Notice 2018-76: Taking a Bite Out of the Business Expense Deductions for Meals, Entertainment

Sunday, October 7, 2018

On October 3, 2018, the IRS issued transitional guidance in Notice 2018-76 concerning the business expense deductions for meals and entertainment following the changes made by the Tax Cuts and Jobs Act (“TCJA”) — which generally disallowed a deduction for expenses related to entertainment, amusement or recreation, but did not specifically address the deductibility of business meal expense.

The Notice explained that, under Code Section 274(k), no deduction is allowed for food and beverage expense unless the expense is not lavish or extravagant under the circumstances and the taxpayer or an employee of the taxpayer is present at the furnishing of the food and beverage. If those requirements are satisfied, the amount of the deduction is limited to 50 percent of the amount of the food and beverage expense under Code Section 274(n)(1).

Under pre-TCJA law, a deduction for entertainment expense was allowed if the entertainment was directly related to the active conduct of the taxpayer’s trade or business or in the case of entertainment directly preceding or following a substantial and bona fide business discussion, the entertainment was associated with the active conduct of the taxpayer’s trade or business. The amount of the deduction was limited to 50 percent of the amount of the entertainment expense under Code Section 274(n)(1).

The TCJA did not address the circumstances under which food and beverages might constitute entertainment — and would, therefore, not be deductible. The Notice announced that the Treasury Department and IRS intended to publish proposed regulations under Code Section 274 clarifying when business meals might constitute nondeductible entertainment expense. Until the proposed regulations become effective, taxpayers may rely on the Notice and may deduct 50 percent of food and beverage expense if:

• The expense is ordinary and necessary under Code Section 162(a) or incurred in carrying on a trade or business;

• The expense is not lavish or extravagant;

• The taxpayer or an employee of the taxpayer is present at the furnishing of the food and beverage;

• The food and beverage are provided to current or potential customers, clients, consultants or similar business contacts; and

• In the case of food and beverage provided during or at an entertainment activity or event, the food and beverages are purchased separately from the entertainment or the cost of the food and beverages is stated separately from the cost of the entertainment on the bill, invoice or receipt.

The Notice stated that the Treasury Department and IRS intend to issue separate guidance concerning the treatment of food and beverages furnished primarily to employees on the employer’s business premises.

Key Take Away: Whether sitting with clients in the cheap seats or a luxury party box, make sure those ballpark beers and hot dogs are paid for or itemized separately from the ballgame itself.