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Issue Contents



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## IRS Guidance on "Convenience of the Employer" for Exclusion of Meals Provided to Employees

by Robert P. Achenbach, Jr.*

In general, distributions of property as payment for services to employees, including food produced or purchased by the business, is taxable to the employees as income[1] is taxable to the employer/producer to the extent the market value of the property exceeds the employer's basis in the property,[2] and is deductible by the employer/producer if the basis equals the fair market value of the property.

**Employee Income Exclusion For Meals Provided by Employer**

A special rule under I.R.C. § 119 generally allows the value of meals provided to employees to be excluded from the employees' income and still be deductible by the employer where the meals are provided at the employment premises[3] and for the convenience of the employer.[4]

Under the regulations,[5] 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. Because I.R.C. § 119 is an exception to inclusion of the value of the meals in income, the burden is on the employer to prove that the meals are provided for the convenience of the employer.[6]

The regulations provide that meals furnished by an employer to an 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.[7]

The regulations give a couple of specific instances of a substantial noncompensatory business reason:

(1) Meals will be regarded as furnished for a substantial noncompensatory business reason of the employer when the meals are furnished to an employee during the employee's working hours in order to have the employee available for emergency calls during the meal period.[8] In order to demonstrate that meals are furnished to an employee to have the

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Happy Holidays to You and Yours!

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employee available for emergency calls, it must be shown that emergencies have actually occurred, or can reasonably be expected to occur, in the employer's business which have resulted, or will result, in the employer calling on the employee to perform the employee's job during the meal period.

(2) A substantial noncompensatory business reason can be a situation where the employer's business is such that the employee must be restricted to a short meal period (30 to 45 minutes), the employee cannot be expected to eat elsewhere in such a short period, and where peak work load occurs during meal hours.[9]

(3) 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, for example where there are insufficient eating facilities in the vicinity of the employer's premises.[10]

(4) However, meals will not be regarded as furnished for a noncompensatory business reason of the employer when the meals are furnished to the employee to promote the morale or goodwill of the employee, or to attract prospective employees.[11]

The IRS has released a Chief Counsel Advice Memorandum[12] discussing the standards for determining whether meals provided to employees are excludible from the employees' income and deductible by the employer.

**Facts of the Memorandum**

Although the memorandum discusses the issues more generally, the factual focus of the memorandum involves employers who claim the I.R.C. § 119 deduction for meals provided to employees in separate rooms at the employers' business premises. The employers provided a variety of "substantial noncompensatory business reasons" for supplying the meals. The given reasons included: (1) facilitating employee innovation, collaboration and productivity; (2) enabling employees to work long days and overtime; (3) promoting healthier eating habits; and (4) discouraging the unintentional disclosure of trade secrets through conversations in public restaurants and other eating locations.

**Standards for Determining "Convenience of the Employer"**

The IRS first discussed *Kowalski v. Commissioner*[13] which held that "convenience of the employer" means that an employee must accept the employer-provided meals in order properly to perform the employee's duties. That holding was reinforced by *Boyd Gaming Corp. v. Commissioner*[14] which held that an employer's policy requiring employees to "stay on the premises" was sufficient to demonstrate that meals provided to the employees were provided for the convenience of the employer under I.R.C. § 119, even if the employees had the option to refuse the meals.

In the memorandum, the IRS noted its acquiescence of *Boyd Gaming Corp.*, where the IRS recognized that an employer's meal policy could be sufficient proof of the "convenience of the employer" requirement of Section 119 so long as the policy reasonably related to the needs of the employer's business and the policy was in fact followed by the employer in the conduct of its business. Thus, the memorandum states that the IRS, in determining whether an employer's meal policy has a substantial noncompensatory business reason, will examine whether the employer has proof that the policy was reasonably required by the business and whether the employer has proof of actually following the policy.[15] The memorandom gives examples of proof of a meals policy actually enforced by an employer: (1) a written employee manual or employee contracts which state the meals policy, (2) employee disciplinary records showing disciplinary action for violating the policy, or (3) employee time records showing the existence of short meal times.[16]

**In conclusion**

Even though most farm employees would easily meet the two requirements for exclusion of the value of meals provided by the farmer or rancher, given the rural location and need for employees throughout the day, farm and ranch businesses should create some sort of record of their employee meal policy and enforcement of it to avoid any question on an audit.

**ENDNOTES**

[1] See I.R.C. § 61; Treas. Reg. §§ 1.61-2(d), 1.61-9(b).

[2] See Harl and Achenbach, *Agricultural Law*, § 28.06[2][b] (2018); Achenbach, *Farm Income Tax Manual*, § 3.03[4] (2018).

[3] The term "business premises of the employer" generally means the place of employment of the employee and includes leased farm or ranch land. See Commissioner v. Anderson, 371 F.2d 59 (6th Cir. 1966), *rev'g* 42 T.C. 410 (1964) (meals must be provided either at place of employment or where the employee performs significant of duties). See Harl and Achenbach, *Agricultural Law*, § 57.03[2][c] (2018); Achenbach, *Farm Income Tax Manual*, § 3.03[4] (2018).

[4] See I.R.C. § 119. See Harl and Achenbach, *Agricultural Law*, § 57.03[2] (2018). Note that under *Rowan Cos. v. United States, 452 U.S. 247 (1981)*, meals provided for the convenience of the employer are also not subject to FICA or FUTA taxes.

[5] Treas. Reg. § 1.119-1(a)(1).

[6] See Bussen v. Comm'r, T.C. Memo. 2014185); Robertson v. Comm'r, T.C. Memo.1997–526.

[7] Treas. Reg. § 1.119-1(a)(2)(i).

[8] Treas. Reg. § 1.119-1(a)(2)(ii)(a).

[9] Treas. Reg. § 1.119-1(a)(2)(ii)(b).

[10] Treas. Reg. § 1.119-1(a)(2)(ii)(c).

[11] Treas. Reg. § 1.119-1(a)(2)(iii).

[12] AM 2018-004, Oct. 23, 2018.

[13] 434 U.S. 77 (1977).

[14] 177 F.3d 1096 (1999), *acq.*, A.O.D. 1999-010 (Aug. 10, 1999).

[15] See Ltr. Rul. 9602001, Sept. 15, 1995 (meals not provided for substantial noncompensatory business reason where (1) shortened meal period not required by any business need of employer but required only to shorten work day of employees; (2) eating facilities not required, since several commercial eating facilities were

nearby; and (3) other employer concerns, such as availability of alcohol products at local restaurants and increased traffic in area, were not sufficient business reasons for shortened meal periods).

[16] See, e.g., Incorporated Trustees of Gospel Worker Soc. v. United States, 85–2 U.S. Tax Cas. (CCH) ¶ 9828 (Fed. Cir. 1985), *aff'g* 6 Cl. Ct. 308 (1984) (value of meals and lodging provided to religious society members living in society printing business premises not excludible from income when employees could adequately perform duties without being provided free meals and lodging).

# CASES, REGULATIONS AND STATUTES

## BANKRUPTCY

### GENERAL

**DISCHARGE**. The debtors, husband and wife, owned and operated a farm raising cattle and tobacco. The debtors obtained operating loans from the creditor bank and granted security interests in farm equipment and crops. After the debtors defaulted on the loans, the bank obtained judgments against the debtors and the debtors filed for Chapter 13. After the Chapter 13 case was dismissed without a discharge, the debtors liquidated their farm assets and filed for Chapter 7, listing the amount owed to the bank as an unsecured claim. The bank sought summary judgment that its claim was nondischargeable under Section 523(a)(2)(A), (2)(B), (4), and (6) or Section 727(a)(3), (4), (5), and (7). The court held that an issue of fact remained on the Section 523(a)(2)(A) (fraud) claim and denied summary judgment on that claim. The bank argued that its claim was nondischargeable under Section 523(a)(2)(B) because the financial documents submitted by the debtors in applying for the loans were materially false. Section 523(a)(2)(B) denies a discharge—

"for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by— . . .

(B) use of a statement in writing—

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; . . ."

The court denied summary judgment on this issue because material questions of fact remained as to whether the loan documents were false. Summary judgment was similarly denied because of questions of facts as to the Section 523(a)(4) (fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny) and Section 523(a)(6) (willful and malicious injury) claims. Section 727(a)(3) provides that a court shall grant a discharge unless: "the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case . . .." Section 727(a)(5) provides that a court shall grant a discharge unless "the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities . . .." The court found that the debtors failed to provide evidence to account for the loss of value of crops and cattle. Thus, the court held that the debtors failed to account for the disparities between the assets claimed in the financial documents supporting their loan applications and the assets listed on their Chapter 7 schedules; therefore summary judgment denying discharge was granted to the bank. ***In re* Tingle, 2018 Bankr. LEXIS 3654 (Bankr. E.D. Ky. 2018)**.

## FEDERAL ESTATE AND GIFT TAXATION

**GENERATION SKIPPING TRANSFERS**. The taxpayers, husband and wife, established an irrevocable trust prior to 2000 for their children and descendants. The husband funded the trust with stock. The trust was susceptible to potential generation skipping transfer (GST) tax; however, the taxpayers' attorney told them that the trust was exempt from GST tax. Thus, the taxpayers did not file a Form 709, *United States Gift (and Generation-Skipping Transfer) Tax Return*, to report the transfer to the trust and signify consent to treat all gifts made by both spouses as having been made one-half by each under I.R.C. § 2513. Accordingly, no GST exemption was allocated to the transfer to the trust. A second attorney discovered the error and the taxpayers filed an untimely Form 709 which signified their consent to treat the transfer as made one-half by each spouse under I.R.C. § 2513. In addition, the taxpayers each allocated their GST exemption to the one-half portion of the transfer that was attributable to them based on the consent under Section 2513. The taxpayers then requested an extension of time pursuant to I.R.C. § 2642(g) and Treas. Reg. §§ 301.9100-1 and 301.9100-3 to make a timely allocation of GST exemption to the husband's portion of the transfer to the trust, effective as of the date of the transfer to the trust. I.R.C. § 2513(a)(1) provides that a gift made by one spouse to any person other than his spouse shall be considered as made one-half by him and one-half by his spouse, but only if at the time of the gift each spouse is a citizen or resident of the United States. I.R.C. § 2513(a)(2) provides that I.R.C. § 2513(a)(1) shall apply only if both spouses have signified (under the regulations provided for in I.R.C. § 2513(b)) their consent to the application of I.R.C. § 2513(a)(1) in the case of all such gifts