aug. 22, 2008), available at <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/ordinances08/o0199-08.pdf> (as visited Dec. 7, 2009).

B. Who Can Sponsor and Who Can Participate in a Qualified Transportation Plan?

1. Any Type of Employer Can Sponsor

Any employer can sponsor a qualified transportation plan for its employees, no matter what the employer's size. Eligible employers include corporations (Subchapter S or Subchapter C), partnerships, non-profit organizations, government entities, limited liability companies (LLCs), limited liability partnerships (LLPs), and sole proprietorships. (Caution: Certain owners are ineligible for the Code § 132(f) tax exclusion, as discussed in subsection B.) Government employers can sponsor qualified transportation plans, as can companies in the private sector. For example, federal employees are allowed to exclude their mass transit and vanpooling commuting costs from taxable wages and to pay for those benefits through compensation reduction.⁷ Businesses that are under common control or are part of an affiliated service group (called controlled groups) may sponsor a single plan for all of their employees. All employees that are treated as employed by a single employer under Code § 414(b), (c), (m) or (o) (relating to controlled groups of corporations, trades or businesses under common control, or affiliated service groups) are also treated as employed by a single employer for this purpose.⁸

See subsection H for a discussion of how the statutory limits apply when individual employees work for multiple related or unrelated employers.

⁷ Executive Order 13150 (Apr. 21, 2000). The President also announced a qualified transportation fringe benefit program under which federal employees working in Washington, D.C. and the surrounding area would receive transit passes on a tax-free basis. A three-year transit pass program was also adopted for three federal agencies in the National Capital Region (NCR). Subsequently, it was expanded to all federal employees as a three-year pilot program. Federal employees in the NCR, Departments of Transportation (DOT) and Energy (DOE) and the Environmental Protection Agency (EPA) receive a transit or vanpool pass equal to their actual commuting costs, up to \$100 per month. Outside the NCR, federal employees may elect to reduce their pre-tax income by an amount equal to their transit or vanpool expenses, up to \$100 per month. Executive Order 13150 Federal Workforce Transportation (Frequently Asked Questions), http://www.fta.dot.gov/about/about_FTA_4645.html (as visited Dec. 9, 2009).

⁸ Treas. Reg. § 1.132-9, Q/A-10. This regulation was adopted before the bicycle commuting benefit was added to Code § 132(f), but nothing in the bicycle commuting provisions of Code § 132(f) suggests that this regulation will not also apply to bicycle commuting benefits. For details about how to identify the members of a controlled group in the context of a cafeteria plan, see *Cafeteria Plans* (Thomson Reuters/EBIA, 1991-present, updated quarterly).

2. Only Current Employees Can Participate

Only individuals who are “currently employees at the time the qualified transportation fringe is provided” are eligible to participate.⁹ As used in the regulations, the term “employee” includes only common-law employees and other statutory employees, such as officers of corporations.¹⁰

a. Former Employees Cannot Participate

Former employees cannot participate in a qualified transportation fringe benefit plan. Consequently, an employer cannot reimburse otherwise qualified transportation expenses that are neither incurred nor paid by former employees *before* their employment termination date. However, this “no former-employee participants” rule does not prevent an employer from reimbursing a claim for an expense submitted by a former employee within the plan’s applicable run-out period (i.e., the period after the close of a coverage period during which reimbursement claims may still be submitted) if the claim is for qualified transportation expenses that were incurred or paid *before* the employee’s termination date, including expenses that were incurred *before* but paid *after* the termination date.

b. Self-Employed Individuals Cannot Participate

Self-employed individuals (partners, sole proprietors, more-than-2% Subchapter S shareholders, and independent contractors) are ineligible for the income exclusion.¹¹

Can self-employed individuals obtain any favorable tax treatment for transportation expenses, even though they are ineligible for a qualified transportation plan? Yes. Individuals who are partners, more-than-2% shareholders and independent contractors may still obtain income exclusions under the working condition and de minimis fringe provisions in Code §§ 132(a)(3) and (a)(4), even though they don’t qualify under Code § 132(f).¹²

Example: Other Fringe Benefit Exclusions May Be Available to Self-Employed Individuals. Deanna is a partner in Prime Partnership. She commutes to and from her office every day and parks free of charge in Prime’s parking lot. Deanna can’t exclude the value of her parking under Code § 132(f) because she is self-employed, but she can exclude it if it qualifies as a de minimis fringe under Code § 132(a)(4).^{*} Also, any tokens or farecards provided to her by Prime that enable her to commute on a public transit system are excludable if the value of the tokens and farecards in any month doesn’t exceed the limits in that regulation.[†] The de minimis fringe benefit exclusions are more limited than the qualified transportation fringe benefits limits, however. For example, a partner receiving a farecard from the partnership can only exclude its value up to \$21 per month (the limit for a de minimis fringe under Treas. Reg. § 1.132-6(d)(1)), which is much less than the Code § 132(f) combined limit for transit passes and vanpooling.[‡] Moreover, if amounts in excess of \$21 are provided, then under Treas. Reg. § 1.132-6(d)(1), the entire amount is taxable.

* See also Treas. Reg. § 1.132-9, Q/A-24(d).

† Treas. Reg. § 1.132-9, Q/A-24(b).

‡ IRS Information Letter 2001-0050 (Jan. 28, 2001).

⁹ Code § 132(f)(1); Treas. Reg. § 1.132-1(b)(2)(i); and Treas. Reg. § 1.132-9, Q/A-5. This regulation was adopted before the bicycle commuting benefit was added to Code § 132(f), but nothing in the bicycle commuting provisions of Code § 132(f) suggests that this regulation will not also apply to bicycle commuting benefits.

¹⁰ Treas. Reg. § 1.132-9, Q/A-5.

¹¹ Code § 132(f)(5)(E); see also IRS Notice 94-3, 1994-3 I.R.B. 14 and Treas. Reg. § 1.132-9, Q/As-5 and -24. See also IRS Information Letter 2001-0050 (Jan. 28, 2001); and IRS Publication 15-B (Employer’s Tax Guide to Fringe Benefits) (noting that more-than-2% shareholders should be treated in the same way as partners in a partnership for fringe benefit purposes, but that the benefit should not be treated as a reduction in distributions to the more-than-2% shareholder).

¹² Treas. Reg. § 1.132-9, Q/A-24(a). This regulation was adopted before the bicycle commuting benefit was added to Code § 132(f), but nothing in the bicycle commuting provisions of Code § 132(f) suggests that this regulation will not also apply to bicycle commuting benefits.

c. Leased Employees and PEOs

In addition, an individual who is treated as a leased employee of a recipient-employer under Code § 414(n) is treated as an employee of the recipient-employer for purposes of Code § 132.¹³ Some employers have contracts with employee leasing firms or professional employer organizations (PEOs) under which the leasing firm or PEO fulfills the employer's staffing needs and handles payroll. It is unclear whether such leasing firms or PEOs can maintain a qualified transportation plan for the individuals who they lease to recipient employers.¹⁴ See subsection H for a discussion of how the statutory monthly limits apply when individual employees work for related or unrelated multiple employers.

For sample language describing which employees are—and are not—eligible to participate in a qualified transportation plan, see the sample transportation plan document behind Appendix Tab 10.

C. What Types of Transportation Fringe Benefits May Be Offered in General?

Under Code § 132(f)(1), four types of benefits can be qualified transportation fringes:

- parking;
- transit passes;
- vanpooling (i.e., transportation in a commuter highway, vehicle if such transportation is in connection with travel between the employee's residence and place of employment); and
- bicycle commuting expense reimbursements.

Employers should consider the unique characteristics of their location to determine what benefits they believe actually would be used by employees. Many employers have taken surveys of their employees prior to implementing a qualified transportation plan to get a feel for how their employees are commuting to work and what other options they would consider. For example, it would be pointless to include transit passes under a qualified transportation plan if mass transit is virtually nonexistent in a particular city.

After deciding which types of benefits should be offered, the employer will need to set the benefit amounts, within certain statutory limits. Congress has limited the favorable tax treatment available by setting maximum limits for each type of benefit. Those limits are sometimes referred to as "exclusion amounts" because employees who receive benefits in excess of those statutory limits will lose the income exclusion and employers will have new withholding and reporting obligations. For 2010 expenses, the statutory limits (i.e., the exclusion amounts) are:

- \$230 per month for parking;
- for transit passes and vanpooling combined, \$230 per month (i.e., the same as the limit for parking); and
- for bicycle commuting expense reimbursements, an amount per calendar year equal to the number of qualified bicycle commuting months during the calendar year times \$20 (up to a maximum of \$240 per calendar year).¹⁵

The limits for parking, transit and vanpooling (but not bicycle commuting) are subject to cost-of-living adjustments (if any) for future years, which are announced by the IRS before the beginning of each calendar year. Special issues that arise in connection with the administration of these limits are addressed in detail in subsection H.

Caution: E-Z Pass Use Is Not a Qualified Transportation Fringe Benefit. E-Z Pass is an electronic toll collection system that is common on the East Coast and in parts of the Midwest. It is often used by commuters to pay their daily tolls for bridges, tunnels, turnpikes, etc. Although expenses paid with E-Z Pass may be related to commuting, they do not fall within the definition of qualified parking, transit passes, or vanpooling under Code § 132. Thus, expenses paid through E-Z Pass should not be reimbursed under a qualified transportation plan, nor should the use of electronic payment cards be permitted for E-Z Pass expenses under a qualified transportation plan.

¹³ Code § 414(n)(3)(C); Treas. Reg. § 1.132-9, Q/A-10. This regulation was adopted before the bicycle commuting benefit was added to Code § 132(f), but nothing in the bicycle commuting provisions of Code § 132(f) suggests that this regulation will not also apply to bicycle commuting benefits.

¹⁴ For details about how to identify leased employees in the context of a cafeteria plan and for other issues raised by PEOs, see *Cafeteria Plans* (Thomson Reuters/EBIA, 1991-present, updated quarterly).

¹⁵ Rev. Proc. 2009-50, 2009-45 I.R.B. 617 (setting rate for 2010). The American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 (Feb. 17, 2009) amended Code § 132(f)(2) to make the monthly limit for transit passes and vanpooling temporarily the same as the monthly limit for parking. This change is effective only through December 2010. For these limits in other years, see the Table of Plan Limits behind Appendix Tab 11.

An employee can receive parking, transit and vanpooling benefits, or any combination of those benefits, during the same month, so long as he or she receives no more than the applicable statutory limit for each type of benefit, calculated on the basis of a calendar month or substantially equivalent period consistently applied.

Example: Combined Limit for Vanpooling and Transit Passes. Mika lives on Heavenly Island. She parks her car at a lot near the ferry terminal on the island (which costs \$230 per month), rides the ferry to downtown Emerald City (which costs \$120 per month), and then joins a vanpool to travel to her work in a distant city suburb (which costs \$110 per month). For January and February of 2009, she could exclude \$230 per month for parking but only \$120 for the ferry transit passes and vanpooling expenses combined (a total of \$350 in tax-free benefits per month). She could not exclude both \$120 per month for ferry transit passes and \$110 per month for vanpooling because the \$120 per month statutory limit on mass transit benefits that was in effect for January and February of 2009 applied to transit passes and vanpooling combined. However, for March through December of 2009, and for 2010, she can exclude all of her ferry and vanpooling expenses (as well as her parking expense) because her combined mass transit expenses do not exceed the \$230 per month combined limit that applies to those expenses.*

* Code § 132(f)(2), as amended by the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 (Feb. 17, 2009); Treas. Reg. § 1.132-9, Q/As-7(a) and -7(c).

The receipt of other transportation fringe benefits does, however, have an effect on an employee's right to bicycle commuting reimbursements. If an employee receives any parking, transit or vanpooling benefit for a month, that month is not a "qualified bicycle commuting month" and consequently cannot be counted toward the employee's annual exclusion amount. If the employee has bicycle commuting expenses during that month that meet the other requirements for reimbursement, those expenses may still be reimbursed, but only up to the annual statutory limit—which will be reduced for each month in which the employee receives any other qualified transportation fringe benefit. For more information about the effect of other transportation fringe benefits on the bicycle commuting benefit, see subsection H.

The different types of transportation fringe benefits—parking, transit passes, commuter highway vehicle transportation (also known as vanpooling), and bicycle commuting reimbursements—are discussed in detail below, together with special rules regarding the limitations on the amounts that may be provided.

D. Qualified Parking

1. Qualified Parking Defined

"Qualified parking" includes:

- parking provided to an employee at or near the business premises of the employer; and
- parking provided to an employee at or near a location from which the employee commutes to work by mass transit, by vanpooling, in a commuter highway vehicle, by carpool, or by any other means.¹⁶

Parking is "provided" to an employee if the employer pays (directly to a parking lot operator or by reimbursement to the employee), or the employer provides the parking on premises that it owns or leases.

Qualified parking does not include parking on or near an employee's residence.¹⁷ How near is "near" for purposes of the above requirements is a facts-and-circumstances question, so employers should be consistent and reasonable in making these determinations and should make sure that they have no knowledge that an employee is in fact parking at a nonqualifying location (e.g., near the employee's residence).

¹⁶ Treas. Reg. § 1.132-9, Q/A-4.

¹⁷ Treas. Reg. § 1.132-9, Q/A-4.

Question: Are park-and-ride expenses qualified parking or transit expenses?

Answer: They will probably qualify as both if the employee is commuting to and from work. If the employee pays to park at the parking lot, the expenses will be considered qualified parking expenses; the mass-transit costs to continue the employee's commute to work will be considered transit pass expenses. (Also see the text box in subsection C.) Note that some park-and-ride lots are used for carpoolers. In that case, the parking expenses of each individual member of the carpool would probably be qualified parking expenses; actual carpooling expenses might qualify as vanpooling expenses. (See subsection F for information on vanpooling.)

The IRS has issued one private letter ruling to date that analyzes whether an employer's parking arrangement meets the definition of "qualified parking."¹⁸ Under the facts of the ruling, the employer provided parking in a lot adjoining the employer's work site and charged employees \$150 per month to park there. Employees wishing to use the lot would elect to receive parking valued at \$150 per month in lieu of \$150 per month of cash compensation for the month. The IRS ruled that this plan did in fact provide qualified parking. This particular ruling is noncontroversial—it will be interesting, however, to see if other employers seek IRS rulings on more debatable parking arrangements.

2. Monthly Limit for Qualified Parking Expenses

The statutory limit for parking expenses is \$230 per month for 2009 and 2010, subject to cost-of-living adjustments for future years, which (if any) are announced by the IRS before the beginning of each calendar year.¹⁹ See subsection H for special issues that arise in connection with administration of the monthly limits.

3. Types of Vehicles That Can Meet Qualified Parking Requirements

Qualified parking benefits are available for a wide range of vehicles. Obviously, they cover the costs of parking multiple-occupancy vehicles such as cars, vans, and trucks, so long as they are used for commuting to work. Employees may be reimbursed for the costs of parking vehicles used for vanpooling (other vanpool costs may be reimbursed under the vanpooling transportation fringe benefit, discussed in subsection F, if the vanpool qualifies as a commuter highway vehicle). Employees may also be reimbursed for the costs of parking vehicles used for carpooling (i.e., transportation to work in a vehicle that is not a commuter highway vehicle because it doesn't have enough seating or the proper mileage usage), even though other carpooling costs (e.g., the value of the ride in the carpool) may not qualify under the vanpooling fringe benefit (see subsection D regarding prime member parking).

Qualified parking benefits can also be made available to employees who pay a fee to park single-occupancy vehicles, such as motorcycles, so long as the applicable requirements for qualified parking are met.²⁰ Interestingly, qualified parking benefits do not appear to be limited to motorized vehicles. As a result, employees commuting to work by bicycle who pay a fee to park their bicycles in a secure location could be permitted to submit those expenses as a transportation fringe benefit.

4. Parking Costs Incurred at Temporary Work Locations Do Not Qualify

Occasionally, employees work at premises away from their primary work location—sometimes on a temporary basis, and other times on a nontemporary basis (generally defined as greater than one year; see the discussion that follows). Reimbursements for parking costs incurred at nontemporary work locations are excludable from an employee's income as a qualified transportation fringe to the extent that the reimbursements do not exceed the applicable statutory limits.²¹ However, parking costs incurred at temporary work locations are not qualified parking expenses and are not eligible for reimbursement as a transportation fringe benefit under Code § 132(f).

What is a "temporary" work location for purposes of this rule? This is a work location that is realistically expected to last, and does in fact last, for one year or less in the absence of facts and circumstances

¹⁸ Priv. Ltr. Rul. 200347003 (July 11, 2003), reproduced behind Appendix Tab 1.

¹⁹ Rev. Proc. 2008-66, 2008-45 I.R.B. 1107 (rate for 2009); Rev. Proc. 2009-50, 2009-45 I.R.B. 617 (rate for 2010). For limits in other years, see the Table of Plan Limits behind Appendix Tab 11.

²⁰ IRS Information Letter 2002-0117 (Sept. 30, 2002).

²¹ IRS Chief Counsel Advice Memorandum 200105007, 2001 TNT 24-74.