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**Re: Personal Business Expenses for State Legislators – Tax Impact After 2017 Tax Cuts and Jobs Act**

NCSL has received numerous inquiries from state legislatures regarding whether the Tax Cuts and Jobs Act (the “Act”) will adversely impact the ability of state legislators to deduct or otherwise obtain tax-free treatment for travel, lodging or other living expenses in connection with their legislative service.

**While each legislator will want to discuss these issues with an experienced tax preparer based on their own facts and circumstances, NCSL can provide the following update and summary. The National Conference of State Legislatures does not provide tax advice or opinions to state legislatures or to state legislators. This notice is for purposes of general guidance only.**

Section 162(h) of the federal tax code (the “Code”) has traditionally provided a valuable income tax-related benefit for state legislators, if a legislator’s place of residence is more than 50 miles from their state capitol building (a “Qualified State Legislator”). This provision allows a Qualified State Legislator to treat their “tax home” as their place of residence in their legislative district, even if they perform the bulk of their legislative duties at their state capital or elsewhere. With their tax home being their place of residence, Section 162(h) then allows a certain amount of “deemed” travel, lodging and living expenses to be incurred by the Qualified State Legislator during each legislative day (the “Deemed Business Expenses”), by reason of being away from home for legislative activities.

Prior to the Act, a Qualified State Legislator could obtain the special tax treatment under Section 162(h) by filling out an election form, adding up the Deemed Business Expenses for each legislative day, and taking the total amount as a miscellaneous itemized deduction on his/her personal federal income tax return. **The Act no longer allows this “direct” deduction by a legislator, because it eliminated all miscellaneous itemized deductions through 2025.**

However, based on NCSL’s research, the Act did not repeal Section 162(h) itself and the “tax home” benefit still exists under certain circumstances. Specifically, a Qualified State Legislator may still obtain the special tax treatment under Section 162(h) by filling out the same election form and receiving direct expense reimbursements or per diem amounts from his or her legislature for each legislative day, under an IRS-compliant “accountable plan.” As long as the per diem amounts or reimbursements are made under an accountable plan, and the total daily per diem/reimbursement amount does not exceed the limit established by Section 162(h) for Deemed Business Expenses (explained further below), the Qualified State Legislator may still receive these amounts on a tax-free basis, where no payroll tax withholdings or Form W-2 reporting is required. **The Act did not eliminate or change this scenario, with the result that a legislature may continue to provide tax-free reimbursements or per diem payments of this nature.**

To ensure continued tax-free treatment for such per diem payments or reimbursements under the “accountable plan” concept, a legislature will need to keep several continuing requirements in mind.

First, Qualified State Legislators will still need to elect the Section 162(h) treatment by signing an election form, providing the signed election to their payroll administrator in their legislature, and attaching the signed election to their federal personal income tax return.

Second, a legislature will need to confirm that its per diem or expense reimbursement arrangement complies with all of the IRS requirements for an accountable plan. *See IRS Publication 463 for details.*

Third, the total daily per diem/reimbursement amount cannot exceed the limit established by Section 162(h) for Deemed Business Expenses. This is generally the applicable federal per diem limit for the state capital location for federal executive branch employees, or if higher, the state’s own per diem rate for state employees away from home up to 110% of the federal per diem rate (the “Applicable Limit”).

Please note that it is possible that many state legislatures will have a per diem or reimbursement limit for legislative days that is lower than the Applicable Limit. In past years, a Qualified Legislator would have been able to take the difference between his or her daily per diem/reimbursement amount and the Applicable Limit as a miscellaneous itemized expense on his/her federal income tax return for that year. Because of the Act, this opportunity is no longer available.

For questions regarding this update, please contact Brian Weberg at [brian.weberg@ncsl.org](mailto:brian.weberg@ncsl.org) or John Mahoney at [john.mahoney@ncsl.org](mailto:john.mahoney@ncsl.org).