Office of Chief Counsel
Internal Revenue Service
memorandum

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subject: Employer-Provided Eating Facilities

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

Legend

Taxpayer =

Year 1 =

Year 2 =

Year 3 =

This memorandum responds to your inquiry concerning whether the value of certain employer-provided meals are excludable from employees' gross incomes under section 132(e)(2).

Issue

May crew members exclude the value of catered meals that Taxpayer provides them while they perform their flight duties from their gross incomes under section 132(e) of the Internal Revenue Code (the Code)?

Conclusion

The meals are not excludable under section 132(e) of the Code because they are not provided at an "eating facility."

Facts

Taxpayer provides catered meals on its planes for crew members to eat while they are performing their flight duties. The meals are prepared by an independent third party vendor at a facility on the ground. The facility is not owned, leased, or operated by the employer. The crew has to report for duty at least one hour prior to their flight and remain at least 30 minutes after the flight, possibly due to safety checks. During the pre-flight/ in-flight/ post-flight time period, the crew is not allowed to leave the plane. The amount of food provided to the crew is dependent upon the time period, which the employer refers to as "Duty Time," during which the crew must remain on the plane:

- beverages provided regardless of duration (coffee, water, juice, etc.)
- domestic flights with the Duty Time exceeding hours = 1 in-flight snack
- domestic flights with the Duty Time exceeding hours = 1 in-flight meal
- domestic flights with the Duty Time exceeding hours = 2 in-flight meals
- international flights with the Duty Time exceeding hours = 1 in-flight snack
- international flights with the Duty Time exceeding hours = 1 in-flight meal
- international flights with the Duty Time exceeding hours = 2 in-flight meals

The planes have limited seating areas at which crew members may consume the meals. Photographs provided to the IRS indicate that the only such areas are the seats that are located on or near the flight deck (namely, a seat for the pilot(s) and possibly a jump seat).

The IRS proposed an adjustment to the amount that Taxpayer deducted for expenses incurred providing meals to its flight crews. Taxpayer took a full deduction, and the IRS proposed limiting the deduction to 50 percent of the expenses incurred based on section 274(n)(1), which limits the amount allowed as a deduction for food or beverages to 50 percent of the expenses incurred. Taxpayer disputed the adjustment, arguing that the meals were excluded from the limitation by way of 274(n)(2)(B), which excepts food or beverages from the 50 percent limitation if they qualify as de minimis fringe benefits under section 132(e). Taxpayer seeks to deduct expenses attributable to meals in the amounts of $ for Year 1, $ for Year 2, and $ for Year 3.

Law

Section 61(a)(1) of the Code provides that gross income includes compensation for services, including fringe benefits, except as otherwise provided.

Section 119(a) of the Code allows an employee to exclude the value of any meals furnished by or on behalf of his employer if the meals are furnished on the employer's business premise for the convenience of the employer.

Section 1.119-1(a)(1) of the income tax regulations states that the question of whether meals are 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)(2)(i) of the income tax regulations provides meals furnished by an employer without charge to the employee will be regarded as furnished for the convenience of the employer if such meals are furnished for a substantial noncompensatory business reason of the employer.

Section 1.119-1(a)(2)(ii)(b) of the income tax regulations provides that meals will be regarded as furnished for a substantial noncompensatory business reason of the employer if the meals are furnished to the employee during the employee's working hours because the 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.

Section 1.119-1(a)(2)(ii)(c) of the income tax regulations provides that meals will be regarded as furnished for a substantial noncompensatory business reason of the employer if the meals are furnished to the employee during the employee's working hours because the employee could not otherwise secure proper meals within a reasonable meal period.

Section 119(b)(4) of the Code provides that if the employer furnishes meals to employees at the employer's place of business and the employer furnishes the meals to more than half of the employees for the convenience of the employer, the meals furnished to all employees will also be regarded as furnished for the convenience of the employer.

Section 132(a)(4) of the Code excludes from gross income any fringe benefit which qualifies as a de minimis fringe. Section 132(e)(2) of the Code provides that the value of meals provided to employees at an employer-operated eating facility is an excludable de minimis fringe benefit if the revenue derived from the facility normally equals or exceeds the direct operating costs of the facility.

Section 1.132-7(a)(2) of the income tax regulations provides that in determining if the revenues derived from the facility normally equal or exceed the direct operating costs of the facility, the employer can disregard the costs and revenues attributable to meals provided that can be reasonably determined to be excludable under section 119 of the Code.

For Taxpayer's eating facility to qualify as a de minimis fringe benefit, the facility must meet each of the requirements under section 132(e)(2) of the Code. Namely, this subsection provides that the term "de minimis fringe" includes the operation by an employer of any eating facility for employees if (A) such facility is located on or near the business premises of the employer, and (B) revenue derived from such facility normally equals or exceeds the direct operating costs of such facility. However, the above sentence applies with respect to a highly compensated employee only if access to the facility is available on substantially the same terms to each member of a group of employees that is defined under a reasonable classification set up by the employer that does not discriminate in favor of highly compensated employees.

Section 162(a) of the Code allows a deduction for the ordinary and necessary expenses paid or incurred in carrying on any trade or business, including the expenses of traveling away from home. The value of meals qualifying for the exclusion of section 119 ordinarily is deductible by the employer as a compensation expense under section 162.

An amount otherwise deductible under section 162(a) may be subject to disallowance or limitation by section 274.

Under Section 274(n), the deduction is limited, as a general rule, to 50 percent of the amount expended for meals or beverages.

Section 274(n)(2) of the Code, however, sets forth several exceptions to section 274(n)(1). Section 274(n)(2)(B) allows a full deduction for "an expense for food or beverages" if "such expense is excludable from the gross income of the recipient under section 132 by reason of subsection (e) thereof (relating to de minimis fringes)."

Analysis

Although it appears that the meals are excludable from crew members' gross incomes under section 119 of the Code, they are not excludable under section 132 of the Code. Taxpayer may therefore deduct only 50 percent of the costs associated with providing the meals.

In particular, the limited information we have indicates that Taxpayer is indeed likely to be able to sustain its burden of establishing that the meals satisfy the requirements of section 119. First, it appears that the meals satisfy the requirement of section 119 that the meals be provided to employees by or on behalf of Taxpayer; the meals are provided, to this end, by a third party vendor with whom Taxpayer has entered into a contract. It also appears that the meals provided meet the requirement of section 119 that Taxpayer provide them on its business premises; that is, the meals are provided on the airplanes on which the employees provide services to Taxpayer. Finally, the facts and circumstances indicate that the meals meet the requirement of section 119 that they are provided for a substantial noncompensatory business reason ; namely, crew members must remain on the airplanes during their meal periods.

What is ultimately at issue in this matter is the extent to which Taxpayer can deduct the costs it incurs to provide its employees with food and beverages.

Although the Taxpayer is entitled to deduct these costs as trade or business expenses under section 162, section 274(n) limits the extent of this deduction. Namely, section 274(n)(1) limits the Taxpayer's deduction to 50 percent of these costs.

The expenses are excepted from this 50 percent limitation if they are excludable as de minimis fringe benefits under section 132(e). The conclusion that these meals are excludable under section 119 is not dispositive of the issue of whether they are excludable under section 132(e).

The legislative history of section 274(n) clarifies that the 50 percent limitation applies even to expenses associated with meals that are excludable under section 119. H.R. Conf. Rep. 99-841 specifies that the 50 percent limitation applies to "the amount of any deduction otherwise allowable for meal expenses, including . . . meals furnished on an employer's premises to its employees (whether or not such meals are excludable from the employee's gross incomes under sec. 119)." This conference report further indicates that Congress did not intend for this limitation to apply to meals excludable only under section 119 when it stated that the exception to the limitation applied only to:

> (1) reimbursed meal expenses (in which case the employer or person making the reimbursement is subject to the 80-percent rule); (2) employer-furnished meals that are excludable from the employee's gross income as de minimis fringes under Code section 132(e) (including meals at certain eating facilities excludable under sec. 132(e)(2)); (3) meals fully taxed to the recipient as compensation; and (4) items sold to the public (such as expenses incurred by restaurants or dinner theaters for food or entertainment provided to their customers), or furnished to the public as samples or for promotion (such as expenses incurred by a hotel in furnishing complimentary lodging to potential customers).

In sum, this conference committee report specifies both that the 50 percent limitation applies to provision of meals that are excludable only under section 119, and that the provision of meals must satisfy the particular requirements of section 132(e)(2) to be exempted from this 50 percent limitation.

Taxpayer asserts that the costs are, indeed, excludable under section 132(e)(2). The Ninth Circuit's decision in Boyd Gaming Corp. v. Comm'r, 177 F.3d 1096 (9th Cir. 1999), lends some support to this argument. The court held in Boyd that an employer-provided meal meets the revenue/direct operating cost test of section 132(e)(2) if the employee could exclude the value of that meal under section 119. As noted above, it appears that employees could exclude the value of the majority—if not all—of the meals at issue in the present matter under section 119. These meals therefore meet the

revenue/direct operating cost test of section 132(e)(2). It is important to note, however, that Boyd is distinguishable from the instant incase insofar as the meals in Boyd were provided at a cafeteria on the employer's business premises.

That the meals are excludable under section 119 does not, however, mean that they necessarily qualify for exclusion under section 132(e)(2). To conclude that any meal that meets the revenue/direct operating cost test of section 132(e)(2) by virtue of being excludable under section 119 is a de minimis fringe benefit would effectively nullify the status of section 119 as a stand-alone exclusion. That is, because employer-provided meals that meet the requirements of section 132(e) are fully deductible, while those that meet the requirements of section 119 are only partially deductible, taxpayers would always exclude the meals under section 132(e). Congress did not intend this result. When Congress amended the Code to include the exception for de minimis fringe benefits in the Deficit Reduction Act of 1984, it explicitly indicated that it did not intend to alter the reach of section 119 when it stated in the House Report that accompanied the amendment that, "Free meals provided on an employer's premises to employees for the convenience of the employer are excludable from income to the extent provided by present-law section 119, which is not amended by this bill." (emphasis added). When Congress codified Boyd Gaming in 1997, it similarly indicated that the provision of a meal does not qualify for exclusion under section 132 merely by virtue of qualifying for exclusion under section 119 when it stated, in the Conference Committee report that accompanied the amending of section 132(e), that "meals that are excludable from employees' incomes because they are provided for the convenience of the employer pursuant to section 119 of the Code are excludable as a de minimis fringe benefit and therefore are fully deductible by the employer, provided that they satisfy the relevant section 132 requirements." (emphasis added).

Among the requirements of section 132(e) is that the employer provide the meal at an "eating facility." Namely, on its face, section 132(e)(2) does not exclude from recipients' gross incomes the value of *all* employer-provided meals that meet the revenue/operating cost test of section 132(e)(2); rather, this exclusion extends only to such meals provided at employer-operated *eating facilities*. Although the Code, Regulations, and cases never explicitly define the term "eating facility," they do imply that an "eating facility" means an identifiable location that is designated for the preparation and/or consumption of meals. To this end, describing the requirements of meeting the 132(e)(2) exclusion, section 1.132-7 of the Tax Regulations refers to "dining rooms" (see Treas. Reg. § 1.132-7(a)(1)(ii) ("each dining room . . . in which meals are served is treated as a separate eating facility"); Treas. Reg. § 1.132-7(b)(ii) ("direct operating costs test may be applied separately for each dining room")) and "cafeterias" (see Treas. Reg. § 1.132-7(a)(1)(ii) ("each . . . cafeteria in which meals are served is treated is a separate eating facility"); Treas. Reg. § 1.132-7(b)(ii) ("direct operating costs test may be applied separately for each . . . cafeteria"); Treas. Reg. § 1.132-7(a)(4) Ex. 1 ("Assume that a not-for-profit hospital system maintains cafeterias for the use of its employees and volunteers")). Further, the regulations contemplate that an eating facility is a location at which individuals are employed to prepare and/or serve food, stating to

this end that components of the direct operating costs of an eating facility include "personnel whose services relating to the facility are performed on the premises of the eating facility" (Treas. Reg. § 1.132-7(b)(ii)) and "labor costs attributable to cooks, waiters, and waitresses." (Treas. Reg. § 1.132-7(b)(ii)). No guidance raises the inference that the exclusion of section 132(e) extends to all meals provided on the employer's business premises, irrespective of whether or not they are provided at an "eating facility."

CONCLUSION

The employer-provided meals at issue in this matter are not excludable as de minimis fringe benefits under section 132(e)(2) of the Code because they are not provided at eating facilities.

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Please contact me at (202) 622-6040 if you have any further questions.