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October 1, 2007

Jay Holmquist, General Manager  
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P.O. Box 82048  
Lincoln, NE 68501

Re: Mileage Expense to and from Board Meetings

Dear Jay:

**QUESTION**

If the IRS considers the payment to a director for travel to and from a director's home to a monthly board meeting as income, should such payment be included in the calculation of maximum "compensation" as provided in *Neb. Rev. Stat. § 70-624.02*? Stated another way, is the travel expense converted to compensation, by the IRS determination, and thus subject to the maximum compensation limit?

**ANSWER**

A meritorious argument can be made that such payment, even if it is considered as income by the IRS, should not be included in the calculation of maximum compensation.

**ANALYSIS**

*Neb. Rev. Stat. § 70-624.02* provides in pertinent part as follows:

**"The members of the board of directors shall be paid their actual expenses, while engaged in the business of the district under the authority of the board of directors, and, for their services, such compensation as shall be fixed by the board of directors.**

The boards of directors of those districts with gross revenue of less than forty million dollars **may fix compensation at not to exceed six thousand seven hundred twenty dollars per year as to all members** except the president and not exceeding seven thousand five hundred sixty dollars a year as to the president.

. . . All salaries and compensation shall be obligations against and be paid solely from the revenue of the district. **No director shall receive any other compensation from the district, except as provided in this section, . . .**

(Emphasis added.)

The answer to the question posed is determined by an interpretation of the plain language of the statute.

The statute in question contains two categories under which a director may receive payments from a public power district. One category is the payment of actual expenses incurred by the director while on business of the district, and the other category is payment of compensation fixed by the board, subject to the maximum allowable by the statute.

The term "actual expenses" is not defined in Charter 70, Article 6. Blacks Law Dictionary defines "expense" as "That which is expended, laid out or consumed, an outlay; charge; cost; price." *Black's Law Dictionary*, (4<sup>th</sup> ed. 1957, 687). "Actual outlay or actual obligation to make outlay." *U.S. v. Block & Kohner Mercantile*, 33 F.2d 196, 197 (D.C. Mo.), cited in *Black's*.

A director incurs an actual expense when he pays for gasoline for his automobile used to drive to and from a board meeting. He is entitled to be reimbursed for this expense, if driving to and from the board meeting is considered as an engagement in the business of the district under the authority of the board of directors. Directors are required to attend the meetings of the Board of Directors and therefore I believe that directors are engaged in the business of the district when they drive to and from a board meeting. Does the character of that payment change from the category of an expense to the category of compensation, if the IRS determines that the payment is income to the director? The IRS may consider the travel to be a personal commute of an employee to his or her place of business and therefore income rather than the reimbursement of an expense?

A determination by the IRS as to whether this payment is income under federal law, should not change the category from actual expense to compensation under state law. The conclusion is further supported by the language of the statute which states "such compensation as shall be fixed by the board of directors" [limited by the maximum]. The determination by the IRS is not compensation fixed by the board of directors. Only compensation that is fixed by the board of directors (up to the maximum) may be considered compensation under the statute.

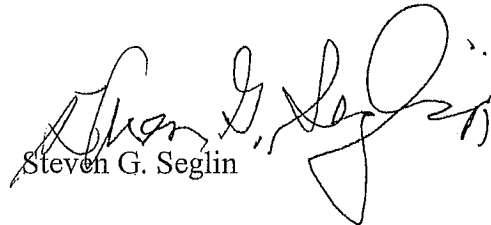
**CONCLUSION**

It seems to me that a reasonable argument can be made that the determination that the travel expense in question may be considered as income under federal law, does not change the category of an actual expense to the category of compensation under state law, and therefore should not be included in the calculation of maximum compensation under the statute in question.

Very truly yours,

CROSBY GUENZEL LLP

By

  
Steven G. Seglin

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