KAPLAN PROFESSIONAL Tax Developments

Entertainment and Meals After the Tax Cuts and Jobs Act

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The Tax Cuts and Jobs Act (Pub. L. 115-97) has created quite a stir in the tax community regarding the status of meals in a business context. Congress moved in the Act to deny any business deduction for entertainment. And the Conference Committee Report allowed that meals "associated with operating" a trade or business remain deductible.

But the one example the Committee Report cited is one where the meal is clearly related to travel—a class of meals no one would have doubted was still an allowed expense under the law. That leaves open the far less easy to resolve question regarding what other meals still remain deductible.

This article, written in mid-February 2018, cannot give a conclusive, final answer to this question—that will need to await IRS guidance or eventual court cases on the issue. But we can look at what we do know right now are clearly are or are not deductible, as well as recognize those expenditures for which no absolute conclusions can yet be drawn.

Entertainment Expenses

The Tax Cuts and Jobs Act bars any deduction for expenses incurred with relation to an activity generally considered to be entertainment.[1] This bar took effect for expenses paid or incurred after December 31, 2017. But this bar does not mean that businesses will not incur such expenses after that date, since business necessity is likely going to require continued activities to build relationships with customers and clients after that date.

The bar on deductions for entertainment also throws into question deductions for at least some meals. As Veena Murthy, legislation counsel for the Joint Committee on Taxation, was quoted in *Tax Notes* as stating at a District of Columbia Bar Community event in early 2018, meals that are entertainment are fully disallowed. But, as she also stated, what those meals are isn't necessarily clear from the law or, frankly, the Conference Committee report that accompanied the Tax Cuts and Jobs Act.

[1] IRC §274(a)

Definition of Entertainment

While Congress changed the consequences of paying expenses for an entertainment related activity, reducing the deduction from 50% to nothing, they made no changes to what constitutes entertainment. Thus, Reg. §1.274-2(b), which defines entertainment, provides a definition that, unless the IRS revises it in light of the change in consequences, should still govern our determination of what is entertainment.

Reg. §1.274-2(b)(1) provides a general definition of entertainment. The definition begins with two sentences that discuss what entertainment is, giving certain specific examples.

> *For purposes of this section, the term "entertainment" means any activity which is of a type generally considered to constitute entertainment, amusement, or recreation, such as entertaining at night clubs, cocktail lounges, theaters, country clubs, golf and athletic clubs, sporting events, and on hunting, fishing, vacation and similar trips, including such activity relating solely to the taxpayer or the taxpayer's family. The term "entertainment" may include an activity, the cost of which is claimed as a business expense by the taxpayer, which satisfies the personal, living, or family needs of any individual, such as providing food and beverages, a hotel suite, or an automobile to a business customer or his family.*

Obviously, the specific examples in the first sentence will almost certainly be challenged in any exam where a taxpayer attempts to deduct such expenses, absent unusual circumstances that, in the particular situation, would render the expense not entertainment.

Also important is to note that the providing of food and beverages (that is, meals) to any individual may also be entertainment. The sentence is not quite as absolute as the statement in the first sentence, but it likely creates a presumption that these expenses will be entertainment. However, the terminology suggests that exceptions to treatment of such expenses as entertainment will not as rare as those for expenses mentioned in the first sentence—but they still will likely be the exception and not the rule.

The regulation then goes on to provide some examples of expenses that, although covered by the "personal expenses" category of the second sentence, are not entertainment.

> *The term "entertainment" does not include activities which, although satisfying personal, living, or family needs of an individual, are clearly not regarded as constituting entertainment, such as (a) supper money provided by an employer to his employee working overtime, (b) a hotel room maintained by an employer for lodging of his employees while in business travel status, or (c) an automobile used in the active conduct of trade or business even though used for routine personal purposes such as commuting to and from work. On the other hand, the providing of a hotel room or an automobile by an employer to his employee who is on vacation would constitute entertainment of the employee.*

In Reg. §1.274-2(b)(1)(ii) the regulation goes on to provide what it calls an "objective test" and to point out that merely because the activity might meet some other definition of a

deductible expense that won't override the denial of the expense for being entertainment generally--§274(a)(1)'s denial only applies to items that are "otherwise deductible" under the IRC.

> *An objective test shall be used to determine whether an activity is of a type generally considered to constitute entertainment. Thus, if an activity is generally considered to be entertainment, it will constitute entertainment for purposes of this section and section 274(a) regardless of whether the expenditure can also be described otherwise, and even though the expenditure relates to the taxpayer alone.* ***This objective test precludes arguments such as that "entertainment" means only entertainment of others or that an expenditure for entertainment should be characterized as an expenditure for advertising or public relations.***

The provision goes on to note some special cases where an item may be so intrinsically tied to the taxpayer's business to render it not entertainment in that very particular case.

> *However, in applying this test the taxpayer's trade or business shall be considered. Thus, although attending a theatrical performance would generally be considered entertainment, it would not be so considered in the case of a professional theater critic, attending in his professional capacity. Similarly, if a manufacturer of dresses conducts a fashion show to introduce his products to a group of store buyers, the show would not be generally considered to constitute entertainment. However, if an appliance distributor conducts a fashion show for the wives of his retailers, the fashion show would be generally considered to constitute entertainment.*

Items Treated as Not Entertainment by Regulation

The IRS also "carved out" some exceptions to put items that might look like entertainment into another category.

Packaged Food or Beverages and Tickets Provided to Another Person

The following two categories of items are to be treated as gifts and not entertainment:

- Packaged food or beverages transferred directly or indirectly to another person intended for consumption at a later time. [Reg. §1.274-2(b)(1)(iii)(b)]
- Tickets of admission to a place of entertainment transferred to another person if the taxpayer does not accompany the recipient to the entertainment. [Reg. §1.274-2(b)(1)(iii)(b)]

While that removes those expenses from complete denial of the expense under §274(a), the expenses are severely limited under §274(b). Gifts to any single individual can only deducted up to $25 per year—a figure that Congress has never adjusted for inflation or raised since this provision was first enacted decades ago.

Aircraft and Automobiles Used Partially for Business

Reg. §1.274-2(b)(1)(iii)(c)(1) also provides a special rule for aircraft and automobiles that are used both for business and entertainment. That provision provides an exception from treatment as entertainment:

> *(1) With respect to a transportation type facility (such as an automobile or an airplane), even though used on other occasions in connection with an activity of a type generally considered to constitute entertainment, to the extent the facility is used in pursuit of a trade or business for purposes of transportation not in connection with entertainment.*

Items Not Treated as Entertainment per IRC §274(e)

While IRC §274(a) states that "[n]o deduction otherwise allowable under this chapter shall be allowed" for an activity generally considered entertainment, later in §274 Congress granted an exception from that treatment for nine categories of expenditures, providing that IRC §274(a) shall apply to these nine expenditures.

Some of them don't totally escape being tax disadvantaged. In some cases the loss of deduction is merely transferred to another party (a customer or employee), while others will face a 50% disallowance under the general 50% disallowance for meals under IRC §274(n), though some of these expenditures also qualify for an exception from the 50% disallowance rule for meals under yet another special rule found at IRC §274(n)(2).

Food and Beverages for Employees [IRC §274(e)(1)]

The first exception provides that food and beverages furnished on a taxpayer's business primarily for the taxpayer's employees. However, while not limited by the entertainment rule found at IRC §274(a), Congress did not include this in the list of expenditures not subject to the 50% disallowance for business meals.[2]

Example

American Trek has a kitchen in its office for the use of its employees. The company stocks the refrigerator in the kitchen with soft drinks and other beverages which the employees are allowed to consume during the day without additional cost. The amounts paid for the soft drinks and beverages are not entertainment expenses, since IRC §274(e)(1) overrides any possible treatment of this expense as entertainment. However, the amounts would still be business meals subject to the 50% deduction limit found at IRC §274(n)(1).

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[2] IRC §274(n)(1), (n)(2)(A)

Expenses Treated as Compensation [IRC §274(e)(2)]

The taxpayer can exclude an amount paid from treatment as entertainment to the extent of the amount is treated as compensation by the employer to an employee and reflected as taxable income on the employee's W-2.[3]

For certain "specified individuals" this limitation is modified to require that the entire amount of the expense must be included in wages of that person for the provision to apply.[4] Such specified individuals includes any individual who:

- Is subject to the requirements of section 16(a) of the Securities Exchange Act of 1934 with respect to the taxpayer or a related party to the taxpayer, or
- Would be subject to such requirements if the taxpayer (or such related party) were an issuer of equity securities referred to in such section.[5]

Section 16(a) of the Securities Exchange Act of 1934 applies to "insiders" generally. Investopedia defines the covered group as:

> Section 16 of the Exchange Act of 1934 requires the reporting of beneficial ownership by the officers, directors or stockholders who possess stock directly or indirectly, resulting in beneficial ownership in excess of 10% of the company's common stock or other class of equity. Parties that fall under Section 16 are typically referred to as insiders. This rule applies not only to public companies, but also private companies whose non-equity securities, such as bonds, are traded on national stock exchanges. [6]

§274(e)(2) provides that this definition is expanded to apply to nonissuers, so any person holding an actual or beneficial interest of more than 10% in the company falls into this category. Related parties for the purposes of this rule are those included under related party rules found at IRC §§267(b) and 707(b).

Business meals included in this category are fully deductible, being excluded from the 50% limitation of IRC §274(n)(1).[7]

Example

Employee Relations Specialists buys its sales staff season tickets to the local professional baseball team. Employee Relations Specialists includes the amount paid for the tickets as wage compensation, subjecting it to

[3] Reg. §1.274-2(f)(2)(iii)(A)
[4] IRC §274(e)(2)(B)(i)
[5] IRC §274(e)(2)(B)(ii)
[6] "Section 16," *Investopedia*, https://www.investopedia.com/terms/s/section-16.asp, February 7, 2018
[7] IRC §274(n)(2)(i)

tax withholding and reporting the amount on the employee's W-2 at year end. Employee Relations is allowed a deduction for 100% of the cost of the season tickets.

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If the employer elects to make use of this provision, the reimbursed expenses rules described below will not apply to the employee for the same expense.

Reimbursed Expenses [IRC §274(e)(3)]

When a business reimburses another person or business for expenses that may be treated as meals or entertainment under IRC §274, you may wonder how the disallowance rules of §274 should apply. Reg. §1.274-2(f)(2)(iv)(A) gives general guidance on how §274 and the related regulations resolve this issue:

> *In the case of any expenditure for entertainment, amusement, recreation, food, or beverages made by one person in performing services for another person (whether or not the other person is an employer) under a reimbursement or other expense allowance arrangement, the limitations on deductions in paragraphs (a) through (e) of this section and section 274(n)(1) apply either to the person who makes the expenditure or to the person who actually bears the expense, but not to both.*

If a taxpayer receives reimbursement for amounts under a reimbursement or expense allowance arrangement with another person, a full deduction is allowed to the taxpayer, so long as the reimbursement meets certain conditions. Some of these conditions are found in the IRC itself, while others are explained in Reg. §1.274-2(f)(2)(iv).

For a person receiving such reimbursement as an employee, the employer cannot have elected to treat such a payment as compensation pursuant to IRC §274(e)(2) discussed earlier. If the employer did not include the amount in the employee's W-2, then the employee recognizes no income and the employer is the one that must apply the entertainment or business meals limitation to the deduction for such expenses. However, if the employer is reimbursed by another party for the employee's expenses, then the employer may escape these limitations.

Example

Mary is an employee of On-Site Education, Inc. which provides human resource training to employers around the country. Mary, as an instructor, travels to locations that require an overnight stay and incurs meals expenses on these trips that she is reimbursed for by On-Site after she submits receipts documenting the expense.

If On-Site does not bill the customers receiving the training separately for these meals under the rules for a non-employee discussed below, then On-Site will only be able to deduct 50% of Mary's meals, while Mary will recognize no income from the reimbursement. However, if On-Site submits the expense for reimbursement to the customer receiving the training from Mary under the rules discussed later, then On-Site

will get a full deduction for the meals. In that case, the customer will end up with the disallowed portion of the deduction for tax purposes.

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For reimbursement arrangements with a non-employee, the law provides that it may be fully deducted if the amount is paid under a reimbursement arrangement where the party being reimbursed fully accounts to the customer for the amount paid.

Until 2013, Reg. §1.274-2 had treated this exception as a "one-way" street—if a vendor was providing an accounting of expenses to a customer, the customer was subject to the limitations on expenses. But with changes to the regulations made in 2013, the decision on which party will be hit with the disallowance when the expenses are reimbursed can be agreed upon by the parties.

As Reg. §1.274-2(f)(2)(iv)(C) begins:

> *(C) Reimbursement arrangements involving persons that are not employees.*
>
> *In the case of an expense for entertainment, amusement, recreation, food, or beverages of a person who is not an employee (referred to as an independent contractor) in performing services for another person (a client or customer) under a reimbursement or other expense allowance arrangement with the person, the limitations on deductions in paragraphs (a) through (e) of this section and section 274(n)(1) apply to the party expressly identified in an agreement between the parties as subject to the limitations.*

If the agreement does not provide which party is to be burdened with the reduced or disallowed deduction, then the following rules (which were in effect before the 2013 changes) apply.

> *If an agreement between the parties does not expressly identify the party subject to the limitations, the limitations apply --*
>
> > *(1) To the independent contractor (which may be a payor described in paragraph (f)(2)(iv)(B) of this section) to the extent the independent contractor does not account to the client or customer within the meaning of section 274(d) and the associated regulations; or*
> >
> > *(2) To the client or customer if the independent contractor accounts to the client or customer within the meaning of section 274(d) and the associated regulations.*[8]

[8] Reg. §1.274-2(f)(2)(iv)(C)

Example

Continuing with the above example, Atlanta Wholesaling contracts with On-Site for Mary to provide two days of human resource training. Atlanta Wholesaling agrees to pay On-Site for Mary's expenses, but also includes a provision in the agreement that On-Site will be the party subject to the §274 limitations.

In this case, despite On-Site providing an itemized list of Mary's expenses and supporting documentation, On-Site will still be subject to the §274 limitations on the expenses incurred.

Example

Assume that the agreement with Atlanta Wholesaling does not include the provision shifting the responsibility for the §274 limits to On-Site. In this case, On-Site's separate billing for Mary's expenses and provision of the documentation will cause Atlanta Wholesaling to be subject to the §274 limitations. On-Site will be able to deduct 100% of Mary's reimbursed expenses.

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Recreational, Etc. Expenses for Employees [IRC §274(e)(4)]

Recreational, social or similar activities, including the facilities related to such activities, conducted primarily for the benefit of rank and file employees are not subject to the entertainment deduction denial under IRC §274(a).

The employees that are excluded from the rank and file category are based on a modified version of those considered highly compensated under IRC §414(q) found in the rules related to qualified retirement plans. The modified list consists of:

- 10% owners of the employers at any time during the tax year (not considering any attribution of ownership of shares held by family members)
- An employee that, for the preceding year
  - Had compensation from the employer of over $120,000[9] *or*
  - If the employer elects, the employee was in the top 20% of employees when ranked on the basis of compensation for the preceeing year.[10]

Reg. §1.274-2(f)(2)(v) contains a list of the following, nonexhaustive, list of examples of the types of activities that all under this exception:

- An employer holding employee gatherings such as:
  - Christmas parties
  - Annual picnics

[9] Notice 2017-64

[10] IRC §§274(e)(4) and 414(q)

  - Summer outings

- An employer maintaining, for the use of its employees generally a
  - Swimming pool
  - Baseball diamond
  - Bowling alley
  - Golf course

The regulation provides the following guidance to be used to determine if the expenditure does not primarily benefit the rank and file employees:

> *Any expenditure for an activity which is made under circumstances which discriminate in favor of employees who are officers, shareholders or other owners, or highly compensated employees shall not be considered made primarily for the benefit of employees generally. On the other hand, an expenditure for an activity will not be considered outside of this exception merely because, due to the large number of employees involved, the activity is intended to benefit only a limited number of such employees at one time, provided the activity does not discriminate in favor of officers, shareholders, other owners, or highly compensated employees.*

Example

Brenda's Boutique holds an annual holiday party which is attended by all of its employees. The expenses related to this party are fully deductible to the business.

Example

Assume that instead of inviting all employees, only the nine equal shareholders of the corporation are invited to and attend the party. In this case, the expenditure will not be protected by this special rule.

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Business meals included in this category are fully deductible, being excluded from the 50% limitation of IRC §274(n)(1).[11]

Employees, Stockholders, Etc., Business Meetings [IRC §274(e)(5)]

Another category of expenses not excluded under the entertainment category are expenses directly related to business meetings of the employer's employees, stockholders, agents or directors. For purposes of this rule, a partnership is considered a taxpayer and a partner an agent of that taxpayer.[12]

[11] IRC §274(n)(2)(i)
[12] Reg. §1.274-2(f)(2)(vi)

Reg. §1.274-2(f)(2)(vi) gives the following description of the types of meetings that would qualify under this rule:

> *For example, an expenditure by a taxpayer to furnish refreshments to his employees at a bona fide meeting, sponsored by the taxpayer for the principal purpose of instructing them with respect to a new procedure for conducting his business, would be within the provisions of this exception. A similar expenditure made at a bona fide meeting of stockholders of the taxpayer for the election of directors and discussion of corporate affairs would also be within the provisions of this exception.*

But the regulation goes on to warn that a taxpayer can't push this exception too far, noting:

> *While this exception will apply to bona fide business meetings even though some social activities are provided, it will not apply to meetings which are primarily for social or nonbusiness purposes rather than for the transaction of the taxpayer's business. A meeting under circumstances where there was little or no possibility of engaging in the active conduct of trade or business (as described in paragraph (c)(7) of this section) generally will not be considered a business meeting for purposes of this subdivision. This exception will not apply to a meeting or convention of employees or agents, or similar meeting for directors, partners or others for the principal purpose of rewarding them for their services to the taxpayer. However, such a meeting or convention of employees might come within the scope of subdivisions (iii) or (v) of this subparagraph.*

The additional possible exceptions noted in the final sentence above are if the amounts are included as taxable compensation to the employee(s) or if the activity can meet the recreational expense exception discussed previously.

Example

Jones and Smith, CPAs holds a meeting at the beginning of the year to go over tax season procedures with the members of the firm involved in handling tax matters. The meeting is held in a meeting room at a local hotel, with lunch and refreshments catered to the group during the day. The expenses incurred for this meeting will be fully deductible to Jones and Smith, CPAs.

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Business meals included in this category are fully deductible, being excluded from the 50% limitation of IRC §274(n)(1).[13]

Meetings of Business Leagues, Etc. [IRC §274(e)(6)]

Expenditures for entertainment "directly related and necessary to attendance at bona fide business meetings or conventions of organizations exempt from taxation under section 501(c)(6) of the Code, such as business leagues, chambers of commerce, real estate boards,

[13] IRC §274(n)(2)(i)

boards of trade, and certain professional associations, is not subject to the limitations on allowability of deductions" provided for under IRC §274(a) for entertainment.[14]

Example

Henry's Used Cars, Inc. sends employees to the annual statewide convention of the car dealers association, a §501(c)(6) organization. The expenses for attending this convention will be fully deductible to Henry's Used Cars. Inc.

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Items Available to the Public [IRC §274(e)(7)]

If taxpayer makes entertainment activities available to the public (rather than only its customers), the business will not be denied a deduction for the expenses incurred for such entertainment. Reg. §1.274-2(f)(2)(viii) expands on this exception as follows:

> *Expenditures for entertainment of the general public by means of television, radio, newspapers and the like, will come within this exception, as will expenditures for distributing samples to the general public. Similarly, expenditures for maintaining private parks, golf courses and similar facilities, to the extent that they are available for public use, will come within this exception. For example, if a corporation maintains a swimming pool which it makes available for a period of time each week to children participating in a local public recreational program, the portion of the expense relating to such public use of the pool will come within this exception.*

As the last sentence of above quoted portion of the regulation indicates, if the employer makes a facility available to the public only at certain times, the deduction will be allowed only for the portion of time the facility is made available to the public.

Business meals included in this category are fully deductible, being excluded from the 50% limitation of IRC §274(n)(1).[15]

Entertainment Sold to Customers [IRC §274(e)(8)]

If taxpayer's business is providing entertainment as its product (such as a professional sports team or a corporation operating a movie theatre), a deduction will be allowed for the cost of the entertainment sold to the public, so long as it is sold in a bona fide transaction for adequate consideration.[16]

[14] Reg. §1.274-2(f)(2)(vii)
[15] IRC §274(n)(2)(i)
[16] Reg. 1.274-2(f)(2)(ix)

Reg. §1.274-2(f)(2)(ix) provides the following example:

> *Thus, the cost of producing night club entertainment (such as salaries paid to employees of night clubs and amounts paid to performers) for sale to customers or the cost of operating a pleasure cruise ship as a business will come within this exception.*

Business meals included in this category are fully deductible, being excluded from the 50% limitation of IRC §274(n)(1).[17]

Expenses Includable in Income of Persons Who Are Not Employees [IRC §274(e)(9)]

The final category included in the list of "allowable" entertainment expenses per IRC §274(e) relates to expenses paid that are includable in the income of someone other than an employee for services or as an award taxable under IRC §74. However, if the amount in question is required to be included in an information return (such as a Form 1099MISC) or would be so required to be reported except that the amount is less than $600, the deduction will not be allowed unless the amount is actually reported on the appropriate information return to the individual.

On Premises Meals Facility

The Tax Cuts and Jobs Act made significant changes to the employer deduction to employer provided meals facilities or meals provided for the convenience of the employer.

Eventually such expenses will be wholly non-deductible by the employer. For years beginning after December 31, 2025, the following provision, found at IRC §274(o), will apply:

> *(o) Meals provided at convenience of employer*
>
> *No deduction shall be allowed under this chapter for --*
>
> > *(1) any expense for the operation of a facility described in section 132(e)(2), and any expense for food or beverages, including under section 132(e)(1), associated with such facility, or*
> >
> > *(2) any expense for meals described in section 119(a).*

Note that, in this case, the barred deduction includes items covered by the provisions of IRC §132(e)(1) for food costs "so small as to make accounting for it unreasonable or administratively impracticable."

In the interim, the law removes old IRC §274(n)(2)(B) which had provided protection from the 50% disallowance rule for such expenses. The removal is effective for tax years

[17] IRC §274(n)(2)(i)

beginning after December 31, 2017. Until full disallowance comes in 2026, such costs will be only 50% deductible.

Thus, these expenses related to on-premises eating facilities are deductible at the following rates for the various years:

- Years beginning before January 1, 2018 – 100%
- Years beginning on or after January 1, 2018 through December 31, 2025 – 50%
- Years beginning on or after January 1, 2026 – 0%

Example

Yellow Widgets, Inc., a C corporation, operates an on premises eating facility that qualifies under IRC §132(e)(2). For each year, Yellow incurs $150,000 for the costs of operations and food associated with the facility every year from 2017 through 2026.

The amount of deductible expense that Yellow can claim on its calendar year Form 1120 is:

Year	*Amount*
2017	*$150,000*
2018	*75,000*
2019	*75,000*
2020	*75,000*
2021	*75,000*
2022	*75,000*
2023	*75,000*
2024	*75,000*
2025	*75,000*
2026	*0*

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One ironic item of note is that, early in 2017 prior to the passage of the Tax Cuts and Jobs Act, a case had expanded the coverage of the on premises meal facility rule. In the case of *Jacobs v. Commissioner*, 148 TC No. 24 (2017) the Tax Court noted its disagreement with the IRS's narrow view of what constituted an "employer eating facility" by allowing a professional hockey team to consider hotel space leased for away games to qualify as such, but did agree with the IRS that to be 100% deductible and fully excluded from the employee's income under the law then in effect a meal for the convenience of the employer did have to be provided in an employer eating facility.

Business Meals after TCJA

Prior to 2017, for a business meal (other than a meal for an employee traveling on business) to qualify as a deductible business expense generally we assumed the parties must have a

substantial business discussion directly before, during, or after the meal.[18] The provision did not apply in the case of individuals eating alone while away from home on business – that is, travel related meals—as such meals were not considered "potentially entertainment."

TCJA removed the special "substantial business discussion" provision applied to entertainment that was found at IRC §274(a)(1)(A) was remove from the law. That section now reads:

> *(1) In general*
>
> *No deduction otherwise allowable under this chapter shall be allowed for any item --*
>
> *(A) Activity*
>
> *With respect to an activity which is of a type generally considered to constitute entertainment, amusement, or recreation,*

Previously it read like this (pay special attention to the underlined text):

> *(1) In general*
>
> *No deduction otherwise allowable under this chapter shall be allowed for any item --*
>
> *(A) Activity*
>
> *With respect to an activity which is of a type generally considered to constitute entertainment, amusement, or recreation, unless the taxpayer establishes that the item was directly related to, or, in the case of an item directly preceding or following a substantial and bona fide business discussion (including business meetings at a convention or otherwise), that such item was associated with, the active conduct of the taxpayer's trade or business.*

Now that language is simply no longer there. So, arguably, any deduction that previously required showing that a substantial business discussion took place is now simply not deductible since the now stricken provision was an exception to disallowance of the deduction.

That clause was the source of the oft-cited advice regarding the need for such discussions before or after a meal, or to show the meal was directly related to the taxpayer's trade or business in order to claim any deduction for a business meal.

The removal of that language in the Tax Cuts and Jobs Act was meant to insure that no entertainment would be deductible. But are (or were) meals with customers and others related to the taxpayer's business always entertainment and saved only by that clause? Or were only some meals with customers and others entertainment?

[18] IRC §274(a)(1)(A) prior to amendment by Pub. L. 115-97 (the Tax Cuts and Jobs Act)

Prior to TCJA that was mainly an academic question—whether a meal was or was not entertainment, it would be 50% deductible as IRC §274(n) imposed a 50% limit on all business meals no matter how allowed under the IRC. Prudence suggested treating all such meals as "entertainment" and applying the rules of old §274(a)(1) and documentation rules of §274(d) to such activities, rather than attempting to find "non-entertainment" meals. But the question of whether there exists "non-entertainment" meals is no longer merely an academic exercise—unless such meals exist, all such meals (except those explicitly excluded from §274(a) treatment by §274(e)) would not be deductible for federal income tax purposes.

Guidance on Deductions for Business Meals

The Committee Report accompanying Pub. L. 115-97 (TCJA) provided the following, not terribly clarifying, explanation of what meals are still deductible by the taxpayer:

> *However, taxpayers may still, generally, deduct 50 percent of the food and beverage expenses associated with operating their trade or business (e.g., meals consumed by employees on work travel).*

What is clear is that any activity that is "generally considered" to be entertainment is not deductible and, per Reg. §1.274-2(b) the provision of food and drink can be considered entertainment. For the moment, pending future guidance or clarification from the IRS or other sources (perhaps a Joint Committee on Taxation Blue Book on the law), it seems prudent to advise clients:

- Meals other than those being provided to employees traveling or that fits within the exemptions discussed in the entertainment section under IRC §274(e) may no longer be allowed as a deduction but
- Taxpayers should continue to maintain the required documentation for all such meals to take into account the very real possibility that guidance may later emerge that could allow certain meals other than that limited group to be deductible by the taxpayer.

Tax Adviser's Options While Awaiting Guidance

Since the revision applies to amounts paid or incurred after December 31, 2017, fiscal year taxpayers may have little time to wait for additional guidance. Even for calendar year taxpayers there is no assurance clarifying guidance will be available prior to the date the taxpayer's return is due.

So what is a tax adviser to do in such a case? In the absence of any additional guidance, the adviser should attempt to present possible reasonable interpretations of the law that can be applied. The taxpayer's position will generally be sustainable in the absence of guidance on ambiguous portions of the law so as the position is both a reasonable interpretation and the positions are consistently applied by the taxpayer to his/her facts.

But since the IRS might have a contrary view on whether a position is reasonable and it may be difficult to persuade the agent that a position the agent does not agree with has substantial authority, if a return is prepared in a situation where guidance does not exist, the

adviser should strongly consider advising the inclusion of a Form 8275, *Disclosure Statement*, with the return. Such a form will, first, clearly document the taxpayer's basis for his/her position and second, force the IRS to demonstrate the position lacks a reasonable basis if the agency attempts to impose a penalty on any understatement the agency may assert is due.

Advisers also should inform a client that if the client opts to take a very conservative position, it may mean that claims for refund may be necessary later if and when the IRS issues guidance that allows for deductions for amounts not claimed on the return. Many clients are most anxious to avoid any issue with the IRS, so an adviser should expect a significant number of clients will want to take an extremely conservative position.

Basically, to be deductible the adviser must be able to defend a position that an expenditure either:

- Meets one of the exceptions to treatment as entertainment under either Reg. §1.274-2 or IRC §274(e) or
- Show the activity that lead to the expense in question is not one generally considered to be entertainment that is an ordinary and necessary business expense.