DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

INFO
2005-0015

June 24, 2004

CC:ITA:B02:
UIL: 162.08-00

Dear :

This responds to a request for a ruling letter on the proper tax treatment of travel expense reimbursements paid by (the taxpayer) to an employee who works out of his residence in one state but who regularly travels to the taxpayer's office in another state, where he stays in a corporate apartment provided by the taxpayer. We have determined that, in the interest of sound tax administration and because of the factual nature of the issues involved, we must decline to issue a letter ruling and we will refund your users fee under separate cover. We hope, however, that the following general information will be helpful to you.

An employer's payments to an employee, including fringe benefits, generally are included in the employee's gross income, and the employer must treat the payments as wages subject to withholding and employment taxes. However, a fringe benefit that qualifies as a working condition fringe is not treated as taxable wages. Section 132(d) of the Internal Revenue Code defines working condition fringe as "any property or services provided to an employee of the employer to the extent that, if the employee paid for such property or services, such payment would be allowable as a deduction under section 162 or 167."

Section 162(a)(2) allows deductions for traveling expenses (including amounts expended for meals and lodging other than amounts that are lavish or extravagant under the circumstances) paid or incurred while away from home in the pursuit of a trade or business. To be deductible under § 162(a)(2), an employee's traveling expenses must be: (1) ordinary and necessary, (2) incurred in pursuit of a trade or business, and (3) incurred while away from home. *Commissioner v. Flowers*, 326 U.S. 465 (1946), 1946-1 C.B. 57. Also, § 162(a) and Rev. Rul. 93-86, 1993-2 C.B. 71, provide that traveling expenses with respect to an assignment in a single location that exceeds one year are not be deductible.

In *Commissioner v. Flowers*, the Court determined that travel undertaken by a lawyer from his residence in Jackson, Mississippi, to his office for a railroad company based in Mobile, Alabama, was not incurred in pursuit of his trade or business. The traveling expenses, the Court found, were incurred solely for personal purposes and did

further the employer's business: "The exigencies of business rather than the personal conveniences and necessities of the traveler must be the motivating factors. Such was not the case here." 326 U.S. at 474.

For purposes of § 162(a)(2) the term "home" (usually referred to in this context as the "tax home") means the vicinity of the employee's regular place of business -- but if the employee has more than one regular place of business, the tax home is the vicinity of the employee's principal place of business. The determination of which regular place of business is the principal one depends on the facts and circumstances. Rev. Rul. 54-147, 1954-1 C.B. 51, sets forth some of the more important factors:

- (1) the total time ordinarily spent by the taxpayer at each of his business posts,
- (2) the degree of business activity at each such post, and
- (3) whether the financial return in respect of each post is significant or insignificant.

See *Markey v. Commissioner*, 490 F.2fd 1249 (6th Cir. 1974); see also *Andrews v. Commissioner*, 931 F.2d 132 (1st Cir. 1991).

If the factors indicate that the vicinity of the employee's residence is the employee's principal place of business (and hence the employee's tax home), then the employee's use of the corporate apartment while traveling in the pursuit of the trade or business will be considered a working condition fringe, and the value will not be treated as taxable wages. If the employee's "tax home" is located in the vicinity of the taxpayer's office, or if the employee's travel is not in the pursuit of the trade or business, then the use of the corporate apartment is not a working condition fringe; the taxpayer would be required to treat as taxable wages the value of the employee's use of the apartment.

I hope this information is helpful. Please call , at [redacted] if you have any questions.

Sincerely,

Thomas D. Moffitt
Branch Chief, Branch 2
(Income Tax & Accounting)