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TITLE 26--INTERNAL REVENUE CODE

Subtitle A--Income Taxes

CHAPTER 1--NORMAL TAXES AND SURTAXES

Subchapter B--Computation of Taxable Income

PART III--ITEMS SPECIFICALLY EXCLUDED FROM GROSS INCOME

Sec. 129. Dependent care assistance programs

(a) Exclusion

(1) In general

Gross income of an employee does not include amounts paid or incurred by the employer for dependent care assistance provided to such employee if the assistance is furnished pursuant to a program which is described in subsection (d).

(2) Limitation of exclusion

(A) In general

The amount which may be excluded under paragraph (1) for dependent care assistance with respect to dependent care services provided during a taxable year shall not exceed \$5,000 (\$2,500 in the case of a separate return by a married individual).

(B) Year of inclusion

The amount of any excess under subparagraph (A) shall be included in gross income in the taxable year in which the dependent care services were provided (even if payment of dependent care assistance for such services occurs in a subsequent taxable year).

(C) Marital status

For purposes of this paragraph, marital status shall be determined under the rules of paragraphs (3) and (4) of section 21(e).

(b) Earned income limitation

(1) In general

The amount excluded from the income of an employee under subsection (a) for any taxable year shall not exceed--

(A) in the case of an employee who is not married at the

close of such taxable year, the earned income of such employee for such taxable year, or

(B) in the case of an employee who is married at the close of such taxable year, the lesser of--

(i) the earned income of such employee for such taxable year, or

(ii) the earned income of the spouse of such employee for such taxable year.

(2) Special rule for certain spouses

For purposes of paragraph (1), the provisions of section 21(d)(2) shall apply in determining the earned income of a spouse who is a student or incapable of caring for himself.

(c) Payments to related individuals

No amount paid or incurred during the taxable year of an employee by an employer in providing dependent care assistance to such employee shall be excluded under subsection (a) if such amount was paid or incurred to an individual--

(1) with respect to whom, for such taxable year, a deduction is allowable under section 151(c) (relating to personal exemptions for dependents) to such employee or the spouse of such employee, or

(2) who is a child of such employee (within the meaning of section 151(c)(3)) under the age of 19 at the close of such taxable year.

(d) Dependent care assistance program

(1) In general

For purposes of this section a dependent care assistance program is a separate written plan of an employer for the exclusive benefit of his employees to provide such employees with dependent care assistance which meets the requirements of paragraphs (2) through (8) of this subsection. If any plan would qualify as a dependent care assistance program but for a failure to meet the requirements of this subsection, then, notwithstanding such failure, such plan shall be treated as a dependent care assistance program in the case of employees who are not highly compensated employees.

(2) Discrimination

The contributions or benefits provided under the plan shall not discriminate in favor of employees who are highly compensated employees (within the meaning of section 414(q)) or their dependents.

(3) Eligibility

The program shall benefit employees who qualify under a classification set up by the employer and found by the Secretary not to be discriminatory in favor of employees described in paragraph (2), or their dependents.

(4) Principal shareholders or owners

Not more than 25 percent of the amounts paid or incurred by the employer for dependent care assistance during the year may be provided for the class of individuals who are shareholders or owners

(or their spouses or dependents), each of whom (on any day of the year) owns more than 5 percent of the stock or of the capital or profits interest in the employer.

(5) No funding required

A program referred to in paragraph (1) is not required to be funded.

(6) Notification of eligible employees

Reasonable notification of the availability and terms of the program shall be provided to eligible employees.

(7) Statement of expenses

The plan shall furnish to an employee, on or before January 31, a written statement showing the amounts paid or expenses incurred by the employer in providing dependent care assistance to such employee during the previous calendar year.

(8) Benefits

(A) In general

A plan meets the requirements of this paragraph if the average benefits provided to employees who are not highly compensated employees under all plans of the employer is at least 55 percent of the average benefits provided to highly compensated employees under all plans of the employer.

(B) Salary reduction agreements

For purposes of subparagraph (A), in the case of any benefits provided through a salary reduction agreement, a plan may disregard any employees whose compensation is less than \$25,000. For purposes of this subparagraph, the term ``compensation'' has the meaning given such term by section 414(q)(4), except that, under rules prescribed by the Secretary, an employer may elect to determine compensation on any other basis which does not discriminate in favor of highly compensated employees.

(9) Excluded employees

For purposes of paragraphs (3) and (8), there shall be excluded from consideration--

(A) subject to rules similar to the rules of section 410(b)(4), employees who have not attained the age of 21 and completed 1 year of service (as defined in section 410(a)(3)), and

(B) employees not included in a dependent care assistance program who are included in a unit of employees covered by an agreement which the Secretary finds to be a collective bargaining agreement between employee representatives and 1 or more employees, if there is evidence that dependent care benefits were the subject of good faith bargaining between such employee representatives and such employer or employers.

(e) Definitions and special rules

For purposes of this section--

(1) Dependent care assistance

The term ``dependent care assistance'' means the payment of, or provision of, those services which if paid for by the employee would be considered employment-related expenses under section 21(b)(2) (relating to expenses for household and dependent care services necessary for gainful employment).

(2) Earned income

The term ``earned income'' shall have the meaning given such term in section 32(c)(2), but such term shall not include any amounts paid or incurred by an employer for dependent care assistance to an employee.

(3) Employee

The term ``employee'' includes, for any year, an individual who is an employee within the meaning of section 401(c)(1) (relating to self-employed individuals).

(4) Employer

An individual who owns the entire interest in an unincorporated trade or business shall be treated as his own employer. A partnership shall be treated as the employer of each partner who is an employee within the meaning of paragraph (3).

(5) Attribution rules

(A) Ownership of stock

Ownership of stock in a corporation shall be determined in accordance with the rules provided under subsections (d) and (e) of section 1563 (without regard to section 1563(e)(3)(C)).

(B) Interest in unincorporated trade or business

The interest of an employee in a trade or business which is not incorporated shall be determined in accordance with regulations prescribed by the Secretary, which shall be based on principles similar to the principles which apply in the case of subparagraph (A).

(6) Utilization test not applicable

A dependent care assistance program shall not be held or considered to fail to meet any requirements of subsection (d) (other than paragraphs (4) and (8) thereof) merely because of utilization rates for the different types of assistance made available under the program.

(7) Disallowance of excluded amounts as credit or deduction

No deduction or credit shall be allowed to the employee under any other section of this chapter for any amount excluded from the gross income of the employee by reason of this section.

(8) Treatment of onsite facilities

In the case of an onsite facility maintained by an employer, except to the extent provided in regulations, the amount of dependent care assistance provided to an employee excluded with respect to any dependent shall be based on--

(A) utilization of the facility by a dependent of the employee, and

(B) the value of the services provided with respect to such dependent.

(9) Identifying information required with respect to service provider

No amount paid or incurred by an employer for dependent care assistance provided to an employee shall be excluded from the gross income of such employee unless--

(A) the name, address, and taxpayer identification number of the person performing the services are included on the return to which the exclusion relates, or

(B) if such person is an organization described in section 501(c)(3) and exempt from tax under section 501(a), the name and address of such person are included on the return to which the exclusion relates.

In the case of a failure to provide the information required under the preceding sentence, the preceding sentence shall not apply if it is shown that the taxpayer exercised due diligence in attempting to provide the information so required.

(Added Pub. L. 97-34, title I, Sec. 124(e)(1), Aug. 13, 1981, 95 Stat. 198; amended Pub. L. 97-448, title I, Sec. 101(e), Jan. 12, 1983, 96 Stat. 2366; Pub. L. 98-369, div. A, title IV, Sec. 474(r)(6), July 18, 1984, 98 Stat. 839; Pub. L. 99-514, title I, Sec. 104(b)(1), title XI, Secs. 1114(b)(4), 1151(c)(5), (f), (g)(4), 1163(a), (b), Oct. 22, 1986, 100 Stat. 2104, 2450, 2503, 2506, 2507, 2510; Pub. L. 100-485, title VII, Sec. 703(c)(2), Oct. 13, 1988, 102 Stat. 2427; Pub. L. 100-647, title I, Sec. 1011B(a)(14), (15), (18), (30), (31)(A), (c)(1), (2)(A), title III, Sec. 3021(a)(14), Nov. 10, 1988, 102 Stat. 3485, 3487-3489, 3631; Pub. L. 101-140, title II, Secs. 203(a)(1), (2), 204(a)(1)-(3)(C), Nov. 8, 1989, 103 Stat. 830, 832; Pub. L. 101-239, title VII, Sec. 7811(h)(2), Dec. 19, 1989, 103 Stat. 2409; Pub. L. 104-188, title I, Sec. 1431(c)(1)(B), Aug. 20, 1996, 110 Stat. 1803.)

Codification

Pub. L. 101-140, Sec. 203(a)(1), amended this section to read as if the amendments made by section 1151(c)(5)(A) of Pub. L. 99-514 (amending subsec. (d)(1)) had not been enacted. Subsequent to amendment by Pub. L. 99-514, subsec. (d)(1) was amended by Pub. L. 100-647. See 1988 Amendment note below.

Prior Provisions

A prior section 129 was renumbered section 139 of this title.

Amendments

1996--Subsec. (d)(8)(B). Pub. L. 104-188 substituted ``section 414(q)(4)'' for ``section 414(q)(7)''.

1989--Subsec. (a). Pub. L. 101-239 struck out at end ``For purposes of the preceding sentence, marital status shall be determined under the rules of paragraphs (3) and (4) of section 21(e).''

Subsec. (d)(1). Pub. L. 101-140, Sec. 204(a)(3)(B), substituted ``paragraphs (2) through (8)'' for ``paragraphs (2) through (7)''.

Pub. L. 101-140, Sec. 204(a)(1), inserted at end ``If any plan would qualify as a dependent care assistance program but for a failure to meet the requirements of this subsection, then, notwithstanding such failure, such plan shall be treated as a dependent care assistance program in the case of employees who are not highly compensated employees.''

Pub. L. 101-140, Sec. 203(a)(1), amended par. (1) to read as if the amendments by Pub. L. 99-514, Sec. 1151(c)(5)(A), had not been enacted, see 1986 Amendment note below.

Subsec. (d)(3). Pub. L. 101-140, Sec. 204(a)(2)(B), struck out at end ``For purposes of this paragraph, there may be excluded from consideration employees who may be excluded from consideration under section 89(h).'' for ``For purposes of this paragraph, there shall be excluded from consideration employees not included in the program who are included in a unit of employees covered by an agreement which the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and one or more employers, if there is evidence that dependent care benefits were the subject of good faith bargaining between such employee representatives and such employer or employers.''

Pub. L. 101-140, Sec. 203(a)(2), amended par. (3) to read as if amendments by Pub. L. 100-647, Sec. 1011B(a)(31)(A)(i), had not been enacted, see 1988 Amendment note below.

Pub. L. 101-140, Sec. 203(a)(1), amended par. (3) to read as if amendments by Pub. L. 99-514, Sec. 1151(g)(4), had not been enacted, see 1986 Amendment note below.

Subsec. (d)(6). Pub. L. 101-140, Sec. 203(a)(1), amended par. (6) to read as if amendments by Pub. L. 99-514, Sec. 1151(c)(5)(B), had not been enacted, see 1986 Amendment note below.

Subsec. (d)(7). Pub. L. 101-140, Sec. 204(a)(3)(A), redesignated par. (7) as (8).

Pub. L. 101-140, Sec. 203(a)(1), amended par. (7) to read as if amendments by Pub. L. 99-514, Sec. 1151(c)(5)(B), had not been enacted, see 1986 Amendment note below.

Subsec. (d)(8). Pub. L. 101-140, Sec. 204(a)(3)(A), redesignated par. (7) as (8).

Pub. L. 101-140, Sec. 203(a)(2), amended par. (8) to read as if amendments by Pub. L. 100-647, Sec. 1011B(a)(31)(A)(ii), had not been enacted, see 1988 Amendment note below.

Subsec. (d)(9). Pub. L. 101-140, Sec. 204(a)(2)(A), added par. (9).

Subsec. (e)(6). Pub. L. 101-140, Sec. 204(a)(3)(C), substituted ``(8)'' for ``(7)''.

1988--Subsec. (a)(2). Pub. L. 100-647, Sec. 1011B(c)(2)(A), amended par. (2) generally. Prior to amendment, par. (2) read as follows: ``The aggregate amount excluded from the gross income of the taxpayer under this section for any taxable year shall not exceed \$5,000 (\$2,500 in the case of a separate return by a married individual).''

Subsec. (d)(1)(B). Pub. L. 100-647, Sec. 1011B(a)(30), substituted ``(7)'' for ``(6)'' , see Codification note above.

Subsec. (d)(3). Pub. L. 100-647, Sec. 1011B(a)(31)(A)(i), struck out at end ``For purposes of this paragraph, there may be excluded from consideration employees who may be excluded from consideration under section 89(h).''

Subsec. (d)(7). Pub. L. 100-647, Sec. 1011B(a)(14), redesignated par. (8) as (7).

Subsec. (d)(7)(A). Pub. L. 100-647, Sec. 1011B(a)(15)(A), inserted ``under all plans of the employer'' after second and third reference to ``employees''.

Subsec. (d)(7)(B). Pub. L. 100-647, Sec. 3021(a)(14), struck out ``within the meaning of section 414(q)(7))'' after ``whose compensation'' and inserted at end ``For purposes of this subparagraph, the term `compensation' has the meaning given such term by section 414(q)(7), except that, under rules prescribed by the Secretary, an employer may elect to determine compensation on any other basis which does not discriminate in favor of highly compensated employees.''

Pub. L. 100-647, Sec. 1011B(a)(15)(B), (C), substituted ``a plan may disregard'' for ``there shall be disregarded'' and ``414(q)(7)'' for ``415(q)(7)''.

Subsec. (d)(8). Pub. L. 100-647, Sec. 1011B(a)(31)(A)(ii), added par. (8). Former par. (8) redesignated (7).

Subsec. (e)(6). Pub. L. 100-647, Sec. 1011B(a)(18), inserted ``other than paragraphs (4) and (7) thereof'' after ``subsection (d)''.

Subsec. (e)(8). Pub. L. 100-647, Sec. 1011B(c)(1), in introductory provisions, inserted ``maintained by an employer'' after ``onsite facility'' and ``of dependent care assistance provided to an employee'' after ``the amount'', in subpar. (A), inserted ``of the facility by a dependent of the employee'' after ``utilization'', and in subpar. (B), inserted ``with respect to such dependent'' after ``provided''.

Subsec. (e)(9). Pub. L. 100-485 added par. (9).

1986--Subsec. (a). Pub. L. 99-514, Sec. 1163(a), substituted ``Exclusion'' for ``In general'' in heading and amended text generally. Prior to amendment, text read as follows: ``Gross income of an employee does not include amounts paid or incurred by the employer for dependent care assistance provided to such employee if the assistance is furnished pursuant to a program which is described in subsection (d).''

Subsec. (c)(1). Pub. L. 99-514, Sec. 104(b)(1)(A), substituted ``section 151(c)'' for ``section 151(e)''.

Subsec. (c)(2). Pub. L. 99-514, Sec. 104(b)(1)(B), substituted ``section 151(c)(3)'' for ``section 151(e)(3)''.

Subsec. (d)(1). Pub. L. 99-514, Sec. 1151(c)(5)(A), added par. (1) and struck out former par. (1) which read as follows: ``For purposes of this section a dependent care assistance program is a separate written plan of an employer for the exclusive benefit of his employees to provide such employees with dependent care assistance which meets the requirements of paragraphs (2) through (7) of this subsection.''

Subsec. (d)(2). Pub. L. 99-514, Sec. 1114(b)(4), substituted ``highly compensated employees (within the meaning of section 414(q))'' for ``officers, owners, or highly compensated,''

Subsec. (d)(3). Pub. L. 99-514, Sec. 1151(g)(4), substituted ``For purposes of this paragraph, there may be excluded from consideration employees who may be excluded from consideration under section 89(h).'' for ``For purposes of this paragraph, there shall be excluded from consideration employees not included in the program who are included in a unit of employees covered by an agreement which the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and one or more employers, if there is evidence that dependent care benefits were the subject of good faith bargaining between such employee representatives and such employer or employers.''

Subsec. (d)(6), (7). Pub. L. 99-514, Sec. 1151(c)(5)(B), redesignated par. (7) as (6) and struck out former par. (6) which read as follows: ``Notification of eligible employees.--Reasonable notification of the availability and terms of the program shall be provided to eligible employees.''

Subsec. (d)(8). Pub. L. 99-514, Sec. 1151(f), added par. (8).

Subsec. (e)(8). Pub. L. 99-514, Sec. 1163(b), added par. (8).

1984--Subsec. (b)(2). Pub. L. 98-369, Sec. 474(r)(6)(A), substituted ``section 21(d)(2)'' for ``section 44A(e)(2)''.

Subsec. (e)(1). Pub. L. 98-369, Sec. 474(r)(6)(B), substituted

``section 21(b)(2)'' for ``section 44A(c)(2)''.

Subsec. (e)(2). Pub. L. 98-369, Sec. 474(r)(6)(C), substituted

``section 32(c)(2)'' for ``section 43(c)(2)''.

1983--Subsec. (d)(1). Pub. L. 97-448, Sec. 101(e)(1)(C), substituted

``paragraphs (2) through (7)'' for ``paragraphs (2) through (6)''.

Subsec. (d)(2). Pub. L. 97-448, Sec. 101(e)(1)(A), added par. (2).

Former par. (2) redesignated (3).

Subsec. (d)(3). Pub. L. 97-448, Sec. 101(e)(1)(A), (B), redesignated former par. (2) as (3) and substituted ``employees described in paragraph (2), or their dependents'' for ``employees who are officers, owners, or highly compensated, or their dependents''. Former par. (3) redesignated (4).

Subsec. (d)(4) to (7). Pub. L. 97-448, Sec. 101(e)(1)(A), redesignated former pars. (3) to (6) as (4) to (7), respectively.

Subsec. (e)(7). Pub. L. 97-448, Sec. 101(e)(2), substituted ``shall be allowed to the employee under any other section of this chapter for any amount excluded from the gross income of the employee'' for ``shall be allowed under any other section of this chapter for any amount excluded from income''.

Effective Date of 1996 Amendment

Amendment by Pub. L. 104-188 applicable to years beginning after Dec. 31, 1996, except that in determining whether an employee is a highly compensated employee for years beginning in 1997, such amendment to be treated as having been in effect for years beginning in 1996, see section 1431(d)(1) of Pub. L. 104-188, set out as a note under section 414 of this title.

Effective Date of 1989 Amendments

Amendment by Pub. L. 101-239 effective, except as otherwise provided, as if included in the provision of the Technical and Miscellaneous Revenue Act of 1988, Pub. L. 100-647, to which such amendment relates, see section 7817 of Pub. L. 101-239, set out as a note under section 1 of this title.

Amendment by section 203(a)(1), (2) of Pub. L. 101-140 effective as if included in section 1151 of Pub. L. 99-514, see section 203(c) of Pub. L. 101-140, set out as a note under section 79 of this title.

Section 204(a)(3)(D) of Pub. L. 101-140 provided that: ``Section 129(d)(8) (as redesignated by subparagraph (A)) shall apply to plan years beginning after December 31, 1989.''

Section 204(d)(1), (2) of Pub. L. 101-140 provided that:

``(1) The amendments made by subsections (a)(1), (a)(2), and (b)(2) [amending this section and section 414 of this title] shall apply to years beginning after December 31, 1988.

``(2) The amendments made by subsection (a)(3) [amending this section] shall apply to plan years beginning after December 31, 1989.''

Effective Date of 1988 Amendments

Amendment by section 1011B(a)(14), (15), (18), (30), (31)(A), (c)(1) of Pub. L. 100-647 effective, except as otherwise provided, as if included in the provision of the Tax Reform Act of 1986, Pub. L. 99-514, to which such amendment relates, see section 1019(a) of Pub. L. 100-647, set out as a note under section 1 of this title.

Section 1011B(c)(2)(C) of Pub. L. 100-647 provided that:

``(i) Except as provided in this subparagraph, the amendments made

by this paragraph [amending this section and section 6051 of this title] shall apply to taxable years beginning after December 31, 1987.

``(ii) A taxpayer may elect to have the amendment made by subparagraph (A) [amending this section] apply to taxable years beginning in 1987.

``(iii) In the case of a taxpayer not making an election under clause (ii), any dependent care assistance provided in a taxable year beginning in 1987 with respect to which reimbursement was not received in such taxable year shall be treated as provided in the taxpayer's first taxable year beginning after December 31, 1987.''

Section 3021(d) of Pub. L. 100-647 provided that:

``(1) Subsection (a).--The amendments made by subsection (a) [amending this section and sections 89, 410, 4976, 6039D, and 6652 of this title] shall take effect as if included in the amendments made by section 1151 of the Tax Reform Act of 1986 [Pub. L. 99-514, see Effective Date note below]; except that the amendment made by subsection (a)(8) [amending section 89 of this title] shall apply to testing years beginning after December 31, 1989.

``(2) Subsection (b).--The amendments made by subsection (b) [amending sections 89 and 414 of this title] shall apply to years beginning after December 31, 1986.''

Amendment by Pub. L. 100-485 applicable to taxable years beginning after Dec. 31, 1988, see section 703(d) of Pub. L. 100-485, set out as a note under section 21 of this title.

Effective Date of 1986 Amendment

Amendment by section 104(b)(1) of Pub. L. 99-514 applicable to taxable years beginning after Dec. 31, 1986, see section 151(a) of Pub. L. 99-514, set out as a note under section 1 of this title.

Amendment by section 1114(b)(4) of Pub. L. 99-514 applicable to years beginning after Dec. 31, 1987, see section 1114(c)(2) of Pub. L. 99-514, set out as a note under section 414 of this title.

Amendment by section 1151(c)(5), (f), (g)(4) of Pub. L. 99-514 applicable, with certain qualifications and exceptions, to years beginning after Dec. 31, 1988, see section 1151(k) of Pub. L. 99-514, as amended, set out as a note under section 79 of this title.

Section 1163(c) of Pub. L. 99-514 provided that: ``The amendments made by this section [amending this section] shall apply to taxable years beginning after December 31, 1986.''

Effective Date of 1984 Amendment

Amendment by Pub. L. 98-369 applicable to taxable years beginning after Dec. 31, 1983, and to carrybacks from such years, see section 475(a) of Pub. L. 98-369, set out as a note under section 21 of this title.

Effective Date of 1983 Amendment

Amendment by Pub. L. 97-448 effective, except as otherwise provided, as if it had been included in the provision of the Economic Recovery Tax Act of 1981, Pub. L. 97-34, to which such amendment relates, see section 109 of Pub. L. 97-448, set out as a note under section 1 of this title.

Effective Date

Section applicable to taxable years beginning after Dec. 31, 1981, see section 124(f) of Pub. L. 97-34, set out as an Effective Date of 1981 Amendment note under section 21 of this title.

Regulations

Secretary of the Treasury or his delegate to issue before Feb. 1, 1988, final regulations to carry out amendments made by section 1114 of Pub. L. 99-514, see section 1141 of Pub. L. 99-514, set out as a note under section 401 of this title.

Nonenforcement of Amendment Made by Section 1151 of Pub. L. 99-514 for Fiscal Year 1990

No monies appropriated by Pub. L. 101-136 to be used to implement or enforce section 1151 of Pub. L. 99-514 or the amendments made by such section, see section 528 of Pub. L. 101-136, set out as a note under section 89 of this title.

Plan Amendments Not Required Until January 1, 1998

For provisions directing that if any amendments made by subtitle D [Secs. 1401-1465] of title I of Pub. L. 104-188 require an amendment to any plan or annuity contract, such amendment shall not be required to be made before the first day of the first plan year beginning on or after Jan. 1, 1998, see section 1465 of Pub. L. 104-188, set out as a note under section 401 of this title.

Plan Amendments Not Required Until January 1, 1989

For provisions directing that if any amendments made by subtitle A or subtitle C of title XI [Secs. 1101-1147 and 1171-1177] or title XVIII [Secs. 1800-1899A] of Pub. L. 99-514 require an amendment to any plan, such plan amendment shall not be required to be made before the first plan year beginning on or after Jan. 1, 1989, see section 1140 of Pub. L. 99-514, as amended, set out as a note under section 401 of this title.

Section Referred to in Other Sections

This section is referred to in sections 21, 51A, 414, 3121, 3306, 3401, 6039D, 6051 of this title; title 42 section 409.