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Part III

Administrative, Procedural, and Miscellaneous

26 CFR 601.105: Examination of returns and claims for refund, credit, or abatement; determination of correct tax liability.
(Also Part I, 62, 162, 267, 274; 1.62-2, 1.162-17, 1.267(a)-1, 1.274-5.)

Rev. Proc. 2008-59

SECTION 1. PURPOSE

This revenue procedure updates Rev. Proc. 2007-63, 2007-42 I.R.B. 809, and provides rules under which the amount of ordinary and necessary business expenses of an employee for lodging, meal, and incidental expenses, or for meal and incidental expenses, incurred while traveling away from home are deemed substantiated under 1.274-5 of the Income Tax Regulations when a payor (the employer, its agent, or a third party) provides a per diem allowance under a reimbursement or other expense allowance arrangement to pay for the expenses. In addition, this revenue procedure provides an optional method for employees and self-employed individuals who are not reimbursed to use in computing the amounts paid or incurred for business meal and incidental expenses, or for incidental expenses only if no meal expenses are paid or incurred, while traveling away from home. Use of a method described in this revenue procedure is not mandatory, and a taxpayer may use actual allowable expenses if the

taxpayer maintains adequate records or other sufficient evidence for proper substantiation. This revenue procedure does not provide rules under which the amount of an employee's lodging expenses will be deemed substantiated to a payor when a payor provides an allowance to pay for those expenses but not meal and incidental expenses.

SECTION 2. BACKGROUND AND CHANGES

.01 Section 162(a) of the Internal Revenue Code allows a deduction for all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. Under that provision, an employee or self-employed individual may deduct expenses paid or incurred while traveling away from home in pursuit of a trade or business. However, under 262, no portion of the travel expenses that is attributable to personal, living, or family expenses is deductible.

.02 Section 274(n) generally limits the amount allowable as a deduction under 162 for any expense for food, beverages, or entertainment to 50 percent of the amount of the expense that otherwise would be allowable as a deduction. In the case of any expenses for food or beverages consumed while away from home (within the meaning of 162(a)(2)) by an individual during, or incident to, the period of duty subject to the hours of service limitations of the Department of Transportation, 274(n)(3) provides that, for taxable years beginning in 2008, the deductible percentage for these expenses is 80 percent.

.03 Section 274(d) provides, in part, that no deduction is allowed under 162 for any travel expense (including meals and lodging while away from home) unless the taxpayer

complies with certain substantiation requirements. Section 274(d) further provides that regulations may prescribe that some or all of the substantiation requirements do not apply to an expense that does not exceed an amount prescribed by the regulations.

.04 Section 1.274-5(g), in part, grants the Commissioner the authority to prescribe rules relating to reimbursement arrangements or per diem allowances for ordinary and necessary expenses paid or incurred while traveling away from home. Pursuant to this grant of authority, the Commissioner may prescribe rules under which these arrangements or allowances, if in accordance with reasonable business practice, are regarded (1) as equivalent to substantiation, by adequate records or other sufficient evidence, of the amount of travel expenses for purposes of 1.274-5(c), and (2) as satisfying the requirements of an adequate accounting to the employer of the amount of travel expenses for purposes of 1.274-5(f).

.05 For purposes of determining adjusted gross income, 62(a)(2)(A) allows an employee a deduction for expenses allowed by Part VI (161 and following), subchapter B, chapter 1 of the Code, paid or incurred by the employee in connection with the performance of services as an employee under a reimbursement or other expense allowance arrangement with a payor.

.06 Section 62(c) provides that an arrangement is not treated as a reimbursement or other expense allowance arrangement for purposes of 62(a)(2)(A) if it--

(1) does not require the employee to substantiate the expenses covered by the arrangement to the payor, or

(2) provides the employee with the right to retain any amount in excess of the substantiated expenses covered under the arrangement.

Section 62(c) further provides that the substantiation requirements described therein do not apply to any expense to the extent that, under the grant of regulatory authority prescribed in 274(d), the Commissioner has provided that substantiation is not required for the expense.

.07 Under 1.62-2(c), a reimbursement or other expense allowance arrangement satisfies the requirements of 62(c) if it meets the requirements of business connection, substantiation, and returning amounts in excess of expenses as specified in the regulations. If an arrangement meets these requirements, all amounts paid under the arrangement are treated as paid under an accountable plan and are excluded from income and wages. If an arrangement does not meet these requirements, all amounts paid under the arrangement are treated as paid under a nonaccountable plan and are included in the employee's gross income, must be reported as wages or compensation on the employee's Form W-2, and are subject to the withholding and payment of employment taxes. Section 1.62-2(e)(2) specifically provides that substantiation of certain business expenses in accordance with rules prescribed under the authority of 1.274-5(g) is treated as substantiation of the amount of the expenses for purposes of 1.62-2. Under 1.62-2(f)(2), the Commissioner may prescribe rules under which an arrangement providing per diem allowances is treated as satisfying the requirement of returning amounts in excess of expenses, even though the arrangement does not require the employee to return the portion of the allowance that relates to days of travel

substantiated and that exceeds the amount of the employee's expenses deemed substantiated pursuant to rules prescribed under 274(d), provided the allowance is reasonably calculated not to exceed the amount of the employee's expenses or anticipated expenses and the employee is required to return within a reasonable period of time any portion of the allowance that relates to days of travel not substantiated.

.08 Section 1.62-2(h)(2)(i)(B) provides that, if a payor pays a per diem allowance that meets the requirements of 1.62-2(c)(1), the portion, if any, of the allowance that relates to days of travel substantiated in accordance with 1.62-2(e), that exceeds the amount of the employee's expenses deemed substantiated for the travel pursuant to rules prescribed under 274(d) and 1.274-5(g), and that the employee is not required to return, is subject to withholding and payment of employment taxes. See

31.3121(a)-3, 31.3231(e)-1(a)(5), 31.3306(b)-2, and 31.3401(a)-4 of the Employment Tax Regulations. Because the employee is not required to return this excess portion, the reasonable period of time provisions of 1.62-2(g) (relating to the return of excess amounts) do not apply to this portion.

.09 Under 1.62-2(h)(2)(i)(B)(4), the Commissioner has the discretion to prescribe special rules regarding the timing of withholding and payment of employment taxes on per diem allowances.

.10 Section 1.274-5(j)(1) grants the Commissioner the authority to establish a method under which a taxpayer may elect to treat a specific amount as paid or incurred for meals while traveling away from home in lieu of substantiating the actual cost of meals.

.11 Section 1.274-5(j)(3) grants the Commissioner the authority to establish a method under which a taxpayer may elect to treat a specific amount as paid or incurred for incidental expenses while traveling away from home in lieu of substantiating the actual cost of incidental expenses.

.12 Sections 3.02(1)(a), 4.04(6), and 5.06 of this revenue procedure provide transition rules for the last 3 months of calendar year 2008.

.13 Section 5.02 of this revenue procedure contains revisions to the per diem rates for high-cost localities and for other localities for purposes of section 5.

.14 Section 5.03 of this revenue procedure contains the list of high-cost localities, and section 5.04 of this revenue procedure describes changes to the list of high-cost localities for purposes of section 5.

.15 Sections 7.10 and 8.06 of this revenue procedure refer to Rev. Rul. 2006-56, 2006-46 I.R.B. 874, which describes circumstances when a payor's reimbursement or other expense allowance arrangement evidences a pattern of abuse of the rules of § 62(c) and the regulations thereunder.

SECTION 3. DEFINITIONS

.01 Per diem allowance. The term "per diem allowance" means a payment under a reimbursement or other expense allowance arrangement that is

(1) paid with respect to ordinary and necessary business expenses incurred, or that the payor reasonably anticipates will be incurred, by an employee for lodging, meal, and incidental expenses, or for meal and incidental expenses, for travel away from home in connection with the performance of services as an employee of the employer,

(2) reasonably calculated not to exceed the amount of the expenses or the anticipated expenses, and

(3) paid at or below the applicable federal per diem rate, a flat rate or stated schedule, or in accordance with any other Service-specified rate or schedule.

.02 Federal per diem rate and federal M&IE rate.

(1) In general. The federal per diem rate is equal to the sum of the applicable federal lodging expense rate and the applicable federal meal and incidental expense (M&IE) rate for the day and locality of travel.

(a) CONUS rates. The rates for localities in the continental United States ("CONUS") are set forth in Appendix A to 41 C.F.R. ch. 301. However, in applying section 4.01, 4.02, or 4.03 of this revenue procedure, taxpayers may continue to use the CONUS rates in effect for the first 9 months of 2008 for expenses of all CONUS travel away from home that are paid or incurred during calendar year 2008 in lieu of the updated GSA rates. A taxpayer must consistently use either these rates or the updated rates for the period October 1, 2008, through December 31, 2008.

(b) OCONUS rates. The rates for localities outside the continental United States ("OCONUS") are established by the Secretary of Defense (rates for non-foreign localities, including Alaska, Hawaii, Puerto Rico, the Northern Mariana Islands, and the possessions of the United States) and by the Secretary of State (rates for foreign localities), and are published in the Per Diem Supplement to the Standardized Regulations (Government Civilians, Foreign Areas) (updated on a monthly basis).

(c) Internet access to the rates. The CONUS and OCONUS rates may be found on the Internet at www.gsa.gov.

(2) Locality of travel. The term "locality of travel" means the locality where an employee traveling away from home in connection with the performance of services as an employee of the employer stops for sleep or rest.

(3) Incidental expenses. The term incidental expenses has the same meaning as in the Federal Travel Regulations, 41 C.F.R. 300-3.1 (2007). Thus, based on the current definition of "incidental expenses" in the Federal Travel Regulations, "incidental expenses" means fees and tips given to porters, baggage carriers, bellhops, hotel maids, stewards or stewardesses and others on ships, and hotel servants in foreign countries; transportation between places of lodging or business and places where meals are taken, if suitable meals can be obtained at the temporary duty site; and the mailing cost associated with filing travel vouchers and payment of employer-sponsored charge card billings.

.03 Flat rate or stated schedule.

(1) In general. Except as provided in section 3.03(2) of this revenue procedure, an allowance is paid at a flat rate or stated schedule if it is provided on a uniform and objective basis with respect to the expenses described in section 3.01 of this revenue procedure. The allowance may be paid with respect to the number of days away from home in connection with the performance of services as an employee or on any other basis that is consistently applied and in accordance with reasonable business practice. Thus, for example, an hourly payment to cover meal and incidental expenses paid to a

pilot or flight attendant who is traveling away from home in connection with the performance of services as an employee is an allowance paid at a flat rate or stated schedule. Likewise, a payment based on the number of miles traveled (such as cents per mile) to cover meal and incidental expenses paid to an over-the-road truck driver who is traveling away from home in connection with the performance of services as an employee is an allowance paid at a flat rate or stated schedule.

(2) Limitation. An allowance that is computed on a basis similar to that used in computing the employee's wages or other compensation (such as the number of hours worked, miles traveled, or pieces produced) does not meet the business connection requirement of 1.62-2(d), is not a per diem allowance, and is not paid at a flat rate or stated schedule, unless, as of December 12, 1989, (a) the allowance was identified by the payor either by making a separate payment or by specifically identifying the amount of the allowance, or (b) an allowance computed on that basis was commonly used in the industry in which the employee is employed. See 1.62-2(d)(3)(ii).

SECTION 4. PER DIEM SUBSTANTIATION METHOD

.01 Per diem allowance. If a payor pays a per diem allowance in lieu of reimbursing actual lodging, meal, and incidental expenses incurred or to be incurred by an employee for travel away from home, the amount of the expenses that is deemed substantiated for each calendar day is equal to the lesser of the per diem allowance for that day or the amount computed at the federal per diem rate (see section 3.02 of this revenue procedure) for the locality of travel for that day (or partial day, see section 6.04 of this revenue procedure).

.02 Meal and incidental expenses only per diem allowance. If a payor pays a per diem allowance only for meal and incidental expenses in lieu of reimbursing actual meal and incidental expenses incurred or to be incurred by an employee for travel away from home, the amount of the expenses that is deemed substantiated for each calendar day is equal to the lesser of the per diem allowance for that day or the amount computed at the federal M&IE rate for the locality of travel for that day (or partial day). A per diem allowance is treated as paid only for meal and incidental expenses if (1) the payor pays the employee for actual expenses for lodging based on receipts submitted to the payor, (2) the payor provides the lodging in kind, (3) the payor pays the actual expenses for lodging directly to the provider of the lodging, (4) the payor does not have a reasonable belief that lodging expenses were or will be incurred by the employee, or (5) the allowance is computed on a basis similar to that used in computing the employee's wages or other compensation (such as the number of hours worked, miles traveled, or pieces produced).

.03 Optional method for meal and incidental expenses only deduction. In lieu of using actual expenses in computing the amount allowable as a deduction for ordinary and necessary meal and incidental expenses paid or incurred for travel away from home, employees and self-employed individuals who pay or incur meal expenses may use an amount computed at the federal M&IE rate for the locality of travel for each calendar day (or partial day) the employee or self-employed individual is away from home. This amount will be deemed substantiated for purposes of paragraphs (b)(2) and (c) of 1.274-5, provided the employee or self-employed individual substantiates the

elements of time, place, and business purpose of the travel for that day (or partial day) in accordance with those regulations. See section 6.05(1) of this revenue procedure for rules related to the application of the limitation under 274(n) to amounts determined under this section 4.03. See section 4.05 of this revenue procedure for a method for substantiating incidental expenses that may be used by employees or self-employed individuals who do not pay or incur meal expenses.

.04 Special rules for transportation industry.

(1) In general. This section 4.04 applies to (a) a payor that pays a per diem allowance only for meal and incidental expenses for travel away from home as described in section 4.02 of this revenue procedure to an employee in the transportation industry, or (b) an employee or self-employed individual in the transportation industry who computes the amount allowable as a deduction for meal and incidental expenses for travel away from home in accordance with section 4.03 of this revenue procedure.

(2) Transportation industry defined. For purposes of this section 4.04, an employee or self-employed individual is in the transportation industry only if the employee's or individual's work (a) is of the type that directly involves moving people or goods by airplane, barge, bus, ship, train, or truck, and (b) regularly requires travel away from home which, during any single trip away from home, usually involves travel to localities with differing federal M&IE rates. For purposes of the preceding sentence, a payor must determine that an employee or a group of employees is in the transportation industry by using a method that is consistently applied and in accordance with reasonable business practice.

(3) Rates. A taxpayer described in section 4.04(1) of this revenue procedure may treat \$52 as the federal M&IE rate for any CONUS locality of travel, and \$58 as the federal M&IE rate for any OCONUS locality of travel. A payor that uses either (or both) of these special rates with respect to an employee must use the special rate(s) for all amounts subject to section 4.02 of this revenue procedure paid to that employee for travel away from home within CONUS and/or OCONUS, as the case may be, during the calendar year. Similarly, an employee or self-employed individual that uses either (or both) of these special rates must use the special rate(s) for all amounts computed pursuant to section 4.03 of this revenue procedure for travel away from home within CONUS and/or OCONUS, as the case may be, during the calendar year. See section 4.04(6) of this revenue procedure for transition rules.

(4) Periodic rule. A payor described in section 4.04(1) of this revenue procedure may compute the amount of the employee's expenses that is deemed substantiated under section 4.02 of this revenue procedure periodically (not less frequently than monthly), rather than daily, by comparing the total per diem allowance paid for the period to the sum of the amounts computed either at the federal M&IE rate(s) for the localities of travel, or at the special rate described in section 4.04(3), for the days (or partial days) the employee is away from home during the period.

(5) Examples.

(a) Example 1. Taxpayer, an employee in the transportation industry, travels away from home on business within CONUS on 17 days (including partial days) during a calendar month and receives a per diem allowance only for meal and incidental

expenses from a payor that uses the special rule under section 4.04(3) of this revenue procedure. The amount deemed substantiated under section 4.02 of this revenue procedure is equal to the lesser of the total per diem allowance paid for the month or \$884 (17 days at \$52 per day).

(b) Example 2. Taxpayer, a truck driver employee in the transportation industry, is paid a “cents-per-mile” allowance that qualifies as an allowance paid under a flat rate or stated schedule as defined in section 3.03 of this revenue procedure.

Taxpayer travels away from home on business for 10 days. Based on the number of miles driven by Taxpayer, Taxpayer’s employer pays an allowance of \$500 for the 10 days of business travel. Taxpayer actually drives for 8 days, and does not drive for the other 2 days Taxpayer is away from home. Taxpayer is paid under the periodic rule used for transportation industry employers and employees in accordance with section 4.04(4) of this revenue procedure. The amount deemed substantiated is the full \$500 because that amount does not exceed \$520 (ten days away from home at \$52 per day).

(6) Transition rules. Under the calendar-year convention provided in section 4.04(3), a taxpayer who used the federal M&IE rates during the first 9 months of calendar year 2008 to substantiate the amount of an individual's travel expenses under sections 4.02 or 4.03 of Rev. Proc. 2007-63 may not use, for that individual, the special transportation industry rates provided in this section 4.04 until January 1, 2009.

Similarly, a taxpayer who used the special transportation industry rates during the first 9 months of calendar year 2008 to substantiate the amount of an individual's travel expenses may not use, for that individual, the federal M&IE rates until January 1, 2009.

.05 Optional method for incidental expenses only deduction. In lieu of using actual expenses in computing the amount allowable as a deduction for ordinary and necessary incidental expenses paid or incurred for travel away from home, employees and self-employed individuals who do not pay or incur meal expenses for a calendar day (or partial day) of travel away from home may use, for each calendar day (or partial day) the employee or self-employed individual is away from home, an amount computed at the rate of \$3 per day for any CONUS or OCONUS locality of travel. This amount will be deemed substantiated for purposes of paragraphs (b)(2) and (c) of 1.274-5, provided the employee or self-employed individual substantiates the elements of time, place, and business purpose of the travel for that day (or partial day) in accordance with those regulations. See section 4.03 of this revenue procedure for a method that may be used by employees or self-employed individuals who pay or incur meal expenses. The method authorized by this section 4.05 may not be used by payors that use section 4.01, 4.02, or 5.01 of this revenue procedure, or by employees or self-employed individuals who use the method described in section 4.03 of this revenue procedure. See section 6.05(5) of this revenue procedure for rules related to the application of the limitation under 274(n) to amounts determined under this section 4.05.

SECTION 5. HIGH-LOW SUBSTANTIATION METHOD

.01 In general. If a payor pays a per diem allowance in lieu of reimbursing actual lodging, meal, and incidental expenses incurred or to be incurred by an employee for travel away from home and the payor uses the high-low substantiation method described in this section 5 for travel within CONUS, the amount of the expenses that is

deemed substantiated for each calendar day is equal to the lesser of the per diem allowance for that day or the amount computed at the rate set forth in section 5.02 of this revenue procedure for the locality of travel for that day (or partial day, see section 6.04 of this revenue procedure). Except as provided in section 5.06 of this revenue procedure, this high-low substantiation method may be used in lieu of the per diem substantiation method provided in section 4.01 of this revenue procedure, but may not be used in lieu of the meal and incidental expenses only per diem substantiation method provided in section 4.02 of this revenue procedure.

.02 Specific high-low rates. Except as provided in section 5.06 of this revenue procedure, the per diem rate set forth in this section 5.02 is \$256 for travel to any "high-cost locality" specified in section 5.03 of this revenue procedure, or \$158 for travel to any other locality within CONUS. The high or low rate, as appropriate, applies as if it were the federal per diem rate for the locality of travel. For purposes of applying the high-low substantiation method and the 274(n) limitation on meal expenses (see section 6.05(3) of this revenue procedure), the amount of the high and low rates that is treated as paid for meals is \$58 for a high-cost locality and \$45 for any other locality within CONUS.

.03 High-cost localities. The following localities have a federal per diem rate of \$207 or more, and are high-cost localities for all of the calendar year or the portion of the calendar year specified in parentheses under the key city name:

Key city

County or other defined location

Arizona

Phoenix/Scottsdale
(January 1-April 30)
Sedona
(March 1-April 30)

Maricopa
City Limits of Sedona

California

Napa
San Diego
(January 1-August 31)
San Francisco
Santa Barbara
Santa Monica
South Lake Tahoe
(December 1-March 31)

Napa
San Diego

San Francisco
Santa Barbara
City limits of Santa Monica
El Dorado

Colorado

Aspen
(December 1-April 30)
Crested Butte/Gunnison
(December 1-March 31)
Silverthorne/Breckenridge
(December 1-April 30)
Steamboat Springs
(December 1-March 31)
Telluride
(October 1-March 31)
Vail
(December 1-July 31)

Pitkin

Gunnison

Summit

Routt

San Miguel

Eagle

District of Columbia

Washington D.C. (also the cities of Alexandria, Falls Church, and Fairfax, and the counties of Arlington and Fairfax, in Virginia; and the counties of Montgomery and Prince George's in Maryland) (See also Maryland and Virginia)

Florida

Fort Lauderdale
(October 1-April 30)
Fort Walton Beach/De Funiak Springs
(June 1-July 31)
Key West
Miami
(October 1-February 28)
Naples

Broward

Okaloosa and Walton

Monroe
Miami-Dade

Collier

(February 1-March 31)
Palm Beach
(December 1-April 30)

Boca Raton, Delray Beach,
Jupiter, Palm Beach Gardens,
Palm Beach, Palm Beach
Shores, Singer Island and West
Palm Beach

Illinois
Chicago

Cook and Lake

Maryland
Baltimore City
Cambridge/St. Michaels
(May 1-August 31)
Ocean City
(June 1-September 30)
Washington, DC Metro Area

Baltimore City
Dorchester and Talbot

Worcester

Montgomery and Prince
George s

Massachusetts
Boston/Cambridge
Martha's Vineyard
(June 1-August 31)
Nantucket
(June 1-September 30)

Suffolk, City of Cambridge
Dukes

Nantucket

New York
Floral Park/Garden City/Glen Cove/
Great Neck/Roslyn
Manhattan (includes the boroughs of
Manhattan, Brooklyn, the Bronx, Queens
and Staten Island)
Saratoga Springs/Schenectady
(July 1-August 31)
Tarrytown/White Plains/New Rochelle/
Yonkers

Nassau

Bronx, Kings, New York, Queens,
Richmond

Saratoga and Schenectady

Westchester

Pennsylvania
Philadelphia

Philadelphia

Rhode Island
Jamestown/Middletown/Newport
(June 1-September 30)

Newport

Utah Park City (January 1-March 31)	Summit
Virginia Washington, DC Metro Area	Cities of Alexandria, Fairfax, and Falls Church; counties of Arlington and Fairfax
Washington Seattle	King
Wyoming Jackson/Pinedale (July 1-August 31)	Teton and Sublette

.04 Changes in high-cost localities. The list of high-cost localities in section 5.03 of this revenue procedure differs from the list of high-cost localities in section 5.03 of Rev. Proc. 2007-63 (changes listed by key cities).

(1) The following localities have been added to the list of high-cost localities:
Jackson/Pinedale, Wyoming.

(2) The portion of the year for which the following are high-cost localities has been changed: Phoenix/Scottsdale, Arizona; San Diego, California; Silverthorne/Breckenridge, Colorado; Steamboat Springs, Colorado; Vail, Colorado; Palm Beach, Florida; Cambridge/St. Michaels, Maryland; Ocean City, Maryland; Martha's Vineyard, Massachusetts; Nantucket, Massachusetts; Jamestown/Middletown/Newport, Rhode Island.

(3) The following localities have been removed from the list of high-cost localities:
Palm Springs, California; Yosemite National Park, California; Stuart, Florida; Incline Village/Crystal Bay/Reno/Sparks, Nevada; Conway, New Hampshire; Providence,

Rhode Island; Loudon County, Virginia; Virginia Beach, Virginia; Lake Geneva, Wisconsin.

.05 Specific limitation.

(1) Except as provided in section 5.05(2) of this revenue procedure, a payor that uses the high-low substantiation method with respect to an employee must use that method for all amounts paid to that employee for travel away from home within CONUS during the calendar year. See section 5.06 of this revenue procedure for transition rules.

(2) With respect to an employee described in section 5.05(1) of this revenue procedure, the payor may reimburse actual expenses or use the meal and incidental expenses only per diem substantiation method described in section 4.02 of this revenue procedure for any travel away from home, and may use the per diem substantiation method described in section 4.01 of this revenue procedure for any OCONUS travel away from home.

.06 Transition rules. A payor who used the substantiation method of section 4.01 of Rev. Proc. 2007-63 for an employee during the first 9 months of calendar year 2008 may not use the high-low substantiation method in section 5 of this revenue procedure for that employee until January 1, 2009. A payor who used the high-low substantiation method of section 5 of Rev. Proc. 2007-63 for an employee during the first 9 months of calendar year 2008 must continue to use the high-low substantiation method for the remainder of calendar year 2008 for that employee. A payor described in the previous sentence may use the rates and high-cost localities published in section 5 of Rev. Proc.

2007-63, in lieu of the updated rates and high-cost localities provided in section 5 of this revenue procedure, for travel on or after October 1, 2008, and before January 1, 2009, if those rates and localities are used consistently during this period for all employees reimbursed under this method.

SECTION 6. LIMITATIONS AND SPECIAL RULES

.01 In general. The federal per diem rate and the federal M&IE rate described in section 3.02 of this revenue procedure for the locality of travel will be applied in the same manner as applied under the Federal Travel Regulations, 41 C.F.R. Part 301-11 (2007), except as provided in sections 6.02 through 6.04 of this revenue procedure.

.02 Federal per diem rate. A receipt for lodging expenses is not required in determining the amount of expenses deemed substantiated under section 4.01 or 5.01 of this revenue procedure. See section 7.01 of this revenue procedure for the requirement that the employee substantiate the time, place, and business purpose of the expense.

.03 Federal per diem or M&IE rate. A payor is not required to reduce the federal per diem rate or the federal M&IE rate for the locality of travel for meals provided in kind, provided the payor has a reasonable belief that meal and incidental expenses were or will be incurred by the employee during each day of travel.

.04 Proration of the federal per diem or M&IE rate. Pursuant to the Federal Travel Regulations, in determining the federal per diem rate or the federal M&IE rate for the locality of travel, the full applicable federal M&IE rate is available for a full day of travel from 12:01 a.m. to 12:00 midnight. The method described in section 6.04(1) of this

revenue procedure must be used for purposes of determining the amount deemed substantiated under section 4.03 or 4.05 of this revenue procedure for partial days of travel away from home. For purposes of determining the amount deemed substantiated under section 4.01, 4.02, 4.04, or 5 of this revenue procedure for partial days of travel away from home, either of the following methods may be used to prorate the federal M&IE rate to determine the federal per diem rate or the federal M&IE rate for the partial days of travel:

(1) The rate may be prorated using the method prescribed by the Federal Travel Regulations. Currently the Federal Travel Regulations allow three-fourths of the applicable federal M&IE rate for each partial day during which the employee or self-employed individual is traveling away from home in connection with the performance of services as an employee or self-employed individual. The same ratio may be applied to prorate the allowance for incidental expenses described in section 4.05 of this revenue procedure; or

(2) The rate may be prorated using any method that is consistently applied and in accordance with reasonable business practice. For example, if an employee travels away from home from 9 a.m. one day to 5 p.m. the next day, a method of proration that results in an amount equal to two times the federal M&IE rate will be treated as being in accordance with reasonable business practice (even though only one and a half times the federal M&IE rate would be allowed under the Federal Travel Regulations).

.05 Application of the appropriate 274(n) limitation on meal expenses. Except as provided in section 6.05(5), all or part of the amount of an expense deemed

substantiated under this revenue procedure is subject to the appropriate limitation under 274(n) (see section 2.02 of this revenue procedure) on the deductibility of food and beverage expenses.

(1) If an amount for meal and incidental expenses is computed pursuant to section 4.03 of this revenue procedure, the taxpayer must treat that amount as an expense for food and beverages.

(2) If a per diem allowance is paid only for meal and incidental expenses, the payor must treat an amount equal to the lesser of the allowance or the federal M&IE rate for the locality of travel for each day (or partial day, see section 6.04 of this revenue procedure) as an expense for food and beverages.

(3) If a per diem allowance is paid for lodging, meal, and incidental expenses for each calendar day (or partial day) the employee is away from home at a rate equal to or in excess of the federal per diem rate for the locality of travel, the payor must treat an amount equal to the federal M&IE rate for the locality of travel for each calendar day (or partial day) as an expense for food or beverages.

(4) If a per diem allowance is paid for lodging, meal, and incidental expenses for each calendar day (or partial day) the employee is away from home at a rate less than the federal per diem rate for the locality of travel, the payor must:

(a) treat an amount equal to the federal M&IE rate for the locality of travel for each calendar day (or partial day) or, if less, the amount of the allowance, as an expense for food or beverages; or

(b) treat an amount equal to 40 percent of the allowance as an expense for food or beverages.

(5) If an amount for incidental expenses is computed under section 4.05 of this revenue procedure, none of the amount so computed is subject to limitation under 274(n) on the deductibility of food and beverage expenses.

.06 No double reimbursement or deduction. If a payor pays a per diem allowance in lieu of reimbursing actual lodging, meal, and incidental expenses, or meal and incidental expenses, in accordance with section 4 or 5 of this revenue procedure, and such amounts are treated as paid under an accountable plan, any additional payment with respect to those expenses is treated as paid under a nonaccountable plan, is included in the employee's gross income, is reported as wages or other compensation on the employee's Form W-2, and is subject to withholding and payment of employment taxes. Similarly, if an employee or self-employed individual computes the amount allowable as a deduction for meal and incidental expenses for travel away from home in accordance with section 4.03 or 4.04 of this revenue procedure, no other deduction is allowed to the employee or self-employed individual with respect to those expenses. For example, assume an employee receives a per diem allowance from a payor for lodging, meal, and incidental expenses, or for meal and incidental expenses, incurred while traveling away from home and such amounts are treated as paid under an accountable plan. During that trip, the employee pays for dinner for the employee and two business associates. The payor reimburses as a business entertainment meal expense the meal expense for the employee and the two business associates. Because the payor also

pays a per diem allowance to cover the cost of the employee's meals, the amount paid by the payor for the employee's portion of the business entertainment meal expense is treated as paid under a nonaccountable plan, is reported as wages or other compensation on the employee's Form W-2, and is subject to withholding and payment of employment taxes.

.07 Related parties. Sections 4.01 and 5 of this revenue procedure do not apply if a payor and an employee are related within the meaning of 267(b), but for this purpose the percentage of ownership interest referred to in 267(b)(2) is 10 percent.

SECTION 7. APPLICATION

.01 If the amount of travel expenses is deemed substantiated under the rules provided in section 4 or 5 of this revenue procedure, and the employee substantiates to the payor the elements of time, place, and business purpose of the travel for that day (or partial day) in accordance with paragraphs (b)(2) and (c) (other than subparagraph (2)(iii)(A) thereof) of 1.274-5, the employee is deemed to satisfy the adequate accounting requirements of 1.274-5(f) as well as the requirement to substantiate by adequate records or other sufficient evidence for purposes of 1.274-5(c). See also 1.62-2(e)(1) for the rule that in order to satisfy the substantiation requirement of an accountable plan, an arrangement must require business expenses to be substantiated to the payor within a reasonable period of time.

.02 An arrangement providing per diem allowances will be treated as satisfying the requirement of 1.62-2(f)(2) of returning amounts in excess of expenses if the employee is required to return within a reasonable period of time (as defined in

1.62-2(g)) any portion of the allowance that relates to days of travel not substantiated, even though the arrangement does not require the employee to return the portion of the allowance that relates to days of travel substantiated and that exceeds the amount of the employee's expenses deemed substantiated. For example, assume a payor provides an employee an advance per diem allowance for meal and incidental expenses of \$250, based on an anticipated 5 days of business travel at \$50 per day to a locality for which the federal M&IE rate is \$39, and the employee substantiates 3 full days of business travel. The requirement to return excess amounts is treated as satisfied if the employee is required to return within a reasonable period of time (as defined in 1.62-2(g)) the portion of the allowance that is attributable to the 2 unsubstantiated days of travel (\$100), even though the employee is not required to return the portion of the allowance (\$33) that exceeds the amount of the employee's expenses deemed substantiated under section 4.02 of this revenue procedure (\$117) for the 3 substantiated days of travel. However, the \$33 excess portion of the allowance is treated as paid under a nonaccountable plan as discussed in section 7.04 of this revenue procedure.

.03 An employee is not required to include in gross income the portion of a per diem allowance received from a payor that is less than or equal to the amount deemed substantiated under the rules provided in section 4 or 5 of this revenue procedure if the employee substantiates the business travel expenses covered by the per diem allowance in accordance with section 7.01 of this revenue procedure. See

1.274-5T(f)(2)(i). Assuming that the remaining requirements for an accountable plan

provided in § 1.62-2 are satisfied, that portion of the allowance is treated as paid under an accountable plan, is not reported as wages or other compensation on the employee's Form W-2, and is exempt from the withholding and payment of employment taxes. See 1.62-2(c)(2) and (c)(4).

.04 An employee is required to include in gross income only the portion of the per diem allowance received from a payor that exceeds the amount deemed substantiated under the rules provided in section 4 or 5 of this revenue procedure if the employee substantiates the business travel expenses covered by the per diem allowance in accordance with section 7.01 of this revenue procedure. See 1.274-5T(f)(2)(ii). In addition, the excess portion of the allowance is treated as paid under a nonaccountable plan, is reported as wages or other compensation on the employee's Form W-2, and is subject to withholding and payment of employment taxes. See 1.62-2(c)(3)(ii), (c)(5), and (h)(2)(i)(B).

.05 If the amount of the expenses that is deemed substantiated under the rules provided in section 4.01, 4.02, or 5 of this revenue procedure is less than the amount of the employee's business expenses for travel away from home, the employee may claim an itemized deduction for the amount by which the business travel expenses exceed the amount that is deemed substantiated, provided the employee substantiates all the business travel expenses (not just the excess over the federal per diem rate), includes on Form 2106, "Employee Business Expenses," the deemed substantiated portion of the per diem allowance received from the payor, and includes in gross income the portion (if any) of the per diem allowance received from the payor that exceeds the

amount deemed substantiated. See 1.274-5T(f)(2)(iii). However, for purposes of claiming this itemized deduction with respect to meal and incidental expenses, substantiation of the amount of the expenses is not required if the employee is claiming a deduction that is equal to or less than the amount computed under section 4.03 of this revenue procedure minus the amount deemed substantiated under sections 4.02 and 7.01 of this revenue procedure. The itemized deduction is subject to the appropriate limitation (see section 2.02 of this revenue procedure) on meal and entertainment expenses provided in 274(n) and the 2-percent floor on miscellaneous itemized deductions provided in 67.

.06 An employee who pays or incurs amounts for meal expenses and does not receive a per diem allowance for meal and incidental expenses may deduct an amount computed pursuant to section 4.03 of this revenue procedure only as an itemized deduction. This itemized deduction is subject to the appropriate limitation on meal and entertainment expenses provided in 274(n) and the 2-percent floor on miscellaneous itemized deductions provided in 67. See section 7.07 of this revenue procedure for the treatment of an employee who does not pay or incur amounts for meal expenses and does not receive a per diem allowance for incidental expenses.

.07 An employee who does not pay or incur amounts for meal expenses and does not receive a per diem allowance for incidental expenses may deduct an amount computed pursuant to section 4.05 of this revenue procedure only as an itemized deduction. This itemized deduction is subject to the 2-percent floor on miscellaneous itemized deductions provided in 67. See section 7.06 of this revenue procedure for

the treatment of an employee who pays or incurs amounts for meal expenses and does not receive a per diem allowance for meal and incidental expenses.

.08 A self-employed individual who pays or incurs meal expenses for a calendar day (or partial day) of travel away from home may deduct an amount computed pursuant to section 4.03 of this revenue procedure in determining adjusted gross income under 62(a)(1). This deduction is subject to the appropriate limitation on meal and entertainment expenses provided in 274(n).

.09 A self-employed individual who does not pay or incur meal expenses for a calendar day (or partial day) of travel away from home may deduct an amount computed pursuant to section 4.05 of this revenue procedure in determining adjusted gross income under 62(a)(1).

.10 If a payor's reimbursement or other expense allowance arrangement evidences a pattern of abuse of the rules of 62(c) and the regulations thereunder, all payments under the arrangement will be treated as made under a nonaccountable plan. See § 1.62-2(k) and Rev. Rul. 2006-56. Thus, these payments are included in the employee's gross income, are reported as wages or other compensation on the employee's Form W-2, and are subject to withholding and payment of employment taxes. See 1.62-2(c)(3), (c)(5), and (h)(2), and section 8.06 of this revenue procedure.

SECTION 8. WITHHOLDING AND PAYMENT OF EMPLOYMENT TAXES

.01 The portion of a per diem allowance, if any, that relates to the days of business travel substantiated and that exceeds the amount deemed substantiated for those days

under section 4.01, 4.02, or 5 of this revenue procedure is treated as paid under a nonaccountable plan and is subject to withholding and payment of employment taxes.

See 1.62-2(h)(2)(i)(B).

.02 In the case of a per diem allowance paid as a reimbursement, the excess described in section 8.01 of this revenue procedure is subject to withholding and payment of employment taxes in the payroll period in which the payor reimburses the expenses for the days of travel substantiated. See 1.62-2(h)(2)(i)(B)(2).

.03 In the case of a per diem allowance paid as an advance, the excess described in section 8.01 of this revenue procedure is subject to withholding and payment of employment taxes no later than the first payroll period following the payroll period in which the days of travel with respect to which the advance was paid are substantiated. See 1.62-2(h)(2)(i)(B)(3). If some or all of the days of travel with respect to which the advance was paid are not substantiated within a reasonable period of time and the employee does not return the portion of the allowance that relates to those days within a reasonable period of time, the portion of the allowance that relates to those days is subject to withholding and payment of employment taxes no later than the first payroll period following the end of the reasonable period. See 1.62-2(h)(2)(i)(A).

.04 In the case of a per diem allowance only for meal and incidental expenses for travel away from home paid to an employee in the transportation industry by a payor that uses the rule in section 4.04(4) of this revenue procedure, the excess of the per diem allowance paid for the period over the amount deemed substantiated for the period under section 4.02 of this revenue procedure (after applying section 4.04(4) of

this revenue procedure), is subject to withholding and payment of employment taxes no later than the first payroll period following the payroll period in which the excess is computed. See 1.62-2(h)(2)(i)(B)(4).

.05 For example, assume that an employer pays an employee a per diem allowance under an arrangement that otherwise meets the requirements of an accountable plan to cover business expenses for meals and lodging for travel away from home at a rate of 120 percent of the federal per diem rate for the localities to which the employee travels. The employer does not require the employee to return the 20 percent by which the reimbursement for those expenses exceeds the federal per diem rate. The employee substantiates 6 days of travel away from home: 2 days in a locality in which the federal per diem rate is \$160 and 4 days in a locality in which the federal per diem rate is \$120. The employer reimburses the employee \$960 for the 6 days of travel away from home ($2 \times (120\% \times \$160) + 4 \times (120\% \times \$120)$), and does not require the employee to return the excess payment of \$160 ($2 \text{ days} \times \$32 (\$192 - \$160) + 4 \text{ days} \times \$24 (\$144 - \$120)$). For the payroll period in which the employer reimburses the expenses, the employer must withhold and pay employment taxes on \$160. See section 8.02 of this revenue procedure.

.06 If a per diem allowance arrangement has no mechanism or process to determine when an allowance exceeds the amount that may be deemed substantiated and the arrangement routinely pays allowances in excess of the amount that may be deemed substantiated without requiring actual substantiation of all the expenses or repayment of the excess amount, the failure of the arrangement to treat the excess

allowances as wages for employment tax purposes causes all payments made under the arrangement to be treated as made under a nonaccountable plan. See Rev. Rul. 2006-56.

SECTION 9. EFFECTIVE DATE

This revenue procedure is effective for per diem allowances for lodging, meal and incidental expenses, or for meal and incidental expenses only, that are paid to an employee on or after October 1, 2008, with respect to travel away from home on or after October 1, 2008. For purposes of computing the amount allowable as a deduction for travel away from home, this revenue procedure is effective for meal and incidental expenses or for incidental expenses only paid or incurred on or after October 1, 2008.

SECTION 10. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 2007-63 is superseded.

DRAFTING INFORMATION

The principal author of this revenue procedure is Stewart H. Brant of the Office of Associate Chief Counsel (Income Tax and Accounting). For further information regarding this revenue procedure, contact Mr. Brant at (202) 622-4930 (not a toll-free call).