

section [amending this section and sections 1033, 1034, 1038, 1250, and 6012 of this title] shall apply to sales or exchanges after July 26, 1978, in taxable years ending after such date.”

EFFECTIVE DATE OF 1976 AMENDMENT

Pub. L. 94-455, title XIV, §1404(b), Oct. 4, 1976, 90 Stat. 1733, provided that: “The amendment made by subsection (a) [amending this section] shall apply to taxable years beginning after December 31, 1976.”

EFFECTIVE DATE

Pub. L. 88-272, title II, §206(c), Feb. 26, 1964, 78 Stat. 40, provided that: “The amendments made by this section [enacting this section, redesignating former section 121 as 122, and amending sections 1033, 1034, and 6012 of this title] shall apply to dispositions after Dec. 31, 1963, in taxable years ending after such date.”

SENSE OF CONGRESS CONCERNING TAX TREATMENT OF PRINCIPAL RESIDENCE OF MEMBERS OF ARMED FORCES WHILE AWAY FROM HOME ON ACTIVE DUTY

Pub. L. 105-261, div. A, title X, §1074, Oct. 17, 1998, 112 Stat. 2138, provided that: “It is the sense of Congress that a member of the Armed Forces should be treated for purposes of section 121 of the Internal Revenue Code of 1986 as using property as a principal residence during any continuous period that the member is serving on active duty for 180 days or more with the Armed Forces, but only if the member used the property as a principal residence for any period during or immediately before that period of active duty.”

TRANSITIONAL RULE IN CASE OF SALE OR EXCHANGE OF RESIDENCE BEFORE JULY 26, 1981

Pub. L. 95-600, title IV, §404(d)(2), Nov. 6, 1978, 92 Stat. 2870, as amended by Pub. L. 99-514, §2, Oct. 22, 1986, 100 Stat. 2095, provided that: “In the case of a sale or exchange of a residence before July 26, 1981, a taxpayer who has attained age 65 on the date of such sale or exchange may elect to have section 121 of the Internal Revenue Code of 1986 [formerly I.R.C. 1954] applied by substituting ‘8-year period’ for ‘5-year period’ and ‘5 years’ for ‘3 years’ in subsections (a), (d)(2), and (d)(5) of such section.”

**§ 122. Certain reduced uniformed services retirement pay**

**(a) General rule**

In the case of a member or former member of the uniformed services of the United States, gross income does not include the amount of any reduction in his retired or retainer pay pursuant to the provisions of chapter 73 of title 10, United States Code.

**(b) Special rule**

**(1) Amount excluded from gross income**

In the case of any individual referred to in subsection (a), all amounts received after December 31, 1965, as retired or retainer pay shall be excluded from gross income until there has been so excluded an amount equal to the consideration for the contract. The preceding sentence shall apply only to the extent that the amounts received would, but for such sentence, be includible in gross income.

**(2) Consideration for the contract**

For purposes of paragraph (1) and section 72(n), the term “consideration for the contract” means, in respect of any individual, the sum of—

(A) the total amount of the reductions before January 1, 1966, in his retired or re-

tainer pay by reason of an election under chapter 73 of title 10 of the United States Code, and

(B) any amounts deposited at any time by him pursuant to section 1438 or 1452(d) of such title 10.

(Added Pub. L. 89-365, §1(a)(1), Mar. 8, 1966, 80 Stat. 32; amended Pub. L. 93-406, title II, §§2005(c)(10), 2007(a), (b)(1), Sept. 2, 1974, 88 Stat. 992, 994.)

PRIOR PROVISIONS

A prior section 122 was renumbered section 140 of this title.

AMENDMENTS

1974—Subsec. (a). Pub. L. 93-406, §2007(a), substituted “United States, gross income does not include the amount of any reduction in his retired or retainer pay pursuant to the provisions of chapter 73 of title 10, United States Code” for “United States who has made an election under chapter 73 of title 10 of the United States Code to receive a reduced amount of retired or retainer pay, gross income does not include the amount of any reduction after December 31, 1965, in his retired or retainer pay by reason of such election”.

Subsec. (b)(2). Pub. L. 93-406, §2005(c)(10), substituted “72(n)” for “72(o)”.

Subsec. (b)(2)(B). Pub. L. 93-406, §2007(b)(1), inserted reference to section 1452(d) of title 10.

EFFECTIVE DATE OF 1974 AMENDMENT

Amendment by section 2005(c)(10) of Pub. L. 93-406 applicable only with respect to distributions or payments made after Dec. 31, 1973, in taxable years beginning after Dec. 31, 1973, see section 2005(d) of Pub. L. 93-406, set out as a note under section 402 of this title.

Pub. L. 93-406, title II, §2007(c), Sept. 2, 1974, 88 Stat. 993, provided that: “The amendments made by this section [amending this section and sections 72, 101, and 2039 of this title] apply to taxable years ending on or after September 21, 1972. The amendments made by paragraphs (3) and (4) of subsection (b) [amending sections 101 and 2039 of this title] apply with respect to individuals dying on or after such date”.

EFFECTIVE DATE

Pub. L. 89-365, §1(d), Mar. 10, 1966, 80 Stat. 33, provided that: “The amendments made by subsections (a) and (b) [enacting this section and amending section 72 of this title] shall apply with respect to taxable years ending after December 31, 1965. The amendment made by subsection (c) [amending section 101 of this title] shall apply with respect to individuals making an election under chapter 73 of title 10 of the United States Code who die after December 31, 1965.”

**§ 123. Amounts received under insurance contracts for certain living expenses**

**(a) General rule**

In the case of an individual whose principal residence is damaged or destroyed by fire, storm, or other casualty, or who is denied access to his principal residence by governmental authorities because of the occurrence or threat of occurrence of such a casualty, gross income does not include amounts received by such individual under an insurance contract which are paid to compensate or reimburse such individual for living expenses incurred for himself and members of his household resulting from the loss of use or occupancy of such residence.

**(b) Limitation**

Subsection (a) shall apply to amounts received by the taxpayer for living expenses incurred dur-

ing any period only to the extent the amounts received do not exceed the amount by which—

(1) the actual living expenses incurred during such period for himself and members of his household resulting from the loss of use or occupancy of their residence, exceed

(2) the normal living expenses which would have been incurred for himself and members of his household during such period.

(Added Pub. L. 91-172, title IX, §901(a), Dec. 30, 1969, 83 Stat. 709.)

#### PRIOR PROVISIONS

A prior section 123 was renumbered section 140 of this title.

#### EFFECTIVE DATE

Pub. L. 91-172, title IX, §901(c), Dec. 30, 1969, 83 Stat. 709, provided that: "The amendments made by this section [enacting this section] shall apply with respect to amounts received on or after January 1, 1969."

### **[§ 124. Repealed. Pub. L. 101-508, title XI, § 11801(a)(9), Nov. 5, 1990, 104 Stat. 1388-520]**

Section, added Pub. L. 95-618, title II, §242(a), Nov. 9, 1978, 92 Stat. 3193, related to qualified transportation provided by employers.

A prior section 124 was renumbered section 140 of this title.

#### SAVINGS PROVISION

For provisions that nothing in repeal by Pub. L. 101-508 be construed to affect treatment of certain transactions occurring, property acquired, or items of income, loss, deduction, or credit taken into account prior to Nov. 5, 1990, for purposes of determining liability for tax for periods ending after Nov. 5, 1990, see section 11821(b) of Pub. L. 101-508, set out as a note under section 45K of this title.

## **§ 125. Cafeteria plans**

### **(a) General rule**

Except as provided in subsection (b), no amount shall be included in the gross income of a participant in a cafeteria plan solely because, under the plan, the participant may choose among the benefits of the plan.

### **(b) Exception for highly compensated participants and key employees**

#### **(1) Highly compensated participants**

In the case of a highly compensated participant, subsection (a) shall not apply to any benefit attributable to a plan year for which the plan discriminates in favor of—

(A) highly compensated individuals as to eligibility to participate, or

(B) highly compensated participants as to contributions and benefits.

#### **(2) Key employees**

In the case of a key employee (within the meaning of section 416(i)(1)), subsection (a) shall not apply to any benefit attributable to a plan for which the statutory nontaxable benefits provided to key employees exceed 25 percent of the aggregate of such benefits provided for all employees under the plan. For purposes of the preceding sentence, statutory nontaxable benefits shall be determined without regard to the second sentence of subsection (f).

#### **(3) Year of inclusion**

For purposes of determining the taxable year of inclusion, any benefit described in

paragraph (1) or (2) shall be treated as received or accrued in the taxable year of the participant or key employee in which the plan year ends.

### **(c) Discrimination as to benefits or contributions**

For purposes of subparagraph (B) of subsection (b)(1), a cafeteria plan does not discriminate where qualified benefits and total benefits (or employer contributions allocable to qualified benefits and employer contributions for total benefits) do not discriminate in favor of highly compensated participants.

### **(d) Cafeteria plan defined**

For purposes of this section—

#### **(1) In general**

The term "cafeteria plan" means a written plan under which—

(A) all participants are employees, and

(B) the participants may choose among 2 or more benefits consisting of cash and qualified benefits.

#### **(2) Deferred compensation plans excluded**

##### **(A) In general**

The term "cafeteria plan" does not include any plan which provides for deferred compensation.

##### **(B) Exception for cash and deferred arrangements**

Subparagraph (A) shall not apply to a profit-sharing or stock bonus plan or rural cooperative plan (within the meaning of section 401(k)(7)) which includes a qualified cash or deferred arrangement (as defined in section 401(k)(2)) to the extent of amounts which a covered employee may elect to have the employer pay as contributions to a trust under such plan on behalf of the employee.

##### **(C) Exception for certain plans maintained by educational institutions**

Subparagraph (A) shall not apply to a plan maintained by an educational organization described in section 170(b)(1)(A)(ii) to the extent of amounts which a covered employee may elect to have the employer pay as contributions for post-retirement group life insurance if—

(i) all contributions for such insurance must be made before retirement, and

(ii) such life insurance does not have a cash surrender value at any time.

For purposes of section 79, any life insurance described in the preceding sentence shall be treated as group-term life insurance.

##### **(D) Exception for health savings accounts**

Subparagraph (A) shall not apply to a plan to the extent of amounts which a covered employee may elect to have the employer pay as contributions to a health savings account established on behalf of the employee.

### **(e) Highly compensated participant and individual defined**

For purposes of this section—

#### **(1) Highly compensated participant**

The term "highly compensated participant" means a participant who is—