



AMERICAN TRUCKING ASSOCIATIONS

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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

and by email to: comments@irs.counsel.treas.gov

RE: Notice 2009-46

Dear Sirs:

The American Trucking Associations (ATA) thanks the Internal Revenue Service (IRS) for the opportunity given by IRS Notice 2009-46 to provide these comments on proposed changes to the rules for the substantiation of the business use of employer-provided cell phones and similar devices.

In brief, ATA believes that each of the three simplified substantiation methods outlined in the Notice may be appropriate for some businesses, and ATA urges IRS to adopt all three, reserving to individual employers the option to choose among them.

In addition, however, we note IRS Commissioner Shulman's request that Congress revise the Internal Revenue Code to remove cell phones and related devices as "listed property" under IRC section 280F.* ATA hopes the Commissioner's remarks indicate the Service will assume a non-enforcement position with respect to this difficult area of the tax law.

Background

ATA, based in Arlington, Virginia, is a national federation of all types and sizes of motor carriers, as well as allied industries, individual-member councils, affiliated conferences of specialized carriers, and fifty affiliated state trucking associations, representing altogether some 37,000 members, including every kind of motor carrier in the United States.

* That is, property subject to additional record-keeping requirements when furnished by an employer to an employee. Other such property includes automobiles, computers, and property associated with entertainment.

Good stuff.



The current rules promulgated by IRS for the substantiation of the business use of employer-provided cell phones and similar devices are burdensome for many in the industry ATA represents, as well as for ATA itself, other trucking associations affiliated with ATA, and their employees. Today's motor carrier industry depends heavily upon reliable long-distance communications among truck drivers, dispatchers, and management, safety, and maintenance personnel. Increasingly, these communications are accomplished by means of cell phones and related devices, and these are frequently supplied by the employer for its convenience.* It should be emphasized in this connection that the trucking industry is made up overwhelmingly of small businesses. The average trucking fleet is six vehicles, and the average carrier's gross receipts are well under \$1 million annually. Such small entities, of which there are many tens of thousands in the trucking industry, are apt to be disproportionately burdened by unrealistic tax record keeping requirements.

The various business associations that represent this highly mobile industry are likewise dependent upon these communications devices, which, again, are often supplied by the association to their employees for the association's convenience. These non-profit entities are also typically small, with only a very few employees.

Discussion

IRS proposes three simplified substantiation methods in order for employers – and, not incidentally, their employees, who are involved in each of these methods – to deal with the requirements implicated by the continued status of cell phones and related devices as “listed property” under Internal Revenue Code section 280F: (1) the minimal personal use method, (2) the safe harbor substantiation method, and (3) the statistical sampling method. Since ATA believes that the underlying statutory requirement has become unreasonable in today's circumstances, it also believes that none of these methods is ideal. However, provided that a taxpayer may choose freely among them, the adoption by IRS of all three should provide some administrative relief to motor carriers that provide cell phones to their employees.

Under the minimal personal use method, either of the described options could allow an employer to assure itself fairly easily that its employees were using the cell phones for at most incidental personal use. IRS does not make clear, however, just what remaining substantiation requirements would be imposed on an employer that chose the second option under this method.

The safe harbor method, which automatically deems a certain proportion (tentatively, 25%) of phone use to be personal, may be suitable for some employers. It should not be required of any business, however, since it will demand that the employer attribute income related to personal use for each of its employees to which it has provided phones, and withhold tax accordingly. In many instances, such attribution, and the associated administrative burden, would be wholly unwarranted.

* ATA supports the safe use of these communication technologies and encourages all drivers and their employers to consider a range of policies and safeguards intended to reduce, minimize, or eliminate driver distractions that may be caused by their use during the operation of a motor vehicle.

The potential burden involved in the statistical sampling method would seem to depend considerably on the sampling techniques that IRS may prescribe and on the record keeping that would be required to back them up. For many operations, and with respect to many employees, this method might be simple and appropriate, although in some cases it would lead to the attribution of very small amounts of income to employees with otherwise negligible personal use of their employer-supplied phones.

ATA cannot comment on a simplified fair market value determination. We have no information on this aspect of the problem.

Conclusion

ATA believes that each of the three simplified substantiation methods proposed by IRS in Notice 2009-46 may have something to offer to many of the business entities represented by ATA and its affiliated organizations. For the reasons alluded to above, however, no single one of them will be appropriate for all motor carrier businesses. IRS should therefore leave the choice of one of these methods to the option of the taxpayer and not prescribe any one of them as a single simplified method.

ATA also believes, however, that this area of the law will remain problematic, and will likely become increasingly more burdensome for employers, until cell phones and related devices are removed as "listed property" under the Code. ATA applauds Commissioner Shulman's recent request that Congress take such a step promptly. In the interim, ATA suggests that IRS assume a non-enforcement position with respect to this area of the tax law.

Sincerely,



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