

Part III - Administrative, Procedural, and Miscellaneous

Application of Retroactive Increase in Excludible Transit Benefits

Notice 2013-8

PURPOSE

This notice provides guidance with respect to issues related to the enactment of section 203 of the American Taxpayer Relief Act (ATRA), Pub. L. 112-240, 126 STAT. 2313, which increased the monthly transit benefit exclusion under section 132(f)(2)(A) of the Internal Revenue Code from \$125 per participating employee to \$240 per participating employee for the period of January 1, 2012 through December 31, 2012. To address employers' questions regarding the retroactive application of the increased exclusion for 2012 and to reduce filing and reporting burdens, the Internal Revenue Service (Service) is clarifying how the increase applies for 2012 and providing a special administrative procedure for employers to use in filing Form 941, Employer's QUARTERLY Federal Tax Return, for the fourth quarter of 2012 to reflect changes in the excludable amount for transit benefits provided in all quarters of 2012, and in filing Forms W-2, Wage and Tax Statement.

BACKGROUND

Section 132(a)(5) provides that any fringe benefit that is a qualified transportation fringe is excluded from gross income. Section 132(f)(1) provides in relevant part that the term "qualified transportation fringe" includes (when provided by an employer to an employee): (1) transportation in a commuter highway vehicle between home and work, (2) any transit pass, or (3) qualified parking.

Section 132(f)(2) provides that the amount of fringe benefits which are provided by an employer to any employee and which may be excluded from gross income under section 132(a)(5) shall not exceed \$100 per month in the case of the aggregate of transportation in a commuter highway vehicle and any transit pass, and \$175 in the case of qualified parking. These amounts are adjusted annually for inflation under section 132(f)(6). Prior to enactment of ATRA, the adjusted maximum monthly excludable amount for 2012 for the aggregate of transportation in a commuter highway vehicle and any transit pass was \$125 and the adjusted maximum monthly excludable

amount for qualified parking was \$240. Section 3.12 of Rev. Proc. 2011-52, 2011-45 I.R.B. 701, prior to amendment by section 3 of Rev. Proc. 2013-15 (released January 11, 2013).

ATRA amended section 132(f)(2) to increase the maximum monthly excludable amount for employer-provided commuter highway vehicle transportation and transit pass benefits to an amount equal to the maximum monthly excludable amount for qualified parking. The amendment is effective retroactively beginning on January 1, 2012, and extending through December 31, 2013. Rev. Proc. 2013-15 clarifies that the maximum monthly excludable amount for employer-provided commuter highway vehicle transportation and transit pass benefits for 2012 is \$240. (Rev. Proc. 2013-15 also specifies that the maximum monthly excludable amount for 2013 is \$245.)

Amounts which are excluded from gross income under section 132 are also excluded from Federal Insurance Contributions Act (FICA) taxes (both social security and Medicare) and Federal income tax withholding. Sections 3121(a)(20) and 3401(a)(19).

Generally, corrections of overpayments of FICA tax are made after an error has been ascertained using the adjustment process under section 6413 or using the refund claim process under section 6402. An error is ascertained when the employer has sufficient knowledge of the error to be able to correct it.

Under section 31.6413(a)-1(a) and section 31.6413(a)-2(b) of the Employment Tax Regulations, before making an adjustment of an overpayment of FICA tax, an employer generally must repay or reimburse its employee in the amount of the overcollection prior to the expiration of the period of limitations on credit or refund, and, for FICA tax overcollected in a prior year, must also secure the employee's written statement confirming that the employee has not made any previous claims (or the claims were rejected) and will not make any future claims for refund or credit of the amount of the overcollected FICA tax. An employer repays the employee by direct payment to the employee; an employer reimburses an employee by applying the amount of the overcollection against the employee FICA tax which attaches to wages paid by the employer to the employee. Section 31.6413(a)-1(b) provides that employers cannot adjust overpayments of withheld income tax after the end of the calendar year.

Section 31.6402(a)-2 provides rules under which a refund claim for an overpayment of FICA tax may be made. Pursuant to § 31.6402(a)-2(a), an employer has a duty to assure that its employee's rights to recover overcollected taxes are protected by repaying or reimbursing overcollected amounts. Alternatively, an employer may obtain the employee's consent to the filing of the refund claim. Under section 6414 and § 31.6414-1, no refund to the employer is allowed for the overpayment of withheld

income tax which the employer deducted or withheld from an employee.

To make employment tax corrections for overpayments (that is, to make adjustments or to claim refunds), an employer uses the “X” form that corresponds to the return being corrected. Thus, an employer corrects overreported taxes on a previously filed Form 941 by filing Form 941-X, Adjusted Employer’s QUARTERLY Federal Tax Return or Claim for Refund. A separate X form must be filed for each taxable period.

EMPLOYERS WHO PROVIDED TRANSIT BENEFITS IN EXCESS OF \$125 PER MONTH AND LESS THAN OR EQUAL TO \$240 PER MONTH IN 2012

For purposes of the remaining discussion, “transit benefits” refers to the aggregate benefit of transportation in a commuter highway vehicle and transit passes. Pursuant to the change made by ATRA, which was retroactive to January 1, 2012, any transit benefits provided by an employer to an employee in excess of \$125 (the former maximum monthly excludable amount) up to \$240 (the amended maximum monthly excludable amount) is excluded from the employee’s gross income and wages. These excess amounts are referred to as “excess transit benefits” in this notice. The exclusion applies whether the employer provided the transit benefits out of its own funds or whether the transit benefits were provided through salary reduction arrangements as permitted by section 132(f)(4) and § 1.132-9, Q/A 11 of the Income Tax Regulations.

SPECIAL ADMINISTRATIVE PROCEDURE FOR EMPLOYERS WHO DESIRE TO MAKE ADJUSTMENTS FOR 2012 ON THE FORM 941 FILED FOR THE FOURTH QUARTER OF 2012

Employers, who originally reported excess transit benefits as includible in gross income and wages, and withheld income taxes and FICA taxes, would normally be required to file Form 941-X for each quarter to correct the error.

Due to the timing of the statutory change and the due dates for Forms 941 for the fourth quarter of 2012 and Forms W-2, and in order to reduce administrative burden, the Service is providing a special administrative procedure for employers that treated excess transit benefits as wages and that have not yet filed their fourth quarter Form 941 for 2012. Employers who desire to use this special administrative procedure must repay or reimburse their employees the overcollected FICA tax on the excess transit benefits for all four quarters of 2012 on or before filing the fourth quarter Form 941. The employer, in reporting amounts on its fourth quarter Form 941, may reduce the fourth quarter Wages, tips and compensation reported on line 2, Taxable social security wages reported on line 5a, and Medicare wages and tips reported on line 5c, by the excess transit benefits for all four quarters of 2012. By taking advantage of this special administrative procedure, employers will avoid having to file Forms 941-X, and will also

avoid having to file Forms W-2c as discussed below.

This procedure can only be used to the extent that employers have repaid or reimbursed their employees for the employee share of FICA tax attributable to the excess transit benefits. Under this special administrative procedure, employers may only correct the employer share of FICA tax that corresponds to the employees' share of FICA tax that has been repaid or reimbursed to the employees. Employers using this special procedure do not need to obtain written statements from their employees confirming, for each employee, that the employee did not make a claim (or if the employee did make a claim, the claim was rejected) and will not make a claim for refund of FICA tax overcollected in a prior year.

The repayment or reimbursement of overwithheld social security tax and the corresponding reduction for wages reported on Form 941, line 5a, Taxable social security wages, must take into account that refunds or credits of social security tax are limited to the amount paid on that portion of the excess transit benefits that, when added to other wages for the year, did not exceed the social security wage base for 2012 (\$110,100).

The same procedures are available to filers of other employment tax returns reporting FICA taxes (*e.g.*, the related Spanish-language return or return for U.S. possessions) and to filers of employment tax returns reporting taxes under the Railroad Retirement Tax Act.

EMPLOYER INSTRUCTIONS – FOURTH QUARTER FORM 941 HAS BEEN FILED OR THE EMPLOYER HAS NOT REPAID OR REIMBURSED ALL EMPLOYEES

Employers that have filed the fourth quarter Form 941 must use Form 941-X to make an adjustment or claim a refund for any quarter in 2012 with regard to the overpayment of tax on the excess transit benefits after repaying or reimbursing the employees or, for refund claims, securing consents from its employees. Similarly, employers that, on or before filing the fourth quarter Form 941, have not repaid or reimbursed some or all employees who received excess transit benefits in 2012 must use Form 941-X to make an adjustment or claim for refund with respect to the excess transit benefits provided to those employees and must follow the normal procedures.

EMPLOYER INSTRUCTIONS – FORM W-2

Employers that have not furnished 2012 Forms W-2 to their employees should take into account the increased exclusion for transit benefits in calculating the amount of wages reported in box 1, Wages, tips, other compensation; box 3, Social security wages; and box 5, Medicare wages and tips. Employers that have repaid or reimbursed their employees for the overcollected FICA taxes prior to furnishing Form W-2 should

reduce the amounts of withheld tax reported in box 4, Social security tax withheld, and box 6, Medicare tax withheld, by the amounts of the repayments or reimbursements. In all cases, however, employers must report in box 2, Federal income tax withheld, the amount of income tax actually withheld during 2012. The additional income tax withholding will be applied against the taxes shown on the employee's individual income tax return (Form 1040, U.S. Individual Income Tax Return).

Employers that repaid or reimbursed their employees for the overcollected FICA taxes after furnishing Forms W-2 to their employees but before filing Forms W-2 with the Social Security Administration (SSA), should check the "Void" box at the top of each incorrect Form W-2 (Copy A). The employer should prepare new Forms W-2 with the correct information, and send these new Forms W-2 (Copy A) to the SSA. The employers should write "CORRECTED" on the employees' new copies (B, C, and 2), and furnish them to the employees. See the 2012 Instructions for Forms W-2 and W-3.

Employers that have already filed 2012 Forms W-2 with SSA will need to file Forms W-2c, Corrected Wage and Tax Statement, to take into account the increased exclusion for transit benefits.

DRAFTING INFORMATION

The principal author of this notice is Jean Casey of the Office of Associate Chief Counsel (Tax Exempt & Government Entities). For further information regarding this notice, contact Ms. Casey at (202) 622-6040 (not a toll-free call).