INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM
April 6, 2000

Number: **200030001**
Release Date: 7/28/2000
Third Party Contact:
Index (UIL) No.: 274.14-00
CASE MIS No.: TAM-117215-99/CC:DOM:IT&A:B2

District Director

Taxpayer's Name:
Taxpayer's Address:
Taxpayer's Identification No:
Years Involved:
Date of Conference:

LEGEND:

Taxpayer =
Number N =
Number O =

ISSUE(S):

Are food and beverages provided by Taxpayer to its independent contractor representatives at national and regional meetings subject to the partial deduction disallowance of § 274(n)(1) of the Internal Revenue Code? Do the exceptions to the § 274(n)(1) partial deduction disallowance for (a) de minimis fringe benefits, or (b) recreational or social activities for employees, apply?

CONCLUSION(S):

The food and beverages provided by Taxpayer to independent contractor representatives at national and regional meetings are subject to the partial deduction disallowance of § 274(n)(1). None of the exceptions to the partial deduction disallowance apply.

FACTS:

Taxpayer is a brokerage firm that does business through approximately N broker representatives in approximately O locally owned and operated branch offices. Taxpayer treats the brokers as independent contractors for tax purposes.

During each of the tax years in question Taxpayer held four regional sales and education conferences, a national sales and education conference, and a top producers conference. The purposes of the conferences were to (1) promote

Taxpayer's products and services, and (2) provide educational presentations that satisfy the National Association of Securities Dealers' continuing education requirements for brokers. The conferences included programs and presentations relating to developments in the industry, new product lines, and sales ideas and techniques. The regional conferences lasted three days and two nights, the top producers' conferences lasted four days and three nights, and the national conferences lasted five days and four nights.

Each representative was invited to one regional conference and the national conference. Taxpayer invited representatives who satisfied certain performance quotas to the top producers' conference. Representatives typically attended one regional conference and the national conference. Each representative attending a conference was allowed to invite a spouse or other guest.

At each conference Taxpayer provided breakfast and lunch to the representatives (but not their guests) each day at no charge. Taxpayer provided lunch for attendees because time constraints did not allow attendees to leave the premises for lunch. The short lunch period provided scheduling flexibility, allowed attendees to network, and encouraged attendees to interact with one another and share individual insights and personal experiences.

At both the regional and national conferences Taxpayer paid for two cocktail parties at which food and beverages were served. The cocktail parties were open to attendees and guests and also were attended by conference organizers, event sponsors (representatives of companies whose products are distributed by Taxpayer), and industry representatives (generally, conference speakers on industry issues). The cocktail parties provided a place for the attendees and their guests to meet and for attendees to discuss the day's topics and ask questions. The breakfasts, lunches, and cocktail parties were generally catered by the hotel hosting the conference.

At the regional conferences industry sponsors took the representatives and their guests to dinner at an outside location. The sponsors, not the Taxpayer, paid for these dinners. At the national conferences Taxpayer and industry sponsors each hosted two dinners for the representatives and their guests. Similarly, at the top producers' conferences Taxpayer and industry sponsors each hosted a dinner for the representatives and their guests.

Taxpayer knew the identity of each representative and the number of guests attending each conference. Additionally, Taxpayer knew the aggregate cost of food and beverages provided at each conference. The aggregate cost of food and beverages provided ranged from $109 per representative at one conference to $709 per representative at another conference. Taxpayer did not include the value of food and beverages provided to each representative at conferences in the amount of taxable compensation reported on Forms 1099 furnished by Taxpayer to the representatives.

On its tax returns for the years in question Taxpayer deducted the full cost of the meals and cocktail parties provided at the conferences, less the cost of meals and entertainment provided to guests of attendees, without applying the 50% deduction disallowance of § 274(n).

LAW:

Section 162(a) allows a deduction for the ordinary and necessary expenses paid or incurred in carrying on any trade or business. However, a deduction otherwise allowable under § 162(a) may be subject to disallowance or reduction by § 274.

Section 274(n)(1) limits the deduction for any expense for food or beverages to 50% of the amount that otherwise would be allowable under § 162(a). However, § 274(n)(2) excludes certain expenses from the application of § 274(n)(1), including:

(A) expenses described in § 274(e)(2), (3), (4), (7), (8), or (9), and

(B) expenses for food or beverages excludable from the recipient's gross income under § 132 by reason of § 132(e), relating to de minimis fringes.

Section 274(e)(4) describes expenses for recreational, social, or similar activities primarily for the benefit of employees, other than highly compensated employees. Section 1.274-2(f)(2)(v) states that the exception provided in § 274(e)(4) applies to "usual employee benefit programs" such as Christmas parties, annual picnics, and athletic facilities that are available to employees generally.

Section 61 provides that gross income includes all income from whatever source derived, including compensation for services, fees, commissions, fringe benefits, and similar items.

Section 1.61-21(a)(4) provides that a taxable fringe benefit is included in the income of the person performing the services in connection with which the fringe benefit is furnished. Thus, a fringe benefit may be taxable to a person even though that person did not actually receive the fringe benefit. If a fringe benefit is furnished to someone other than the service provider such benefit is considered as furnished to the service provider.

Section 132(a)(4) excludes from gross income the value of a de minimis fringe benefit, as defined in § 132(e). Section 1.132-6(c) provides, however, that a fringe benefit not satisfying the definition in § 132(e) for exclusion under § 132(a)(4) is includible in the employee’s gross income unless excluded under a provision other than § 132(a)(4).

Pursuant to § 132(e), the term "de minimis fringe" means 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(b)(1) provides that, generally, the frequency with which similar fringes are provided by the employer to the employer's employees is generally determined by reference to the frequency with which the employer provides the fringes to each individual employee rather than to the employer's workforce as a whole (“employee-

measured frequency”). However, § 1.132-6(b)(2) provides that, where it would be administratively difficult to determine frequency with respect to individual employees, the frequency with which the employer provides similar fringes is determined by reference to the frequency with which the employer provides the fringes to the workforce as a whole (“employer-measured frequency”).

Section 1.132-6(c) provides that, unless excluded by a provision of the Internal Revenue Code other than § 132(a)(4), the value of any fringe benefit that would not be unreasonable or administratively impracticable to account for is includable in the employee's gross income.

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).

Section 1.132-6(e)(2) provides examples of fringe benefits that are not excludable from an employee’s gross income as de minimis. These include season tickets to sporting or theatrical events; the commuting use of an employer-provided automobile or other vehicle more than one day a month; membership in a private country club or athletic facility, regardless of the frequency with which the employee uses the facility; and use of employer-owned or leased facilities (such as an apartment, hunting lodge, boat, etc.) for a weekend.

Section 1.132-1(b)(4) provides that, for purposes of § 132(a)(4) (relating to de minimis fringes), the term "employee" means any recipient of a fringe benefit. Consequently, recipients of de minimis fringes who are treated as independent contractors may be eligible to exclude the value of the benefits from their gross income.

ANALYSIS:

Taxpayer asserts that its deduction for the cost of food and beverages provided to its representatives who attended one or more of its conferences is not subject to the partial disallowance of § 274(n)(1) because the food and beverages either (1) constitute a de minimis fringe benefit, or (2) are social activities within the meaning of § 274(e)(4).

<u>De minimis fringe benefits</u>

The taxpayer’s representatives performed services for the taxpayer and attended one or more conferences at which they received the food and beverages that the taxpayer seeks to classify as de minimis fringe benefits. Although they are treated as independent contractors by the taxpayer, the representatives would be eligible to

exclude these fringe benefits from their gross incomes (under § 132(a)(4)) if the provisions of § 132(e) are satisfied. Section 1.132-1(b)(4).[1]

Whether a benefit qualifies as a de minimis fringe depends on the facts and circumstances of a particular case. Generally, the value of the benefit and the frequency with which Taxpayer provided similar fringe benefits to Taxpayer's representatives are relevant considerations.

In this case, as part of a multi-day conference, the taxpayer provided each attendee a package of food and beverages consisting at least of breakfast, lunch, snacks, and cocktails. Therefore, in determining the value and frequency with which similar benefits are provided to employees, we conclude that the benefit properly to be considered here is the food and beverages provided to each representative during each multi-day conference. Additionally, the value of food and beverages provided to each representative included the food and beverages provided to the representative's spouse or guest. *See* section 1.61-21(a)(4).

Since Taxpayer knew the identity of each representative attending a particular conference, it would not have been administratively difficult for Taxpayer to determine the frequency with which Taxpayer provided the benefit to each individual representative. Consequently, the frequency with which Taxpayer provided the benefit must be determined with respect to each individual representative in accordance with the "employee-measured" standard of § 1.132-6(b)(1). In this case, Taxpayer invited each representative to a regional conference and the national conference and invited select representatives to the top producers' conference. Thus, an individual representative might attend, at most, three conferences a year. This maximum frequency of three times a year would not preclude treating the benefit as de minimis if the aggregate value of food and beverages provided to each representative and guest attending a particular conference was so small as to make accounting for it unreasonable or administratively impracticable.

However, the pro rata value of food and beverages that Taxpayer provided to each representative per conference (dividing Taxpayer's cost by the total number of attendees) ranged from $109 to $709. Even the lowest value ($109) exceeds an amount that would reasonably be considered to be de minimis. It would not be unreasonable or administratively impracticable for Taxpayer to account for this amount. Under the circumstances of this case, the benefit provided to associates attending even one multi-day conference is more like the use of employer-owned facilities for a weekend (not a de minimis fringe) than an occasional group meal or cocktail party. We conclude that the value of the food and beverages that Taxpayer provided to its representatives at the conferences was not a de minimis fringe benefit.

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[1] Although not necessary to the discussion in this memorandum, it appears that, even if § 132(a)(4) does not exclude the fringe benefits here from the representatives incomes, § 132(a)(3), relating to working condition fringe benefits as defined in §132(d), would exclude some or all of the benefits from their incomes.

Social activities for employees

We also conclude that § 274(e)(4) does not apply to Taxpayer's expenses. Section 274(e)(4) applies only to expenses for recreational, social, or similar activities for *employees*, not for independent contractors, as Taxpayer treated the majority of its representatives. Even if the representatives were Taxpayer's employees, the activities were available only to the limited group of individuals who worked as brokers and not to Taxpayer's employees generally. *See* 1.274-2(f)(2)(v). Finally, Taxpayer has asserted that the meals and cocktail parties served a significant business purpose. Thus, they were not recreational or social in nature.

We have considered the other exceptions in § 274(n)(2) to § 274(n)(1), but none apply under the facts presented. Thus, Taxpayer's deduction for the cost of food and beverages provided to its representatives at its sales and educational conferences is subject to the partial deduction disallowance of § 274(n)(1).

CAVEAT(S):

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