

DEFENDER

THE NADC NEWSLETTER

IRS Strictly Interprets Tool Reimbursement Plan Requirements

Michael G. Charapp



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A recent ruling by the Internal Revenue Service shows that it continues to strictly construe the requirements that allow payments under tool reimbursement plans to be treated as non-taxable to dealership technicians.

Most dealers have probably received solicitations from companies proposing to establish tool reimbursement plans. The selling point is that a qualifying reimbursement plan allows a dealer to provide tool reimbursement payments to technicians that are not taxable to them. This allows the dealer to provide additional benefits to technicians, it is represented, with little additional cost.

For a number of years, the IRS has

warned that it will carefully scrutinize these plans. In Revenue Ruling 2005-52 (2005 WL 1819760), issued this summer, the IRS showed just how strictly it will apply its standards.

In the Revenue Ruling, the IRS considered a tool reimbursement plan in which the employees only record their time worked requiring use of tools. The employer converts the hours into an amount to be treated as expenses based on a statistical model. Using this statistical process, the employer estimates the tool expense incurred by employees based on the number of hours worked, rather than requiring specific

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Call Me Tom...Grisham?

Thomas B. Hudson



Thomas B. Hudson

OK, admit it. You have actually thought about writing the Great American Novel. After all, you're a lawyer, and lawyers deal with interesting stuff. We all have a couple of hundred war stories that would serve as the basis for at least a few chapters.

The thought of going to the mailbox and picking up those royalty checks is an enticing one, as is the thought that writing can be done anywhere – the beach, the mountains, wherever you want to be when you aren't doing your lawyering work.

It was with these thoughts in mind that I opened a mailing from an outfit

called SEAK. It was titled "Fiction Writing for Lawyers," and it was to be a three-day workshop in Falmouth, Massachusetts. The brochure described the workshop agenda and the location, and I admit that the location was a real draw for me – I like Cape Cod, and I could eat lobster at least three times a day.

Now, I have a confession to make. I've often had that thought. You know, the one that goes, "How hard can it be? Grisham's dashing off book after book, and he's spending a good part of his time, I suspect, counting his millions. I could do that." And by "that," I mean

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write and count my millions.

But, I've never seriously thought about trying to write fiction for a living. I always suspected that I didn't have the imagination for plot and character creation. So if the workshop had been just about fiction writing, I'd probably have filed the brochure in my Walter Mitty/Don Quixote file and forgotten about it.

But the brochure promised help for the non-fiction author, as well. The first day was a separate workshop on non-fiction, and some of the course content for the second and third days was the sort of stuff – finding an agent, dealing with publishers – that both fiction and nonfiction writers need to know.

In addition, I rationalized, some of the fiction stuff was bound to be helpful to a nonfiction author, especially one who often invents fictional characters to make dry legal content come to life a bit. And the two featured instructors, Lisa Scottoline and Stephen Horn have been on the New York Times Top Ten fiction list, and seemed like they would be great fun. Finally, my wife is a writer, and she enthusiastically agreed that we should attend.

Those were enough hooks for me. You see, I have about 450 pages or so

of a nonfiction book pretty much done. It's about legal stuff for car dealers, banks and sales finance companies. I thought the workshop might actually help me.

And did it ever.

I won't bore you with the details, but by the end of the three-day session, I had concluded that I did not need an agent or a publisher. Having a book printed is no big deal, I discovered, although you need some professional help to avoid having folks look down their noses at your efforts. The so-called "vanity press" publishers, will print anything, and they will print what you send them. That's why so many self-published books look like amateur efforts.

I learned that with the right professional help, it is virtually impossible to tell a self-published book from a book done by the "normal" publishing houses. Specifically, you need a really savvy proofreader, a professional editor and a professional book designer. I've found the first two, and I have a lead on a good book designer.

I also learned that there are publishers who will print on demand, and who will handle the so-called "fulfillment" chores. You don't have to rent a warehouse to store a couple of thousand books, and you can contract for all the invoicing, shipping and mailing. Cool.

In addition to being great fun and permitting me to stuff myself with lobsters, the workshop kept me from making some pretty elementary mistakes, and saved me several thousand dollars. If you've got that book lurking around in your head – fiction or nonfiction – I recommend a workshop like this very highly.

Editor's Note: SEAK is conducting its 5th Annual Legal Fiction Writing for Lawyers workshop in Cape Code October 20-22, 2006. For more information, go to www.seak.com.

Thomas B. Hudson, Esq. (tbhudson@hudco.com) is the Publisher of Spot Delivery®, a monthly legal newsletter for auto dealers, and the Editor in Chief of CARLAW®, a monthly report of legal developments in all states for the auto finance and leasing industry. He is also a partner in the Maryland office of Hudson Cook, LLP.



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President's Message



I am delighted to report that the Fall workshop, entitled "Anatomy of a Buy-Sell," was attended by 46 people, including four speakers, Co-chair Gene Kelley and two facilitators. The entire program may be accessed on our website, and I urge you to do so. My thanks to Gene, Jerry Coker, Joe Aboyoun, Ron Coleman and facilitators, Lyne Richardson, a partner in Ford & Harrison's Los Angeles office, and John Hickey, of Planet Automotive. Oren Tasini, the other Co-Chair, was digging out of a hurricane and had to miss the great San Diego weather.

In response to multiple comments after our annual conference last Spring in Atlanta, we set about presenting an in-depth educational seminar on a timely topic, with the added benefit of CLE credit. This seminar dealt with the real nuts and bolts of the acquisition or sale of a dealership, with two speakers con-

centrating on the entire transaction from initial client contact to closing, from the buyer's viewpoint and from the seller's viewpoint. Jerry Coker, Chair of our Labor Law for Dealers Section, spoke about the scary labor issues that arise when a transaction takes place. Jerry is well known throughout the country and concentrates on labor law. He is as experienced as anyone I have seen, and his presentation was well worth the price of admission. Joe Aboyoun, one of our East Coast members talked about the transaction from the seller's side and did a terrific job. He has handled hundreds of such transactions, and he was generous with his expertise. Ron Coleman, one of our board members, from Washington state did a great job as clean-up hitter, touching on all the things everyone forgot. I spoke on the transaction from the buyer's side and, as always at these workshops, got more than I gave. The workshop consisted of four one-hour presentations, followed by two breakout sessions where the audience and the speak-

ers met with a facilitator to discuss common problems and share solutions. Again, I learned a lot.

We are all grateful to Rob Cohen and Auto Advisory Services for being the host of the Thursday evening cocktail party. The food was superb and the conversation and camaraderie were just marvelous.

The membership of NADC can look forward to many more of these events, but you have to tell us what topics are of interest. We are in the planning stages of our annual spring national conference, and we must have your suggestions for subjects about which you would like to hear. Please let us know. There are 350 of us, we are growing, we are successful, and our membership is as generous a group of professionals as I have ever encountered. If you don't believe me, just look at the list serve.

Jonathan P. Harvey of Harvey and Mumford LLP is President of the NADC and can be reached by e-mail at jpharvey@harveyandmumford.com.



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substantiation of actual tool expenditures by the employees.

The Ruling notes that there are three specific tests to determine whether payments under a tool reimbursement plan can be excluded from income by the employee. These are:

1. Is there a business connection for the payments? This is satisfied if the payments are advances, allowances, or reimbursements only for business expenses that are allowable as deductions.
2. Are the expenses substantiated? The employee must substantiate actual expenses within a reasonable time frame.
3. Does the arrangement provide for the return of excess payments? The

employee must be required to reimburse the employer within a reasonable period of time for any amount advanced in excess of substantiated expenses.

For a plan to qualify, it must meet *all three tests*.

In considering the plan before it, the IRS held that it did not qualify as an "accountable plan" allowing the employee to disregard the payments as income because it did not meet the second and third tests. Specifically, the statistical averaging method used by the employer, according to the IRS, may be sufficient to make a determination whether the payments have a "business connection," but it is not appropriate to meet the substantiation requirement. Only substantiated actual expenses may be reimbursed under a qualifying plan. Also, any plan must require reimbursement of excess payments over substantiated expenses. The IRS will not even

allow the employer to report the excess payments as income.

The technical nature of the rules applicable to tool reimbursement programs, as well as the continuing practice of the IRS to strictly construe the rules applicable to these programs, makes implementation of a tool reimbursement plan something that must be done carefully. The dealership's tax advisor should review the program and agree that it meets the qualifications required by the IRS to allow payments under the program to be disregarded as income by the employees involved.

Michael Charapp is a partner with Charapp & Weiss, LLP in McLean, VA. He is Second Vice President of the NADC and serves as Chairman of the Membership and Advancement Committee.

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CLE Credit Update

The NADC Workshop: Anatomy of a Buy-Sell took place November 3-4, 2006. There were 46 people in attendance for the four sessions that covered the spectrum of buy-sell transactions. An open forum provided attendees the opportunity to ask questions and discuss the topics.

We applied for CLE credit to all states requested by attendees. The accompanying table shows the responses to those applications to date. All attendees should have received certificates of attendance, and lists of attendees are being sent to the appropriate state agencies.

| State | CLE Credit Status |
|----------------|--|
| Arizona | Accepts certificate of attendance |
| California | Application pending |
| Colorado | 5 hours CLE credit |
| Florida | 5 hours CLE credit |
| Georgia | 4 hours CLE credit |
| Illinois | Application pending |
| Indiana | 4 hours CLE credit |
| Massachusetts | Accepts certificate of attendance |
| Minnesota | Application pending |
| Missouri | Application pending |
| Montana | 4 hours CLE credit |
| New Mexico | Application pending |
| New York | Accepts credit of jurisdictions with which it has reciprocal agreements* |
| North Carolina | 4 hours CLE credit |
| Oklahoma | 5 hours CLE credit |
| Oregon | 4 hours CLE credit |
| Pennsylvania | Application pending |
| Texas | 4 hours CLE credit |
| Washington | 5.5 hours CLE credit |
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* including CA, CO, GA, IN, NM, OK, OR, PA, WI listed above

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Rob Cohen, Editor
rob.cohen@autoadvisory.com
Defender, The NADC Newsletter
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P.O. Box 383
Linthicum, MD 21090
410-712-4037
Fax 410-712-4038
www.dealercounsel.com