

Part III. Administrative, Procedural, and Miscellaneous

Treatment of Certain Amounts Paid to Section 170(c) Organizations Under Employer Leave-Based Donation Programs

Notice 2001-69

PURPOSE AND OVERVIEW

In the aftermath of the September 11, 2001, terrorist attacks, a number of employers have adopted or are considering adopting leave-based donation programs, under which employees forgo vacation, sick, or personal leave in exchange for employer contributions of amounts to organizations described in § 170(c) of the Internal Revenue Code. This notice provides interim guidance on the application of income and employment taxes to, and the proper reporting of, payments by employers under these programs. During the period covered by this interim guidance, the Internal Revenue Service and the Treasury Department intend to study whether it may be appropriate to modify the regulations under § 61 to address certain leave-based donation programs.

BACKGROUND

Under general assignment-of-income tax principles, where, pursuant to an agreement or understanding, services are rendered to a person for the benefit of an organization described in § 170(c) and an amount for such services is paid to such organization by the person to whom services are rendered, the amount so paid constitutes income to the person performing the services. Section 1.61-2(c) of the Income Tax Regulations. See also *Lucas v. Earl*, 281 U.S. 111 (1930); Rev. Rul. 58-495 (1958-2 C.B. 27). Under general constructive receipt principles, when income is made available so that the taxpayer may draw upon it at any time, the income is constructively received by the taxpayer unless the taxpayer's control of its receipt is subject to substantial limitations or restrictions. Section 1.451-2(a). However, application of assignment-of-income and constructive receipt principles depends on the facts and circumstances of each case. See, e.g., *Commissioner v. Giannini*, 129 F.2d 638 (9th Cir. 1942).

INTERIM GUIDANCE

The Service will not assert that payments made by an employer to an organization described in § 170(c), in exchange for vacation, sick, or personal leave that the employee elects to forgo, constitute gross income or wages of an employee, provided that the payments are made to such organizations before January 1, 2003. Similarly, the Service will not assert that the opportunity to make such an election results in constructive receipt of gross income or wages for employees.

Amounts to which this interim guidance applies need not be included in Box 1, 3 (if applicable), or 5 of the Form W-2.

Participating employees may not claim a charitable contribution deduction under § 170 with respect to the value of forgone leave excluded from compensation and wages. In the case of an employer, the Service will not assert that payments made under such programs before January 1, 2003, are deductible under § 170, rather than under § 162.

REQUEST FOR COMMENTS

The Service and the Treasury Department invite comments on the taxation of leave-based donation programs, including comments on whether § 1.61-2(c) should be modified to except certain leave-based donation programs from the assignment-of-income doctrine, and on appropriate limitations to any such exception. Comments are also requested on the application of constructive receipt principles in connection with those programs. Finally, comments are requested on what types of leave-based donation programs employers currently offer.

Comments may be submitted on or before February 1, 2002, to Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20224, Attn: CC:ITA:RU (Notice 2001-69), Room 5226. Submissions may also be sent electronically via the Internet to the following e-mail address: notice.comments@m1.irs.counsel.treas.gov. All materials submitted will be available for public inspection and copying.

FURTHER INFORMATION

For further information, please contact Mr. Sheldon A. Iskow at (202) 622-4920 (not a toll-free call).

26 CFR 601.105: Examination of returns and claims for refund, credit or abatement; determination of correct tax liability. (Also Part I, § 6662.)

Rev. Proc. 2001-52

SECTION 1. PURPOSE

.01 This revenue procedure updates Rev. Proc. 2001-11 (2001-2 I.R.B. 275), and identifies circumstances under which the disclosure on a taxpayer's return of a position with respect to an item is adequate for the purpose of reducing the understatement of income tax under § 6662(d) of the Internal Revenue Code (relating to the substantial understatement aspect of the accuracy-related penalty), and for the purpose of avoiding the preparer penalty under § 6694(a) (relating to understatements due to unrealistic positions). This revenue procedure does not apply with respect to any other penalty provision (including the negligence or disregard provisions of the § 6662 accuracy-related penalty).

.02 This revenue procedure applies to any return filed on 2001 tax forms for a taxable year beginning in 2001, and to any return filed on 2001 tax forms in 2002 for short taxable years beginning in 2002.

SEC. 2. CHANGES FROM REV. PROC. 2001-11

Editorial changes only have been made in updating Rev. Proc. 2001-11.

SEC. 3. BACKGROUND

.01 If § 6662 applies to any portion of an underpayment of tax required to be shown on a return, an amount equal to 20 percent of the portion of the underpayment to which the section applies is added to the tax. (The penalty rate is 40 percent in the case of certain gross valuation misstatements.) Under § 6662(b)(2), § 6662 applies to the portion of an underpayment that is attributable to a substantial understatement of income tax.