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July 1, 1991

The Honorable George W. Sumner  
Director of Public Safety  
State of Hawaii  
677 Ala Moana Boulevard  
Suite 1000  
Honolulu, Hawaii 96813

Dear Mr. Sumner:

Re: Use of State Vehicles

By letter dated April 4, 1991, you requested an opinion on whether the use value of state-assigned vehicles (when such vehicles are taken to and from home) must be included in the Department of Public Safety's (PSD) Narcotics Enforcement Division (NED) investigators' gross income for State and federal income tax purposes.

Brief Answer

In our opinion, the personal use value of state vehicles would not be included in the investigators' gross income if the investigators first obtained written permission for personal use (but not for pleasure) of state vehicles from the governor, upon the written recommendation of the comptroller.

Analysis

Hawaii's net income tax law incorporates the Internal Revenue Code of 1954, as amended (hereinafter "the Code") (with certain exceptions), for purposes of determining gross income. Haw. Rev. Stat. §§ 235-2.3, 235-2.5, 235-3.

To implement the Code, Treasury Regulation § 1.2745T(k) has been promulgated which creates an exception to the general rule

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that the personal use value of an employer-provided vehicle is included in an employee's gross income as a fringe benefit. See Internal Revenue Code § 62 ("gross income"), § 132 ("working condition fringe" excluded), § 162 (business expense deduction), § 274 (substantiation required). Treasury Regulation ("Reg.") § 1.274-5T(k) excludes from a law enforcement officer's gross income the personal use value of a state vehicle if the personal use is (1) by a law enforcement officer, (2) for a purpose incident to law enforcement, and (3) is authorized by the state agency which owns the car and employs the officer. In our opinion, NED investigators clearly meet the first two requirements. Regarding the third requirement, we understand that NED investigators presently do not have the requisite authority under State law for personal state car use. Under Haw. Rev. Stat. §§ 105-2(4) and 105-3, however, NED investigators may obtain the requisite authority by obtaining written permission for PSD approved personal state car use from the governor, upon the recommendation of the comptroller. When such permission is obtained, we believe that the personal use value of a state car will be excludable from the gross income of NED investigators.

1. Law enforcement officers

For the exclusion to apply, the personal use of the vehicle must be by a "law enforcement officer." Reg. § 1.274-5T(k)(6)(ii).

To qualify as a "law enforcement officer" under Reg. § 1.274-5T(k)(6)(ii), the following three conditions must be met:

(a) An individual must be employed full-time "by a governmental unit that is responsible for the prevention or investigation of crime involving injury to persons or property."

(b) An individual must be "authorized by law to carry firearms, execute search warrants, and to make arrests (other than merely a citizen's arrest). . . ."

(c) An individual must "regularly carry firearms (except when it is not possible to do so because of the requirements of undercover work)."

NED investigators meet the first requirement (assuming they are full-time employees) because they are employees of PSD which, through the Director, has the power to "[p]reserve the public peace, prevent crime, detect and arrest offenders against the law, protect the rights of persons and property, and enforce and prevent violations of all laws and administrative rules of the State." Haw. Rev. Stat. §§ 353C-2(1), 353C-4(a).

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NED investigators meet the second requirement because they have been given the authority to carry firearms, serve warrants, subpoenas and summons, and make arrests. Haw. Rev. Stat. § 329-51.

NED investigators meet the third requirement because, as PSD informs us, the investigators regularly carry firearms. Thus, NED investigators are "law enforcement officers" within the meaning of Reg. § 1.274-5T(k)(6)(ii).

## 2. Purpose incident to law enforcement

For the exclusion to apply, the personal use of the law enforcement vehicle "must be incident to law-enforcement functions, such as being able to report directly from home to a stakeout or surveillance site or to an emergency situation." Reg. § 1.274-5T(k)(6)(i).

In example (1) of Reg. § 1.274-5T(k) (8), the gross income exclusion applies in a situation where a law enforcement officer "is provided with an unmarked vehicle (equipped with radio communication) for use during off-duty hours because [he] must be able to communicate with headquarters and be available for duty at any time (for example to report to a surveillance or crime site)."

You stated in your letter that State cars assigned to NED investigators are taken home for law enforcement purposes.

"The vehicles are taken home for the purpose of being available after hours, weekends, holidays, or whenever called upon to enforce drug laws. This practice is necessary because the vehicles are radio equipped for communication purpose [sic] with the police department or other investigators. The vehicles are used to store necessary equipment and to transport arrested persons to the office and then to the police department for booking."

Since the vehicles are taken home for law enforcement purposes, it is our opinion that such use clearly qualifies as "incident to law enforcement functions."

## 3. Authority for Use

For the exclusion to apply "any personal use must be authorized by the Federal, State, county or local governmental agency that owns or leases the vehicle and employs the officer . . ." Reg. § 1.274-5T(k)(6)(i).

Authority for personal use of state cars is controlled by Chapter 105, Hawaii Revised Statutes. Haw. Rev. Stat. § 105-1 prohibits personal use of state cars except by those persons and government agencies enumerated in Haw. Rev. Stat. § 105-2.

Although Haw. Rev. Stat. § 105-2(3) allows personal use of a state vehicle by "any member of a police department," the statute is not clear as to whether PSD qualifies as a "police department." There is no statutory provision which designates or defines the PSD as a police department, and Haw. Rev. Stat. Chapter 52D, entitled "Police Departments," concerns only the county police departments.

NED investigators would have valid authority for personal state car use, incident to law enforcement purposes, however, if written permission for such use is obtained from the governor upon written recommendation by the comptroller, pursuant to Haw. Rev. Stat. § 105-2(4). Haw. Rev. Stat. § 105-2(4) extends the authority for personal use of state vehicles to "[a]ny officer or employee of the State who, upon written recommendation of the comptroller, is given written permission by the governor to use, operate, or drive for personal use (but not for pleasure) any motor vehicle owned or controlled by the State." (Emphasis added.) Haw. Rev. Stat. § 105-3 provides that "permits under § 105-2 . . . may extend to general classes of officers or employees . . ."

We recommend that application for written permits be made, allowing NED investigators the personal use of the state cars, subject to PSD approval, for purposes incident to law enforcement functions (but not for pleasure) pursuant to Haw. Rev. Stat. § 105-2(4). Such permission would clearly meet the third requirement of authority under Reg. § 1.2745T(k).

### Conclusion

To exclude the personal use value of state vehicles from gross income of NED officers, such use must be:

- (1) by law enforcement officers;
- (2) incident to law enforcement functions; and
- (3) validly authorized by the PSD.

The use by NED investigators of vehicles to enable the investigators to perform law enforcement functions during off-duty hours meets the first two tests. NED investigators could meet the third requirement by obtaining written permission

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from the governor upon written permission from the state comptroller for personal use of the state vehicles. Provided such permission is obtained, the value of the personal use of state cars by NED investigators for purposes incident to law enforcement functions would not be included in the investigators' gross income for State and federal net income tax purposes.

Very truly yours,



Carlton W. M. Seu  
Deputy Attorney General

APPROVED:



Warren Price, III  
Attorney General

CWMS:mk

c: Honorable Russel S. Nagata  
Comptroller

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