Boyd Gaming Corporation v. Commissioner

Announcement 99–77

The Service (1) acquiesces in the opinion, (2) withdraws proposed training materials relating primarily to the application of section 119 of the Internal Revenue Code to employer-provided meals in the hospitality industry, and (3) terminates the settlement initiative related to this issue.

The Internal Revenue Service (Service) announces three actions as a result of the opinion of the United States Court of Appeals for the Ninth Circuit in *Boyd Gaming Corporation v. Comm'r,* ___ F.3d ___ (9th Cir. May 12, 1999), reversing T.C. Memo 1997–445 T.C. Dkt. Nos. 3433–95, 3434–95 (1997).

First, the Solicitor General has decided not to file a petition for a writ of certiorari with the United States Supreme Court with respect to the Ninth Circuit's opinion. Accordingly, the Service announces today that it acquiesces in the Ninth Circuit's opinion in *Boyd Gaming Corporation*. The acquiescence will appear in 1999–32 I.R.B. (August 9, 1999), and a copy of the Action on Decision memorandum in support of that acquiescence accompanies this announcement.

Second, the Service withdraws the proposed training materials described in Announcement 98–77, 1998–34 I.R.B. 30. See also Announcement 98-100, 1998–46 I.R.B. 42. These materials relate primarily to the application of section 119 of the Internal Revenue Code to meals provided to employees in the hospitality industry.

Finally, the Service terminates the settlement initiative relating to employee meals described in Announcement 98–78, 1998–34 I.R.B. 30. Pending cases involving this issue will be resolved on the basis of their particular facts in light of the Ninth Circuit's opinion in *Boyd Gaming Corporation* and the Service's acquiescence in that opinion.

The principal author of this announcement is Thomas Burger, Director, Office of Employment Tax Administration and Compliance (OETAC). For further information regarding this announcement contact Mr. Burger at (202) 622-3650 (not a toll-free call).

ACTION ON DECISION

Subject: Boyd Gaming Corporation v. Commissioner, __F.3d__ (9th Cir. 1999), rev'g T.C. Memo. 1997–445 T.C. Dkt. Nos. 3433–95, 3434–95

Issue: Whether a meal furnished by the taxpayer/employer on its business premises to an employee is furnished for "the convenience of the employer" within the meaning of that phrase in section 119 of the Internal Revenue Code.

Discussion: Section 119 of the Internal Revenue Code provides that an employee's gross income does not include the value of any meal furnished to him in kind by or on behalf of his employer for the convenience of the employer if the meal is furnished on the employer's business premises. Treas. Reg. § 1.119–1(a)-(2) provides that a meal is furnished for "the convenience of the employer" if it is furnished for a substantial noncompensatory business reason of the employer. Whether an employer-provided meal is furnished for "the convenience of the employer" is important to the employer for federal tax purposes because the interplay of sections 119, 132, and 274 of the Internal Revenue Code determines whether the employer can fully deduct the cost of the meal.

During the years in issue, the taxpayer furnished free meals on its business premises to all of its employees, most of whom were required to stay on the taxpayer's business premises during their working hours primarily because of the particular security concerns of the casino industry. The taxpayer argued that, because its employees were required to remain on its business premises during their working hours, the meals it provided to its employees were provided for a substantial noncompensatory business reason.

The Tax Court held that the taxpayer's stay-on-the-business-premises requirement did not satisfy the convenience-of-the-employer requirement of section 119, determining that there must be a "closer and better documented connection between the necessities of the employer's business and the furnishing of free meals."

The Ninth Circuit reversed the Tax Court decision. The Ninth Circuit found that the taxpayer's particular security and other business-related concerns provided sufficient justification for its policy of requiring employees to stay on the employer's business premises to satisfy "the convenience of the employer" test of section 119. Specifically, the Ninth Circuit stated that –

> Boyd was required to and did support its closed campus policy with adequate evidence of legitimate business reasons. While reasonable minds might differ regarding whether a "stay-on-the-premises" policy is necessary for

> security and logistics, the fact remains that the casinos here operate under this policy. Given the credible and uncontradicted evidence regarding the [business] reasons underlying the "stay-on-the-premises" policy, it is inappropriate to second guess these reasons or to substitute a different business judgment for that of Boyd.

In light of the Ninth Circuit's opinion, the Service will not challenge whether meals provided to employees of casino businesses similar to that operated by Boyd Gaming meet the section 119 "convenience of the employer" test where the employer's business policies and practices would otherwise preclude employees from obtaining a proper meal within a reasonable meal period. A bona fide and enforced policy that requires employees to stay on the employer's business premises during their normal meal period is only one example of the type of business practice that could justify the employer's providing of meals that would qualify for section 119 treatment. Another example could be a practice requiring "check-out" procedures for employees leaving the premises in order to address the same type of security concerns that were relevant in Boyd Gaming where these procedures have the same practical effect.

More generally, in applying section 119 and Treas. Reg. § 1.119–1, the Service will not attempt to substitute its judgment for the business decisions of an employer as to what specific business policies and practices are best suited to addressing the employer's business concerns. By the same token, to paraphrase the Ninth Circuit, "it would not [be] enough for [an employer] to wave a 'magic wand' and say it had a policy in order [for meals to qualify under section 119]." Thus, the Service will consider whether the policies decided upon by the employer are reasonably related to the needs of the employer's business (apart from a desire to provide additional compensation to its employees) and whether these policies are in fact followed in the actual conduct of the business. If such reasonable procedures are adopted and applied, and they preclude employees from obtaining a proper meal off the employer's business premises during a reasonable meal period, section 119 will apply.

Recommendation: Acquiescence

Reviewer: Paul C. Feinberg,
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Approved: Stuart L. Brown,
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By: Nancy J. Marks,
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