

through (e) of this section, section 3121(v)(2) and the amendments made to section 3121(a)(2), (3), and (13) by the Social Security Amendments of 1983 (Pub. L. 98-21, 97 Stat. 65 (1983)), as amended by section 2662(f)(2) of the Deficit Reduction Act of 1984 (Pub. L. 98-369, 98 Stat. 494 (1984)), apply to amounts deferred and benefits paid after December 31, 1983.

(b) *Definitions.* For purposes of §31.3121(v)(2)-1 and paragraphs (a) through (e) of this section, the following definitions apply:

FICA. FICA means the Federal Insurance Contributions Act (26 U.S.C. § 3101 et seq.).

457(a) plan. A 457(a) plan means an eligible deferred compensation plan of a State or local government or of a tax-exempt organization to which section 457(a) of the Internal Revenue Code applies.

Gap agreement. Gap agreement means an agreement adopted after March 24, 1983, and on or before December 31, 1983.

March 24, 1983 agreement. March 24, 1983 agreement means an agreement in existence on March 24, 1983 between an individual and a nonqualified deferred compensation plan within the meaning of §31.3121(v)-1(b). For this purpose only, any plan (or agreement) to make payments that qualify for one of the retirement payment exclusions is treated as a nonqualified deferred compensation plan, regardless of whether the plan (or agreement) is treated as a nonqualified deferred compensation plan within the meaning of §31.3121(v)-1(b). For example, §31.3121(v)-1(b)(4)(v) provides that certain benefits established in connection with impending termination do not result from the deferral of compensation and thus are not considered deferred under a nonqualified deferred compensation plan. However, a plan that provides such benefits and that was in existence on March 24, 1983 is treated as a nonqualified deferred compensation plan for purposes of this paragraph (b) to the extent it provides benefits that would have satisfied one of the retirement payment exclusions had the benefits been paid on April 19, 1983.

Post-amendment. Post-amendment means after December 31, 1983.

Pre-amendment. Pre-amendment means on or before December 31, 1983.

Retirement payment exclusions. Retirement payment exclusions are the exclusions from wages (for FICA tax purposes) for retirement payments under sections 3121(a)(2)(A), (a)(3), and (a)(13)(A)(iii), as in effect on April 19, 1983.

Transition benefits. Transition benefits are post-amendment payments attributable to pre-amendment services.

(c) *Transition rules*—(1) *In general.* The general effective date described in paragraph (a) of this section applies to post-amendment payments attributable solely to post-amendment services, whether or not paid under a March 24, 1983 agreement or a gap agreement. Thus, section 3121(v)(2) applies, and the retirement payment exclusions do not apply, to these benefits. Special effective dates apply to transition benefits under a March 24, 1983 agreement and transition benefits under a gap agreement. These special effective dates are set forth in paragraphs (c)(2) and (c)(3) of this section, respectively.

(2) *Transition benefits under a March 24, 1983 agreement.* Transition benefits under a March 24, 1983 agreement (except for those under a 457(a) plan) are not subject to the special timing rule of section 3121(v)(2) and remain subject to section 3121(a) as in effect on April 19, 1983. Thus, transition benefits under a March 24, 1983 agreement (except for those under a 457(a) plan) are excluded from wages (for FICA tax purposes) only if they qualify for any of the retirement payment exclusions (or any other exclusion provided under section 3121(a) as in effect on April 19, 1983).

(3) *Transition benefits under a gap agreement.* The payor of transition benefits under a gap agreement must choose to either—

(i) Take the transition benefits into account as wages when paid; or

(ii) Take the amount deferred (within the meaning of §31.3121(v)-1(c)) with respect to the transition benefits into account as wages under section 3121(v)(2) (as if section 3121(v)(2) had applied before its general effective date).

(d) *Determining transition benefit portion.* For purposes of determining the portion of total benefits under a nonqualified deferred compensation plan that represents transition benefits, if, under the terms of the plan, benefits are not attributed to specific years of

service, the employer may use any reasonable method. For example, if a plan provides that the employee will receive benefits equal to two percent of high three-year average compensation multiplied by years of service, and the employee retires after 25 years of service, nine of which are before 1984, the employer may determine that 9/25 of the total benefits to be received beginning in 2000 are transition benefits attributable to services performed before 1984.

(e) *Order of payment.* If an employer determines, in accordance with paragraph (d) of this section, that a portion of the total benefits under a nonqualified deferred compensation plan constitutes transition benefits, then, for purposes of determining the portion of each benefit payment that constitutes transition benefits—

(1) For a payment made before the effective date of this section, the employer may use any reasonable allocation method to determine the portion of a payment that consists of transition benefits, provided that the allocation method is consistent with the terms of the plan; and

(2) For a payment made on or after the effective date of this section, the employer must treat each payment as consisting of transition benefits in the same proportion as the transition benefits that have not been paid (as of the effective date of this section) bear to total benefits that have not been paid (as of the effective date of this section), unless such allocation is inconsistent with the terms of the plan.

Margaret Milner Richardson,
Commissioner of Internal Revenue.

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TEST OF EMPLOYMENT TAX EARLY REFERRAL PROCEDURES FOR APPEALS

Announcement 96-13

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SECTION 1. SUMMARY

Early referral procedures were published in Rev. Proc. 96-9, 1996-2 I.R.B. 15. This Announcement applies the provisions of the revenue procedure to employment tax issues, as described below, on a one-year test basis.

Taxpayers whose returns are being examined can request early referral of one or more employment tax issue(s) from district compliance functions ("the District") to Appeals. Early referral of the employment tax issue(s) does not alter the District Director's authority to audit the returns of a taxpayer nor limit or expand the District Director's authority to resolve any issues, including the authority in Delegation Order No. 236, 1991-1 C.B. 313.

These procedures are effective for requests for early referral made during the one-year test period beginning on March 18, 1996, the date this announcement is published in the Internal Revenue Bulletin.

SECTION 2. PURPOSE and SCOPE

.01 In general. This Announcement is part of the Internal Revenue

Service's strategy designed to improve employment tax administration for all taxpayers, including those who are small business owners. The purpose of early referral for employment tax issues is to resolve them more expeditiously through simultaneous action by the District and Appeals. This Announcement describes the method by which a taxpayer requests early referral of one or more unagreed employment tax issues from the District to Appeals. A taxpayer may request early referral of any developed, unagreed employment tax issue that is under the jurisdiction of the District Director arising from an audit. The District will continue to develop other issues arising in the audit.

Early referral for employment tax issues is:

- optional;
- initiated by the taxpayer;
- subject to the approval of both the District Director and the Assistant Regional Director of Appeals (ARDA); and

- not limited to Coordinated Examination Program (CEP) taxpayers.

.02 APPROPRIATE ISSUES FOR EARLY REFERRAL. Appropriate issues for early referral include those that if resolved can reasonably be expected to result in a quicker resolution of the entire case; and that both the taxpayer and District Director agree should be referred to Appeals early. Therefore, early referral may not be available for every employment tax issue.

Examples of appropriate employment tax issues for early referral include:

1) Worker Classification Issues, including whether a worker is an employee or independent contractor under the common law; whether a worker is a statutory employee or statutory non-employee; whether Section 530 of the Revenue Act of 1978 applies; whether I.R.C. § 3509 rates are appropriate; and whether the taxpayer qualifies for an interest-free adjustment.

2) Other Issues, including whether certain payments are excepted from the definition of "wages" (e.g., a fringe benefit that would be excludable from the employee's gross income under I.R.C. § 132); and whether certain services are excepted from the definition of "employment."

Because taxes under the Self-Employment Contributions Act (I.R.C.

§§ 1401-1403) are income taxes, rather than employment taxes, issues arising under these sections are not included in this early referral procedure.

SECTION 3. HOW TO REQUEST EARLY REFERRAL

An early referral request must follow the requirements set forth in section 3, **Procedures For Requesting Early Referral**, in Rev. Proc. 96-9. A request for early referral must be submitted in writing by the taxpayer to the case manager. The case manager may suggest that a taxpayer make such a request. For purposes of this announcement, "case manager" includes Compliance, Examination, Collection, and EP/EO group managers. See section 3.02 regarding **Statement of Issues and Position**; section 3.03, **Perjury Statement**; and section 3.04, **Signatures**.

SECTION 4. PROCESSING AN EARLY REFERRAL REQUEST

An early referral request will be processed in the manner described in section 4 of Rev. Proc. 96-9, **Processing An Early Referral Request**. Included in section 4 are: section 4.01, **Approving or Denying the Request for Early Referral**; section 4.02, **Notification of Action**; and section 4.03, **No Appeal**.

SECTION 5. TRANSFERRING THE ISSUE FROM THE DISTRICT TO APPEALS

.01 In general. If an issue is approved for transfer from the District to Appeals, the procedures described in section 5 of Rev. Proc. 96-9 generally will apply. The following specifically apply to employment tax issues:

.02 The District issues an **employment tax report**. The District will prepare an employment tax report for each approved early referral issue. The report must identify the amount of employment tax(es) in dispute; fully describe the issue(s); and explain the District's position. This report will be sent to the taxpayer.

.03 **Taxpayer response to District's report**. The taxpayer must respond in writing to the District's report. The response must contain an explanation of the taxpayer's position regarding the issue(s), similar to that which would be provided in an Appeals protest, and

satisfy the declaration and signature requirements in sections 3.03 and 3.04 of Rev. Proc. 96-9.

The taxpayer's response must be submitted to the case manager within 30 days of the date of the report. This 30-day requirement may be extended by the case manager. If the taxpayer's response with respect to an issue is not received within the time provided, the taxpayer's early referral request will be considered withdrawn regarding that particular issue(s) without prejudice to the taxpayer's right to an administrative appeal at a later date. But see section 8 of Rev. Proc. 96-9, **Withdrawal from the Early Referral Process**, regarding withdrawal after Appeals has taken jurisdiction over the early referral issue(s).

.04 Early referral file sent to Appeals. After the taxpayer has responded in writing to the report, the District compliance function will send the early referral file to Appeals. The file should include copies of:

- applicable portions of tax returns and workpapers;
- the approved early referral request;
- the District's report;
- the taxpayer's written response to the report; and
- the District's response to the taxpayer's position, if any.

Appeals has jurisdiction over the issue(s) accepted for early referral. All other issues in the case remain in the District's jurisdiction.

SECTION 6. RESOLVING THE EARLY REFERRAL ISSUE(S)

.01 In general. The taxpayer's written response to the District's report generally serves the same purpose as an Appeals protest. Established Appeals procedures, including those governing submissions and taxpayer conferences, apply to early referral issues. See § 601.106 *et seq.* of the Statement of Procedural Rules. See generally section 6 of Rev. Proc. 96-9. The following specifically apply to early referral of employment tax issues:

.02 If agreement of the early referral issue(s) is reached. If an agreement is reached with respect to an early referral issue(s), an agreement Form 2504 or 2504 AD, labelled "Partial Agreement," may be used for factual or non-complex issues that have

no features that affect subsequent years. A closing agreement generally will be prepared for issues where a settlement is complex or affects subsequent years. See I.R.C. § 7121 and also Rev. Proc. 68-16, 1968-1 C.B. 770, which describes the preparation of closing agreements. Appeals will coordinate effects on subsequent years with the District and District Counsel.

.03 If agreement of the early referral issue(s) is not reached. If an agreement is not reached with respect to an early referral issue(s), see section 6.03 of Rev. Proc. 96-9, **Agreement Not Reached**. See also generally, section 7, of Rev. Proc. 96-9, **Effect of Conclusion of Examination**. The following specifically apply to early referral of employment tax issues: If no issues in the case remain unagreed except for an early referral employment tax issue that could not be settled by Appeals and has been returned to the District, no 30-day letter will be issued. Rather, the District will process the case for assessment of tax due from the taxpayer.

SECTION 7. NO USER FEE

There is no user fee for an early referral employment tax request.

SECTION 8. EFFECTIVE DATE

These procedures are effective for requests for early referral made during the one-year test period beginning on March 18, 1996, the date this announcement is published in the Internal Revenue Bulletin.

DRAFTING INFORMATION

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Foundations Status of Certain Organizations

Announcement 96-14

The following organizations have failed to establish or have been unable

to maintain their status as public charities or as operating foundations. Accordingly, grantors and contributors may not, after this date, rely on previous rulings or designations in the Cumulative List of Organizations (Publication 78), or on the presumption arising from the filing of notices under section 508(b) of the Code. This listing does *not* indicate that the organizations have lost their status as organizations described in section 501(c)(3), eligible to receive deductible contributions.

Former Public Charities. The following organizations (which have been treated as organizations that are not private foundations described in section 509(a) of the Code) are now classified as private foundations:

Academic Boosters of Breathitt County, Jackson, KY
AIDS Research Foundation Inc., Toms River, NJ
Akron Youthquake Ministries Inc., Akron, OH
Alexandria Band Boosters Inc., Alexandria, IN
Arlington Elder Care Corp., Arlington, VA
Asbury Male Youth Project Inc., Washington, DC
Association for Americans Outdoors Inc., Bloomington, IN
Atlantic Reef Builders Inc., Margate, NJ
Berkeley County Schools Foundation, Inc., Martinsburg, WV
Biblical Institute for Social Change, Washington, DC
Black Hills Citizens for a Better Community, Grand Rapids, MI
Black Managers Association Inc., Indianapolis, IN
Brunswick Housing Development Corp., Medina, OH
Bryan Elementary Parent Teacher Organization, Bryan, OH
Campbell Lodge a Home for Boys Alumni Association Inc., Park Hills, KY
Carolyn Steinhoff Smith, Inc., Tulsa, OK
Center Grove High School Choir, Greenwood, IN
Center School Association, Mayfield Village, OH
Charles W. Bissinger & Associates Inc., Arnold, MD
Childrens Hospice of New Jersey Inc., Union, NJ