INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

September 14, 2018

Number: **201903017**
Release Date: 1/18/2019

Third Party Communication: None
Date of Communication: Not Applicable

Index (UIL) No.: 119.00-00, 132.04-00, 132.04-02
CASE-MIS No.: TAM-128519-17

SBSE:ET:Large Case

Taxpayer's Name:
Taxpayer's Address:

Taxpayer's Identification No
Year(s) Involved:
Date of Conference:
Date of Adverse Conference:

LEGEND:

Taxpayer =

ISSUE(S):

Is the value of meals and snacks that Taxpayer provided to employees in the headquarters offices during the tax years includable in employees' income and subject to employment taxes?

Specific Questions Presented:

(1) For purposes of applying section 119 of the Internal Revenue Code (Code), do *Boyd Gaming Corp. v. Commissioner*, 177 F.3d 1096 (9th Cir. 1999), A.O.D. 1999-010 (Aug. 10, 1999), and *Jacobs v. Commissioner*, 148 T.C. No. 24 (2017), preclude the IRS from substituting its judgment for the business decisions of Taxpayer as to: (1) the taxpayer's

business needs and/or concerns; and (2) what specific business policies or practices are best suited to addressing the taxpayer's business needs and/or concerns?

(2) Can Taxpayer satisfy its burden of proof, as a matter of law, to demonstrate that it has a substantial noncompensatory business reason for providing meals in the absence of written policies or tracking data?

(3) Is the ability of employees to (1) bring food from home, or (2) have food delivered relevant to assessing whether there are insufficient eating facilities in the vicinity of the employer's business premises pursuant to Treas. Reg. § 1.119-1(a)(2)(ii)(c)?

(4) Is the value of meals furnished to Taxpayer's employees excludable from gross income under section 119 of the Code as furnished for the convenience of the employer, if Taxpayer's stated business reasons for furnishing the meals include:

a) protecting confidential and proprietary information, including intellectual property by providing a secure environment for business discussions on business premises;
b) fostering collaboration and innovation by encouraging employees to stay on the Taxpayer's business premises;
c) protecting employees due to unsafe conditions surrounding Taxpayer's business premises;
d) providing healthy eating options for employees to improve employee health;
e) because, given Taxpayer's particular location and situation, employees cannot secure a meal within a reasonable meal period;
f) providing meals where the demands of the employees' job functions allow them to take only a short meal break but Taxpayer can only provide limited substantiation for this policy; or
g) providing meals so that employees are available to handle emergency outages that regularly occur?

(5) Has Taxpayer satisfied section 119(b)(4) of the Code by showing that at least half of its employees are furnished meals that are excludable under section 119?

(6) Is the value of meals furnished to employees excludable from gross income under section 132(e)(2) and the corresponding Treas. Reg. § 1.132-7?

(7) Is the value of snacks furnished to Taxpayer's employees for the same business reasons provided for furnishing meals excludable from gross income under section 119 as furnished for the convenience of the employer?

(8) Is the value of snacks furnished to employees excludable from gross income under section 132(e)(1) of the Code and the corresponding Treas. Reg. § 1.132-6?

(9) Do Taxpayer's snack areas meet the regulatory definition of "eating facility" under Treas. Reg. § 1.132-7 such that the value of snacks furnished to employees are excludable from gross income under section 132(e)(2) and the corresponding Treas. Reg. § 1.132-7? If not, are the snacks in these areas considered "meals" such that the value of the snacks must be determined using the 150% multiplier provided in Treas. Reg. § 1.61-21(j)?

(10) Is the value of meals and snacks furnished to employees excludable from gross income under section 119 by virtue of the "reasonable belief test" whereby the taxpayer claims it was reasonable to believe that the value of the meals and snacks was excludable from income under one or more applicable statutory exemptions?

(11) If the value of the meals and snacks provided by Taxpayer to its employees is includible in the employees' wages, is the amount of employment taxes owed determined under Exam's method, Taxpayer's method, or an alternative method?

CONCLUSION(S):

(1) *Boyd Gaming* and *Jacobs* do preclude the IRS from substituting its judgment for the business decisions of Taxpayer as to its business needs and concerns and what specific business policies or practices are best suited to addressing these business needs and concerns. However, these cases do not preclude the IRS from determining whether an employer actually follows and enforces its stated business policies and practices, and whether these policies and practices, and the needs and concerns they address, qualify as a substantial noncompensatory business reason for furnishing meals to employees within the meaning of the regulations under section 119 and the applicable judicial guidance.

(2) Taxpayers bear the burden of proving that they are entitled to exclusions. Employers who claim the exclusion from income and wages for meals furnished for the convenience of the employer must provide substantiation if requested concerning the business reasons the employer provides to support its claim of furnishing meals for the convenience of the employer. Employers who provide specific business policies as substantial noncompensatory business reasons for furnishing meals to employees must be able to substantiate that such policies exist in substance not just in form by showing they are enforced on the specific employees for whom the employer claims these policies apply and must demonstrate how these policies relate to the furnishing of meals to employees.

(3) Given the absence of bringing food from home as a factor in existing section 119 "convenience of the employer" analysis, this option should not be a consideration in determining whether an employee "could not otherwise secure proper meals within a reasonable meal period" under § 1.119-1(a)(2)(ii)(c). While the availability of meal delivery is not determinative in every analysis concerning § 1.119-1(a)(2)(ii)(c),

especially in situations where delivery options are limited, meal delivery should be a consideration in determining whether an employer qualifies under this regulation and generally when evaluating other business reasons proffered by employers as support for providing meals for the "convenience of the employer" under section 119.

(4a) Based on the information provided, during the period at issue Taxpayer had no policies for any employee positions related to the discussion of confidential business information in secure environments that would have required employer-provided meals in order for employees to properly perform their duties. Taxpayer has not substantiated any link between its concern for providing a secure business environment for discussions of confidential business and a business necessity for furnishing meals to employees. Accordingly, Taxpayer's general concern does not qualify as a substantial noncompensatory business reason under the section 119 regulations and Taxpayer's employer-provided meals are not excludable from income under section 119 for this business reason.

(4b) The facts in this case do not demonstrate that Taxpayer had any policies related to innovation and collaboration that would have required employer-provided meals in order for employees to properly perform their duties. Taxpayer has not substantiated any link between its general desire for innovation and collaboration and a business necessity for furnishing meals to employees. Thus, this business objective does not qualify as a substantial noncompensatory business reason under the section 119 regulations and Taxpayer's employer-provided meals are not excludable from income under section 119 for this business reason.

(4c) Taxpayer has provided little factual support related to its claim that its employees could not safely obtain meals off business premises under usual circumstances such that employer-provided meals are a necessity for Taxpayer's employees to properly perform their duties. Taxpayer has also not provided any evidence of safety-related policies that required employer-provided meals in order for employees to properly perform their duties. General goals and objectives of employee safety are not substantial noncompensatory business reasons for furnishing meals and Taxpayer's employer-provided meals are not excludable from income under section 119 for this business reason.

(4d) The facts do not demonstrate that Taxpayer had any policies related to employee health that would have required employer-provided meals in order for employees to properly perform their duties. General goals and objectives of improving employee health do not qualify as a substantial noncompensatory business reasons for furnishing meals under the section 119 regulations and Taxpayer's employer-provided meals are not excludable from income under section 119 for this business reason.

(4e) Taxpayer employees had access to many nearby eating facilities and the facts do not indicate that Taxpayer's employees' ability to secure a proper meal within a

reasonable period was significantly limited. Therefore, Taxpayer's employer-provided meals are not excludable from income under section 119 for this business reason.

(4f) Taxpayer had no policy for meal periods for salaried employees and has provided no substantiated evidence that employees actually took shortened meal breaks or that they did so due to the nature of the employer's business, and has provided no substantiated evidence or information concerning how the nature of its business mandated a shortened meal period. Taxpayer has not demonstrated that its meal period policy fits the conditions described in § 1.119-1(a)(2)(ii)(b) and therefore this policy does not qualify as a substantial noncompensatory business reason under the section 119 regulations and Taxpayer's employer-provided meals are not excludable from income under section 119 for this business reason.

(4g) Taxpayer has demonstrated, through policy documents and employee declarations, that it had policies in place during the years at issue requiring certain employees in the job family to respond at unspecified times to incidents that Taxpayer reasonably characterized as emergencies. Taxpayer has provided evidence that, in accordance with these policies, at least certain employees were at times designated on-call to perform their jobs in response to these emergencies during their meal periods. Accordingly, meals provided to those employees when, under the employer's policy, such employees were designated on call during a meal period were provided for a substantial noncompensatory business reason and are excludable under section 119. However, Taxpayer has not provided information showing how many employees were on call during a typical lunch period; without such information, Taxpayer has not substantiated *how many* employee meals can be excluded for on-call employees.

In addition, through employee declarations and policy documents Taxpayer has provided some evidence that certain employees were expected to be available to respond to emergencies at times when not on call. However, Taxpayer has not provided sufficiently detailed substantiation (such as incident reports, or schedules with responsible parties) demonstrating which employees were reasonably expected to respond to emergencies when not on call, when and how often such employees were expected to be available to respond to emergencies during their meal periods when not on call, or the usual or average number of employees, in addition to on-call employees, that were reasonably expected to be available to respond to emergencies during a typical meal period. To the extent that Taxpayer can provide this information for the years at issue, meals provided to such other identified employees during such specified periods or demonstrated emergency incidents in order to have them available to respond to the emergencies during their meal periods were provided for a substantial noncompensatory business reason and are excludable under section 119.

Taxpayer has not provided information indicating that its emergency response policy (as described in the policy documents provided by Taxpayer) applied to any other employees, besides employees, in the employee population that it calls its "emergency response group." The substantiation provided by Taxpayer via policy documents and employee declarations demonstrates only that this policy applied to employees in the job family and that only employees who were on call (as well as an unspecified number of other employees not on call) responded to emergencies during their meal periods. While Taxpayer has provided declarations from employees in other job families describing how these employees on occasion did respond to emergencies, no policy documents or other substantiation was provided demonstrating that these employees were expected to be available to respond to emergencies during meal periods as part of their job duties. Therefore, the exclusion under § 1.119-1(a)(2)(ii)(a) is available to employees reasonably expected to respond to emergencies during their meal periods, but not a majority of employees.

(5) Based on the information provided, Taxpayer has not demonstrated that at least half of all employees are furnished meals for the convenience of the employer and therefore has not shown that the requirement of section 119(b)(4) has been met.

(6) Based on the information provided, the snack areas and employees' desks at which meals were provided and consumed at did not qualify as eating facilities under section 132(e)(2) because these areas were not set aside only for meals and no services were provided in the facilities related to preparing and serving food. In addition, for all , because Taxpayer provides meals free of charge, it does not derive any revenue from its facility and therefore facility revenue does not meet or exceed operating costs as required under section 132(e)(2). Based on the information provided, Taxpayer has not demonstrated that it meets the requirement of section 119(b)(4) such that all of its employees are considered provided meals for the convenience of the employer under section 119 in order to have all employees treated as having paid amounts equal to the direct operating costs of the facility under section 132(e)(2)(B). Therefore, the value of the meals Taxpayer furnishes to its employees in its eating facility is not excludable as a de minimis fringe benefit under section 132(e)(2).

(7) The snacks that Taxpayer provides its employees in designated snack areas are not meals prepared for consumption at a meal time and therefore do not qualify as meals provided for the convenience of the employer under section 119.

(8) Generally, quantifying the value consumed by each employee of snacks that come in small, sometimes difficult to quantify portions and are stored in open-access areas is administratively impractical given the low value of each snack portion, even if the employer offers the snacks on a continual basis. Therefore, the value of the snacks Taxpayer furnishes to its employees is excludable from gross income as a de minimis fringe benefit under section 132(e)(1).

(9) Because Taxpayer's snack areas are not eating facilities, the value of snacks furnished to employees in these snack areas are not excludable from gross income under section 132(e)(2). Since the snacks in the snack areas are not provided in an employer-operated eating facility, these snacks are not considered meals for which the value may be determined using the 150% multiplier provided in § 1.61-21(j).

(10) The exclusion from wages of the value of meals based on a reasonable belief that the meals were excludable under section 119 is measured using an objective standard. If an employer seeks to rely on the exclusion, it must demonstrate that its belief that the exclusion was applicable was objectively reasonable, based on an understanding of the law, related IRS guidance, and application of the statute in case law. With the exception of meals provided so that certain employees are available to respond to emergencies, Taxpayer has not demonstrated that its belief that its reasons for furnishing meals to its employees qualified such meals for the exclusion from income under section 119 was an objectively reasonable belief based on an understanding of the law, IRS guidance related to section 119, and application of section 119 in case law.

(11) The snack areas and employee desks used for consuming meals in do not qualify as an eating facility as defined in § 1.132-7, and therefore fair market value must be used in determining the amount to include for meals furnished to employees by Taxpayer at . For the meals provided at either fair market value or § 1.61-21(j) can be used to value meals furnished to employees. If § 1.61-21(j) is used, methods supported by the regulations must be used to value meals.

FACTS:

Taxpayer, headquartered in is a corporation that develops, markets, and operates

Meals and Snacks Provided

For the years under examination,

, Taxpayer provided meals, without charge, to all employees, contractors, and visitors (meals were not available on the weekends). Taxpayer provided meals to all employees without distinction as to the employee's position, specific job duties, ongoing responsibilities, external circumstances, or other facts and circumstances. In meals were consumed at seating in or near snack areas, or at employee desks. In , meals were consumed in a cafeteria.

Taxpayer also provided unlimited snacks and drinks in designated snack areas. Each of the snack areas had appliances such as mini-refrigerators, microwaves, toasters, and coffee machines. , there were no tables in any of the snack areas. Items available in the snack areas included

. The snacks were available to employees, contractors and escorted guests.

Taxpayer's Meal Period Policies

During the periods at issue, Taxpayer did not have a policy for meal period lengths for salaried employees and hourly employees were allowed 30 minutes for a meal break. According to Taxpayer, employees in the group (including

), as well as employees who performed security services, comprised over half the workforce and routinely remained on site throughout their work day. employees were tasked with the creation and expansion of ideas and innovations and with responding to daily questions, requests, and comments from

Security personnel (employees in the period under exam) were another group of workers who routinely remained on premises because their jobs generally required continual monitoring of at-desk projects.

Taxpayer had no policy requiring employees to continuously remain on site during working hours. According to informal observations from Taxpayer (Taxpayer provided no data concerning its employees' meal period length), its employees regularly spent approximately 15 to 25 minutes getting a meal on site before returning to their work spaces (this number averages closer to 10-15 minutes for employees who eat the employer-provided meals at their desks). When longer periods of time were spent on meals, employees often sat together at lunch tables, working collaboratively on Taxpayer projects.

As with many employers, Taxpayer's employees are grouped by job function; Taxpayer calls its job function groups "job families." The following is a list of the job families Taxpayer describes as part of its "emergency response group" during the periods at issue, i.e., job families in which, according to Taxpayer, all employees were involved in responding to what Taxpayer considers "emergencies" that occurred in the course of Taxpayer's business. The list includes a summary of Taxpayer's description of each job family and any other additional information provided by the Taxpayer.[1]

– These employees provide support for and are divided into teams,

These employees manage and resolve incidents

[1] The use of the terms "emergency" or "emergencies" in the below descriptions are from Taxpayer and are not intended to concede that all such instances would constitute emergencies within the meaning of the regulations under section 119, discussed further *infra*.

Taxpayer provided declarations[2] from four employees describing the expectation of their job position that they respond to emergency incidents and the types of incidents to which they were required to respond in , and that these incidents frequently occurred during meal periods.

- These employees work with employees to provide data, metrics, and analysis

– These employees work closely with other employees to provide key insights and analysis . Taxpayer provided a declaration from a employee describing the expectation of the job position, that the employee and other employees in the group responded to emergency incidents, the types of incidents to which they were required to respond , and that having meals provided allowed these employees to respond to incidents as quickly as possible (the declaration also provided employees had similar response duties).

– These employees are who work closely with others in responding to

employees are divided up into teams and at any given moment each team must have a on-call employee ready to respond to incidents. However, these on-call employees are expected, if circumstances surrounding the incident require it, to immediately bring in other team members, employees from other teams, and even employees in other job families.

Taxpayer has provided declarations from employees describing how employees are expected to be on-call for incidents, including emergency incidents, and describing the types of incidents that have occurred, and types of incidents for which other team members and members of other teams had to respond to the incidents during meal periods. In these declarations, employees also describe that Taxpayer was making major structural shifts in its during the periods at issue, and that the required to effectuate these shifts often caused . For this reason,

.

[2] We have assumed for purposes of analysis that the declarations provided by Taxpayer reflect all material facts and that these facts are true.

Taxpayer has also provided a copy of its Policy and Procedures that describe Taxpayer's on-call policies, including the requirement of on-call employee for each team at any time, and that other team members and other must be called upon if the nature of an incident requires the expertise of others. These policy documents do not indicate the time period in which they applied, but the "Last Edited" dates as well as the dates on these documents indicate that they come from . However, employee declarations indicate that the policies in these documents, or substantially similar policies, applied during the periods at issue. In addition, Taxpayer provides an Report detailing .

Executive Leadership – Executives, responsible for entire of the company, are the public face of the company. They also make key real-time decisions for the company and at times must respond to emergency incidents in Taxpayer's business operations. Taxpayer provided declarations from three members of executive leadership. These declarations describe the reasons Taxpayer decided to provide meals to employees, emphasizing employee productivity, but do not detail any situations where executive leadership was required to respond to emergency incidents. However, employees in other job families, in their declarations, do state that sometimes executive leadership had to be consulted when emergency incidents occurred.

– These employees are responsible for Taxpayer provided a declaration from an employee in this job family, which describes how these employees had to respond to emergency incidents (sometimes during meal periods)

– These employees are managers who are ultimately responsible for a particular product. They are responsible for responding to emergencies regarding their assigned products and coordinating with other employees . Taxpayer provided a declaration from two employees describing the expectation of the job position, that the declarants and other employees in the group responded to emergency incidents, the types of incidents to which they were required to respond during the periods at issue, and that having meals provided allowed these employees to respond to emergency incidents as quickly as possible.

- The team addresses all the for Taxpayer. Taxpayer provided a declaration from an employee in

this job family describing how they treat reported to them as an emergency, and sometimes they responded to these reports through the meal period.

– These employees are responsible for keeping company networks and systems, applications, running. Taxpayer provided a declaration from an employee in this job family describing these responsibility to respond to emergency incidents in the systems, some of the types of incidents to which they were required to respond, and how sometimes they worked through the meal period to respond to such emergency incidents.

– These employees maintain and manage Taxpayer's network and computer systems and ensure that all technology is working properly at all times. No declaration was provided from any employees. However, the declaration from the employee provided that employees served a similar function as employees and for that reason were also expected to respond to emergency incidents in the systems they monitored, including during meal times.

- employees are responsible for managing risk and financial loss

Per the declarations from two employees in this job family provided by Taxpayer, these employees responded to incidents involving fraudulent behavior and potential loss

At times, these fraud responses occurred during meal periods.

Below is a table showing how many employees worked in each of these job families for the tax years at issue, as provided by Taxpayer.

Job Family in Emergency Response Group	- # of Employees	- # of Employees
Executive Leadership		

Total Emergency Response Group Employees		
Total Taxpayer Employees		

Restaurant Options in the Vicinity

Taxpayer provides a detailed list of restaurant options within the general vicinity of the company's offices, showing restaurants within a radius of Taxpayer's headquarters. In addition, exam found several meal delivery services that operate in the vicinity of Taxpayer's location (apart from individual restaurants that offer their own delivery services), all of which appear to have been operating in the area during the periods at issue. These meal delivery services can provide meal delivery from various restaurants in the area.

Area Crime and Taxpayer Security

Taxpayer's current headquarters is located in an area . According to information provided by Taxpayer, in the 2-month period between crimes were reported to have occurred within crimes were reported to have occurred within the violent crime rate was , and the property crime rate was

However, no data was provided concerning the usual time of day of crimes, effect of any criminal activity on other employers in the area and their employees, comparisons of these crime statistics to statistics for employment centers in other cities, or similar data linking the crime statistics to the ability of employees to obtain meals.

Taxpayer employs various security measures to keep its offices and employees safe, including badge readers . Security guards patrol the premises , and respond to security incidents, all of which are in and, as necessary, reported to the Police Department.

.

According to Taxpayer, the company has experienced safety threats

When are anticipated, Taxpayer security emails all employees to encourage them to remain in the building

Tax Treatment of Meals and Snacks

Taxpayer excluded from employee income and wages the value of the meals it provided to employees in under the section 119 exclusion for meals provided for the convenience of the employer. In support for the claim that the employer-provided meals were furnished for its convenience, Taxpayer provided the following reasons for providing meals to its employees:

- To foster collaboration and innovation by encouraging employees to stay on the taxpayer's business premises;
- To protect the taxpayer's confidential and proprietary information, including its intellectual property by providing a secure environment for business discussions on its premises;
- To protect employees due to unsafe conditions surrounding the taxpayer's business premises;
- To provide healthy eating options for employees to improve employee health;
- Because employees cannot secure a meal within a reasonable meal period;
- Because the demands of the employees' job functions allow them to take only a short meal break; and
- To provide meals so that employees are available to handle emergencies that regularly occur.

Except for a discussion concerning which employee job families were provided meals so that they were available to handle what the Taxpayer considers emergencies that occur, Taxpayer does not provide details as to which employees were provided meals for each of these reasons, but rather asserts generally that meals provided for these reasons were provided to over half of its employees and therefore the meals can be considered provided to all employees for the convenience of the employer under section 119(b)(4) and excludable under section 119. Taxpayer also excluded the value of the snacks provided to employees as a de minimis fringe benefit excludable under section 132(e) of the Code.

LAW AND ANALYSIS:

Section 61(a)(1) provides that gross income includes compensation for services, including fringe benefits, except as otherwise provided. Section 119(a) 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 3121(a)(19) of the Code excepts from the term "wages" for FICA tax purposes the value of any meals furnished by or on behalf of the employer if at the time of such furnishing it is reasonable to believe that the employee will be able to exclude such items from income under section 119.

No specific exception from the term "wages" is provided in section 3401(a) for income tax withholding purposes for meals excludable under section 119. However, Treas. Reg. § 31.3401(a)-1(b)(9) provides, in part, that the value of any meals furnished to an employee by his employer is not subject to withholding if the value of the meals is excludable from the gross income of the employee, and then refers to the regulations under section 119.

Section 3121(a)(20) provides that the term "wages" for FICA tax purposes does not include any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 132. Section 3401(a)(19) provides an identical exclusion from the term "wages" for income tax withholding purposes.

Treas. Reg. § 1.119-1(a)(1) 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) provides meals furnished by an employer 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)(a) provides that meals will be regarded as furnished for a substantial noncompensatory business reason of the employer when the meals are furnished to an employee during his or her working hours to have the employee available for emergency calls during the meal period. In order to demonstrate that meals are furnished to an employee to have the 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 his or her job during his meal period.[3]

[3] Section 1.119-1(f) Example 9 provides an example of the application of this provision. Specifically, Example 9 describes a situation in which a hospital maintains a cafeteria on premises where all 230 of its employees are provided meals free of charge. 210 of the 230 employees are provided meals so that they are available for any emergencies that may occur "and it is shown that each such employee is at times called upon to perform services during his meal period." Also, "[a]lthough the hospital does not require such employees to remain on the premises during meal periods, they rarely leave the hospital during their meal period." Because the hospital provides meals to "each of substantially all of its employees in order to have each of them available for emergency call during his meal period, all of the hospital employees

Section 1.119-1(a)(2)(ii)(b) provides that 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) and the employee cannot be expected to eat elsewhere in such a short period. The provision provides the example of a business where peak work load occurs during meal hours.

Section 1.119-1(a)(2)(ii)(c) 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. As an example, this section provides that meals may qualify for the exclusion under section 119 when there are insufficient eating facilities in the vicinity of the employer's premises.

In the 1977 Supreme Court case of *Kowalski v. Commissioner*, New Jersey state police troopers received cash meal allowances which were excluded from income as meals provided for the convenience of the employer under section 119. *Kowalski v. Commissioner*, 434 U.S. 77 (1977). The Supreme Court ruled that the section 119 exclusion for employer-provided meals applied only to meals provided in kind, and not to cash allowances. *Id.* at 94. In the opinion, the Court traces the legislative history of section 119 in order to provide a standard for determining when meals are provided for the convenience of the employer.

> In enacting § 119, the Congress was determined to "end the confusion as to the tax status of meals and lodging furnished an employee by his employer." However, the House and Senate initially differed on the significance that should be given the convenience-of-the-employer doctrine for the purposes of § 119. As explained in its Report, the House proposed to exclude meals from gross income "if they [were] furnished at the place of employment and the employee [was] required to accept them at the place of employment as a condition of his employment." Since no reference whatsoever was made to the concept, the House view apparently was that a statute "designed to end the confusion as to the tax status of meals and lodging furnished an employee by his employer" required complete disregard of the convenience-of-the-employer doctrine. The Senate, however, was of the view that the doctrine had at least a limited role to play…. After conference, the House acquiesced in the Senate's version of § 119.

---

who obtain their meals in the hospital cafeteria may exclude from their gross income the value of such meals." The "substantially all" standard in the example preceded the change to section 119 that added section 119(b)(4), which provides that all meals furnished on the business premises of an employer to its employees will be treated as furnished for the convenience of the employer if meals furnished to more than half the employees on the business premises are furnished for the convenience of the employer.

Id. at 90-92 (citations omitted), citing H.R. Rep. No. 83-1337, 83d Cong., 2d Sess.,18 (1954).

Based on the language that was eventually adopted as section 119 and on explanations from the Senate Report concerning the section 119 bill, the Court concludes that:

> The language of § 119 quite plainly rejects the reasoning behind rulings like O.D. 514, which rest on the employer's characterization of the nature of a payment. This conclusion is buttressed by the Senate's choice of a term of art, "convenience of the employer," in describing one of the conditions for exclusion under § 119. In so choosing, the Senate obviously intended to adopt the meaning of that term as it had developed over time, except, of course, to the extent § 119 overrules decisions like *Doran* [*v. Commissioner*]. As we have noted above, *Van Rosen v. Commissioner*, provided the controlling court definition at the time of the 1954 recodification and it expressly rejected the *Jones* [*v. United States*][4] theory of "convenience of the employer" … and adopted as the exclusive rationale the business-necessity theory.[5] …Finally, although the Senate Report did not expressly define "convenience of the employer" it did

[4] Earlier in the opinion, the Court discusses O.D. 514, *Doran V. Commissioner*, and *Jones v. United States* as pre-section 119 cases where employer-provided meals and housing were found to be excludible from income based on the employer's characterization of the meals and housing as noncompensatory. *Kowalski,* 434 U.S. at 85, 87, 89, citing O.D. 514, 2 Cum.Bull. 90 (1920); *Jones v. United States*, 60 Ct.Cl. 552, 569 (1925); and *Doran v. Commissioner*, 21 T.C. 374 (1953). In *Van Rosen v. Commissioner*, on the other hand, the Tax Court rejected the idea that the tax treatment of employer-provided meals and lodging should "turn on the intent of the employer," but rather "settled on the business-necessity rationale for excluding food and lodging from an employee's income." *Id.* at 88, citing *Van Rosen v. Commissioner*, 17 T.C. 834, 838 (1951).

[5] The term "business-necessity theory" referenced here is coined by Justice Brennan earlier in the opinion, and comes from several early IRS rulings and court cases concerning employer-provided meals and lodging, including the Tax Court case of *Van Rosen v. Commissioner* cited by Justice Brennan. Specifically, the Tax Court in *Van Rosen* found that:

> The catch phrase 'furnished for the convenience of the employer' has oftentimes been adopted as a short-cut expression to describe the subsistence and quarters furnished, where the tax result has been favorable to the employee. Rather obviously, such a statement, and nothing more, is an over-simplification of the problem. …Rather obviously, neither the salary nor the subsistence and quarters would have been provided unless the employer regarded the expenditures as being for his convenience. …The better and more accurate statement of the reason for the exclusion from the employee's income of the value of subsistence and quarters furnished in kind is found, we think in [*Benaglia v. Commissioner*], where it was pointed out that, on the facts, the subsistence and quarters were not supplied by the employer and received by the employee 'for his personal convenience comfort or pleasure, but solely because he could not otherwise perform the services required of him. ' In other words, though there was an element of gain to the employee, in that he received subsistence and quarters which otherwise he would have

> describe those situations in which it wished to reverse the courts and create an exclusion as those where "[an] employee must accept . . . meals or lodging in order properly to perform his duties."

Id. at 92-93 (citations omitted) (footnotes omitted), citing O.D. 514, 2 Cum.Bull. 90 (1920); *Van Rosen v. Commissioner*, 17 T.C. 834, 838-40 (1951); and S.Rep. No. 1622, 83d Cong., 2d Sess., 190 (1954).

Thus, basing its finding on legislative history and pre-statute case law, the Supreme Court in *Kowalski* provides that the appropriate standard for determining convenience of the employer is the business-necessity theory, which means, as stated in the Senate Report, a situation where an employee must accept the employer-provided meals in order properly to perform his or her duties.

In 1978, Congress added section 119(b) to the Code as part of an Act addressing the taxation of fringe benefits, Pub. L. No. 95-427, 92 Stat. 996 (1978). Section 119(b)(2) provides that, in determining whether meals are furnished for the convenience of the employer, the fact that a charge is made for such meals, and the fact that the employee may accept or decline such meals, shall not be taken into account. The legislative history indicates that the purpose of this addition was to overrule an IRS regulation under section 119 that had provided that the exclusion under section 119 was not available to employers who charged for meals furnished to employees, not to change the standard by which "convenience of the employer" is determined. During congressional debate on the bill, Senator Bob Dole, who introduced the provision, stated that:

> [T]he Internal Revenue Service has taken the position that employer-provided meals are disqualified automatically from being treated as being furnished for the convenience of the employer where the employee bears a portion of the cost of the meal and has the option of accepting the meals or providing his own meals. … I am concerned that the IRS has attempted to narrow the meaning of the broad term "convenience of the employer." If the IRS interpretation is left standing, the tax exclusion will not apply to meals furnished for a charge if the employee may decline to purchase the meals and obtain them in another way. I believe that the

---

> had to supply for himself, he had nothing he could take, appropriate, use and expend according to his own dictates, but rather, the ends of the employer's business dominated and controlled, just as in the furnishing of a place to work and in the supplying of the tools and machinery with which to work. The fact that certain personal wants and needs of the employee were satisfied was plainly secondary and incidental to the employment.

Van Rosen,17 T.C. at 837–38 (citations omitted), citing *Benaglia v. Commissioner*, 36 B.T.A. 838, 839 (1937); *see Kowalski*, 434 U.S. at n.21.

> position of the Internal Revenue is inconsistent with the correct reading of the law. Careful reading of the legislative history shows that this automatic disqualification rule is not warranted. There is nothing in the legislative history which indicates that Congress intended employer meals be precluded from the application of section 119 if the employee bears a portion of the cost. *Madam President, the legislation acted on today is not intended to alter the basic thrust of section 119.*

124 Cong. Rec. 23883-84 (emphasis added). As Senator Dole's statement indicates, the purpose of this provision was to make the section 119 exclusion available to employees who are offered meals at a subsidized price by their employer and who have the option to decline to purchase such meals. The provision was not intended to otherwise "alter the basic thrust of section 119" and the legislative history does not evidence an intent to change the business-necessity rationale behind "convenience of the employer" with this provision.

The more recent Ninth Circuit case of *Boyd Gaming Corp. v. Commissioner* provides clarification as to how the business-necessity rationale and section 119(b)(2) are reconciled. *Boyd Gaming Corp. v. Commissioner,* 177 F.3d 1096 (1999), A.O.D. 1999-010 (Aug. 10, 1999). The court in *Boyd Gaming* did not reject the business-necessity rationale, even though section 119(b)(2) had been part of the Code for 20 years at the time of the case. Rather, it relied heavily on the *Kowalski* opinion and the business-necessity rationale therein (calling it at one point the "*Kowalski* test") in finding that meals furnished to employees who could not leave their employer's premises during work hours because of a "stay-on-premises" employer policy were furnished for the convenience of the employer.[6]

> For guidance, we look to the Supreme Court's decision in *Commissioner v. Kowalski*. The Court examined the history of section 119 and concluded that the "convenience of the employer" should be measured according to a "business-necessity" theory. Under that theory, the exclusion from gross income applies only when the employee must accept the meals "in order properly to perform his duties." … Boyd has adopted a "stay-on-premises" requirement and, as a consequence, furnishes meals to its employees because they cannot leave the casino properties during their shifts. Common sense dictates that once the policy was embraced, the "captive" employees had no choice but to eat on the premises. … [T]he furnished meals here were, in effect, "indispensable to the proper discharge" of the employees' duties.

[6] The taxpayer, Boyd Gaming Corp., did dispute the continued viability of *Kowalski*, but in a footnote the court responded that, "In light of our decision, we need not address this issue." *Boyd Gaming*, 177 F3d at 1100 n.7. It then went on to apply the "*Kowalski* test" to the facts in the case.

Boyd Gaming, 177 F.3d at 1100-01 (citations omitted) (footnotes omitted) (citing *Kowalski,* 434 U.S. at 93; *Van Rosen*, 17 T.C. at 838-40; and *Caratan v. Commissioner*, 442 F.2d 606, 609 (9th Cir. 1971).

In addition, the court explained that the "*Kowalski* test" does not require that "the meals must be linked to an employee's specific duties," because such a test would be "virtually impossible to satisfy; only restaurant critics and dieticians could meet such a test." *Id*. at 1101. This further clarification of the business-necessity rationale is in line with the provision in section 119(b)(2) that the fact that an employee may accept or decline a meal is not taken into account when determining whether a meal is furnished for the convenience of the employer.

Thus, the *Kowalski* test, as clarified by *Boyd Gaming*, and in keeping with section 119(b)(2), provides that "convenience of the employer" means that the carrying out of the employee's duties in compliance with employer policies for that employee's position must require that the employer provide the employee meals in order for the employee to properly discharge such duties. If the employer's particular business policies are such that employer-provided meals are necessary for the employee to properly discharge the duties of a particular job position, then meals provided to employees with such duties in that job position are provided for the convenience of the employer, even if certain individual employees in that position decline the meals. Accordingly, the *Kowalski* test is applicable in determining whether a particular noncompensatory business reason for furnishing meals is *substantial,* as required by the regulations under section 119 for meeting the convenience of the employer standard.

1. *For purposes of applying section 119, do Boyd Gaming Corp. v. Commissioner, 177 F.3d 1096 (9th Cir. 1999), A.O.D. 1999-010 (Aug. 10, 1999), and Jacobs v. Commissioner, 148 T.C. No. 24 (2017), preclude the IRS from substituting its judgment for the business decisions of the taxpayer as to: (1) the taxpayer's business needs and/or concerns; and (2) what specific business policies or practices are best suited to addressing the taxpayer's business needs and/or concerns?*

Boyd Gaming Corp. v. Commissioner concerned an employer who furnished meals to employees and excluded these meals from employee wages under section 119 on the basis that employees were required by the employer to remain on premises during work hours for reasons "including addressing security and efficiency concerns, maintaining work force control, handling business emergencies and continuous customer demands, and the impracticality of obtaining meals within a reasonable proximity" and were therefore furnished meals for the convenience of the employer. *Boyd Gaming*, 177 F.3d. at 1097-98.[7] One of the arguments made by the IRS to support the claim that the

[7] The tax court in *Jacobs v. Commissioner* cites to *Boyd Gaming* in applying the Ninth Circuit's finding that the IRS should not second guess an employer's business policies to the facts in that case, but does

meals in this case were not provided for the convenience of the employer was that the evidence did not support the employer's claimed security and efficiency reasons behind its "stay-on-premises" policy, and therefore there was no business nexus between the policy and the meals provided to employees. *Id.* at 1098. The Ninth Circuit disagreed, finding that, "[g]iven the credible and uncontradicted evidence regarding the reasons underlying the 'stay-on-premises' policy, we find it inappropriate to second guess these reasons or to substitute a different business judgment for that of Boyd." *Id*. at 1101. However, the Court also cautioned that "it would not have been enough for Boyd simply to wave a 'magic wand' and say it had a policy in order to be entitled to a deduction. Instead, Boyd was required to and did support its closed campus policy with adequate evidence of legitimate business reasons." *Id.*

The IRS issued an Action on Decision (AOD) on the *Boyd Gaming* case, acquiescing to the decision and providing that the IRS "will not challenge whether meals provided to employees of … 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." Announcement 99-77, 1999-32 I.R.B. 243, 1999-2 C.B. 243, August 9, 1999. The IRS also stated that "[m]ore generally, in applying section 119 and Treas. Reg. section 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." *Id*. However, the AOD reiterated the Ninth Circuit's caution, adding that "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." *Id.*

Thus, while *Boyd Gaming* precludes the IRS from substituting its judgment for the business decisions of Taxpayer as to its business needs and concerns and what specific business policies or practices are best suited to addressing these business needs and concerns, *Boyd Gaming* does not preclude the IRS from determining whether an employer actually follows and enforces its stated business policies and practices, and whether these policies and practices, and the needs and concerns they address, qualify as a substantial noncompensatory business reason for furnishing meals to employees within the meaning of the regulations under section 119 and the applicable judicial guidance of *Kowalski*. In *Boyd Gaming,* while the Ninth Circuit found it inappropriate for the IRS to question Boyd's business judgment underlying its "stay-on-premises" policy, the court did not question the appropriateness of the IRS making a determination as to whether or not the "stay-on-premises" policy itself qualified as a

---

not provide detailed discussion of the finding. *Jacobs,* 148 T.C. at 10. For this reason, this discussion focuses on the finding in *Boyd v. Gaming.*

substantial noncompensatory business reason.[8] Similarly, in the AOD, the IRS states that it "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," but the AOD did not state that the IRS will cease carrying out its responsibility to apply the section 119 regulations to employers by determining whether the employer has actually established policies which the employer enforces and whether these employer policies qualify as substantial noncompensatory business reason for providing meals to employees.

There seems little reason to doubt that Taxpayer's general business goals such as promoting collaboration and healthier employees, keeping employees safe, or protecting sensitive information and any related policies aimed at achieving these objectives are all legitimate. However, the fact that these business goals are legitimate does not necessarily qualify them as substantial noncompensatory business reasons for furnishing meals to employees. Indeed, in several instances these goals are not much more than aspirations, since Taxpayer has no specific policies to implement them.

Specific employer policies are necessary to connect a business goal to the business necessity for furnishing meals to employees in order to achieve that goal. If, for a particular business goal, an employer does not have a related policy that governs how employees carry out their duties and how employer-provided meals are necessary to achieve the goals of the policy, then the employer will have great difficulty in demonstrating how furnishing meals to employees is necessary for the employees to carry out their job duties with regard to that business goal (as the Kowalski standard requires for excluding meals under section 119). So while the IRS cannot question an employer's business goals and objectives, nor the employer's policies aimed at achieving these goals and objectives, in examining whether meals are excludable under section 119, the IRS must determine whether a policy to carry out a goal or objective actually exists, and if so, whether employer-provided meals are necessary to achieve the goals of the policy such that it rises to the level of a substantial noncompensatory business reason for furnishing meals to employees such that the meals qualify for the exclusion under section 119.

2. *Can the taxpayer satisfy its burden of proof, as a matter of law, to demonstrate that it has a substantial noncompensatory business reason for providing meals in the absence of written policies or tracking data?*

There is no provision in section 119, related regulations, or in case law that requires the IRS to accept an employer's claim to a certain business policy that allegedly relates to the provision of meals to employees at face value, or that precludes the IRS from

[8] Ultimately, the court ruled the IRS had made the wrong determination when it determined that the stay-on-premises policy was not a substantial noncompensatory business reason, but the court did not question the right of the IRS to make any determination in the matter.

requiring substantiation that this policy exists and how it relates to the provision of meals. On the contrary, "[s]tatutory exclusions from income are matters of legislative grace and are narrowly construed. Consequently, taxpayers bear the burden of proving that they are entitled to any exclusion claimed." *Bussen v. C.I.R.*, 108 T.C.M. (CCH) 267 (T.C. 2014) (citing *Commissioner v. Schleier*, 515 U.S. 323, 328 (1995) and *Robertson v. Commissioner*, T.C. Memo.1997–526 (citing *Interstate Transit Lines v. Commissioner*, 319 U.S. 590, 593 (1943)), aff'd, 190 F.3d 392 (5th Cir.1999)).

In *Boyd Gaming,* for example, while the court found it was inappropriate for the IRS to second guess the business reasons behind Boyd's "stay-on-premises" policy, the Ninth Circuit did not question the appropriateness of determining whether the taxpayer actually had such a policy (and the legitimate reasons behind it); the court notes in a footnote that both parties had stipulated that "Boyd imposed a 'stay-on-premises' requirement during the taxable years at issue, and that employees who violated this policy were subject to disciplinary action." *Boyd Gaming*, 177 F.3d 1101 n.8.[9] The existence and enforcement of the "stay-on-premises" policy was not at issue in the case, and nowhere does the court suggest that inquiries and determinations into whether an employer has and enforces a business policy that it claims to have is inappropriate. On the contrary, the court implies that some sort of substantiation is necessary when it cautioned that "it would not have been enough for Boyd simply to wave a 'magic wand' and say it had a policy in order to be entitled to a deduction," and when it stated that "Boyd was required to and did support its closed campus policy with adequate evidence of legitimate business reasons." *Boyd Gaming*, 177 F.3d at 1098.

It is the taxpayer's responsibility to provide substantiation when they claim exclusions from income. For employers who claim the exclusion from income and wages for meals furnished for the convenience of the employer, the IRS has a responsibility to require substantiation from the employer concerning the business reasons the employer provides to support its claim of furnishing meals for the convenience of the employer. Employers who provide specific business policies as substantial noncompensatory business reasons for furnishing meals to employees must be able to substantiate that such policies exist in substance not just in form by showing they are enforced on the specific employees for whom the employer claims these policies apply and demonstrating how these policies relate to the furnishing of meals to employees. After this substantiation is provided, the IRS will then determine whether the policy qualifies as a substantial noncompensatory business reason for furnishing meals to employees.

---

[9] In its decision upholding the IRS's determination in this case, the Tax Court had noted that no employee had ever been disciplined for leaving the premises, but the Ninth Circuit found that the Tax Court had focused "on an inconclusive statement by a single employee" and concluded that the Tax Court had "seized on rather weak, tangential evidence of non-enforcement and inappropriately ignored the parties' stipulations and other testimony." *Boyd Gaming*, 177 F.3d 1101 n.8 (citing *Boyd Gaming Corp. v. C.I.R.*, 74 T.C.M. 71-72 (1997)). However, the court does not suggest that it was inappropriate to make a determination as to whether the policy existed or not.

A written expression of an employer policy, for instance, in an employee manual or employment contracts, provided to the employees for whom this policy applies, generally provides adequate substantiation that the policy exists. But a written policy is not required by statute or regulations, so other substantiation may also be provided. For example, disciplinary records showing that employees have been disciplined for violating a policy or a record of requests for waivers from a policy for special circumstances would also serve as substantiation of an employer policy. However, while a written policy is not necessary, a taxpayer must be able to provide enough substantiation to demonstrate that an actual policy, rather than a mere business goal or objective, actually exists. If a policy exists, the employer must also demonstrate how providing meals to employees relates to the policy such that the meals are necessary for the employees to properly perform their duties.

3. *Is the ability of employees to (1) bring food from home, or (2) have food delivered relevant to assessing whether there are insufficient eating facilities in the vicinity of the employer's premises pursuant to Treas. Reg. § 1.119-1(a)(2)(ii)(c)?*

Historically, the ability of employees to bring food from home has not been considered an important factor in assessing whether meals are being furnished for the convenience of the employer. In addition, the regulations do not contemplate the option of bringing food from home in determining whether meals are furnished for a substantial noncompensatory business reason. The ability to bring food from home is not mentioned as a factor to consider in any of the regulatory discussions of specific situations that qualify as substantial noncompensatory business reasons in § 1.119-1(a)(2)(ii), nor is it provided as a consideration in any of the examples listed in § 1.119-1(f). There is no discussion in legislation, regulations, or case law as to why bringing food from home has not been a consideration in analyzing whether meals are furnished for the convenience of the employer. Conceivably, limited food preparation and storage facilities on the business premises could make this an insufficient or impractical option for many employees. Given the lack of guidance on bringing food from home as a factor in applicable law and the implication in the regulations that the ability to bring food from home is not a consideration, this option should not be a consideration in determining whether an employee “could not otherwise secure proper meals within a reasonable meal period” under § 1.119-1(a)(2)(ii)(c).

There is no specific discussion of meal delivery in section 119, related regulations, or in case law involving this provision. However, until relatively recently, meal delivery options were limited in availability. In the past several years, the proliferation of food delivery services, online ordering options, and mobile phone applications that provide delivery services has made meal delivery options much more abundant now than in the past. That the phenomenon of expanded delivery options is so recent may explain its absence from specific discussions of section 119. There is no discussion in section 119

case law of meal delivery options being available in any specific case, nor is there any statement that meal delivery options should *not* be considered in section 119 analysis.

In most cases, extensive meal delivery options at a given location is an indication that there are also extensive eating facility options at the location; i.e., the meals must be prepared somewhere nearby if delivery is a practical option, and many, if not most, establishments that provide meal delivery also have restaurant space for dining at their location. But in addition, if employees have a panoply of meal options that can be delivered to their place of work with just a phone call, through a website, or via a smart phone application, then the requirement in § 1.119-1(a)(2)(ii)(c), that without the employer-provided meals an employee cannot secure a proper meal within a reasonable period, is not met. There is nothing in this provision to indicate that the employee must be able to obtain the meal off business premises. Indeed, the availability of extensive delivery choices mean that the employee has more efficient meal options than a location with no delivery options but many restaurants nearby. By using a delivery service, the employee can continue to work while the food is being prepared and does not have to take time to travel to the eating facility location. Employees with access to abundant and varied meal delivery options are able to secure a proper meal within a reasonable period.

While the availability of meal delivery is not determinative in every analysis concerning § 1.119-1(a)(2)(ii)(c), especially in situations where delivery options are limited, meal delivery should be a consideration in determining whether an employer qualifies under this regulation. In addition, meal delivery options should be considered when evaluating other business reasons proffered by employers as support for providing meals for the "convenience of the employer" under section 119, since in many cases the availability of meal delivery will affect the determination of whether employer-provided meals are necessary for employees to properly perform their duties.

4. *Is the value of meals furnished to Taxpayer's employees excludable from gross income under section 119 of the Code as furnished for the convenience of the employer for Taxpayer's stated business reasons for furnishing the meals.*

Based on the information provided, during the years at issue Taxpayer provided meals to all of its employees without limitation and without any documentation specifying that employees were being provided meals for any particular business reason. As discussed previously, Taxpayer bears the burden of proving that it is entitled to any exclusion claimed. Taxpayer has not explained nor provided substantiation on which employees were furnished meals for a certain business reason, but instead provides after-the-fact explanations concerning its business reasons for furnishing past meals to all employees. Since all employees, no matter their position or duties, were furnished all meals while working during the periods at issue, to the extent that any of its proffered business reasons for furnishing meals to employees qualify as a substantial noncompensatory business reason for furnishing meals under the section 119 regulations, Taxpayer has the burden of providing sufficient substantiation to

demonstrate, during the periods at issue, which employees were provided meals for substantial noncompensatory business reasons and for which meal periods.

The following subsections address each of the business reasons provided by the Taxpayer for furnishing meals to employees.

4(a). Is the value of meals furnished to the taxpayer's employees excludable from gross income under section 119 of the Code as furnished for the convenience of the employer, if the taxpayer's stated business reason for furnishing the meals is protecting the taxpayer's confidential and proprietary information, including its intellectual property by providing a secure environment for business discussions on its premises?

In applying the *Kowalski* test to determine whether Taxpayer's business objective to provide a secure business environment for discussions of confidential business is a substantial noncompensatory business reason under the section 119 regulations, Taxpayer must demonstrate that, in the years at issue, employees who occupied positions that made them privy to Taxpayer's confidential business information required employer-provided meals in order to properly perform their duties in compliance with Taxpayer policies related to achieving its business objective that such employees discuss confidential business in a secure environment and avoid discussing such information in public.

Based on the facts provided,
, Taxpayer did not have any formal policies concerning public discussions of confidential business information that directly related to employee meals; Taxpayer did not mandate that employees remain during meal periods or otherwise prohibit employees from leaving business premises for meals.

Employees were allowed to leave business premises for meals, so employees who did choose to go off-site for lunch were trusted enough to not discuss confidential business in public. In addition, there is no indication that employees were discouraged from socializing in public outside of work hours.

There also is no mention in the facts that Taxpayer had experienced a problem with public discussions of confidential business. There is no indication that Taxpayer's business information was of such a nature that employees would have had difficulty refraining from discussing it in public.

Based on the information provided, Taxpayer had no policies, for any employee positions, related to the discussion of confidential business information in secure environments rather than in public, that would have necessitated employer-provided meals in order for employees to properly perform their duties. Taxpayer's concern for

providing a secure business environment for discussions of confidential business does not qualify as a substantial noncompensatory business reason under the section 119 regulations and Taxpayer's employer-provided meals are not excludable from income under section 119 for this business reason.

4(b). Is the value of meals furnished to the taxpayer's employees excludable from gross income under section 119 of the Code as furnished for the convenience of the employer, where the taxpayer's stated business reason for furnishing the meals is fostering collaboration and innovation by encouraging employees to stay on the taxpayer's business premises?

In applying the *Kowalski* test to determine whether Taxpayer's business objective of promoting collaboration and innovation constitutes a substantial noncompensatory business reason for furnishing meals to employees, Taxpayer must demonstrate that employees in positions for which collaboration and innovation were encouraged required meals furnished by Taxpayer to properly perform their duties in compliance with Taxpayer policies related to its business objective that these employees collaborate and innovate.

There is nothing in the facts that indicate Taxpayer had any formal policies concerning employee collaboration and innovation that relate to employee meals. Employees were not required to collaborate during meal periods nor were they prohibited from eating alone at their desks (in fact, the facts indicate that some employees did eat at their desks) and they were not prohibited from leaving the business premises altogether to obtain a meal alone elsewhere. In addition, there is no indication that Taxpayer employees were precluded from collaboration and innovation in settings that did not involve meals. Rather, Taxpayer states that there were many spaces on its premises, outside of the cafeteria, set aside for employees to work in groups.

The facts in this case do not demonstrate that Taxpayer had any policies related to innovation and collaboration that would have required employer-provided meals in order for employees to properly perform their duties. Thus, this business objective does not qualify as a substantial noncompensatory business reason for furnishing meals under the section 119 regulations and Taxpayer's employer-provided meals are not excludable from income under section 119 for this business reason.

4(c). Is the value of meals furnished to the taxpayer's employees excludable from gross income under section 119 of the Code as furnished for the convenience of the employer, if the taxpayer's stated business reason for furnishing the meals is protecting employees due to unsafe conditions surrounding the taxpayer's business premises?

The facts provided show that Taxpayer takes employee safety seriously. But in applying the *Kowalski* test to determine if Taxpayer's business objective to keep employees safe qualifies as a substantial noncompensatory business reason for furnishing meals, Taxpayer must demonstrate that employees in positions for which Taxpayer's business objective to keep employees safe applied (presumably this is all employee positions) could not, without Taxpayer's provided meals, properly perform their duties in accord with Taxpayer policies related to ensuring employee safety.

The crime statistics Taxpayer provides show that crime surrounding Taxpayer's business premises was , but little information is provided concerning how these statistics led to any established policy for Taxpayer employees or related to its employees being able to properly perform their duties. Its location was not isolated; many businesses, restaurants, hotels, are located within of Taxpayer's location. The facts provided do not include any description of employees of these other area businesses and institutions experiencing out of the ordinary risks to safety when leaving their business premises to obtain meals. Taxpayer has not provided any evidence of formal policies concerning safety that related to employee meals. Taxpayer allowed its own employees to leave the business premises at any time before, after, and during work hours, including during meal periods. there's no indication that it provided security escort or other measures for employees when they left the building.

There is little evidence in the facts provided, beyond general crime statistics, that shows that, during the periods at issue, employees could not relatively safely obtain meals off business premises under usual circumstances. Certainly, if unusual circumstances existed, such or dangerous weather, forcing employees to remain on the business premises, then meals provided by Taxpayer during those events would have been provided for a substantial noncompensatory business reason and excludable from income. But under typical conditions, the facts do not indicate that employer-provided meals were a necessity for Taxpayer employees to safely perform their jobs. Additionally, Taxpayer has also not provided any evidence of safety related policies that required employer-provided meals in order for employees to properly perform their duties. In this case, Taxpayer's general employee safety concerns are not a substantial noncompensatory business reason for furnishing meals and Taxpayer's employer-provided meals are not excludable from income under section 119 for this business reason.

4(d). Is the value of meals furnished to the taxpayer's employees excludable from gross income under section 119 of the Code as furnished for the convenience of the employer, if the taxpayer's stated business reasons for furnishing the meals is providing healthy eating options for employees to improve employee health?

In applying the *Kowalski* test to determine whether Taxpayer's business objective of encouraging employee healthy eating habits constitutes a substantial noncompensatory business reason for furnishing meals to employees, Taxpayer must demonstrate that employer-provided meals were necessary for employees to properly perform their duties in accord with Taxpayer's employee health-related policies.

There is nothing in the facts of this case to indicate that Taxpayer's concern for the eating habits of its employees went beyond a general concern for maintaining a healthy and productive workforce. The facts do not indicate that Taxpayer had any formal policies concerning employee health that directly related to employee meals. Employees were not required to eat the meals furnished by the employer, neither were they prohibited from leaving business premises to obtain less healthy food elsewhere, from ordering less healthy food for delivery, or bringing unhealthy food from home. In addition, there is no indication in the facts that Taxpayer employees were precluded from obtaining healthy meals from sources other than employer-provided meals, such as by ordering healthier items from restaurant menus.

The facts do not demonstrate that Taxpayer had any policies related to employee health which required employer-provided meals in order for employees to properly perform their duties. Taxpayer's general business objective of improving employee health does not qualify as a substantial noncompensatory business reason for furnishing meals under the section 119 regulations. Taxpayer's employer-provided meals are not excludable from income under section 119 for this business reason.

4(e). Is the value of meals furnished to the taxpayer's employees excludable from gross income under section 119 of the Code as furnished for the convenience of the employer, where the taxpayer's stated business reasons for furnishing the meals is because, given Taxpayer's particular location and situation, employees cannot secure a meal within a reasonable meal period?

Section 1.119-1(a)(2)(ii)(c) provides that meals will be regarded as furnished for a substantial noncompensatory business reason of the employer if the meals are furnished because the employee could not otherwise secure proper meals within a reasonable meal period, such as when there are insufficient eating facilities in the vicinity of the employer's premises.

This provision of the regulations is exemplified in many of the early court cases in which employer-provided meals were found to be excludable under section 119. Many of these cases where employer-provided meals were found to be excludable under section 119 involved employers who were providing meals and lodging in remote places such as Greenland (*Stone v. Commissioner*, 32 T.C. 1021 (1959)), Alaska (*Olkjer v. Commissioner*, 32 T.C. 464 (1959)), or an isolated ranch (*Wilhelm v. US*, 257 F.Supp. 16 (1966)). Later cases, like *Boyd Gaming*, established that if meals cannot be secured for other reasons, such as when employees are prohibited from leaving the business

premises during work hours, the employer-provided meals will be considered furnished for the convenience of the employer.

Taxpayer is located in a non-isolated, location with many restaurants nearby (of its location). During the periods at issue, its employees' ability to secure a meal was not restricted by any business policy that mandated employees remain on the premises. In addition, employees had access to a number of meal delivery options and could therefore obtain a meal without even leaving the business premises. There is nothing in the facts to indicate that Taxpayer's employees' ability to secure a proper meal within a reasonable period was in any way significantly more limited than any other typical employer of its size located within . Taxpayer employees, just like the employees of other employers in Taxpayer's immediate vicinity, had access to many nearby eating facilities, allowing them to secure a proper meal within a reasonable meal period. Therefore, Taxpayer does not fit the situation described in § 1.119-1(a)(2)(ii)(c) and Taxpayer's employer-provided meals are not excludable from income under section 119 for this business reason.

4(f). Is the value of meals furnished to the taxpayer's employees excludable from gross income under section 119 of the Code as furnished for the convenience of the employer, if the taxpayer's stated business reasons for furnishing the meals is providing meals where the demands of the employees' job functions allow them to take only a short meal break but the taxpayer can only provide limited substantiation for this policy?

Section 1.119-1(a)(2)(ii)(b) provides that 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), such as a business where peak work load occurs during meal hours. Therefore, an employer who claims to have a shortened meal period policy, as described in this provision, must substantiate that its business is of a nature that restricts the employees to whom the policy applies to a short meal period. The employer must also substantiate that the shortened meal policy is enforced.

As with any policy, written documentation of the policy that has been distributed to the affected employees is one example of substantiation. The employer could also show disciplinary records that demonstrate employees were disciplined for violation of the shortened meal policy. Or, if the employees are required to check in and out for lunch, the employer could show these records to demonstrate short lunch periods. The employer could also provide evidence that, as the provision suggests, peak workloads for these employees occur during meal hours (such as a customer or client count for work days that shows a peak number of interactions during meal hours). A mere assertion by the employer that its business is of a nature that requires short meal periods is insufficient substantiation that the employer's reason qualifies as a substantial noncompensatory business reason under § 1.119-1(a)(2)(ii)(b). The employer must

provide additional information that demonstrates that the employees indeed have shortened meal periods required by their employer and that these shortened meal periods for these employees are linked to the nature of the employer's business.

Taxpayer states that hourly employees had a 30-minute lunch period, but that it did not have any set policy for meal periods for its salaried employees. Taxpayer also states that informal observations show that employees generally spent 15 to 25 minutes for meal periods. Certain employee declarations provided by Taxpayer provide that some employees worked through lunch or took a very short meal break, but these declarations also indicate that this was a choice on the part of the employees, rather than a requirement from the employer. Serving as a connection between shortened meal periods and the nature of Taxpayer's business is Taxpayer's statement that employees were required to promptly respond to . However, Taxpayer provides no information or evidence as to how prompt these responses had to be, which employees were responsible for handling these duties, and how the need for prompt responses required a shortened meal period.

Taxpayer had no set policy for meal periods for salaried employees and has provided no substantiated evidence or information concerning how the nature of its business mandated a shortened meal period. While declarations from Taxpayer's employees provide that some employees did take shortened meal periods, these same declarations indicate that this was the employees' choice, rather than a requirement. In addition, these employees' declarations about their particular experiences do not support a broader claim that all employees in a job family had shortened meal periods. Without further evidence or information, Taxpayer has not demonstrated that its meal period policy fits the conditions described in § 1.119-1(a)(2)(ii)(b) and therefore this policy does not qualify as a substantial noncompensatory business reason for furnishing meals and Taxpayer's employer-provided meals are not excludable from income under section 119 for this business reason.

If additional information can be provided showing specifically why certain employee positions, such as security personnel, required shortened meal periods and that employees in these positions were indeed restricted to shortened meal periods, then meals furnished to employees in these positions would be furnished for a substantial noncompensatory business reason and excludable from income under section 119.

4(g). Is the value of meals furnished to the taxpayer's employees excludable from gross income under section 119 of the Code as furnished for the convenience of the employer, if the taxpayer's stated business reasons for furnishing the meals is providing meals so that employees are available to handle emergency outages that regularly occur?

Section 1.119-1(a)(2)(ii)(a) provides that meals will be regarded as furnished for a substantial noncompensatory business reason of the employer when the meals are furnished to an employee during his or her working hours to have the employee available for emergency calls during the meal period. The employer must show 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 his or her job during his meal period.

Example 9 under § 1.119-1(f) provides an illustration of this provision where an employer furnishes meals to hospital workers in order to have them available for emergencies should they occur and it was shown that these employees are called upon to respond to emergencies during meal periods. Although the hospital does not require such employees to remain on the premises during meal periods, they rarely leave the hospital during their meal period. Meals furnished to these employees are considered as provided for the convenience of the employer and their value is excludable under section 119.

There has been little discussion of § 1.119-1(a)(2)(ii)(a) in case law. Cases in which this provision was used to exclude meals usually concerned disputes involving other issues under section 119, such as whether the meals must be provided in kind (*United States v. Morelan*) or whether groceries used for the meals by employees qualified as "meals" for purposes of section 119 (*Sibla v. Commissioner*). *United States v. Morelan*, 356 F.2d 199 (1966); *Sibla v. Commissioner*, 611 F.2d 1260 (1980). That the meals provided to these personnel were furnished so that they could respond to emergencies was not in question. All of these cases and Example 9 under the regulations involve emergency responders (hospital workers in Example 9, state highway patrolmen in *United States v. Morelan*, and firefighters in *Sibla v. Commissioner*) who had job positions in which responding to unquestionable emergencies was a major component of the job description.

As noted above, § 1.119-1(a)(2)(ii)(a) provides that an employer claiming to furnish a meal in order to have the particular employee available for emergencies must show two things: (1) that emergencies have actually occurred (or can reasonably be expected to occur) and (2) such emergencies are ones for which that particular employee was called (or is reasonably expected to be called) on to perform his or her duties during a meal period. In addition, the exclusion under section 119, by its own terms, is a meal-by-meal determination ("[t]here shall be excluded from gross income of an employee the value of any meals … furnished to him … for the convenience of the employer"). Thus, an employer claiming the exclusion under section 119 for reasons described in § 1.119-1(a)(2)(ii)(a) must show that, for any particular meal period for which a meal is furnished, each of the employees being furnished the meal is provided the meal in order for that employee to be available to respond to emergencies during that meal period.

For certain jobs, especially emergency responders, the nature of the job position is such that essentially whenever the employee is working the employee is to be available to respond to emergencies, and therefore any meal provided to such employee during work hours is provided so that the employee is available for emergencies. On the other hand, other jobs may require employees to respond to emergencies only in specified circumstances. For example, certain employers may assign employees to be "on call" for emergencies on certain days, or during certain hours, and not responsible for emergency response otherwise. In these instances, only meals furnished to the employee when the employee is "on call" are furnished to have the employee available for emergencies. Since the employer does not need the employee to be available for emergencies when the employee is not on call, meals furnished to the employee when the employee is not on call are not excludable under § 1.119-1(a)(2)(ii)(a).

Neither the regulations or case law provides a description of what qualifies as an "emergency" for purposes of § 1.119-1(a)(2)(ii)(a). The example in the regulations and the few court cases that reference § 1.119-1(a)(2)(ii)(a) address employees who were responding to emergency situations that involved or had the potential to involve physical danger or harm to individuals and/or damage to property (fire, medical emergencies, dangerous motor vehicle situations, etc.). The Merriam-Webster Dictionary defines "emergency" as "an unforeseen combination of circumstances or the resulting state that calls for immediate action."

Whether a situation rises to the level of an "emergency" depends on the nature of an employer's business. Taxpayer has the knowledge and information to determine what occurrences or incidents constitute "emergencies" within the meaning of the section 119 regulations with respect to its own business, as long as it employs a reasonable application of this standard. Due to the nature of the services it provides, , some of the other problems that Taxpayer experiences may cause in such a manner or to such a degree that such failures may put its employees in harm's way) or may create critical business exigencies that need immediate action). In addition, Taxpayer's employees at times must also respond to situations beyond Taxpayer's control in order to help prevent or limit harm to its employees, These unpredictable occurrences are of a nature that "call for immediate action" and can appropriately be considered emergencies under the dictionary definition of the term.

According to Taxpayer, due to its concern over incidents, Taxpayer has a policy that certain employees are required to be on-call to respond to these incidents. As substantiation for this policy, Taxpayer provides:

(1) policy documents for employees detailing employee on-call duties and procedures for incident response,

(2) an Report detailing incidents that required a response from on-call employees

(3) a graphic

(4) a description of Taxpayer's job positions (called "job families") that Taxpayer claims involve "emergency response" (though the "emergencies" being responded to are not limited to), with a focus on the position's responsibilities regarding "emergency response"; and

(5) a census of every Taxpayer employee in by the job family to which each employee belonged.

While this data does provide further information concerning Taxpayer's policies regarding "emergency response," its applicability is limited by the fact that much of it applies to periods that came after the tax years at issue (However, Taxpayer has provided declarations from employees that such policies, or substantially similar ones, existed in .

The Report details Taxpayer's incidents .

.[10]

[10]

[11]

There is no date on the graphic
so there is no way of knowing what period this graphic is describing. The job family descriptions do not have a date and there is no indication that these or substantially similar descriptions (including the responsibility to respond to the incidents) were provided to employees during the tax years at issue. Without dates, other indications, or explanations to show that these descriptions were applied to and communicated to specific employees or groups of employees in , these descriptions do not provide sufficient factual data to support a claim that all employees in these job positions were required to respond to emergencies during all meal periods during the years at issue.

Beyond this policy and statistical data, as additional substantiation for its claim that employees were furnished meals so that they could be available to respond to "emergencies," Taxpayer provides signed declarations from employees in each one of the "emergency response group" job families that describe how employees in that job family were required to respond to "emergencies." Section 1.119-1(a)(2)(i) provides that, "In determining the reason of an employer for furnishing meals, the mere declaration that meals are furnished for a noncompensatory business reason is not sufficient to prove that meals are furnished for the convenience of the employer, but such determination will be based upon an examination of all the surrounding facts and circumstances." The declarations of Taxpayer and its employees provide descriptions of specific incidents or types of incidents where meals were furnished to the declarant because he or she was responding to an "emergency," or, in some cases, provide descriptions of specific occasions in which the declarant was furnished meals in order to be available for "emergency response" even when not on call. However, in addition to not distinguishing between any incident and , such accounts do not substantiate the broader statement that all meals furnished to the declarant were furnished so that he or she was available to respond to "emergencies," nor do they support the general claim that all employees in the declarant's particular job family were provided meals in order that all of them could be available to respond to any form of incident that qualified as an emergency within the meaning of section 119 during any meal period. As provided earlier, the exclusion under section 119 is a meal-by-meal determination and Taxpayer must therefore demonstrate that, for any particular meal period for which a meal is furnished and excluded under § 1.119-1(a)(2)(ii)(a), each of the employees being furnished the meal is provided the

---

[11]

meal in order for that employee to be available to respond to emergencies during that meal period.

Based on the substantiation provided by Taxpayer, the following is an analysis of each of Taxpayer's job families and Taxpayer's claims that meals were provided to employees in that job family because they were required to be available to respond to emergencies during meal periods.

The policy documents provided by Taxpayer state that the procedures outlined in the documents apply to employees. The provides that each "team" must have a on-call employee at all times. While it is unclear from the documents themselves whether this applied during the years at issue, Taxpayer has demonstrated through employee declarations that these procedures, or something substantially like them, existed in . Therefore, we agree that on-call employees covering meal periods for each team were provided meals so that they could respond to incidents identified in the , at least some of which can be reasonably characterized as emergencies that were reasonably expected to occur. Such meals were furnished for a substantial noncompensatory business reason. Exactly how many employees were on-call at any particular meal period cannot be determined because Taxpayer has not provided any information concerning the number of teams that existed . Without such information, Taxpayer has not substantiated *how many* meals can be excluded under section 119 for on-call employees.

With regard to the employees that were not on call, Taxpayer's document also provides that,

In addition, the declarations from employees in the job family state that employees who were not on call were still expected to respond to certain incidents if they had the specific expertise to resolve the incidents

. These declarations describe (1) specific types of incidents for which the declarant was called on to respond during meal periods even when not on call and (2) some specific occasions, , when the declarant was expected to respond to incidents during meal periods. The declarations provide generally that sometimes these incidents were that can be reasonably characterized as emergencies. For this reason, Taxpayer argues that, for any meal period, all employees were furnished meals in order that they be available to respond to emergencies. The declarations are not sufficient to support such argument.

For the types of incidents described in the declarations that can be reasonably characterized as emergencies, and for the specific occasions when declarants were reasonably expected to be available to respond to incidents reasonably characterized as emergencies, declarants were expected to be available to respond to emergencies while not on call and we agree that meals furnished to declarants during the time of such incidents or occasions were furnished for a substantial noncompensatory business reason. However, beyond general declarations that the types of incidents described could at times be , Taxpayer provides no information concerning when or how often incidents could reasonably be characterized as emergencies. For this reason, it is impossible to determine when declarants were provided meals so that they were available to respond to emergencies even though they were not on call versus when declarants were provided meals while responding to less urgent, more routine incidents. Mere statements from declarants that all or most of the time they were furnished meals in order that they be available to respond to emergencies, even while not on call, are not sufficient to demonstrate that meals were so furnished.

For all other employees (those who did not provide declarations),Taxpayer provides few details, beyond general statements, concerning which of these employees were reasonably expected to be called upon to respond to what could reasonably be characterized as emergencies (rather than responding to non-urgent, routine incidents) during meal periods when not on call and when and how often this occurred. Taxpayer's declarations and policy documents provide generally that employees were responsible for , and that these employees were divided into teams, but they do not provide the responsibilities of each of these teams (or even how many teams existed during the periods at issue), how the responsibilities of each team required that its members be available to respond to emergencies even when not on call, if all or only a few team members were expected at times to be available to respond to emergencies when not on call, and when and how often team members were reasonably expected to respond to emergencies when not on call. For instance, several declarations provide generally that employees were expected to be available to respond to incidents when , but no data, such as reports or schedules, is provided that distinguishes

. And no information is provided concerning which employees were responsible for the

.

As noted earlier, the Report provided by Taxpayer details the incidents to which on-call employees responded However, no information is provided concerning what incidents occurred in the years at issue, nor does the report provide information as to how many or which employees were involved in the response to incidents that constituted emergencies). Additionally, no data is provided showing how often emergency incidents required a response from employees that were not on call or, in such situations, how many employees who were not on call were typically involved in the response.

Without any of this data concerning (1) which employees were reasonably expected to be called upon to respond to incidents that would constitute emergencies during meal periods when not on call and (2) when and how often employees not on call were reasonably expected to be called up on to respond to emergencies during meal periods (such as by providing an Report from the years at issue), it is impossible to extrapolate how many meals provided during a typical meal period to employees, whether or not they provided a declaration, who were not on call were being furnished so that the employee could be available to respond to emergencies reasonably expected to occur during the meal period. Therefore, Taxpayer has not substantiated which employee meals can be excluded under § 1.119-1(a)(2)(ii)(a) for employees who were not on call.

If Taxpayer can demonstrate, through data such as a reports, schedules, or policy documents from the years at issue, specific periods during which specific employees not on call were reasonably expected to be needed for emergencies--such as a specific time period following a for which such employees were responsible to respond to reasonably expected emergencies, meals provided during such specific periods would be considered provided so that employees could be available to respond to emergencies. In addition, if Taxpayer can demonstrate, through data such as incident reports, which employees were in fact called upon for emergencies during meal periods, or even provide data-based calculations of the average number of employees called upon for emergencies during any given meal period, meals provided to such employees can be treated as having been provided to employees who were reasonably expected to be available to respond to emergencies during their meal period. However,

by themselves, the declarations from a few of Taxpayer's employees that *all* employees were required to be available to respond to "emergencies" during all meal periods even when not on call and the general provisions of the documents that in certain situations employees who are not on call should be consulted are not sufficient to substantiate that all meals furnished to employees were excludable under section 119 for this reason.

Employees in provide support for

according to employee declarations, employees, were expected to respond to daily emergencies .

Given the nature of the work of employees, as described in employee declarations and in the job description provided by Taxpayer, some employees may have been expected to be available to respond to emergencies that were reasonably expected to occur, such that providing meals enabled them to properly perform their duties. However, Taxpayer has not provided any documentation beyond employee declarations showing which employees were reasonably expected to be called upon to respond to emergencies during meal times (or showing how many employees were reasonably expected to respond to emergencies during any particular meal period). Taxpayer has not provided any evidence that, like the employees, employees had specialized skills that required they be on-call to respond to emergencies in their skill area, or that they had any sort of on-call system. Alternatively, Taxpayer has also not provided documentation, beyond employee declarations, that all employees were reasonably expected to be called upon to respond to emergencies during meal periods. For this reason, Taxpayer has not substantiated that employees were furnished meals in order that they be available to respond to emergencies during meal periods in order to exclude such meals from employee income under § 1.119-1(a)(2)(ii)(a).

Employees in the job families all work in some capacity on the . While the declarations from employees in these families

provided by Taxpayer state that they too were often tasked with responding to incidents, there is no indication that, during the years at issue, these employees were subject to the on-call that applied to employees or to any other procedures or policies regarding . Taxpayer has not provided any substantiation beyond the declarations that all, or even some of these employees, were reasonably expected to be called upon during meal times to respond to incidents that could be reasonably characterized as emergencies and that were reasonably expected to occur, such that providing meals enabled them to properly perform their duties. As discussed earlier, the declarations of Taxpayer and its employees, though relevant and helpful, by themselves are insufficient to prove that the meals furnished by Taxpayer were furnished to have employees available to respond to emergencies. For this reason, Taxpayer has not substantiated that these employees were furnished meals in order that they be available to respond to emergencies during meal periods in order to exclude such meals from employee income under § 1.119-1(a)(2)(ii)(a).

In their declarations, employees from the job families all provide that their positions involve responding to "emergency" incidents. However, the nature of these incidents differs significantly from the types of incidents to which the employees respond. employees respond to

in such a manner or to such a degree that such failures may put its employees, in harm's way or result in critical business exigencies. employees respond in order to help prevent or limit harm to its employees . In contrast, employees, for instance, address which, though important, do not typically involve a potential business shutdown situation and possible harm to people or a time exigency requiring work during meal times. Similarly, addressing fraud is an important business function, but is not typically considered an emergency response activity and does not involve preventing a business shutdown. Such incidents are not of a nature that would normally be characterized as creating an emergency that would require employees to be available during meal times. Though involve analyzing data for use in emergency situations, the gathering of the data itself is not an emergency response. Taxpayer did not provide any documentation beyond employee declarations that these employees were expected to be available during meal periods to respond to incidents that could reasonably be characterized as emergencies and that were reasonably expected to occur during meal periods, such that providing meals enabled them to properly perform their duties. Insufficient factual substantiation was provided to find that employees in these job families were furnished meals in order

that they be available for emergencies, and therefore meals provided to these employees were not provided for the convenience of the employer and not excludable from income under section 119.

Executive Leadership

Several declarations of employees in multiple job families state that in certain outage incidents, Executive Leadership employees must weigh in to provide guidance on how to move forward. However, the declarations from those in Executive Leadership barely mention emergency response, and do not provide that they were required to respond to emergencies during meal periods. Taxpayer has not substantiated that these employees were reasonably expected to be called upon during meal periods to respond to incidents that could reasonably be characterized as emergencies and that were reasonably expected to occur during meal periods, such that providing meals enabled them to properly perform their duties. Insufficient factual information was provided to find that Executive Leadership employees were furnished meals in order that they be available for emergencies, and therefore meals provided to these employees were not provided for the convenience of the employer and not excludable from income under section 119.

5. *Has Taxpayer satisfied section 119(b)(4) by showing that at least half of its employees are furnished meals that are excludable under section 119?*

Section 119(b)(4) provides that if more than half of the employees on the employer's business premises who are furnished meals are furnished meals for the convenience of the employer, then all meals to employees are treated as furnished for the convenience of the employer. Most of the business reasons Taxpayer has provided for furnishing meals to employees are not substantial noncompensatory business reasons for furnishing meals and meals furnished for these reasons are not excludable under section 119. Taxpayer has provided support that a small group of its employees – employees who were on-call – were furnished meals for the convenience of the employer. In addition, Taxpayer has provided support that certain employees were furnished meals for the convenience of the employer at times when not on call. Assuming Taxpayer can provide the additional support discussed above concerning its employees who are not on call, then Taxpayer may demonstrate that those employees for which it provides such support were furnished the meals for which it provides such support so that employees could be available to respond to emergencies, such that these meals qualify for the section 119 exclusion under § 1.119-1(a)(2)(ii)(a). But, even if such support were to be provided with respect to all meals furnished to all employees, employees did not comprise more than half of Taxpayer's employees during the periods at issue ( ). Taxpayer has not provided sufficient factual substantiation to demonstrate that at least

half of all employees are furnished meals for the convenience of the employer and therefore has not shown that the requirement of section 119(b)(4) has been met.

6. Is the value of meals furnished to employees excludable from gross income under section 132(e)(2) and the corresponding Treas. Reg. § 1.132-7?

Among the requirements of section 132(e)(2), which provides that operation by an employer of an eating facility for employees is excludable from income as a de minimis fringe benefit, is that the employer provide the meal at an "eating facility." Therefore, this exclusion extends only to such meals provided at employer-operated eating facilities. Although the Code, regulations thereunder, and related case law never explicitly define the term "eating facility," the context strongly indicates that an "eating facility" means an identifiable location that is designated and set aside for the preparation and/or serving and consumption of meals. To this end, describing the requirements of meeting the section 132(e)(2) exclusion, § 1.132-7 refers to "dining rooms" (see § 1.132-7(a)(1)(ii) ("each dining room ... in which meals are served is treated as a separate eating facility"); § 1.132-7(b)(ii) ("direct operating costs test may be applied separately for each dining room")) and "cafeterias" (see § 1.132-7(a)(1)(ii) ("each ... cafeteria in which meals are served is treated is a separate eating facility"); § 1.132-7(b)(ii) ("direct operating costs test may be applied separately for each ... cafeteria"); § 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" (§ 1.132-7(b)(ii)) and "labor costs attributable to cooks, waiters, and waitresses" (§ 1.132-7(b)(ii)), although the employer may engage a third party to operate the facility.

According to the facts provided, Taxpayer's meals were provided to employees free of charge. In Taxpayer's , there was no cafeteria or dining room, but rather food was consumed in snack areas and at employee desks. Snack areas and employee desks are not locations set aside for the specific purpose of providing and consuming meals and do not qualify as "employer-operated eating facilities" under section 132(e)(2) and the corresponding Treas. Reg. § 1.132-7. Thus, meals served to employees at are not excludable from gross income under section 132(e)(2).

At , employees ate in cafeterias set aside for providing and consuming meals and therefore the cafeterias in are considered employer-operated eating facilities under section 132(e)(2). However, the meals served in are not excludable under this section because the other requirements of this provision are not met. 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.

Because Taxpayer provides meals free of charge, it does not derive any revenue from its eating facility and therefore facility revenue does not exceed operating costs. Based on the facts provided, Taxpayer has not demonstrated that it meets the requirement of section 119(b)(4) such that all of its employees are considered provided meals for the convenience of the employer under section 119 in order to have all employees treated as having paid amounts equal to the direct operating costs of the facility under section 132(e)(2)(B). Taxpayer's eating facility's revenues therefore do not equal or exceed costs, and the value of the meals Taxpayer furnishes to its employees in its eating facility is not excludable as a de minimis fringe benefit under section 132(e)(2).

7. *For the same business reasons provided for furnishing meals, is the value of snacks furnished to the taxpayer's employees excludable from gross income under section 119 as furnished for the convenience of the employer?*

Section 119 provides for the exclusion of *meals* provided for the convenience of the employer. In the 1969 case *Tougher v. Comm'r of Internal Revenue,* the Tax Court found that, "The word 'meals' connotes to us food that is prepared for consumption at such recognized occasions as breakfast, lunch, dinner, or supper, or the equivalent thereof. … To be sure, [individual grocery] items, or portions of some of them, can be processed and combined with other items so as to produce 'meals,' but in their raw form they are not ordinarily regarded as meals, and in the absence of persuasive evidence pointing in the other direction, it is our judgment that Congress did not use the term 'meals' in that sense." *Tougher v. Comm'r of Internal Revenue,* 51 T.C. 737, 745 (1969), *aff'd sub nom. Tougher v. C. I. R.*, 441 F.2d 1148 (9th Cir. 1971), *cert. denied*, 404 U.S. 856 (1971). The snacks that Taxpayer provides its employees in designated snack areas are not meals prepared for consumption at a meal time and therefore do not qualify as meals provided for the convenience of the employer under section 119.

8. *Is the value of snacks furnished to employees excludable from gross income under section 132(e)(1) and the corresponding Treas. Reg. § 1.132-6?*

Section 132(a)(4) of the Code excludes from gross income any fringe benefit which qualifies as a de minimis fringe. Section 132(e)(1) defines a de minimis fringe benefit as any property or service the value of which is (after taking into account the frequency with which similar fringes are provided by the employer to the employer's employees) so

small as to make accounting for it unreasonable or administratively impracticable. Section 1.132-6(a) provides the same definition. Section 1.132-6(e)(1) provides examples of de minimis fringe benefits that are excludable from an employee's gross income. These include occasional typing of personal letters by a company secretary; occasional personal use of an employer's copying machine; occasional cocktail parties, group meals, or picnics for employees and their guests; traditional birthday or holiday gifts of property (not cash) with a low fair market value; occasional theater or sporting event tickets; coffee, doughnuts, and soft drinks; local telephone calls; and flowers, fruit, books, or similar property provided to employees under special circumstances (e.g., on account of illness, outstanding performance, or family crisis).

According to the facts in this instance, Taxpayer provides snacks, such as , and beverages to all of its employees, contractors, and escorted guests. There's no indication in the facts provided that these snacks are offered in unusually large portions or are of unusually high value. Generally, quantifying the value consumed by each employee of these types of snacks that come in small, sometimes difficult to quantify portions and are stored in open-access areas is administratively impractical given the low value of each snack portion, even if the employer offers the snacks on a continual basis. Therefore, the value of the snacks Taxpayer furnishes to its employees is excludable from gross income as a de minimis fringe benefit under section 132(e)(1).

9. *Do the taxpayer's snack areas meet the regulatory definition of "eating facility" under Treas. Reg. § 1.132-7 such that the value of snacks furnished to employees are excludable from gross income under section 132(e)(2) and the corresponding Treas. Reg. § 1.132-7? If not, are the snacks in these areas considered "meals" such that the value of the snack must be determined using the 150% multiplier provided in Treas. Reg. § 1.61-21(j)?*

As provided previously, for purposes of section 132(e)(2) and the regulations thereunder, an employer-operated eating facility must be an area designated for the preparation and/or serving and consumption of meals. The facts provided indicate that, with the exception of , Taxpayer's snack areas did not contain tables, and there is no indication that individuals were employed to prepare and/or serve meals in the snack areas. Therefore, Taxpayer's snack areas are not eating facilities for purposes of section 132(e)(2). Because Taxpayer's snack areas are not "eating facilities," the value of snacks furnished to employees in these snack areas are not excludable from gross income under section 132(e)(2).[12]

Section 1.61-21(j) provides a valuation rule for meals provided in an employer-operated eating facility as defined in § 1.132-7. Section 1.132-7(a)(2) defines the term "meals"

[12] However, see discussion above under #8 concerning the exclusion of the value of the food and beverages provided in snack areas as de minimis fringe benefits under section 132(e)(1).

for purposes of the section as food, beverages, and related services provided at the facility. Since the snacks in the snack areas are not provided in an employer-operated eating facility, these snacks are not considered meals and the value of the snack cannot be determined using the 150% multiplier provided in § 1.61-21(j).

10. *Can the taxpayer exclude the value of meals and snacks furnished to employees from the employees' wages by virtue of the "reasonable belief test" whereby the taxpayer claims it was reasonable to believe that the value of the meals and snacks was excludable from income under one or more applicable statutory exemptions?*

Section 3121(a)(19) of the Code excepts from the term "wages" for FICA tax purposes the value of any meals furnished by or on behalf of the employer if at the time of such furnishing it is reasonable to believe that the employee will be able to exclude such items from income under section 119.

No specific exception from the term "wages" is provided in section 3401(a) for income tax withholding purposes for meals excludable under section 119. However, § 31.3401(a)-1(b)(9) provides, in part, that the value of any meals furnished to an employee by his employer is not subject to withholding if the value of the meals is excludable from the gross income of the employee, and then refers to the regulations under section 119.

Section 3121(a)(20) provides that the term "wages" for FICA tax purposes does not include any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 132. Section 3401(a)(19) provides an identical exclusion from the term "wages" for income tax withholding purposes.

The exclusion from wages based on a reasonable belief under section 3121(a)(19) or (20) and under section 3401(a)(19) is not triggered merely by an employer's subjective assertion that its belief that the exclusion applied was reasonable. The "reasonable belief" test under these sections is an objective standard. *Am. Airlines, Inc. v. United States*, 40 Fed. Cl. 712, 718 (1998), *aff'd in part*, *rev'd in part on other grounds and remanded*, 204 F.3d 1103 (Fed. Cir. 2000). Therefore, if an employer seeks to rely on the exclusion, it must demonstrate that its belief that the exclusion under sections 3121(a)(19) and (20) was applicable was objectively reasonable, based on an understanding of the law, related IRS guidance, and application of the statute in case law. In this way, the existence of a reasonable belief for excluding the benefits is based on a reasoned judgment.

Section 119 legislative history and case law, including a Supreme Court case (*Kowalski*) and more recently a Ninth Circuit case (*Boyd Gaming*), provide the long-standing standard concerning what constitutes convenience of the employer under section 119

and therefore what constitutes “substantial” for purposes of the regulations -- that the furnished meals must be necessary for the employee to properly perform his or her duties.

To have made a reasoned judgment during the years at issue regarding the application of section 119 and the regulations thereunder, Taxpayer would have been aware of the requirements for and limitations upon the exclusion for employee meals under section 119 of the Code, including the regulatory definition of “convenience of the employer” as a substantial noncompensatory business reason and *Kowalski* standard that “convenience of the employer” means that the meals were necessary for employees to carry out their duties. Taxpayer provides many general business goals as reasons for furnishing meals to its employees, but in all but one case fails to provide substantiated evidence of specific policies for carrying out these goals that affect how its employees carry out their duties. Without such goal-related policies, it was not reasonable for Taxpayer to conclude that furnishing meals to employees was necessary for employees to carry out their duties, as the *Kowalski* standard requires.

Taxpayer incorrectly argues that the *Kowalski* standard that meals must be “necessary for employees to properly perform their duties” no longer applies. But this Supreme Court precedent has not been set aside by Congress and cannot be overruled by an appellate court case. Furthermore, in addition to this Supreme Court standard, many of the noncompensatory business reasons for furnishing meals to employees provided by Taxpayer are business objectives common to many (in some cases most or all) employers, and reasoned judgment must conclude that such common business reasons cannot be considered substantial for purposes of applying an exclusion from income, to be narrowly applied. *See C.I.R. v. Schleier*, 515 U.S. 323, 328 (1995) (the default rule for statutory interpretation is that exclusions from income must be narrowly construed), citing *United States v. Burke*, 504 U.S. 229, 248 (1992) (SOUTER, J., concurring in judgment). Specifically, encouraging collaboration, promoting good employee health, and discouraging the discussion of sensitive business information in public are common business policies that under ordinary circumstances would not reasonably be considered to be a *substantial* business reason for furnishing meals to employees.

Similarly, Taxpayer provides employee safety as a substantial noncompensatory business reason for furnishing meals to employees, but provides little information to demonstrate that its safety concerns are substantial in the sense that they are concerns that go beyond the ordinary safety concerns common to most employers. Under reasonable judgment, ordinary safety concerns do not rise to the level of a substantial noncompensatory business reason for providing meals to employees.

To have made a reasoned judgment regarding the application of section 119, Taxpayer would also have been aware of the past applications of the regulatory requirements under §§ 1.119-1(a)(2)(ii)(a), (b), and (c). Section 1.119-1(a)(2)(ii)(c) 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, such as when there are insufficient eating facilities in the vicinity. Cases where this substantial noncompensatory business reason has been found to exist have usually involved remote or isolated locales. *See Rowan Companies v. United States*, 452 U.S. 247 (1981) (workers on offshore oil rigs); *Stone v. Commissione*r, 32 T.C. 1021 (1959) (construction workers in Alaska); *Olkjer v. Commissioner*, 32 T.C. 464 (1959) (construction workers in Greenland); Rev.Rul. 72-385, 1972-2 C.B. 536 (fisherman on schooner); and Rev.Rul. 71-267, 1971-1 C.B. 37 (Navy personnel assigned to offshore islands). In addition, *Boyd Gaming* established that this substantial noncompensatory business reason also applies if meals cannot be secured because employees are prohibited from leaving the business premises during work hours.

While it may have been reasonable to believe during the years at issue that an employer's location did not have to be as remote as those described above in order for there to be "insufficient eating facilities" at which to obtain a meal in a reasonable meal period, Taxpayer has not shown that eating facilities in its location were insufficient by a reasonable measure. And Taxpayer does not restrict its employees from leaving the business premises. Given the past applications of § 1.119-1(a)(2)(ii)(a), it is not reasonable to conclude that a business in an location surrounded by restaurants and other eating facilities, where employees are free to come and go as they choose (and also have several options for food delivery) is in a situation where employees cannot secure a proper meal such that the business qualifies for the section 119 exclusion under § 1.119-1(a)(2)(ii)(a).

Section 1.119-1(a)(2)(ii)(b) provides that a substantial noncompensatory business reason for furnishing meals to employees 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) and the employee cannot be expected to eat elsewhere in such a short period. Taxpayer has no set policy for meal periods for salaried employees, has not provided substantiated evidence (in contrast to informal observations) that employees actually take shortened meal breaks, and has provided no substantiated evidence or information concerning how the nature of its business mandates a shortened meal period. Given the long standing doctrine that the burden of proving a right to an exclusion from income is on the taxpayer claiming the exclusion, it is unreasonable for Taxpayer to believe that it can exclude the meals it furnishes to employees from income under section 119 by virtue of section 1.119-1(a)(2)(ii)(b) without providing substantiation that it meets the requirements of this section.

Section 1.119-1(a)(2)(ii)(a) provides that meals will be regarded as furnished for a substantial noncompensatory business reason of the employer when the meals are furnished to an employee during his or her working hours to have the employee available for emergency calls during the meal period. The employer must show 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 his or her job during his meal period.

Based on the information provided, Taxpayer has shown that unpredictable occurrences of a nature that can reasonably be considered "emergencies" occur in the course of its business and that some employees are called upon to respond to these emergencies. However, under the regulations, the employer must show that the employee is called upon, or can reasonably be expected to be called upon, to respond to emergencies during meal periods. Taxpayer has shown that a subset of its employees, namely employees who were on call during meal periods (and possibly certain meal for certain employees, even if not "on call," if supported by additional information), were furnished meals in order to be available to respond to incidents that can reasonably be classified as emergencies and that were reasonably expected to occur during meal periods. With such a policy in effect, it was reasonable for Taxpayer to believe that meals furnished to these employees were excludable under section 119.

Taxpayer also claims that other employees, including employees not on call and employees not even subject to policies concerning incident response (based on information provided), were also furnished meals in order that they be available to respond to emergencies. Taxpayer provides only employee declarations as substantiation for this claim. Section 1.119-1(a)(2)(i) provides that, "In determining the reason of an employer for furnishing meals, the mere declaration that meals are furnished for a noncompensatory business reason is not sufficient to prove that meals are furnished for the convenience of the employer, but such determination will be based upon an examination of all the surrounding facts and circumstances." Based on this regulatory provision, it was not reasonable for Taxpayer to believe that, without any substantiation beyond declarations, it could show that these employees were reasonably expected to be called upon to respond to emergencies during meal periods, and therefore it was not reasonable for the Taxpayer to believe that meals furnished to these employees for this reason were excludable under section 119.

11. *If the value of the meals and snacks provided by the taxpayer to its employees should be included in the employees' wages, should the amount of employment taxes owed be determined under Exam's method, the taxpayer's method, or an alternative method?*

For meals furnished by an employer to its employees that do not qualify for exclusion under section 119 or section 132, employers must include in its employees' income the amount by which the fair market value of the meals provided exceeds the sum of the amount, if any, paid for the meals by the employees, and the amount, if any, specifically excluded by another section of the Code. As an alternative to fair market value, § 1.61-21(j) provides a special valuation rule for meals provided at an employer-operated

eating facility as defined under § 1.132-7 that the employer may elect to use to value such meals for purposes of determining the amount to include in an employee's wages.

As explained previously, at Taxpayer's during the period under consideration, the snack areas and employee desks where meals were provided and consumed did not qualify as an employer-operated eating facility defined in § 1.132-7. Therefore, fair market value must be used in determining the amount to include in employee wages for meals furnished to employees by Taxpayer at .

For the , whose cafeterias are employer-operated eating facilities under § 1.132-7, § 1.61-21(j) can be used to value meals furnished to employees at . Section 1.61-21(j)(2)(i) provides that the value of all meals provided at an employer-operated eating facility (as defined in § 1.132-7) for employees during a calendar year is 150 percent of the "direct operating costs" of the eating facility. "Direct operating costs" for purposes of this section is defined in § 1.132-7(b) and includes the adjustments specified in § 1.132-7(a)(2). Section 1.132-7(b) defines "direct operating cost" as the cost of food and beverages plus the cost of labor for personnel whose services relating to the facility are performed primarily on the premises of the eating facility. Section 1.132-7(b)(3) provides that if an employer contracts with another to operate an eating facility for its employees, the direct operating costs of the facility consist both of direct operating costs, if any, incurred by the employer and the amount paid to the operator of the facility to the extent that such amount is attributable to what would be direct operating costs if the employer operated the facility directly. In determining direct operating costs, under § 1.132-7(a)(2), the cost of meals that are excludable under section 119 can be disregarded, as can the cost of meals provided to volunteers as well as the cost of meals provided to nonemployees who are charged more than employees for the meals, if any such costs can reasonably be determined.

Since Taxpayer to provide meals, under § 1.132-7(b)(3), its direct operating costs consist of the amount paid to the extent that this amount is attributable to what would be Taxpayer's direct operating costs if it operated the facility. If Taxpayer can substantiate these amounts can be excluded from the amount paid in determining direct operating costs, since they are not included in the definition of direct operating costs under § 1.132-7(b). However, the labor costs involved in preparing the food must be included in the amount, because if Taxpayer operated its eating facility, it would have to pay for the cost of labor

In addition, if the number of meals excludable under section 119 can be reasonably determined (the facts provided do not contain enough information to determine meals excludable under section 119; more information is necessary to determine this amount), costs associated with these meals can be excluded from the direct operating cost

amount.[13] Since Taxpayer does not charge anyone for meals (and therefore does not charge nonemployees more than employees for meals), costs associated with meals served to nonemployees (with the exception of volunteers) cannot be excluded from calculating direct operating costs. As discussed earlier, the costs associated with snacks and beverages provided in the snack areas should not be included in calculating direct operating costs.

After determining the value of all meals provided at the eating facility (150 percent of the "direct operating costs"), § 1.61-21(j)(2)(i) provides that the taxable value of meals provided at an eating facility may be determined in two ways:

(1) The "individual meal subsidy" may be treated as the taxable value of a meal provided at the eating facility to a particular employee. This rule is available only if there is a charge for each meal selection and if each employee is charged the same price for any given meal selection.

(2) The employer may allocate the "total meal subsidy" (total meal value less the gross receipts of the facility) among employees in any manner reasonable under the circumstances. It will be presumed reasonable for an employer to allocate the total meal subsidy on a per-employee basis if the employer has information that would substantiate to the satisfaction of the Commissioner that each employee was provided approximately the same number of meals at the facility.

Since Taxpayer employees were not charged for their meals, only the second option is available for determining the taxable value of meals provided by Taxpayer. Because Taxpayer did not collect any revenue for the meals, it must allocate the entire total meal value (150% of direct operating costs) to its employees using a reasonable manner given its circumstances. Determinations as to which employees' salaries met or exceeded the social security wage base (so that the additional amounts for meals would not be subject to social security tax) and which employees' salaries did not meet or exceed the withholding threshold for Additional Medicare Tax[14] (and are therefore not subject to this tax) should be substantiated.

CAVEAT(S):

A copy of this technical advice memorandum is to be given to the taxpayer(s). Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

---

[13] Costs associated with meals served to volunteers can also be excluded from the direct operating cost amount, but the facts do no indicate that any such volunteer meals were provided.

[14]

.