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## Rev. Rul. 90-93

### ISSUE

Is a full-time life insurance salesman who is treated as an employee for purposes of the Federal Insurance Contributions Act ("FICA") under section 3121(d)(3) of the Internal Revenue Code an employee for purposes of sections 62 and 67 of the Code?

### FACTS

A is a full-time life insurance salesman and is not an employee under the common law rules for distinguishing between employees and independent contractors. The commissions earned by A were reported on Form W-2, Wage and Tax Statement, as "wages" for purposes of the FICA. No income tax was withheld from the amounts paid to A. In computing net profit or loss on Schedule C, A deducted the trade or business expenses incurred by A in doing business as a full-time life insurance salesman.

### LAW AND ANALYSIS

Section 62(a) of the Code provides that the term "adjusted gross income" means, in the case of an individual, gross income minus certain deductions, including allowable deductions attributable to a trade or business carried on by the taxpayer, if such trade or business does not consist of the performance of services by the taxpayer as an employee.

Section 67(a) of the Code provides that, in computing taxable income, miscellaneous itemized deductions for any taxable year shall be allowed to an individual only to the extent that the aggregate of those deductions exceeds 2 percent of adjusted gross income. Section 67(b) provides that the term "miscellaneous itemized deductions" means all itemized deductions other than certain deductions enumerated in that section. Business expenses under section 162 are an itemized deduction that is not enumerated in section 67(b), and thus such a deduction is included in the term "miscellaneous itemized deductions." <Page 34>

Section 3121(d) of the Code describes four separate categories of individuals who are treated as employees for purposes of applying the FICA tax provisions. These four categories include (1) officers of a corporation, (2) common law employees, (3) individuals in specified occupational groups who are not common law employees, and (4) certain nonfederal governmental workers. Employees in the third category are commonly referred to as "statutory employees." Full-time life insurance salesmen who are not common law employees are expressly included in this third category. A full-time life insurance salesman is one whose entire or principal business activity is devoted to the solicitation of life insurance or annuity contracts, or both, primarily for one life insurance company. See section 31.3121(d)-1(d)(3)(ii) of the regulations.

Section 3121(d)(3) of the Code also provides that the term "employee" includes anyone who performs services for remuneration for any person as an agent-driver or commission-driver, as a home worker, or as a traveling or city salesman, under the conditions stated in the section.

Section 7701(a)(20) of the Code provides that for the purpose of applying certain enumerated sections of the Code, the term "employee" includes a full-time life insurance salesman who is considered an employee for FICA purposes. Sections 62 and 67 are not among the sections of the Code enumerated.

The provisions cited above operate to treat individuals described in section 3121(d)(3) of the Code as statutory employees only for purposes of certain specified provisions of the Code. No statutory or regulatory provision, however, treats these statutory employees as employees for purposes of sections 62 and 67.

Thus, A, who is a statutory employee under section 3121(d)(3) of the Code, is not an employee for purposes of sections 62 and 67. Therefore, A may use Schedule C of the Form 1040 to determine A's net profit or loss from doing business as a full-time life insurance salesman. Further, A's trade or business expenses related to being a full-time life insurance salesman are not subject to the 2-percent floor for miscellaneous itemized deductions.

#### HOLDING

A full-time life insurance salesman described in section 3121(d)(3) of the Code is not an employee for purposes of sections 62 and 67.

This holding also applies to all other statutory employees described in section 3121(d)(3) of the Code in connection with the expenses they incur in the conduct of their trades or businesses.