INTERNAL REVENUE SERVICE TRAINING MATERIALS FOR EMPLOYEE MEALS IN THE HOSPITALITY INDUSTRY

TABLE OF CONTENTS

I. INTRODUCTION

The value of a meal provided in kind by an employer to its employee on its business premises and for the employer's convenience is excludable from the employee's income under section 119.[1] In addition, the value of the meal is excludable from wages for purposes of the Federal Insurance Contributions Act (FICA) tax, Federal Unemployment Tax Act (FUTA) tax, and income tax withholding under sections 3121(a), 3306(b), and 3401(a), respectively.

Any employer providing a meal to an employee must comply with the legal standards under section 119 in order to exclude the value of the meal from the employee's income and wages under section 119. These training materials specifically apply the legal standards of section 119 to facts typically present in the hospitality industry (e.g., casinos, hotels, resorts, etc.).

These training materials first provide an overview of the statutory and regulatory framework applicable to employee meals, including the change made by recently enacted legislation. They then discuss the specific requirements under section 119. In particular, the training materials analyze the four business

---

[1] All references are to the Internal Revenue Code of 1986, as amended ("Code").

reasons provided as examples in the regulations for satisfying the convenience of the employer requirement of section 119. Finally, the training materials discuss a recent Tax Court case applying section 119 to the hospitality industry.

II. OVERVIEW OF EMPLOYEE MEALS

A. INCOME TAX CONSEQUENCES TO THE EMPLOYEE

- **Employee meals are includible in the employee's income unless an exclusion applies.**

Section 61(a) of the Code provides that, unless otherwise provided, gross income includes compensation for services, including fringe benefits. See also section 1.61-21(a)(1) of the Income Tax Regulations. Taxable fringe benefits include free or discounted meals provided to employees, unless an exclusion applies. See section 1.61-2(d)(3).

- **Employee meals provided on the employer's business premises for the convenience of the employer are excludable from the employee's income.**

Section 119(a) provides that the gross income of an employee does not include the value of any meal furnished in kind to him by or on behalf of his employer for the convenience of the employer, but only if the meal is furnished on the employer's business premises. See also section 1.119-1(a)(1) of the regulations.

Thus, in order for the value of a meal to be excluded from income under section 119, three requirements must be met. The meal must be furnished:

(1) in kind,
(2) on the employer's business premises, and
(3) for the employer's convenience.

The application of section 119(a) is on a meal-by-meal and employee-by-employee basis.[2]

1. In kind requirement

The section 119 exclusion only applies to a meal furnished in kind by or on behalf of an employer to the employee. If the employee has an option to receive additional compensation in lieu

---

[2] Accordingly, the employer must be able to demonstrate the time and number of meals an employee receives. See section 6001 of the Code.

of a meal in kind, the value of the meal is not excludable from gross income under section 119. However, the mere fact that an employee, at his option, may decline to accept a meal tendered in kind will not of itself require inclusion of the value thereof in gross income. Section 1.119-1(e).

2. Business premises requirement

The term "business premises of the employer" generally means the place of employment of the employee. Section 1.119-1(c)(1).

3. Employer's convenience requirement[3]

In Kowalski v. Commissioner, 434 U.S. 77, 93 (1977), the Supreme Court concluded that the "convenience of the employer" standard in section 119 requires that the "employee must accept . . . [the] meals . . . in order properly to perform his duties" (quoting S.Rep. No. 1622, 83rd Cong., 2d Sess. 190 (1954)).

The question of whether a meal is furnished for the convenience of the employer is one of fact to be determined by analysis of all the facts and circumstances in each case. Section 1.119-1(a)(1).

A meal furnished by an employer to an employee is furnished for the convenience of the employer if the meal is furnished for a substantial noncompensatory business reason of the employer. If the employer furnishes a meal to an employee for a substantial noncompensatory business reason, the meal is furnished for the convenience of the employer, even though the meal is also furnished for a compensatory reason. Section 1.119-1(a)(2)(i).

- **The regulations provide four examples of providing meals for the convenience of the employer.**

The regulations specifically provide examples of four frequently occurring substantial noncompensatory business reasons in which a meal is considered furnished for the convenience of the employer. Section 1.119-1(a)(2)(i). The reasons are the following:

(1) restaurant and food service employees;
(2) inability to obtain a meal within a reasonable period (such as insufficient eating facilities);
(3) restricted meal period; and

---

[3] Whether the meal is provided in-kind and on the employer's business premises are not usually contested issues in applying section 119 to the hospitality industry; consequently, these training materials focus on the third requirement: whether the meal is provide for the employer's convenience.

(4) emergency call.

See Part III, "Section 119," for a further discussion of each of these examples of a substantial noncompensatory business reason.

- **The statute and regulations discuss factors that, standing alone, do not indicate whether the meal is provided for the convenience of the employer.**

In determining whether a meal is furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment are not determinative of whether the meal is intended as compensation. Section 119(b)(1). The fact that a charge is made for the meal, and the fact that the employee may accept or decline the meal, are not taken into account in determining whether the meal is furnished for the convenience of the employer. Section 119(b)(2).[4]

In determining an employer's reason for furnishing a meal, the mere declaration that the meal is furnished for a noncompensatory business reason is not sufficient to prove that the meal is furnished for the convenience of the employer. The determination will be based upon an examination of all the surrounding facts and circumstances. Section 1.119-1(a)(2)(i).

If an employer furnishes a meal as a means of providing additional compensation to an employee (and not for a substantial noncompensatory business reason of the employer), the meal will not be furnished for the convenience of the employer. Section 1.119-1(a)(2)(i). A meal is furnished for a compensatory business reason of the employer when the meal is furnished to an employee to promote the morale or goodwill of the employee, or to attract prospective employees. Section 1.119-1(a)(2)(iii).

Generally, a meal furnished before or after the working hours of the employee is not furnished for the convenience of the employer. (But see the exceptions provided in section 1.119-

---

[4] If (i) an employee is required to pay on a periodic basis a fixed charge for his meals, and (ii) such meals are furnished by the employer for the convenience of the employer, the employee's gross income does not include an amount equal to such fixed meal charge. This rule applies (i) whether the employee pays the fixed charge out of his stated compensation or out of his own funds, and (ii) only if the employee is required to make the payment whether he accepts or declines the meals. Section 119(b)(3).

1(a)(2)(ii)(d)[5] and (f)[6].) Similarly, a meal furnished on a nonworking day does not qualify for the exclusion under section 119. Section 1.119-1(a)(2)(i).

4. Special Statutory Rule When a Majority of Employees are Covered by Section 119

All meals furnished on the business premises of an employer to the employer's employees shall be treated as furnished for the convenience of the employer if, without regard to this paragraph, more than half of the employees to whom such meals are furnished on such premises are furnished such meals for the convenience of the employer. Section 119(b)(4).[7]

In applying the section 119(b)(4) rule, the determination of whether the majority of the employees are furnished meals for the convenience of the employer must be made on an employee-by-employee basis and based on an analysis of each meal provided to each employee.[8] Furthermore, the determination must be made separately for each of the employer's "business premises."[9]

---

[5] A meal furnished to a restaurant employee or other food service employee for each meal period in which the employee works will be regarded as furnished for a substantial noncompensatory business reason of the employer, irrespective of whether the meal is furnished during, immediately before, or immediately after the working hours of the employee. Section 1.119-1(a)(2)(ii)(d). See discussion infra under Restaurant or Food Service Employee.

[6] If an employer would have furnished a meal to an employee during his working hours for a substantial noncompensatory business reason, a meal furnished to the employee immediately after his working hours because his duties prevented him from obtaining a meal during his working hours will be regarded as furnished for a substantial noncompensatory business reason. Section 1.119-1(a)(2)(ii)(f).

[7] Section 119(b)(4) was added by section 5002 of the Internal Revenue Service Restructuring and Reform Act of 1998, P.L. 105-206, and is effective for all taxable years beginning before, on, or after July 22, 1998 (the date of enactment).

[8] For administrative purposes, in determining whether the section 119(b)(4) rule applies to an employer's workforce, an analysis based on the positions and shifts the employees work may be considered.

[9] See section 1.119-1(c)(1) of the regulations. See also H.R. Conf. Rep. No. 599, 105th Cong., 2d Sess. 333 (1998) (referencing "all meals furnished to employees at a place of business").

The rule provided in section 119(b)(4) effectively replaces the "substantially all" rule provided in section 1.119-1(a)(2)(e) of the regulations. Section 1.119-1(a)(2)(e) provides, if the employer furnishes meals to employees at a place of business and the reason for furnishing the meals to each of substantially all of the employees who are furnished the meals is a substantial noncompensatory business reason of the employer, the meals furnished each other employee will also be regarded as furnished for a substantial noncompensatory business reason of the employer.[10]

B. INCOME TAX CONSEQUENCES TO THE EMPLOYER

- **The employer may only partially deduct employee meal expenses (including meals provided for the convenience of the employer) unless an exception applies.**

Section 162(a) allows a deduction for all ordinary and necessary business expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered.

Section 274(n)(1) provides that the amount allowable as a deduction for any expense for food or beverages shall not exceed 50 percent of the amount of the expense which would otherwise be allowable as a deduction.

- **Two exceptions allow the employer to fully deduct employee meal expenses:**

(1) Meal expenses treated as compensation to the employee

Section 274(n)(2) provides certain exceptions to the Section 274(n)(1) partial deduction disallowance. First, an expense for meals is not subject to the section 274(n)(1) limitation to the extent that the expense is treated by the taxpayer, with respect to the recipient of the meals, (1) as compensation to an employee on the taxpayer's return and (2) as wages to such employee for purposes of income tax withholding. Section 274(n)(2)(A) and section 274(e)(2). To meet the first requirement, the taxpayer must treat the expense as compensation paid to an employee on the

[10] Example (9) of section 1.119-1(f) illustrates this rule. In the example, an employer provides meals for a substantial noncompensatory business reason to 210 of 230 employees (approximately 90 percent). Under the regulation, this constitutes substantially all of the employees.

taxpayer's income tax return *as originally filed* (emphasis added). Section 1.274-2(f)(2)(iii)(A)(1).[11]

(2) Meal expenses incurred in operating a de minimis fringe eating facility

An expense for food or beverages that is excludable from the gross income of the recipient under section 132(e) (relating to de minimis fringe benefits) is not subject to the limitation of section 274(n)(1). Section 274(n)(2)(B). A de minimis fringe benefit includes the operation by an employer of any eating facility for employees if (1) the facility is located on or near the business premises of the employer, and (2) revenue derived from such facility normally equals or exceeds the direct operating costs of the facility. For purposes of the second requirement, an employee entitled under section 119 to exclude the value of a meal provided at the facility is treated as having paid an amount for the meal equal to the direct operating costs of the facility attributable to the meal.[12] Section 132(e)(2).

Accordingly, if the majority of the employees who are furnished meals on the business premises are furnished the meals for the convenience of the employer, the facility is treated as having revenue that equals or exceeds its direct operating costs and is a de minimis fringe eating facility under section 132(e)(2).

C. EMPLOYMENT TAX CONSEQUENCES TO EMPLOYEES AND EMPLOYERS

- **Employee meals are wages and subject to the withholding and payment of employment taxes unless an exception applies.**

The term "wages" includes all remuneration for employment. Sections 3121(a), 3306(b), and 3401(a).

When an employer pays wages, the employer is liable for its share of the FICA tax and for FUTA tax on the wages paid. Sections 3111 and 3301. The employer is also liable to deduct the employee's share of the FICA tax and the employee's income

---

[11] Thus, an amended return filed after the due date of the return will not satisfy this requirement. See J.E. Riley Investment Co. v. Commissioner, 311 U.S. 55 (1940), 1940-2 C.B. 225; Pacific National Co. v. Welch, 304 U.S. 191 (1938), 1938-1 C.B. 274; Howe v. Commissioner, 44 B.T.A. 894 (1941); Rev. Rul. 76-324, 1976-2 C.B. 77; Rev. Rul. 73-467, 1973-2 C.B. 66.

[12] This sentence was added to section 132(e)(2) by section 970(a) of the Taxpayer Relief Act of 1997, P.L. 105-34, effective for tax years beginning after December 31, 1997.

tax from the employee's wages when paid. Sections 3101, 3102, and 3402.

- **Two provisions exclude the meal from wages:**

(1) Meals excludable from income under section 119

For FICA and FUTA tax purposes, wages do not include the value of any meal furnished by or on behalf of the employer if at the time the meal is furnished it is reasonable to believe that the employee will be able to exclude the meal from income under section 119. Sections 3121(a)(19) and 3306(b)(14). An employer's mere assertion that the exceptions apply does not make them applicable. Rather, the employer must have, at a minimum, an understanding of the law and then apply the law to the particular facts. In this way, the existence of a reasonable belief for excluding the benefits is based on a reasoned judgment.

The value of any meal furnished to an employee by his employer is not subject to income tax withholding if the value of the meal is excludable from the gross income of the employee under section 119. Section 31.3401(a)-1(b)(9) of the Employment Tax Regulations.

Thus, if the meal does not meet the requirements of section 119, but the employer reasonably believed at the time the meal was provided that it was excludable under section 119, the meal is includible in the employee's gross income, but is excludable from wages for FICA tax and FUTA tax purposes. The meal is excludable from wages for income tax withholding purposes only if the meal *is* excludable from income under section 119.

(2) Meals excludable from income under section 132(e)

For FICA tax, FUTA tax, and income tax withholding purposes, wages do not include the value of any meal furnished by or on behalf of the employer if at the time the meal is furnished it is reasonable to believe that the employee will be able to exclude the meal from income under section 132. Sections 3121(a)(20), 3306(b)(16), and 3401(a)(19). Section 132(e)(2) excludes from income meals provided in a de minimis fringe eating facility.

III. SECTION 119 CONVENIENCE OF THE EMPLOYER TEST

As noted above, the section 119(a) exclusion from gross income applies on a meal-by-meal and an employee-by-employee

basis.[13] Thus, to exclude a meal from an employee's income, the employer must provide *that* meal to that employee for a substantial noncompensatory business reason (i.e., for the convenience of the employer).[14] As the Supreme Court concluded in Kowalski, 434 U.S. at 93, the section 119 exclusion applies only if "[the] employee must accept . . . meals . . . in order properly to perform his duties."

Accordingly, the employer must demonstrate which meals, if any, provided to an employee satisfy the requirements of section 119(a) and thus are excludable from the employee's income and wages.[15] The employer's ability to monitor and/or control the time and number of meals provided to its employees is relevant to the employer's ability to demonstrate which meals are excludable under section 119(a).

Whether a meal is provided for the convenience of the employer is a factual question to be determined by analysis of all the facts and circumstances in each case. Section 1.119-1(a)(1).

The regulations establish four primary substantial noncompensatory business reasons for providing meals to employees:

(1) restaurant and food service employees;
(2) inability to obtain a meal within a reasonable period (such as insufficient eating facilities);
(3) restricted meal period; and
(4) emergency call.

The following subsections further discuss these substantial noncompensatory business reasons. You may find it helpful to apply them in the order in which they are discussed below.

A. RESTAURANT AND FOOD SERVICE EMPLOYEES

The regulations provide that a meal furnished to a restaurant employee or other food service employee for each meal period in which the employee works will be regarded as furnished

---

[13] However, the special rule of section 119(b)(4) applies on an employee-by-employee basis as described above in section A.4.

[14] Of course, to be excludable under section 119, the meal must also be provided on the employer's business premises. Section 119(a)(1); section 1.119-1(c).

[15] See section 3121(a)(19), section 3306(b)(14), and section 31.3401(a)-1(b)(9). See also section 6001.

for a substantial noncompensatory business reason of the employer, irrespective of whether the meal is furnished during, immediately before, or immediately after the working hours of the employee.[16] Accordingly, to exclude a meal from an employee's income on this basis, the employer must demonstrate both that--

(1) the particular employee is a restaurant or food service employee, and

(2) the particular meal is provided for a meal period worked, and provided during, immediately before, or immediately after the employee's working hours.

- **Is the employee a restaurant or food service employee?**

First, restaurant and food service employees include all employees who perform services related to the provision of food to customers. Mere classification of an employee as a "restaurant" or "food service" employee is not sufficient. An employee whose duties involve solely entertainment or administration and paperwork that could be performed in a separate office is not a restaurant or food service employee.

- **Is the meal provided for a meal period worked, and during or immediately before or after the employee's working hours?**

Second, the meal must be provided to an employee for a meal period actually worked, and must be provided during, immediately before, or immediately after the employee's working hours. Accordingly, a meal provided on a day when the employee does not work or for a meal period during which the employee does not work is not excludable from income.[17]

B. INABILITY TO OBTAIN A MEAL WITHIN A REASONABLE MEAL PERIOD

The regulations provide that a meal is furnished for a substantial noncompensatory business reason of the employer when the meal is furnished to an employee during his working hours because the employee could not otherwise secure a proper meal within a reasonable meal period. In general, the Service will interpret a "reasonable meal period" to be **one hour**. Accordingly, to exclude a meal provided to an employee on this basis, the employer must demonstrate that--

-- the employee could not otherwise obtain a proper meal within one hour.

---

[16] Section 1.119-1(a)(2)(ii)(d).

[17] See section 1.119-1(a)(2) and (f) (Examples 1 and 2).

For example, a meal may qualify on this basis when there are insufficient eating facilities in the vicinity of the employer's premises.[18] Situations in which this substantial noncompensatory business reason has been found to exist have involved remote or isolated locales, such as an oil rig or a fishing schooner.[19] A location as remote as these, however, is not necessary in order to find that the employee could not secure a proper meal within a reasonable meal period.

- **Could the employee obtain a meal within one hour?**

In determining whether an employee could obtain a meal within one hour, it is important to consider--

- the number of facilities in the employer's vicinity, and
- their serving/seating capacities.

In general, in determining the number of facilities, all facilities in the area must be considered, including independently-owned facilities on the employer's premises. An employee's access to a vehicle or other transportation (public or private) may increase the number of facilities at which the employee could obtain a meal within one hour. However, it may be appropriate to exclude those facilities that are luxuriously priced for particular employees.

The mere existence of a company policy, without an underlying substantial noncompensatory business reason, that prohibits employees from patronizing certain facilities or from leaving the premises altogether is irrelevant in determining whether the employee could obtain a meal within a reasonable meal period.

C. RESTRICTED MEAL PERIOD

The regulations provide that a meal is furnished for a substantial noncompensatory business reason when the meal is furnished to the employee during his working hours because the

---

[18] Section 1.119-1(a)(2)(ii)(c).

[19] See Rowan Companies v. United States, 452 U.S. 247 (1981) (workers on offshore oil rigs); Rev. Rul. 72-385, 1972-2 C.B. 536 (fisherman on schooner). See also Stone v. Commissioner, 32 T.C. 1021 (1959) (construction workers in Alaska); Olkjer v. Commissioner, 32 T.C. 464 (1959) (construction workers in Greenland); Rev. Rul. 71-267, 1971-1 C.B. 37 (Navy personnel assigned to offshore islands). See also section 1.119-1(f) (Example 7).

employer's business is such that the employee must be restricted to a short meal period, such as 30 or 45 minutes, and because the employee could not be expected to eat elsewhere in such a short meal period.[20] Accordingly, to exclude a meal from an employee's income on this basis, the employer must demonstrate all of the following three elements--

(1) the employee is restricted to a short meal period (e.g., 30 or 45 minutes),

(2) the restricted meal period is necessitated by the employer's business, and

(3) the employee is not able to eat elsewhere during such restricted meal period.

- **Is the employee restricted to a short meal period?**

First, in determining whether an employee is, in fact, restricted to a short meal period (e.g., 30 or 45 minutes), it is important to consider whether the employer enforces the short meal period.

- **Why is the employee restricted to a short meal period?**

Second, the short meal period must be necessitated by the employer's business. This requirement is met if a peak workload involving the employee's duties exists during the meal period[21] or if the employee's duties must be almost continuously performed and there are insufficient remaining employees to perform such duties. Whether the employer consistently imposes the short meal period on employees with substantially similar duties may be relevant in determining whether the short meal period imposed on some employees is necessitated by the employer's business.

This requirement is not met if the employer could otherwise lengthen the meal period if the employee's work day was lengthened or if breaks were combined.[22] Thus, an employer's reluctance to lengthen an employee's work day due to the effect on the next shift is irrelevant. The mere fact that a union

---

[20] Section 1.119-1(a)(2)(ii)(b).

[21] Section 1.119-1(a)(2)(ii)(b) and (f) (Example 3). See Rev. Rul. 71-411, 1971-2 C.B. 103 (excluding from income meals that were provided to night employees who were limited to 30-minute meal periods due to their workloads and who could not be expected to eat elsewhere during that period because many outside eating facilities were closed).

[22] Section 1.119-1(a)(2)(ii)(b).

contract, employment agreement, or other employment material requires a short meal period, without an underlying substantial noncompensatory business reason, does not satisfy this requirement.

- **Could the employee eat elsewhere during the short meal period?**

Third, the employee must not be able to eat elsewhere during the short meal period. In making this determination, it is important to consider--

- the number of facilities in the employer's vicinity, and
- their serving/seating capacities.

In general, in determining the number of facilities, all facilities in the area must be considered, including independently-owned facilities on the employer's premises. An employee's access to a vehicle or other transportation (public or private) may increase the number of facilities at which the employee could eat within the short meal period. However, it may be appropriate to exclude those facilities that are luxuriously priced for particular employees.

The mere existence of a company policy, without an underlying substantial noncompensatory business reason, that prohibits employees from patronizing certain facilities or from leaving the premises altogether is irrelevant in determining whether the employee could eat elsewhere within his short meal period.

D. EMERGENCY CALL EMPLOYEES

The regulations provide that a meal is furnished for a substantial noncompensatory business reason of the employer when the meal is furnished to an employee during his working hours to have the employee available for emergency call during his meal period. In order to demonstrate this, the employer must show that the employer's business has experienced or can reasonably expect to experience emergencies that have resulted, or will result, in the employer calling on the employee to perform his job during his meal period.[23]

Accordingly, to exclude a meal from an employee's income on this basis, the employer must demonstrate all of the following four elements--

---

[23] Section 1.119-1(a)(2)(ii)(a).

(1) the event is an emergency,

(2) the emergency has occurred or is reasonably likely to occur,

(3) the employee's duties require him to respond to the emergency during a meal period, and

(4) the employee has been or is reasonably likely to be called back from a meal period to respond to the emergency.

- **Is the event an emergency?**

First, the event for which the employee is available must be an emergency. While the term "emergency" is not explicitly defined in the regulations, the regulatory example illustrating this rule involved hospital employees who responded to emergencies.[24] An emergency is an "unexpected, serious occurrence or situation urgently requiring prompt action." Webster's II New Riverside University Dictionary 427 (1994). Other examples of "emergencies" include crime,[25] serious health-related situations, and business shutdowns caused by computer "crashes" or property disasters.[26]

- **Has the emergency occurred or is it reasonably likely to occur?**

Second, the emergency must have occurred or be reasonably likely to occur.[27] An emergency that is extremely rare or very unlikely to happen may not satisfy this requirement.

---

[24] Section 1.119-1(f) (Example 9).

[25] Accordingly, security personnel who are needed to respond to events that are reasonably likely to occur (for example, theft or assault) may often be considered to receive the meals for a substantial noncompensatory business reason.

[26] Cf. Rev. Rul. 71-411 (holding that meals provided to employees who needed to be available to respond to "urgent business" or a "special project" and who have been called upon during meal periods to perform such duties were excludable from income).

[27] Section 1.119-1(a)(2)(ii)(a).

- **Is the employee required to respond to the emergency during a meal period?**

Third, the employee's duties must require him to respond to the emergency during a meal period. Mere status as an "on-call" employee or the mere existence of a company policy that requires an employee to stay on the premises during a meal period, without an underlying substantial noncompensatory business reason, is insufficient.

- **Has the employee been called back or is the employee reasonably likely to be called back?**

Fourth, the employee must have been or be reasonably likely to be called back from his meal period to respond to the emergency. Whether it is likely that the employee be called back from lunch, in part, depends on how many other employees who are not on their meal period are available to respond to an emergency.

IV. CONCLUSION

Whether an employer furnishes a meal to an employee for the convenience of the employer (within the meaning of section 119 and the applicable regulations) that is excludable from gross income and wages is based upon all the surrounding facts and circumstances. While these training materials for the hospitality industry provide a comprehensive discussion of both relevant and irrelevant factors in making such determination, the discussion is not exhaustive and there may be other factors to consider in a manner consistent with the discussion contained herein.

ADDENDUM

BOYD GAMING CORP. V. COMMISSIONER

A. BACKGROUND

In Boyd Gaming Corp. v. Commissioner, 106 T.C. 343 (1996) (Boyd I), the Tax Court considered whether the taxpayer could deduct the full cost of the meals provided in employee dining rooms to both casino and hotel employees. In denying the Respondent's Motion for Partial Summary Judgment, the Tax Court held that the taxpayer could fully deduct the expenses of the meals under section 274(n)(2)(B) and section 132(e)(2) as a de minimis fringe eating facility if substantially all of the meals were provided for the convenience of the employer within the meaning of section 119.[28]

In Boyd Gaming Corp. v. Commissioner, 72 T.C.M. (RIA) 2912 (September 30, 1997) (Boyd II), the Tax Court considered whether section 119 applied to the meals at issue provided by the taxpayer to the casino and hotel employees. Citing Kowalski, supra, the court held that "a substantial noncompensatory business reason requires a business nexus under which the 'employee must accept . . . [the] meals . . . in order properly to perform his duties."[29] However, "[a] meal need not be indispensable to an employee's duties to be excludable under section 119."[30]

The Tax Court concluded that less than substantially all of the employees received meals that were excludable from gross income under section 119 and, thus, the employee dining rooms were not de minimis eating facilities under section 132(e)(2).[31] Therefore, the taxpayer's deduction for the costs of the meals was limited to 80 percent under section 274(n)(1), as in effect for the years at issue.

While the taxpayer's employment tax liability was not at issue in either Boyd I or Boyd II, the conclusion in Boyd II that some of the meals were not provided for the convenience of the

---

[28] At the time of the opinion, the "substantially all" rule of section 1.119-1(a)(2)(e) of the regulations was still in effect.

[29] Boyd Gaming at 2938.

[30] Boyd Gaming at 2938, citing Caratan v. Commissioner, 442 F.2d 606, 609 (9th Cir. 1971), rev'g 52 T.C. 960 (1969).

[31] See note 28, supra.

employer leads to the conclusion that those meals were income and were arguably wages to the employees and should have been treated accordingly for all employment tax purposes.

The taxpayer in Boyd II has appealed the decision to the Court of Appeals for the Ninth Circuit. The appeal is still in process. Unless and until the case is reversed or modified on appeal, the Service will apply the specific holdings in Boyd II to all taxpayers in similar situations to the extent the relevant facts are the same.

B. SPECIFIC HOLDINGS

The Tax Court's holdings in Boyd II are consistent with the principles outlined in the materials. Boyd II, however, is the first case in which a court specifically applied section 119 to the facts of a hospitality industry taxpayer. Specifically, the Tax Court held as follows:

- Whether a meal is provided for the convenience of the employer is determined on an employee-by-employee and a meal-by-meal basis.[32]

- A meal that is furnished to an employee for a meal period other than one during which the employee works is not furnished for the convenience of the employer, such as one of two meals provided to a non-food service employee during one eight-hour shift.[33]

- The extent to which an employer monitors its policies regarding the time and number of meals provided to its employees may be relevant in determining which meals are provided for the convenience of the employer.[34]

- Each separate snack or course provided to an employee during each break constitutes a meal for purposes of section 119.[35]

- Restaurant and food service employees do not include employees of free-standing bar areas, such as cocktail waitresses and bartenders.[36]

---

[32] Boyd Gaming, at 2933, 2937, and 2938.

[33] Id. at 2939-40.

[34] See Id. at 2939-40.

[35] Id. at 2940.

[36] Id. at 2944.

- The term "emergency" does not include "fairly routine occurrences" or "duties concerning the operation of a casino in its regular course of business," such as "plumbing and electrical problems, backed-up hotel or restaurant lines, jackpot payouts, a surge in gambling, [and] equipment failures."[37]

- Meals provided to the relevant employees for one or more of the following reasons are not provided for the convenience of the employer: (1) the employer's internal security concerns, (2) the employer's concern that the employee not wear his uniform in a competitor's restaurant, (3) the employer's concern that the employee might be tardy in returning to the premises, or (4) the employer's concern for a graveyard shift employee.[38]

While the court only addressed the facts of the case before it, many of the facts appear to be common to taxpayers in the hospitality industry.[39] Consequently, the court's holdings regarding the application of section 119 are significantly helpful in analyzing the employee meal issue in connection with examinations of other hospitality industry taxpayers.

---

[37] Id. at 2941.

[38] Id. at 2945.

[39] Consistent with the specific holdings of Boyd II, company policies that are not enforced or that are not related to the employee's proper performance of his duties should not be considered in determining whether the employee's meal is provided for the convenience of the employer. However, company policies that are duly enforced and that are related to the employee's proper performance of his duties may be relevant to the application of section 119.