



February 3, 2009

TO: All State Senators

FROM: Ann M. Ver Heul

RE: 2008 Tax Year State Senators' Business Expense Deductions Pursuant to Tax Home Provision

I. 2008 Tax Year Federal Business Expense Deductions for State Senators

Internal Revenue Code Sec. 162(h), relating to travel expenses of state legislators, allows state legislators whose district homes are more than 50 miles from the state capitol a per diem deduction on their federal returns for business expenses incurred while at the capitol.

The maximum per diem which is allowed as a deduction for legislators pursuant to Internal Revenue Code Sec. 162(h) is determined by the per diem rate for federal employees in Des Moines, as determined by the General Services Administration, for the tax year in question. For tax year 2008, the applicable federal per diem rates were as follows:

January 1, 2008 – September 30, 2008: \$124.00 per day
Ratio: \$80.00 - Lodging
\$44.00 - Meals

October 1, 2008 – December 31, 2008: \$130.00 per day
Ratio: \$86.00 - Lodging
\$44.00 - Meals

Please note: New federal per diem rates issued by the General Services Administration now take effect on October 1 of each year. The rates for Iowa changed on October 1, 2008. It is possible that there may be a rate change later this year for part of 2009.

A. 2008 Business Expense Exclusions and Deductions

1. Expenses of Office Per Diem Exclusion. Beginning in 2007 with the 82nd General Assembly, legislators are paid a per diem based on the maximum amount generally allowable to employees of the executive branch of the federal government for per diem while away from home at the seat of government. Prior to 2007, legislators were paid a per diem of \$86.00. As noted above, in 2008 the per diem amount was \$124.00 per day through September 30, 2008.

The actual per diem provided to you by the State (expenses of office) is not includable in gross income because it is considered a reimbursement for business expense. This per diem is excludable from your gross income for each day the Senate was in session (including periods of

four consecutive days or less when the legislature was in recess). For 2008, the Senate was in session for 104 calendar days. However, pursuant to Iowa Code section 2.10 all legislators were paid expenses of office per diem for only 100 calendar days. This amount, which is \$12,400, is not included in your gross income because it is "deemed substantiated" as a reimbursed business expense pursuant to Internal Revenue Code Sec. 162(h).

2. Other Per Diem Deductions

a. If you itemize deductions, you are entitled to a deduction for each day that the legislature was in session (including periods of four consecutive days or less when the legislature was in recess) for which you did not receive expenses of office. In 2008, the Senate was in session for four calendar days in April during the regular session for which senators did not receive expenses of office. If you itemize deductions, you are entitled to a deduction for four days as an unreimbursed business expense.

b. If you itemize deductions, you are also entitled to a deduction for each day that your presence was recorded at a committee meeting during the interim. This information is provided to you by the Senate Finance Clerk and will indicate the number of days your presence was recorded at a committee meeting during the interim. The interim per diem payments which you received (\$124.00 per day or \$130.00 per day) are treated as taxable wages, not reimbursement for business expenses, on your W-2 form due to the statutory language which authorizes them.

c. The deductions described in paragraphs "a" and "b" are treated as unreimbursed business expenses for federal tax purposes in the amounts of \$124.00 or \$130.00 per day and must be allocated between "lodging and other travel expenses" and "meals" in accordance with the ratio for such expenses under the federal per diem reimbursement rules for travel in the United States. Since the unreimbursed amount is \$124.00 per day for the period from January 1, 2008, through September 30, 2008, and \$130.00 per day for the period from October 1, 2008, through December 31, 2008, the following allocation is applicable:

Unreimbursed Amount	Lodging	Meals
\$124.00	\$80.00	\$44.00
\$130.00	\$86.00	\$44.00

(1) Of the amount allocated to lodging and other travel expenses (\$80.00 or \$86.00), the amount is fully deductible by legislators who itemize, along with all other miscellaneous itemized deductions, subject to the fact that it, along with all other miscellaneous itemized deductions, must meet a floor of 2 percent of the taxpayer's adjusted gross income.

(2) For state legislators, the amount allowable for meals is the federal per diem allocation (\$44.00) less \$2.00 per legislative day. Of this amount (\$42.00), 50 percent or \$21.00 per legislative day is deductible by legislators who itemize, as an employee business expense, subject to the fact that it, along with all other miscellaneous itemized deductions, must also meet a floor of 2 percent of the taxpayer's adjusted gross income.

Once again, these unreimbursed amounts do not require substantiation.

B. Attached to this memo is a form for a "Statement of Election of Tax Home Pursuant to Internal Revenue Code Sec. 162(h)". If this form is completed and attached to your income tax return, you should be in compliance with the proposed tax regulation 26 C.F.R. Sec. 1.162-24, which requires any state legislator who makes a tax home election under Sec. 162(h) for the taxable year to attach such a Statement of Election to the income tax return.

C. In past years, I have provided you with some information concerning the Federal Taxpayer Relief Act of 1997. It appeared that Section 975 of the Act, which amended 26 U.S.C. Sec. 62, might provide an above-the-line deduction for travel expenses of state legislators while they are at the state capitol if they were paid in whole or in part on a “fee basis.”

According to NCSL, the IRS has been inconsistent in its interpretation of Section 975 and the definition of “fee basis.” That is, some legislators have been allowed above-the-line deductions pursuant to Section 975 and some such deductions have been disallowed.

However, an IRS Chief Counsel’s Office Advice Memorandum issued in 1999 and a subsequent IRS information letter published in 2002 indicate that state legislators are not compensated on a “fee basis” and thus are not allowed to deduct their unreimbursed employee business expenses above-the-line on their federal tax returns. These expenses can only be considered as miscellaneous itemized deductions and are subject to the 2 percent floor. A copy of an NCSL memorandum concerning this issue is attached.

Neither NCSL nor this memo provides tax advice on how individual legislators should file their tax returns. The purpose of this memo is simply to make you and your tax preparer aware of tax provisions which may apply to Iowa legislators. NCSL will provide background information on Internal Revenue Code Sec. 162(h) and Section 975 of the Taxpayer Act of 1997 upon request. NCSL can be reached at 303/364-7700.

II. 2008 Tax Year State Business Expense Deduction for State Legislators

Iowa Code section 422.7(10) provides that state legislators who live more than 50 miles from the state capitol may claim the same deductions on their Iowa income tax returns for expenses incurred for meals and lodging as are allowed for federal income tax purposes.

State legislators who live 50 miles or less from the state capitol may claim deductions at a rate of \$50.00 per “legislative day.” However, state legislators may choose to itemize deductions for expenses incurred for meals and lodging. Based on the language of Iowa Code section 422.7(10), it appears that the deduction of \$50.00 per day is available for each day the legislature was in session, including periods of four consecutive days or less when the legislature was in recess, and for each day the legislator’s presence was reported at a committee meeting during the interim as is true under the federal provision.

III. Miscellaneous Business Expense Deductions

Please note that in 2008 you received constituent pay in the amount of \$300.00 per month. This constituent pay is included in taxable wages on your W-2 form and is also deductible as a business expense provided that you can substantiate the expenditures with receipts and a daily log listing the time, place, purpose, and amount of each expense claimed. You also received payments for mileage and taxable meals. If these amounts are direct reimbursement for expenses which you have already substantiated, they are also deductible as business expenses.

IV. Legislator W-2 Forms

Jean McPherson, from Centralized Payroll at the Iowa Department of Administrative Services, has provided an explanation of the information contained on legislators’ W-2 Wage and Tax Statement for 2008.

If you or your tax preparer have any questions about the information contained in my memo, please feel free to contact me. My telephone number is 515/281-3837. My e-mail address is ann.ver.heul@legis.state.ia.us.

CC: Iowa Senate: Senators and Former Senators
Secretary of the Senate
Senate Finance Clerk

0837RR

**STATEMENT OF ELECTION OF TAX HOME
UNDER INTERNAL REVENUE CODE SECTION 162(h)**

TAXABLE YEAR: 2008

TAXPAYER'S NAME _____

SOCIAL SECURITY NUMBER _____

ADDRESS (within legislative district represented): _____

NUMBER OF LEGISLATIVE DAYS (SENATE): 104

FEDERAL PER DIEM RATE FOR STATE CAPITOL:

January 1, 2008 - September 30, 2008 \$124.00

October 1, 2008 - December 31, 2008 \$130.00

DISTANCE IN MILES BETWEEN TAXPAYER'S RESIDENCE WITHIN LEGISLATIVE DISTRICT REPRESENTED AND CAPITOL BUILDING OF THE STATE:_____

0837RRAttachment.doc