

**Office of Chief Counsel
Internal Revenue Service
Memorandum**

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to: Dan Longhi
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from: Tracie M. Knapp
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subject: Gross Income and Grants to Railroads Pursuant to 23 U.S.C. § 130

This memorandum is in response to your request for our assistance in determining whether government grants received by Taxpayer to improve railroad crossing safety constitute income to Taxpayer. This advice may not be used or cited as precedent.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our view

LEGEND

Taxpayer =
Year 1 =
First Grant =
Second Grant =
\$X =
Y =
Z =

ISSUES

Whether government grants received by Taxpayer pursuant to 23 U.S.C. § 130 for improving railroad crossing safety constitute gross income under I.R.C. § 61?

CONCLUSIONS

Grants received by Taxpayer pursuant to 23 U.S.C. § 130 for improving railroad crossing safety do not constitute gross income to Taxpayer.

FACTS

During Year 1, Taxpayer accepted numerous grants from state and local governmental agencies to fund various railroad projects. In order to obtain the grants, Taxpayer generally applied for the funding from the appropriate government agencies and then entered into agreements with the agencies setting forth the terms and conditions of the projects and payments. A number of the grants were to make upgrades to railway-highway crossings, and some of these grants specified that the funding for the grants came from federal money pursuant to 23 U.S.C. § 130 and 23 C.F.R. § 646.210, the Federal regulations relating to 23 U.S.C. § 130. The analysis in this memorandum applies only to those grants received pursuant to 23 U.S.C. § 130 or 23 C.F.R. § 646.210, and not to any other grants received by Taxpayer.

Two examples of grants funded pursuant to 23 U.S.C. § 130 are the grants Taxpayer received from (the First Grant") and from (the Second Grant"). The First Grant provided Taxpayer with funds to have "the grade crossing constructed and train activated warning devices installed." The First Grant also stated that in accordance with 23 C.F.R. § 646.210(b)(1), "the installation of the warning devices and grade crossing is found to be of no ascertainable net benefit to the Railroad and the Railroad shall not be assigned liability in the project costs."

The Second Grant awarded Taxpayer with \$X for installing active warning devices, and was funded Y percent by 23 U.S.C. § 130 Federal funds and Z percent by state funds.

Taxpayer has argued that these grants (and other similar grants) received from the states are not income to Taxpayer because Taxpayer has not received a net benefit pursuant to 23 U.S.C. § 130 and therefore has no accession to wealth.

LAW AND ANALYSIS

Gross income is "all income from whatever source derived," I.R.C. § 61(a), and includes "income realized in any form, whether in money, property, or services." Treas. Reg. § 1.61-1(a). Additionally, in Commissioner v. Glenshaw Glass Co., 348 U.S. 426,

431 (1955), the Supreme Court held that gross income includes “instances of undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.”

Under 23 U.S.C. § 130(a), the cost of construction projects for the elimination of hazards of railway-highway crossings may be paid from Federal aid. The section goes on to state:

The Secretary [of Transportation] may classify the various types of projects involved in the elimination of hazards of railway-highway crossings, and may set for each such classification **a percentage of the costs of construction which shall be deemed to represent the net benefit to the railroad** or railroads for the purpose of determining the railroad’s share of the cost of construction. The percentage so determined shall in no case exceed 10 per centum. The Secretary shall determine the appropriate classification of each project.

23 U.S.C. § 130(b) (emphasis added). The regulations at 23 C.F.R. § 646.210(b), pursuant to 23 U.S.C. § 130(b), classify some of the railway-highway crossing projects and set the costs that a railroad shall share in those projects. The regulation states:

(b) Pursuant to 23 U.S.C. 130(b), and 49 C.F.R. § 1.48:

- (1) Projects for grade crossing improvements are deemed to be of no ascertainable net benefit to the railroads and there shall be no required railroad share of the costs.
- (2) Projects for the reconstruction of existing grade separations are deemed to generally be of no ascertainable net benefit to the railroad and there shall be no required railroad share of the costs, unless the railroad has a specific contractual obligation with the State or its political subdivision to share in the costs.
- (3) On projects for the elimination of existing grade crossings at which active warning devices are in place or ordered to be installed by a State regulatory agency, the railroad share of the project costs shall be 5 percent.
- (4) On projects for the elimination of existing grade crossings at which active warning devices are not in place and have not been ordered installed by a State regulatory agency, or on projects which do not eliminate an existing crossing, there shall be no required railroad share of the project cost.

In the case of Taxpayer and the First Grant, the agreement clearly states that the funds were being provided under 23 C.F.R. § 646.210(b)(1) (and therefore under 23 U.S.C. § 130) and provides no net benefit to Taxpayer. Article 1 of the Second Grant shows that the grant is clearly being provided under 23 U.S.C. § 130(b), and therefore only the percentage of the costs of construction (not to exceed 10 percent) paid by the railroad represent the railroad’s net benefit.

Generally, a government grant is presumed to be income unless it is specifically excluded from income. In this case, however, 23 U.S.C. § 130(b) appears to be a cost-sharing arrangement between the Federal government and the railroads, and implies that Congress views the grants as having a public purpose rather than a private purpose. Any benefit to Taxpayer is incidental and is not an accession to wealth, and therefore the grants received by Taxpayer pursuant to 23 U.S.C. § 130(b), including the First Grant and the Second Grant, are not included in Taxpayer's gross income.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

The analysis in the memorandum pertains only to those grants received by Taxpayer pursuant to 23 U.S.C. § 130. Because of the factual nature of this analysis, grants received by Taxpayer pursuant to provisions other than 23 U.S.C. § 130 should be evaluated individually to determine if they constitute gross income to Taxpayer.¹

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call (651) 726-7353 if you have any further questions.

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¹ In addition, this memorandum does not address the tax consequences to a railroad where a third party voluntarily assumes a railroad's share of the cost of a project. See 23 C.F.R. § 646.210(d).