

## Section 3221.—Rate of Tax

26 CFR 31.3221-4: Exception from supplemental tax.

T.D. 8832

### DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR Part 31

#### Exception From Supplemental Annuity Tax on Railroad Employers

AGENCY: Internal Revenue Service (IRS), Treasury

ACTION: Final regulations.

**SUMMARY:** This document contains final regulations that provide guidance to employers covered by the Railroad Retirement Tax Act. The Railroad Retirement Tax Act imposes a supplemental tax on those employers, at a rate determined by the Railroad Retirement Board, to fund the Railroad Retirement Board's supplemental annuity benefit. These regulations provide rules for applying the exception from the supplemental annuity tax with respect to employees covered by a supplemental pension plan established pursuant to a collective bargaining agreement and for applying a related excise tax with respect to employees for whom the exception applies.

**DATES:** *Effective Date:* These regulations are effective August 6, 1999.

*Applicability Date:* These regulations generally apply beginning on October 1, 1998, except as provided in §31.3221-4(e)(2).

**FOR FURTHER INFORMATION CONTACT:** Linda S. F. Marshall, (202) 622-6030 (not a toll-free number).

#### SUPPLEMENTARY INFORMATION:

##### *Background*

This document contains amendments to the Employment Tax Regulations (26 CFR Part 31) under section 3221(d). On September 23, 1998, REG-209769-95, 1998-41 I.R.B. 8, was published in the

**Federal Register** (63 F.R. 50819) under section 3221(d). The proposed regulations provide guidance regarding the section 3221(d) exception from the tax imposed under section 3221(c) with respect to employees covered by a supplemental pension plan of the employer established pursuant to an agreement reached through collective bargaining. Two written comments were received on the proposed regulations. A public hearing was held on the proposed regulations on January 20, 1999. After consideration of the comments, the proposed regulations under section 3221(d) are adopted as revised by this Treasury decision.

Under the Railroad Retirement Act of 1974, as amended, codified at 45 U.S.C. 231 et seq., if an employee has performed at least 25 years of covered service with the railroad industry, including service with the railroad industry before October 1, 1981, the Railroad Retirement Board (RRB) will pay the employee a supplemental annuity at retirement. The monthly amount of the supplemental annuity ranges from \$23 to \$43, based on the employee's number of years of service. See 45 U.S.C. 231b(e). Under 45 U.S.C. 231a(h)(2), the employee's supplemental annuity is reduced by the amount of payments received by the employee from any plan determined by the RRB to be a supplemental pension plan of the employer, to the extent those payments are derived from employer contributions.

Section 3221(c) imposes a tax on each railroad employer to fund the supplemental annuity benefits payable by the RRB. The tax imposed under section 3221(c) is based on work-hours for which compensation is paid. The RRB establishes the rate of tax under section 3221(c) quarterly, and calculates the rate to generate sufficient tax revenue to fund the RRB's current supplemental annuity obligations.

Under section 3221(d), the tax imposed by section 3221(c) does not apply to an employer with respect to employees who are covered by a supplemental pension plan established pursuant to an agreement reached through collective bargaining between the employer and employees. However, if an employee for whom the employer is relieved of any tax under the section 3221(d) exception becomes enti-

tled to a supplemental annuity from the RRB, the employer is subject to an excise tax equal to the amount of the supplemental annuity paid to the employee (plus a percentage determined by the RRB to be sufficient to cover administrative costs attributable to those supplemental annuity payments).

Section 3221(d) was enacted by Public Law 91-215, 84 Stat. 70, which amended the Railroad Retirement Act of 1937 and the Railroad Retirement Tax Act. The legislative history to Public Law 91-215 indicates that the exception under section 3221(d) from the tax imposed under section 3221(c) was "directed primarily at the situation existing on certain short-line railroads which are owned by the steel companies. The employees of these lines are, for the most part, covered by other supplemental pension plans established pursuant to collective bargaining agreements between the steel companies and the unions representing the majority of their employees. \* \* \* [T]hese railroads will no longer be required to pay a tax to finance the supplemental annuity fund, but will be required to reimburse the Railroad Retirement Board for any supplemental annuities that their employees may be paid upon retirement." S. Rep. 91-650, 91st Cong., 2d Sess. 6 (February 3, 1970).

##### *Explanation of Provisions*

These regulations retain the rules set forth in the proposed regulations for determining whether a plan is a supplemental pension plan established pursuant to an agreement reached through collective bargaining. Under these regulations, a plan is a supplemental pension plan only if the plan is a pension plan within the meaning of §1.401-1(b)(1)(i). Under this definition, a plan is a pension plan only if the plan is established and maintained primarily to provide systematically for the payment of definitely determinable benefits to employees over a period of years, usually for life, after retirement. Thus, for example, a plan generally is not a supplemental pension plan if distributions from the plan that are attributable to employer contributions may be made prior to a participant's death, disability, or termination

of employment. See Rev. Rul. 74-254 (1974-1 C.B. 90); Rev. Rul. 56-693 (1956-2 C.B. 282). A pension plan that is tax-qualified under section 401(a) is subject to special rules with respect to joint and survivor benefits under sections 401(a)(11) and 417.

One commentator requested clarification that these regulations do not preclude a plan from being a supplemental pension plan merely because the plan provides for a single sum distribution form (in addition to providing for periodic payments as described above). A plan is not precluded from being a pension plan within the meaning of §1.401-1(b)(1)(i) merely because it provides for a single sum distribution form in addition to providing for the required periodic payment forms. See section 417(e)(1) and (2). Thus, the availability of a single sum distribution form (offered in addition to the periodic payment form or forms described above) does not preclude a plan from being a supplemental pension plan under these regulations.

Another commentator requested clarification that a plan in which the employer contribution is discretionary or conditioned on contributions made at the election of employees pursuant to a qualified cash or deferred arrangement described in section 401(k)(2) could not qualify as a supplemental pension plan under section 3221(d) and the regulations. A plan that provides for discretionary employer contributions cannot be a pension plan under §1.401(b)-1(b)(1)(i) because it does not provide for the payment of definitely determinable benefits. Under section 401(k)(1), a qualified cash or deferred arrangement under section 401(k) must be part of a profit-sharing or stock bonus plan, a pre-ERISA money purchase plan, or a rural cooperative plan. Thus, a plan that provides for a section 401(k) qualified cash or deferred arrangement with employer matching contributions cannot be a pension plan under §1.401(b)-1(b)(1)(i) (unless the plan is a pre-ERISA money purchase plan or a rural cooperative plan). Thus, apart from these narrow exceptions for certain pre-ERISA and rural cooperative plans, neither of the types of plans noted by the commentator could qualify as supplemental pension plans under section 3221(d) and these regulations.

As provided in the proposed regulations, these regulations also require that the RRB determine that a plan is a private pension under its regulations in order for the plan to be a supplemental pension plan under section 3221(d) and these regulations. This requirement is included because the section 3221(d) exception to the section 3221(c) tax is based on the assumption that any participant for whom the exception applies will receive a reduced supplemental annuity because of the supplemental pension plan on account of which the section 3221(c) tax is eliminated.

These regulations also retain the rules set forth in the proposed regulations for determining whether a plan is established pursuant to a collective bargaining agreement with respect to an employee. These rules generally follow the rules applicable to qualified plans for this purpose. Under these regulations, a plan is established pursuant to a collective bargaining agreement with respect to an employee only if the employee is included in the collective bargaining unit covered by the collective bargaining agreement.

One commentator maintained that employers should also be exempted from supplemental annuity tax with respect to nonbargaining unit employees covered by a plan that is the subject of collective bargaining. The IRS and Treasury Department have determined that it is inappropriate to extend the exception to nonbargaining unit employees. This determination is consistent with the RRB's administrative rulings. As noted below, the final regulations include a delayed effective date for this requirement.

Section 3221(d) imposes an excise tax equal to the amount of the supplemental annuity paid to any employee with respect to whom the employer has been excepted from the section 3221(c) excise tax under the section 3221(d) exception. These regulations retain the rules set forth in the proposed regulations for applying this excise tax under section 3221(d).

#### *Effective Date*

These regulations generally apply beginning on October 1, 1998, as provided in the proposed regulations. However, the IRS and Treasury have determined that it is appropriate to provide a delayed applicability date with respect to the por-

tion of the final regulations clarifying what constitutes a plan established pursuant to a collective bargaining agreement with respect to an employee for purposes of section 3221(d). Accordingly, the final regulations provide that the definition in §31.3221-4(c) applies beginning on January 1, 2000.

#### *Special Analyses*

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Small Business Administration for comment on its impact on small businesses.

#### *Drafting Information*

The principal author of these regulations is Linda S. F. Marshall, Office of the Associate Chief Counsel (Employee Benefits and Exempt Organizations). However, other personnel from the IRS and Treasury Department participated in their development.

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#### *Adoption of Amendments to the Regulations*

Accordingly, 26 CFR part 31 is amended as follows:

#### **PART 31—EMPLOYMENT TAXES AND COLLECTION OF INCOME AT SOURCE**

Paragraph 1. The authority citation for part 31 continues to read in part as follows:

Authority: 26 U.S.C. 7805 \* \* \*

Par. 2. Section 31.3221-4 is added under the undesignated center heading "Tax on Employers" to read as follows:

§31.3221-4 *Exception from supplemental tax.*

(a) *General rule.* Section 3221(d) provides an exception from the excise tax imposed by section 3221(c). Under this exception, the excise tax imposed by section 3221(c) does not apply to an employer with respect to employees who are covered by a supplemental pension plan, as defined in paragraph (b) of this section, that is established pursuant to an agreement reached through collective bargaining between the employer and employees, within the meaning of paragraph (c) of this section.

(b) *Definition of supplemental pension plan—(1) In general.* A plan is a supplemental pension plan covered by the section 3221(d) exception described in paragraph (a) of this section only if it meets the requirements of paragraphs (b)(2) through (b)(4) of this section.

(2) *Pension benefit requirement.* A plan is a supplemental pension plan within the meaning of this section only if the plan is a pension plan within the meaning of §1.401-1(b)(1)(i) of this chapter. Thus, a plan is a supplemental pension plan only if the plan provides for the payment of definitely determinable benefits to employees over a period of years, usually for life, after retirement. A plan need not be funded through a qualified trust that meets the requirements of section 401(a) or an annuity contract that meets the requirements of section 403(a) in order to meet the requirements of this paragraph (b)(2). A plan that is a profit-sharing plan within the meaning of §1.401-1(b)(1)(ii) of this chapter or a stock bonus plan within the meaning of §1.401-1(b)(1)(iii) of this chapter is not a supplemental pension plan within the meaning of this paragraph (b).

(3) *Railroad Retirement Board determination with respect to the plan.* A plan is a supplemental pension plan within the meaning of this paragraph (b) with respect to an employee only during any period for which the Railroad Retirement Board has made a determination under 20 CFR 216.42(d) that the plan is a private pension, the payments from which will result in a reduction in the employee's supplemental annuity payable under 45 U.S.C. 231a(b). A plan is not a supplemental pension plan for any time period

before the Railroad Retirement Board has made such a determination, or after that determination is no longer in force.

(4) *Other requirements.* [Reserved]

(c) *Collective bargaining agreement.* A plan is established pursuant to a collective bargaining agreement with respect to an employee only if, in accordance with the rules of §1.410(b)-6(d)(2) of this chapter, the employee is included in a unit of employees covered by an agreement that the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and one or more employers, provided that there is evidence that retirement benefits were the subject of good faith bargaining between employee representatives and the employer or employers.

(d) *Substitute section 3221(d) excise tax.* Section 3221(d) imposes an excise tax on any employer who has been exempted from the excise tax imposed under section 3221(c) by the application of section 3221(d) and paragraph (a) of this section with respect to an employee. The excise tax is equal to the amount of the supplemental annuity paid to that employee under 45 U.S.C. 231a(b), plus a percentage thereof determined by the Railroad Retirement Board to be sufficient to cover the administrative costs attributable to such payments under 45 U.S.C. 231a(b).

(e) *Effective date—(1) In general.* Except as provided in paragraph (e)(2) of this section, this section applies beginning on October 1, 1998.

(2) *Delayed effective date for collective bargaining agreement provisions.* Paragraph (c) of this section applies beginning on January 1, 2000.

John M. Dalrymple,  
*Acting Deputy Commissioner  
of Internal Revenue.*

Approved July 27, 1999.

Donald C. Lubick,  
*Assistant Secretary of  
the Treasury.*

(Filed by the Office of the Federal Register on August 5, 1999, 8:45 a.m., and published in the issue of the Federal Register for August 6, 1999, 64 F.R. 42831)