I.R.S. V. BOSTON BRUINS: A FACEOFF OVER THE DEDUCTIBILITY OF AWAY GAME MEALS

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I. INTRODUCTION

On April 28, 2015, the owner of the Boston Bruins, Jeremy Jacobs, and his wife, Margaret Jacobs (collectively the "Boston Bruins"), were issued a Notice of Deficiency from the Internal Revenue Service ("IRS").[1] Deeridge Farms Hockey Association, an S Corporation that Jeremy and Margaret are the "sole shareholders of," "operates the Boston Bruins."[2] In the Notice of Deficiency, the IRS claimed that the Boston Bruins owe $45,205.00 for the 2009 tax year and $39,823.00 for the 2010 tax year.[3] Three months after receiving the Notice of Deficiency, the Boston Bruins filed a petition with the United States Tax Court challenging the IRS's determination of deficiency.[4]

The issue between the IRS and the Boston Bruins involves deductions that the team took for meal expenses.[5] Specifically, the IRS claims that the meal expenses, which the team incurred by providing its players with meals during away games, are capped at fifty percent of the amount spent according to Internal Revenue Code ("IRC" or "Tax Code" or "Code") Section 274(n).[6] The Boston Bruins argue that the away game meal expenses are governed by Section 274(n)(2), which provides that the fifty percent limitation "does not apply in some circumstances, including when the meal expense is excludible as gross income of the recipient under the *de minimis* fringe rules of Section 132."[7]

The faceoff between the IRS and the Boston Bruins will require the court to address issues that have "remained unresolved for many years"

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[1] Br. for Pet'r at 1, Jacobs v. Comm'r., No. 19009-15 (T.C. July 27, 2015); *see also Boston Bruins Owners' Seek Redetermination of Tax Deficiencies*, TAX NOTES TODAY 161-13 (Aug. 20, 2015) (Lexis).

[2] Br. for Pet'r, *supra* note 1, at 5.

[3] Br. for Pet'r, *supra* note 1, at 2.

[4] Br. for Pet'r, *supra* note 1, at 9; *see also* Callum Borchers, *Bruins, IRS in Face-Off on Deducting Team Meals*, BOSTON GLOBE (Aug. 17, 2015), https://www.bostonglobe .com/business/2015/08/17/bruins-appeal-for-irs-approval-deduct-cost-feeding-team-during-road-trips/IgfStOf0wBhWGtHr82aVjO/story.html.

[5] Br. for Pet'r, *supra* note 1, at 9; *see also Bruins in Tax Battle with IRS Over Comped Meals*, FOX SPORTS (Aug. 18, 2015), http://www.foxsports.com/nhl/story/irs-boston-bruins-tax-meal-write-offs-081815.

[6] Br. for Pet'r, *supra* note 1, at 9; Roger Russell, *Boston Bruins Battle IRS Over Meal Deductions*, ACCT. TODAY (Aug. 19, 2015), http://www.accountingtoday.com/news/tax-practice/boston-bruins-battle-irs-over-meal-deductions-75542-1.html.

[7] Andrew Velarde, *News Analysis: Are the Bruins About to Hip-Check the IRS on Meal Expenses?*, TAX NOTES TODAY 165-2 (Aug. 25, 2015) (Lexis); *accord* Br. for Pet'r, *supra* note 1, at 9; *see also* 26 I.R.C. § 274(n)(2)(B) (2016) (stating that the fifty percent cap does not apply if "in the case of an expense for food or beverages, such expense is excludable from the gross income of the recipient under section 132 by reason of subsection (e) thereof (relating to *de minimis* fringes) . . . ").

and could have a significant impact on businesses across the country.[8] A favorable ruling for the Boston Bruins would be used as precedent by the "30 NHL teams and 30 NBA teams traveling for 41 games each season, 32 NFL teams traveling eight times a season, and 30 MLB teams traveling for 81 games each year."[9] It would also affect employees of "mobile employers" who have not been deducting 100 percent of their meal expenses.[10] Furthermore, if the court decides in favor of the Boston Bruins, then the IRS could lose millions of dollars in tax revenue.[11]

This note will take the position that the Boston Bruins are correct in deducting 100 percent of the meal expenses incurred during away games. Part II of this note will provide a comprehensive road map. This road map will highlight the relevant parts of the Tax Code that are applicable to the Boston Bruins argument and give insight into how these parts of the Tax Code function together. Part III of this note will discuss what constitutes necessary and ordinary business expenses pursuant to Section 162, and what must be shown by the taxpayer to meet the requirements of Section 162(a)(2) of the Code. The first part of this section will apply the standards provided in Section 162 to the Boston Bruins' case. The next section of Part III will provide an in-depth exploration of Section 274, which limits or denies Section 162 deductions for meals under certain circumstances. During the discussion of the relevant elements of Section 274, this note will apply them to the present dispute between the Boston Bruins and the IRS. Section 274, however, incorporates elements defined in other sections of the Tax Code, particularly Sections 132 and 119. These two sections of the Code will be discussed in Part IV. The first section of Part IV will examine the definition of "meal" and "eating facility" in Section 132(e). The second section of Part IV will present and analyze the historical background of Section 119, which provides an exclusion for the value of food provided to employees for the convenience of the employer on its business premises. In the final segment of this note, Part V, will conclude that although the Boston Bruins face an uphill battle in their challenge of the IRS's position, the team should ultimately be successful in their stated position. Part V will also discuss the ramifications if the Boston Bruins are successful in their faceoff with the IRS.

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[8] Velarde, *supra* note 7.

[9] Velarde, *supra* note 7.

[10] Velarde, *supra* note 7 (stating that an example of an "mobile employer" would be a concert promoter who has a "group of mobile employees" that move from "venue to venue" promoting concerts).

[11] Velarde, *supra* note 7.

II. THE GAME PLAN

A. Tax Code Road Map

The Tax Code "prescribes a complex and not-always-intuitive formula for navigating" the area of employer-provided meals.[12] In order to decipher the argument asserted by the Boston Bruins and the relevant issues, it is important to understand how all of the applicable sections of the Tax Code work together. To begin, Section 162(a) of the Tax Code allows for a taxpayer to deduct "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."[13] Section 162 explicitly treats "travel expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business" as ordinary and necessary business expenses.[14]

Deductions for meals are, however, limited or denied in certain circumstances by Section 274, which applies once the elements of Section 162 are met. Section 274(a)(1) disallows deductions "otherwise allowable under this chapter for any item" or activity that constitutes "entertainment, amusement, or recreation."[15] The section also applies to a "facility" that is used "in connection with an activity" that constitutes entertainment, amusement, or recreation.[16] Though it is not clear on the face of Section 274 that meals are considered "entertainment, amusement, or recreation" the legislative history clearly indicates that it "includes any business expense incurred in furnishing of food and beverage."[17] There are, however, exceptions to the disallowance for "entertainment, amusement, or recreation" expenses. The disallowance is not applicable if "the item was directly related to, or, in the case of an item directly preceding or following a substantial bona fide business discussion . . . associated with, the active conduct of the taxpayer's trade or business."[18] The disallowance is also inapplicable in nine circumstances enumerated in Section 274(e) of the Tax Code.[19] The two

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[12] Syd Gernstein, *Boston Bruins Raise Controversy by Arguing that Meals are Deductible, Team is "World-Class,"* BNA FED. TAX BLOG (Aug. 12, 2015), http://www.bna.com /boston-bruins-raise-b17179934636/.

[13] 26 I.R.C. § 162(a) (2016).

[14] I.R.C. § 162(a)(2).

[15] I.R.C. § 274(a)(1) (2016).

[16] I.R.C. § 274(a)(1)(B).

[17] S. REP. NO. 87-1881, at 27 (1962).

[18] 26 I.R.C. § 274(a)(1)(A) (2016).

[19] I.R.C. § 274(e).

most pertinent exceptions under Section 274(e) with respect to the Boston Bruins are the exceptions for "food and beverages for employees" and "employees, stockholder, etc., business meetings."[20] Even if one of the exceptions applies, expenses for business meals are often limited by Section 274(n) to fifty percent of the expense.[21] The fifty percent limitation is not applicable if the "expense is excludable from the gross income of the recipient under Section 132 by reason of subsection (e) thereof (relating to *de minimis* fringes)."[22]

Section 132 treats an eating facility as a *de minimis* fringe—a fringe benefit of such small value that it is excluded from taxation—if the employer operates the eating facility for the employees, the facility is "located on or near the business premises of the employer," and the "revenue derived from such facility normally equals or exceeds the direct operating costs of such facility."[23] The requirement under Section 132 that the revenue from the facility equals or exceeds the direct operating expenses is satisfied if the employees are permitted to exclude the value of the meal under Section 119. Pursuant to Section 119, an employee may exclude from his gross income "the value of any meals or lodging furnished to him . . . on behalf of his employer" if the meals are provided for the convenience of the employer and "are furnished on the business premises of the employer."[24]

III. SCORING DEDUCTIONS

A. Section 162: Ordinary and Necessary

Before the Boston Bruins can assert that the away game meal expenses they incurred are 100 percent deductible under Section 274, the team must first meet the requirements of Section 162. Section 162(a) allows for deductions of ordinary and necessary trade or business expenses incurred in carrying on a trade or business.[25] The courts, in lieu of offering a bright-line test for determining whether a business expense is necessary and ordinary, have offered an objective standard in which to

[20] I.R.C. § 274(e)(1) ("Subsection (a) shall not apply to—[e]xpenses for food and beverages (and facilities used in connection therewith) furnished on the premises of the taxpayer primarily for his employees.").

[21] I.R.C. § 274(n) (stating in part that the deduction "shall not exceed 50 percent" for "any expense for food and beverages, and any item with respect to an activity which is of a type generally considered to constitute entertainment, amusement, or recreation, or with respect to a facility used in connection with such activity").

[22] I.R.C. § 274(n)(2)(B).

[23] 26 I.R.C. § 132(e)(1) (2016).

[24] 26 I.R.C. § 119(a)(1)-(2) (2016).

[25] I.R.C. § 162(a).

assess the nature of the expense.[26] This test looks at whether a "hard-headed businessman" would have incurred the same expense in an analogous situation.[27]

The determination of whether a trade or business expense is ordinary will depend upon the "time and place and circumstances" in which the expense was incurred.[28] Moreover, in *Deputy v. Du Pont*, the Supreme Court concluded that the "nature and scope" of the business is "extremely relevant" in determining whether an expense is ordinary."[29]

The Boston Bruins will be able to establish that meals provided to its players during away games are ordinary expenses under Section 162(a). Each season the team plays numerous games away from Boston: forty-one regular season games, four preseason games, and potentially several away playoff games.[30] In order for these players to adequately perform and serve their employer's business purpose, the players need to be provided proper food and beverages before the game.[31] Without proper nutrition, the team risks its players encountering "glycogen depletion, hypoglycemia, and fatigue during exercise."[32] Considering the nature and scope of the Boston Bruins' business—"playing and winning professional hockey games"—it is highly probable that the court will find no issue with classifying the away game meal expenses as ordinary.[33]

For an expense to be classified as necessary under Section 162(a), the expense must be found to be "appropriate and helpful" and incurred with the intention of securing a business benefit.[34] In the Boston Bruins'

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[26] United States v. Gilmore, 372 U.S. 39, 49 (stating that the Supreme Court focused on the "origin and character of the claim with respect to which an expense was incurred . . . " in deciding that legal fees that were incurred in a divorce action were not deductible).

[27] General Bancshares Corp. v. Comm'r, 326 F.2d 712, 714 (8th Cir. 1964); *see also* Rittenberg v. U.S., 267 F.2d 605, 608 (5th Cir. 1959).

[28] Deputy v. Du Pont, 308 U.S. 488, 496 (1940) (quoting Welch v. Helvering, 290 U.S. 111, 113-14 (1933)).

[29] *Id.* ("The fact that an obligation to pay has arisen is not sufficient. It is the kind of transaction out of which the obligation arose and its normalcy in the particular business which are crucial and controlling."); *see also* Larrabee v. Comm'r., 33 T.C. 838, 843 (1960) (finding that the petitioners were not allowed to deduct the operating expenses of a yacht because there was a lack of proximate relationship between the expense and the business operations of the petitioners).

[30] Br. for Pet'r, *supra* note 1, at 5.

[31] *See Fueling for Performance: How Proper Timing of Meals Affects Both Sport and Academic Performance*, NCAA (Aug. 6, 2013), http://www.ncaa.org/health-and-safety/nutrition-and-performance/fueling-performance-how-proper-timing-meals-affects-both.

[32] *Id.*

[33] Br. for Pet'r, *supra* note 1, at 7.

[34] Boyd v. Comm'r., 83 T.C.M. (CCH) 1253, at *2 (2002) (citing Welch v. Helvering, 290 U.S. 111, 113 (1933)); Heigerick v. Comm'r., 45 T.C. 475, 478 (1966).

case, the team meets both requirements for the expense to be considered necessary under Section 162(a). The Boston Bruins engage in the business of being "a world-class hockey team that provides entertainment to hockey fans who watch the Bruins' games," entertainment which is sold to the fans "as part of a bona fide transaction."[35] Furthermore, the team's entertainment goals, including their "ultimate purpose of playing, and winning, professional hockey games," can only be accomplished by providing the players' necessary meals.[36] In sports, especially professional sports, "adequate nutrition is absolutely essential for optimal training and performance of the athlete."[37] These "carefully selected" meals that "meet specific nutritional guidelines" can optimize "performance consistency in competition" and "reduce[] risk of injury" to the athletes.[38] Thus, the Bruins will have no issue proving that the away game meals qualify as necessary for the purposes of Section 162(a).

Although the Bruins meet the necessary and ordinary test, the team may also be able to deduct its meal expenses under Section 162(a)(2).[39] To come within the purview of Section 162(a)(2), the taxpayer must clear three hurdles.[40] Specifically, the taxpayer must establish the expense was: (1) "reasonable and necessary," (2) "incurred while away from home," and (3) "incurred in the pursuit of a trade or business."[41]

The first prong will be met if the travel expenses are solely for business, and "reasonable and necessary."[42] This includes "meals and lodging," "travel fare," and other "expenses incident to travel."[43] Moreover, the determination of whether a trip is "related primarily to the taxpayer's trade or business" will depend on the "facts and circumstances in each case."[44]

As to the second prong, the IRS and the courts have decided that the

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35 Br. for Pet'r, *supra* note 1, at 5.

36 Br. for Pet'r, *supra* note 1, at 7.

37 Katherine A. Beals & Anna Mitchell, *Recent Recommendations and Current Controversies in Sport Nutrition*, 9 AM. J. LIFESTYLE MED. 288, 288 (2013).

38 Br. for Pet'r, *supra* note 1, at 8; Beals & Mitchell, *supra* note 37, at 288.

39 26 I.R.C. § 162(a)(2) (2016) ("There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business . . . .").

40 Daly v. Comm'r., 72 T.C. 190, 194 (1979) (citing Comm'r. v. Flowers, 326 U.S. 465, 470 (1946)); I.R.C. § 162(a).

41 *Daly*, 72 T.C. at 194.

42 Treas. Reg. § 1.162-2(a) (2016).

43 *Id.*

44 Treas. Reg. § 1.162-2(b)(2).

taxpayer must meet the "overnight rule."[45] This requires the taxpayer to show that the trip (1) "requir[ed] sleep or rest," (2) the sleep or rest "was substantial in time," and (3) the trip was away from home.[46]

Finally, the last requirement is that the expense be "incurred in the pursuit of a trade or business."[47] Whether this element is met requires the court to examine the facts and circumstances of each case.[48]

The Boston Bruins will be able to meet the aforementioned test for the deduction of business expenses under Section 162(a)(2) of the Code. As to the first prong, the Boston Bruins incurred the meal expenses at hotels solely because of the business the team is involved in.[49] The team would not be able to function if it did not travel for its games because failure to attend away games would cause the Boston Bruins to miss half of its games.[50] Thus, the team traveling to an away game is solely for business reasons.

Turning to the second prong of Section 162(a)(2), the taxpayer needs to meet the overnight rule by showing that he is away from his principal place of business. The team meets the overnight rule because "the players are required to sleep at the designated hotel and abide by a designated curfew."[51] The team will also be able to establish that Boston is the principal location of the business pursuant to the factors provided by the IRS.[52] The fact that the team plays half of its games at its home arena and that the corporate headquarters is located at the home arena is enough for the Boston Bruins to show that Boston is the team's principal business location.[53] This conclusion is further supported by the fact that when the

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[45] Chappie v. Comm'r., 73 T.C. 823, 830 (1980) ("It is well settled that 'away from home' includes only overnight trips or trips which a stop for sleep or rest is required." (citing United States v. Correll, 389 U.S. 299 (1967))).

[46] *Id.*; Siragusa v. Comm'r., 39 T.C.M. (CCH) 1196, at 11-12 (1980) (stating that rest or sleep is substantial in time if it requires the taxpayer to secure lodging and is not "a mere pause in the daily work"); Rev. Rul. 75-432, 1975-2 C.B. 60 (stating that the term "home" has been defined by the IRS as the "place at which the taxpayer conducts the trade or business"); *see generally* Rev. Rul. 54-147, 1954-1 C.B. 51 (The IRS has provided factors that should be considered when determining if the location is the taxpayer's principal place of business, which are: (1) "total time ordinarily spent by the taxpayer at each of his business posts," (2) "the degree of business activity at each such post," and (3) "whether the financial return in respect of each post is significant or insignificant.").

[47] *Daly*, 72 T.C. 190 at 194.

[48] Higgins v. Comm'r, 312 U.S. 212, 217 (1941).

[49] Br. for Pet'r, *supra* note 1, at 6.

[50] Br. for Pet'r, *supra* note 1, at 5.

[51] Br. for Pet'r, *supra* note 1, at 6.

[52] Rev. Rul. 54-147, 1954-1 C.B. 51.

[53] Br. for Pet'r, *supra* note 1, at 5; BOSTON BRUINS, http://bruins.nhl.com/club/page.htm?id=38742 (last accessed Oct. 30, 2016) (stating the Boston Bruins' home arena is TD Garden in Boston).

court and the IRS were faced with a situation where an athlete was trying to deduct his expenses under Section 162(a)(2), both the IRS and court found that the "tax home of the athlete was the principal place of his employment or business (i.e., the city where his team is located)."[54] If the athlete's principal place of business is the city of the team in which he plays for, then it would seem likely that the team's principal place of business is the city where it is located—Boston in this case.

The last requirement that needs to be met by a taxpayer under Section 162(a)(2) is that the expense was incurred in the pursuit of a trade or business. This will be satisfied by the fact that the only reason the team is traveling and incurring meal expenses is because it has to play against another team, which is an essential element of its business of providing hockey entertainment to fans of the sport.[55]

B. Section 274

i. Historical Overview

In the early 1960s, prior to the implementation of Section 274, Congress became concerned about abusive deductions for meals and entertainment.[56]

In 1961, President Kennedy suggested to Congress that "business entertainment and the maintenance of entertainment facilities" be disallowed entirely as tax deductions, and that "restrictions should be imposed on the deductibility of business gifts and travel expenses."[57] Congress did not think that a complete disallowance in all circumstances was the proper solution.[58] Rather, it added a complex provision to IRC Section 274, which disallows deductions for meals in certain circumstances, limits the deductions to fifty percent in most cases, and allows deductions without limitation in other cases.[59] The IRS maintains that the fifty percent limitation applies to the Boston Bruins.[60] The team

[54] Bailey v. Comm'r., 49 T.C.M. (CCH) 141, at 5, 9 (1984) (The taxpayer was a hockey player who played in St. Louis in 1973 and was traded to Detroit in 1974. The Court held that the player's tax home was "Detroit and St. Louis, respectively, during the periods of time petitioner resided in those cities."); *see also* Wills v. Comm'r., 411 F.2d 537, 540 (9th Cir. 1969) (holding the athlete's tax home was Los Angeles during the time he played for the Los Angeles Dodgers); *see generally* Rev. Rul. 54-147, 1954-1 C.B. 51.

[55] Br. for Pet'r, *supra* note 1, at 5.

[56] MARVIN A. CHIRELSTEIN & LAWRENCE ZELENAK, FEDERAL INCOME TAXATION 133 (12th ed. 2012); *see also* S. REP. NO. 87-1881, at 25 (1962).

[57] H.R. REP. NO. 82-1447, at 19 (1962).

[58] S. REP. NO. 87-1881, at 25 (1962).

[59] 26 I.R.C. § 274 (2016); I.R.S. Publication 463, Travel, Entertainment, Gift and Car Expenses, at 11-12, https://www.irs.gov/pub/irs-pdf/p463.pdf.

[60] Br. for Pet'r, *supra* note 1, at 9; Roger Russell, *Boston Bruins Battle IRS Over Meal*

claims that the expenses are fully deductible.[61]

ii. Analysis and Application of Section 274

The provisions of Section 274 are of "stupefying complexity."[62] Section 274(a) generally disallows a deduction for any expenses incurred by the taxpayer which constitute "entertainment, amusement, or recreation" unless such expense is "directly related to" or "associated with" the "active conduct of the taxpayer's trade or business . . . ."[63] Alternatively, if the taxpayer cannot satisfy the "associated with" or the "directly related" tests of Section 274(a), then the taxpayer may be able to show that his business expenses fall under one of the nine exceptions enumerated in Section 274(e).[64] Even if a taxpayer meets the directly related or associated with tests of Section 274(a), or if the taxpayer's situation falls under one of the exceptions provided in 274(e), Section 274(n) caps the expense deductible by a taxpayer for meals and entertainment at fifty percent of the cost of the expense.[65] This fifty percent limitation applies unless the meal or entertainment expense falls under one of the five exceptions listed under Section 274(n)(2).[66]

IRC Section 274, which deals with "entertainment, amusement, or recreation," might not seem applicable to meals provided by the Boston Bruins to players and staff while on the road, but the Senate Report explicitly states that entertainment "includes any business expense incurred in furnishing of food and beverages."[67] The General Explanation of the provision prepared by the staff of the Committee on Taxation states that "allowable deductions for business meals[] includ[e] meals while on a business trip away from home, meals furnished on the employer's business premises to its employees, and meal expense at a business luncheon club or a convention . . . ."[68] Courts have uniformly read Section 274 to apply to all business meals.[69] Treasury Regulations

Deductions, ACCT. TODAY (Sept. 25, 2016), http://www.accountingtoday.com/news/tax-practice/boston-bruins-battle-irs-over-meal-deductions-75542-1.html.

61 Br. for Pet'r, *supra* note 1, at 9.

62 DANIEL Q. POSIN & DONALD B. TOBIN, PRINCIPLE OF FEDERAL INCOME TAXATION OF INDIVIDUALS 400 (7th ed. 2005).

63 26 I.R.C. § 274(a) (2016).

64 I.R.C. § 274(a), (e).

65 I.R.C. § 274(n).

66 I.R.C. § 274(n)(2).

67 I.R.C. § 274(a)(1)(A); S. REP. NO. 87-1881, at 27 (1962).

68 STAFF OF THE COMM. ON TAXATION, 99TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, at 61 (Comm. Print 1987) *available at* http://www.jct.gov/jcs-10-87.pdf.

69 Howard v. Comm'r, 41 T.C.M. (CCH) 1554 (1981) ("We find that the deduction [for the luncheon] is not disallowed by section 274(a) because it falls within the exception to that

("Regulations") indicate that IRC Section 274 applies to meals provided to employees.[70]

IRC Section 274(a) establishes two different tests that a taxpayer can meet for the expense to be deductible: the "associated with" and the "directly related" tests, which require the taxpayer to go beyond the necessary and ordinary requirements of Section 162.[71] These tests require a taxpayer to show a "greater degree of proximate relation" between his business and the expense.[72] However, the taxpayer need only meet one of these tests.[73]

a. Directly Related Tests (*"*Active Business Discussion*"* and *"*Clear Business Setting*"* Tests)

Under the directly related test, an expense will be considered "directly related to the active conduct of the taxpayer's trade of business" if the taxpayer can meet one of the four tests provided by the Treasury Regulations.[74] Only two of these four tests will be discussed—the "active business discussion" test and the "clear business setting" test.[75] The two other tests enumerated under the directly related test have no application to the issues raised by the Boston Bruins.[76] Moreover, from the facts asserted in the Boston Bruins' brief, the team will be able to meet either the active business discussion or the clear business setting test in order to satisfy the directly related test under IRC Section 274(a)[77]

section contained in section 274(e)(1) for business meals furnished under circumstances conducive to business discussions."); Baltran v. Comm'r, 43 T.C.M. (CCH) 892 (1982) ("The deductions we have allowed qualify for the most part as business meals under section 274(e)(1), and we are therefore exempt from the limitations on deductibility contained in section 274(a)."); Lennon v. Comm'r, 37 T.C.M. (CCH) 751 (1978) ("Section 274(e) specifically provides that section 274(a) does not apply to 'business meals.' Instead, section 274(e) provides that if the taxpayer can establish that a 'business meal' was furnished in surroundings generally conducive to a business discussion, the taxpayer need not establish that the meal was 'directly related' to the conduct of his trade or business.").

70 Treas. Reg. § 1.274-2(f)(2)(ii) (2016).

71 26 I.R.C. § 274(a) (2016).

72 Daniel Candee Knickerbocker, Jr., *Entertainment and Related Deductions Under the Revenue Act of 1962*, 31 FORDHAM L. REV. 639, 642 (1963).

73 *See* POSIN &. TOBIN, *supra* note 62, at 402 ("[T]he taxpayer establishes that the item was directly related to—*or* . . . associated with—the active conduct of a taxpayer's trade or business.") (emphasis added).

74 Treas. Reg. § 1.274-2(c)(2).

75 *See* Treas. Reg. § 1.274-2(c)(5) (2016) (discussing the treatment of entertainment expenses when the expense benefits an individual, who is not an employee); *see also* Treas. Reg. § 1.274-2(c)(6) (elaborating on the furnishing of food and beverages, which were incurred prior to 1994).

76 *See* Treas. Reg. § 1.274-2(c)(5)-(6).

77 *See* Br. for Pet'r, *supra* note 1.

1. Active Business Discussion

There are four requirements that must be demonstrated in order to meet the active business discussion test, which in turn means the taxpayer will meet the directly related test.[78] First, when the taxpayer made "the entertainment expenditure . . . , the taxpayer had more than a general expectation of deriving some income or other specific trade or business benefit at some indefinite future time."[79] With respect to the Boston Bruins, the team had more than a general expectation of deriving both a benefit and income from the expenditure for pre-game meals. The success of the Boston Bruins' business is completely dependent on the performance of the players; thus, it is important that these players are provided the proper nutrition.[80] The benefit that the Bruins receive from the two meals provided to players on game days is twofold. First, the pre-game meals allow the team to "control the players' movement up until game time," and they allow coaches and the press to speak to the players during the meals.[81] Second, the pre-game meals "are carefully selected by the club's professional medical staff to meet specific nutrition guidelines."[82] These meals are "heavy on carbohydrates and come in large portions, and the team dictates exactly what proteins, fruits, and vegetables must be available."[83] Therefore, it is evident that the Boston Bruins have more than a general expectation of deriving both a benefit and income from the meal expense—it is absolutely essential that their players are provided food with high nutritional value to ensure the success of the Boston Bruins' business.

Second, it must be shown that during the time the expense was incurred, "the taxpayer actively engaged in a business meeting, negotiation, discussion, or bona fide business transaction, other than entertainment, for the purpose of obtaining" a business benefit or

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[78] Treas. Reg. § 1.274-2(c)(3).

[79] Treas. Reg. § 1.274-2(c)(3)(i) (stating that there is no requirement that the taxpayer show that every expense resulted in income or a business benefit).

[80] Br. for Pet'r, *supra* note 1, at 9; *see generally* Helen DeMarco, *Pre-Event Meals*, AM. COLL. OF SPORTS MED., https://www.acsm.org/docs/current-comments/preevent meals.pdf (last accessed Oct. 31, 2016) ("It is well established that exercise performance can be affected by diet and, in order to maintain optimal training, the body must be properly refueled with appropriate nutrients.").

[81] Br. for Pet'r, *supra* note 1, at 8.

[82] Br. for Pet'r, *supra* note 1, at 8.

[83] Br. for Pet'r, *supra* note 1, at 8. *Cf.* Helen DeMarco, *Pre-Event Meals*, AM. COLL. OF SPORTS MED., http://www.acsm.org/docs/current-comments/preeventmeals.pdf (last accessed Oct. 31, 2016) (Proper meals, especially those that are high in carbohydrates, are essential to preventing athletes from experiencing "weakness and fatigue . . . , ward off feelings of hunger yet minimize gastrointestinal distress from eating . . . , guarantee optimal hydration", and "delay fatigue.").

income.[84] It is undisputed that the Boston Bruins can meet this prong because during these meals "coaches and press staff speak with players individually to prepare them for the upcoming game, an interview with the media, or some similar event."[85]

The third prong under the active business discussion test looks at the facts and circumstances of the expenditure and determines if the principal character of the "combined business and entertainment" expense was the active conduct of the taxpayer's business.[86] The facts of the Boston Bruins case unambiguously demonstrate that these pre-game meals had the principal characteristic of being for a business purpose; the meals provide the players with proper nutrition prior to the game and an opportunity for players to speak with coaches and the media.[87] Moreover, the meals serve to protect the Boston Bruins' business interest of providing entertainment to fans by allowing the team to "control the players' movement and conduct up until the game."[88]

The fourth and final condition that needs to be met under the active business discussion test is the disallowance of nonbusiness guests.[89] In essence, the expenditure must be allocable at the time it was incurred to the "taxpayer and a person with whom the taxpayer engaged in the active conduct of trade or business during the entertainment."[90] The pre-game meals furnished to the players are exclusively available to the "club's entire hockey operation staff."[91] This hockey operation staff consists of "twenty-two hockey players plus the general manager, various coaches, medical trainers, equipment managers, public relations staff, and logistic managers."[92] As a result, the meal expenses are directly attributable to the team and its essential operation staff. Thus, the active business

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84 Treas. Reg. § 1.274-2(c)(3)(ii) (2016); *see* D.A. Foster Trenching Co. v. United States, 473 F.2d 1398, 1403 (1973) (stating that during the business meeting or bona fide business transaction the taxpayer or a representative of the taxpayer, such as the taxpayer's employee, must be present when the expense occurs).

85 Br. for Pet'r, *supra* note 1, at 8.

86 Treas. Reg. § 1.274-2(c)(3)(iii); *see generally* Townsend Indus. v. United States, 342 F.3d 890, 891 (8th Cir. 2003). A company had its sales people attend a "two-day meeting at its headquarters," which involved "corporate staff and some factory workers." After this meeting the company sponsored a fishing trip that lasted four days, during which the CEO spoke about the company and the employees and sales people were free to do whatever they pleased. The Court held that the third prong was met because this trip enabled the company to introduce new products and for "the national sales team to interact with the" manufacturing employees of the company. *Id.*

87 Br. for Pet'r, *supra* note 1, at 8.

88 Br. for Pet'r, *supra* note 1, at 8.

89 Treas. Reg. § 1.274-2(c)(3)(iv) (2016).

90 *Id.*

91 Br. for Pet'r, *supra* note 1, at 8.

92 Br. for Pet'r, *supra* note 1, at 8.

discussion test is satisfied.

2. Clear Business Setting

The second test available to a taxpayer under the directly related test is the clear business setting test.[93] An entertainment expense will be considered directly related to the taxpayer's trade or business if the taxpayer can establish that the expense occurred "in a clear business setting directly in further[ance] of the taxpayer's trade or business."[94] This can be established by the taxpayer demonstrating that "any recipient of the entertainment would have reasonably known that the taxpayer had no significant motive, in incurring the expenditure, other than directly furthering his trade or business," which is determined by objective standards.[95]

The Boston Bruins will be able to establish that the meal expenses occurred in a clear business setting. The team will be able to demonstrate that the players reasonably knew that the team was incurring the meal expenses in order to further the team's business objectives. For example, the meals are specifically chosen with the intent of enhancing the players' performance; the players must meet with coaches and the press during the meals, and the meals ensure that the team has control over the players prior to the game.[96] These aforementioned examples would lead a reasonable player to believe that the meals were provided to further the team's business.

b. *"*Associated With*"* Test

The second test under 274(a) is the associated with test.[97] This test requires that a taxpayer have "a clear business purpose in making the expenditure, such as to obtain new business or to encourage the continuation of an existing business relationship," and that the "entertainment directly preceded or followed a substantial and bona fide business discussion."[98] The test operates with the intent of allowing deductions for business entertainment expenses "incurred primarily for the purpose of fostering goodwill."[99] However, this test is not applicable to the Boston Bruins' case because the meal expenses that the team incurs are directly related to the Boston Bruins' business.

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93 Treas. Reg. § 1.274-2(c)(4) (2016).

94 *Id.*

95 *Id.*

96 Br. for Pet'r, *supra* note 1, at 8.

97 Treas. Reg. § 1.274-2(d).

98 Treas. Reg. § 1.274-2(d)(1), (2).

99 6 MERTENS, LAW OF FED. INCOME TAX'N § 25D.27 (2016).

c. 274(e) Exceptions

Although the Boston Bruins meet the directly related test under Section 274(a), meeting this test may not be necessary because of the exceptions listed in 274(e). IRC Section 274(e) lists nine situations that allow a taxpayer to bypass the associated with and directly related tests of Section 274(a).[100] Two of these exceptions are directly applicable to the Boston Bruins: Section 274(e)(1) (food and beverages for employees) and Section 274(e)(5) (employees, stockholder, etc., business meetings).[101] Pursuant to Section 274(e)(1), expenses incurred for food and beverages "furnished on the taxpayer's business premises primarily for his employees" will be exempted from the "directly related" test.[102] This expectation will apply not only when the expense is incurred for furnishing food and beverages to the employees "in a typical cafeteria or an executive dining room, but also to expenditures with respect to the operation of those facilities."[103] Applying this exception to the Boston Bruins creates a major issue: whether the away game hotels, where the meals are provided, constitute the business premises of the Boston Bruins. What constitutes the business premises of the employer will be addressed in section IV of this note.[104]

Despite the fact that the Boston Bruins are able to satisfy either the directly related test under Section 274(a) or establish that their circumstances fall under one of the exceptions enumerated in Section 274(e), the team may still be restricted to only deducting fifty percent of the total meal costs incurred. Under Section 274(n), any food or beverage expense incurred by the taxpayer will be deductible only up to fifty percent of the cost for the food or beverage, unless an exception applies.[105] Section 274(n)(2) states that the fifty percent cap on food and beverage costs "shall not apply to any expense if" the expense for food and beverages is "excludable from the gross income of the recipient under Section 132 by reason of subsection (e) thereof (relating to *de minimis*

100 26 I.R.C. § 274(e) (2016).

101 I.R.C. § 274(e)(1), (5); Treas. Reg. § 1.274-2(f)(2)(vi) (Section 274(e)(5) allows for "any expenditure by a taxpayer for entertainment which is directly related to bona fide business meetings of the taxpayer's employees, stockholders, agents, or directors held principally for discussion of trade or business . . . ."); MERTENS, *supra* note 99, § 25D.31 (stating that the 274(e)(5) exception "applies to business meeting where some social activities are provided, it is not intended to apply to gatherings which are primary for social purposes . . ."). *But see* 26 I.R.C. § 274(n)(2)(A) (2016). The 274(e)(5) exception will not help the Boston Bruins, because it is still subject to the fifty percent limitation of 274(n). *Id.*

102 Treas. Reg. § 1.274-2(f)(2)(ii).

103 MERTENS, *supra* note 99, § 25D.31.

104 *See infra* Part IV.B.2.ii (discussing the meaning of business premise under IRC Section 119).

105 26 I.R.C. § 274(n) (2016).

fringes)."[106] The requirements that need to be satisfied in order for a cost to be a *de minimis* fringe benefit and thus fall under the exception to the fifty percent cap will be discussed in the following section.

IV. THE FACEOFF

A. Section 132

Section 132(a) provides, "Gross income shall not include any fringe benefit which qualifies as a . . . *de minimis* fringe."[107] An employer-operated eating facility will "be treated as *de minimis* if—(A) such facility is located on or near the business premises of the employer, and (B) revenue derived from such facility normally equals or exceeds the direct operating costs of such facility."[108] If an employee is permitted to exclude the value of the meal under Section 119, then the "value of a meal provided at an 'eating facility' will be treated as having paid an amount equal to the facility's direct operating cost attributable to the meal."[109] In other words, if the consumer of the meal is not required to include the value of the meal in his gross income, then the consumer will be treated as if he paid a value for the meal that is equal to the costs the employer incurred in operating the eating facility. This requirement will be discussed in further detail in the next section of this note under Section 119.

Neither the Tax Code nor the Treasury Regulations provide a definition of what constitutes an "eating facility."[110] However, a Chief Counsel Advice Memoranda does give some insight into what constitutes an eating facility under Section 132(e)(2).[111] The Office of Chief Counsel held that crewmembers of a commercial airline could not exclude the cost of the meals provided to them while in flight from their gross income under Section 132(e) because the airplane does not constitute an eating

106 I.R.C. § 274(n)(2)(B).

107 26 I.R.C. § 132(a)(4) (2016) (Section 132(e) provides that 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.").

108 I.R.C. § 132(e).

109 Velarde, *supra* note 7, at 2.

110 Velarde, *supra* note 7, at 2.

111 Chief Couns. Adv. Mem. 2011-51-020 (Aug. 31, 2011); *see generally* Treas. Reg. § 1.132-7(b)(2)(ii) (2016) ("The cost of labor for personnel whose service relating to the facility are performed primarily on the premises of the eating facility . . . the labor costs attributable to cooks, waiters, and waitresses are included in direct operating costs, but the labor costs attributable to a manager of an eating facility whose services relating to the facility are not primarily performed on the premises of the earing facility is not included in the direct operating costs.").

facility pursuant to Section 132(e)(2).[112] Eating facility, according to the Office of Chief Counsel, "means an identifiable location that is designated for the preparation and/or consumption of meals," such as a cafeteria or dining room.[113] Furthermore, the Treasury Regulations "contemplate that an eating facility is a location at which individuals are employed to prepare and/or serve food."[114] The hotels where the team stays satisfy the Office of Chief Counsel and the Regulation's definition of eating facility because the team contracts with the away city hotel to provide an identifiable place where the meals will be provided, and the team sends a "tightly designed menu" to the hotel's catering staff to prepare for the team.[115]

For an eating facility to qualify as an "employer-operated eating facility" under Section 132, the Code requires that it be "located on or near the business premises of the employer" and that the revenue from the facility equals or exceeds the operating costs of the facility.[116] The Regulations provide four additional conditions:

> (i) [t]he facility is owned or leased by the employer, (ii) [t]he facility is operated by the employer, (iii) [t]he facility is located on or near the business premises of the employer, and (iv) [t]he meals furnished at the facility are provided during, or immediately before or after, the employee's work day.[117]

In section (III)(B)(2)(ii), this note will discuss the Section 132 requirement that the facility be located on or near the business premises of the employer and the meaning of "business premises" under 274(e)(1). With respect to the first element required by the Treasury Regulations, the Boston Bruins should be able to establish that the team leases the hotel's eating facility. When the Boston Bruins travel for away games, the team enters into a formal memorialized letter "or other agreement with each hotel" which enables the Bruins to establish "a base of operations at a local hotel."[118] Pursuant to this agreement, the Boston Bruins pay the hotel an agreed upon amount in exchange for extensive use of the hotel space.[119] Moreover, the Boston Bruins enter into a contract with "each away city hotel for the provision of a space where the meals will be provided and for the meals themselves."[120] The team also enters into a contract regarding what food will be served in the dining

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112 Chief Couns. Adv. Mem. 2011-51-020 (Aug. 31, 2011).

113 *Id.*

114 *Id.*

115 Br. for Pet'r, *supra* note 1, at 8.

116 26 I.R.C. § 132(e)(2)(A)-(B) (2016).

117 Treas. Reg. § 1.132-7(a)(2) (2016).

118 Br. for Pet'r, *supra* note 1, at 6.

119 Br. for Pet'r, *supra* note 1, at 6.

120 Br. for Pet'r, *supra* note 1, at 8.

area.[121] This "tightly designed menu" is sent to the "hotel catering service" prior to the teams arrival and "dictates exactly what proteins, fruits, and vegetables must be available."[122] Moreover, the time spent at the hotel during this short-term lease is substantial.[123] The amount of business conducted during "60 minutes of ice time" for each game pales in comparison to the substantial amount of business conducted at the hotel during the short-term lease.[124] The Treasury Regulations further require that "the facility is operated by the employer."[125] However, the Regulations allow an employer to enter into an agreement "with another to operate an eating facility for its employees."[126] Therefore, since the Boston Bruins enter into a contract with the hotel's catering service that explicitly states what food shall be provided to the players, the Boston Bruins will be able to meet this requirement of the Treasury Regulations. The final requirement pursuant to the Treasury Regulations provides that the meal must be served at the facility "during, or immediately before or after, the employee's work day."[127] Once again, the Boston Bruins will be able to meet this requirement with ease. During the pregame meals, the players are required to speak with coaches and the media about the upcoming game.[128] Furthermore, the coaches "hold a roll call at meals to ensure that all the players are in attendance, ready to participate in any meetings, and ready to head to the arena on time."[129] Immediately after eating and meeting with the coaches to discuss the game plan, the "players are taken to the visiting arena for practice or pre-game warmups."[130] Since the meals are provided right before the team heads to the away arena, the Boston Bruins will be able to meet the last requirement of the Treasury Regulations.

B. Section 119

To avoid the fifty percent limitation on deductions for meal expenses, IRC Section 132(e) requires that the employees be able to exclude the value of the meals from their income under Section 119.[131]

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121 Br. for Pet'r, *supra* note 1, at 8.
122 Br. for Pet'r, *supra* note 1, at 8.
123 Br. for Pet'r, *supra* note 1, at 7.
124 Br. for Pet'r, *supra* note 1, at 7.
125 Treas. Reg. § 1.132-7(a)(2)(ii) (2016).
126 Treas. Reg. § 1.232-7(a)(3).
127 Treas. Reg. § 1.232-7(a)(2)(iv).
128 Br. for Pet'r, *supra* note 1, at 8.
129 Br. for Pet'r, *supra* note 1, at 8.
130 Br. for Pet'r, *supra* note 1, at 8.
131 I.R.C. § 132(e)(2)(B) (2016).

i. Historical Overview

Congress enacted Section 119 to "end the confusion as to the tax status of meals and lodging furnished to an employee by his employer."[132] This confusion resulted from the courts and the IRS asserting different views of when lodging or meals provided by an employer to an employee should be includible to the employee's gross income.[133] Most of the confusion regarding when a situation constitutes the convenience of the employer has subsided; however, there is still considerable confusion about what constitutes the business premise of the employer.[134] The confusion that persists today can be traced back to the legislative history of the Internal Revenue Code of 1964. Originally, the House provided that "[u]nder Section 119, if meals or lodging (1) *are furnished at the place of employment*, and (2) are required to be accepted by the employee at the place of employment, the value thereof shall be excluded from gross income . . . ." [135] However, once the Senate received the bill, the Senate amended critical terms of the bill.[136]

The House bill provided that there shall be excluded from the gross income of an employee the value of any meals or lodging furnished by the employer . . . *but only if such meals or lodging are furnished at the place of employment* . . . The Senate amendment provides that meals or lodging furnished for the convenience of the employer are excluded, *but only if (1) such meals are furnished on the business premises of the employer* . . . The term 'business premises of the employer' is intended in general, to have the same effect as the term 'place of employment' in the House bill. For example, lodging furnished in the home to a domestic servant would be considered lodging furnished on the business premises of the employer. Similarly, meals furnished to a cowhand while herding his employer's cattle on leased lands, or on national forest lands used under a permit, would also be regarded as furnished on the business premises of the employer.[137]

This slight change in words from "place of employment" to "business premise of employer" serves as the foundation of the disagreement between the IRS and the Boston Bruins.[138]

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132 S. REP. NO. 83-1622, at 19 (1954).

133 *See generally id.*; H.R. REP. NO. 83-1337, at A39 (1954).

134 *See* Treas. Reg. § 1.119-1(a)(2)(i) (2015); *see infra* Part IV.B.2.ii.

135 H.R. REP. NO. 83-1337, at A39 (1954) (emphasis added).

136 *See generally* S. REP. NO. 83-1622, at 19 (1954).

137 H.R. REP. NO. 83-2543, at 26 (1954) (Conf. Rep.).

138 Velarde, *supra* note 7.

ii. Application and Analysis of Section 119

a. Convenience of the Employer

As mentioned above, the Boston Bruins are allowed to deduct 100 percent of the cost of meals under IRC Section 274(n)(2) only if the meal expense is a *de minimis* fringe under Section 132(e).[139] Furthermore, Section 132(e) requires that the cost of operating the eating facility equals the revenue generated by it, which will be satisfied if the employee can exclude the value of the meal from his gross income under Section 119.[140] Pursuant to Treasury Regulation Section 1.119(a), an employee may exclude the value of the meal provided by the employer from his gross income if the meal is furnished "on behalf of his employer for the convenience of the employer" and "on the business premises of the employer."[141]

Treasury Regulation Section 1.119-1(a)(2)(i) provides that for meals, the convenience of the employer test will be met if the meals are furnished in kind for a "substantial noncompensatory business reason."[142] Moreover, the determination of the reason why the employer is providing meals will not be satisfied by the "mere declaration that the meals are furnished for the convenience of the employer."[143] Rather, the determination will be strictly based "upon an examination of all the surrounding facts and circumstances."[144] The Treasury Regulations do provide some general examples of when a meal will constitute for the convenience of the employer, such as when the employee needs to be available for emergencies, when the employee only has a short time period to eat because of the nature of his employers business, and when there are a lack of eating facilities available to the employee.[145]

There has been a considerable relaxation in the interpretation of the convenience of the employer test by the courts, which is illustrated by the Tax Court's decision in *Boyd Gaming Corp. v. Commissioner* and the subsequent reversal by the Ninth Circuit. In *Boyd Gaming Corp.*, the petitioners operated a casino where they provided food in their cafeteria to their employees without a charge.[146] The petitioners took the same position as the Boston Bruins, asserting that they should be able to deduct

139 26 I.R.C. § 274(n)(2) (2016).
140 26 I.R.C. § 132(e) (2016).
141 26 I.R.C. § 119(a) (2016).
142 Treas. Reg. § 1.119-1(a)(2)(i) (2016).
143 *Id.*
144 *Id.*
145 Treas. Reg. § 1.119-1(a)(2)(ii)(a)-(c) (2016).
146 Boyd Gaming Corp. v. Comm'r., 74 T.C.M. (CCH) 759, at *3 (1997).

100 percent of the meals as a *de minimis* fringe under Section 274(n)(2).[147] The issue in this case was whether the meals were provided for the convenience of the employer. During the course of this case, the petitioners argued that they met the convenience of the employer test because of their "stay on the premise" policy, which required their employees to remain on the business premises during working hours for security reasons.[148] The Tax Court was not convinced that this policy was sufficient to meet the convenience of the employer test.[149] In coming to this conclusion, the Court reasoned that there has to be a closer nexus between "the necessities of the employer's business and the furnishing of free meals."[150] Essentially, the Tax Court took a business necessity theory approach to the convenience of the employer test, which allows an exclusion of the value of a meal from gross income only "when the employee must accept the meal 'in order properly to perform his duties.'"[151]

On appeal, the Ninth Circuit took a different position on the convenience of the employer test. The Ninth Circuit held that a genuine policy that is enforced by the employer is sufficient to qualify as a substantially noncompensatory reason under the convenience of the employer test.[152] The Ninth Circuit reasoned that the "captive" employees "had no choice but to eat on the premises" and "the furnished meals here were, in effect, 'indispensable to the proper discharge' of the employees' duties."[153] The IRS acquiesced in this decision.[154] Furthermore, the IRS stated 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."[155] However, the IRS added that in determining if a meal was provided for the convenience of the employer, it would consider "whether the policies decided upon by the employer are reasonably related to the needs of the employer's business . . . and whether these policies are in fact followed in the actual conduct of business."[156]

In light of this interpretation, the Boston Bruins will be able to

147 *Id.* at *16.
148 *Id.* at *11.
149 *Id.* at *26.
150 *Id.*
151 Boyd Gaming Corp. v. Comm'r., 177 F.3d 1096, 1100 (9th Cir. 1999).
152 *Id.* at 1101.
153 *Id.*
154 I.R.S. Announcement 99-77, 1999-32 I.R.B. 3 (Aug. 9, 1999).
155 *Id.* at 2.
156 *Id.*

satisfy the convenience of the employer test. The Boston Bruins have two reasons for providing players with mandatory meals prior to an away game and neither of these justifications has a compensatory business reason. First, the mandatory meals allow the team to have complete control over the players prior to the game.[157] The team can control exactly what the player is putting into his body to ensure that he is able to perform at his highest level.[158] Moreover, the mandatory meals allow the team to control the "players' movement and conduct up until the game."[159] To accomplish this, the coaches take attendance at the meals to ensure that the players are present, "ready to participate in any meetings, and ready to head to the arena on time—or simply to ensure that the players are not absent shortly before a game."[160] Secondly, the pregame meals allow for coaches to hold meetings with individual players to ensure that they are all on the same page at the start of the game.[161] It seems unlikely that the court would find that the Boston Bruins' policies are not reasonably related to its business needs. The only reason for these strict policies is to ensure that the team gives the fans a suitable product on game day. Furthermore, there does not seem to be any evidence that the team does not follow its policies in the actual conduct of business. In conclusion, the Boston Bruins have a bona fide policy in place that is strictly enforced, and thus the court should respect this business decision by the Boston Bruins and not substitute the team's judgment with its own.

b. Business Premises of the Employer

This section will provide a working definition of the term "business premises of the employer" under IRC Sections 274(e)(1), 132(e)(2), and 119(a)(1).[162] As discussed in section 4.B.1 of this note, the language of Section 119 was changed in the Senate from "furnished at the place of

157 Br. for Pet'r, *supra* note 1, at 8.

158 Br. for Pet'r, *supra* note 1, at 8.

159 Br. for Pet'r, *supra* note 1, at 8.

160 Br. for Pet'r, *supra* note 1, at 8.

161 Br. for Pet'r, *supra* note 1, at 8.

162 26 I.R.C. § 274(e)(1) (2016) ("Subsection (a) shall not apply to—Expenses for food and beverages . . . furnished on the business premises of the taxpayer primarily for his employees.") (emphasis added); I.R.C. § 132(e)(2) ("The operation by an employer of any eating facility for employees shall be treated as de minimis fringe if—(A) such *facility is located on or near the business premises of the employer* . . . .") (emphasis added); I.R.C. § 119(a) ("There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him . . . by . . . his employer for the convenience of the employer, but only if—(1) . . . *meals are furnished on the business premise of the employer* . . . .") (emphasis added).

employment" to "furnished on the business premise of the employer."[163] Despite the change in the language, the Senate provided that business premise of the employer is "intended in general, to have the same effect as the term 'place of employment.'"[164] The Senate further clarified its position by providing an example of what would constitute the business premises of the employer.[165]

The Supreme Court had an opportunity to provide concrete factors for courts to consider in deciding whether property constitutes the business premises of the employer in *Commissioner v. Kowalski*. The issue was whether the cash meal allowances provided to New Jersey state troopers should be included in the state troopers' gross income, or whether the payment is excluded from the state troopers' income by virtue of Section 119.[166] State troopers, in this case, were provided meal allowances by their employer, enabling the troopers to be "on call" while they were on break.[167] Moreover, the state troopers were not required to spend this money on food, and the amount of money they received for meals was determined by their rank.[168] These factors led the court to hold in favor of the IRS, reasoning that the payments were part of the state troopers' gross income and that Section 119 applies only to "meals or lodging furnished in kind."[169] Unfortunately, the Court did not address the question of whether the restaurants that the state troopers ate at satisfy the business premises requirement of Section 119. However, in a dissent, Justice Blackmun asserted, "[T]he business premises of the State of New Jersey, the trooper's employer, are wherever the trooper is on duty in that State. The employer's premises are statewide."[170]

In deriving a working definition of "business premises of the employer," the Sixth Circuit has applied a two-part test. If the taxpayer meets either one of these elements, the property will be found to be the business premises of the employer. The first element is a spatial test, which states that the business premise of the employer is "the premises where the employer conducts a significant portion of his business," even

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163 H.R. REP. NO. 83-1337, at A39 (1954) (emphasis added); *see* H.R. REP. NO. 83-2543, at 26 (1954) (Conf. Rep.).

164 H.R. REP. NO. 83-2543, at 27 (1954) (Conf. Rep.).

165 *Id.* ("Meals furnished to a cowhand while herding his employer's cattle on leased lands, or on national forest lands used under a permit, would also be regarded as furnished on the business premises of the employer.").

166 Comm'r. v. Kowalski, 434 U.S. 77, 78 (1977).

167 *Id.* at 80.

168 *Id.* at 80-81.

169 *Id.* at 84 (citing S. REP. NO. 83-1622, at 190 (1954)).

170 *Kowalski*, 434 U.S. at 97-98 (Blackmun, J., dissenting).

if the employee does not perform any of his duties at this location.[171] The second element is a functional test, which requires that meals or lodging be provided at "a place where the employee performs a significant portion of his duties," even if it is not at the location where the employer conducts his business operations.[172] The Tax Court has applied a "substantially similar" test for determining the business premises of the employer. This test holds that the phrase "business premises of the employer" should be construed to mean either "(1) an integral part of the business property or (2) premises on which the company carries on some of its business activities."[173] A location will be considered an integral part of the business property if "physically located on the employer's premises" or if the "employee does enough work for the employer" at the location that such location is "identified with the interest of the business and serve[s] important business functions."[174] Conversely, an area "physically located off the worksite [is] not integral to the employer's business unless the employee does significant work for the employer or the employer conducts a significant portion of its business" in the area.[175] Regardless of which version of the test is applied, the business premises of the employer is a factual question which considers "[t]he extent or boundaries of the business premises . . . whose resolution follows a consideration of the employee's duties as well as the nature of the employer's business."[176] Lastly, the employer's ownership of the place where lodging is provided or where meals are furnished "is not intended by Congress to be the crucial test, nor even an essential element, of the meaning of 'business premises.'"[177]

1. Spatial Business Premises

This section of the note will analyze various court cases where the spatial location of the property was a determinative factor in deciding whether or not the property can be considered the business premises of the employer. In *Commissioner v. Anderson*, an employer built a house for his motel manager that was only two blocks from the motel he managed.[178] The manager was required to be available "twenty-four

171 Comm'r. v. Anderson, 371 F.2d 59, 67 (6th Cir. 1966).

172 *Id.*

173 Benninghoff v. Comm'r., 71 T.C. 216, 220 (1978) (citing Dole v. Comm'r., 43 T.C. 697, 707 (1965)).

174 Hargrove v. Comm'r., 92 T.C.M. (CCH) 90, at *4 (2006).

175 *Id.*

176 Van Huff v. Comm'r., 41 T.C.M. (CCH) 764, at *3-4 (1981).

177 *Anderson*, 371 F.2d at 64.

178 *Id.* at 61-62.

hours a day for the business of the motel."[179] Here the Court adopted the rule that "on the business premises of the employer" means that the meals or lodging must be furnished "at a place where the employee performs a significant portion of his duties or on the premises where the employer conducts a significant portion of his business."[180] In the end, the Court held that the house was not on the business premises of the employer.[181] It reasoned that "[t]o make 'two short blocks' or nearness to other business property of the employer the test is to disregard the word 'on' as contained in the phrase 'on the business premises of the employer.'"[182] Furthermore, the Court stated that if Congress had intended "on the business premises of the employer" to mean "near," it would have used words such as "'in the vicinity of' or 'nearby' or 'close to' or 'contiguous to' or similar language, rather than to say 'on' the business premises."[183]

Anderson is similar to *Lindeman v. Commissioner* such that in *Lindeman*, the petitioner was the manager of a hotel and, pursuant to his employment, his employer provided him with a home in a parking lot leased by the employer, which was across the street from the hotel.[184] As manager of the hotel, the petitioner was required to be on call twenty-four hours a day.[185] Moreover, the petitioner had a telephone in his home, which connected directly to the hotel, so that he could conduct business from home.[186] The Court provided that in order for the petitioner's home to constitute the business premises of his employer, the petitioner needed to show that the home was either (1) an "integral part of the business property or (2) premises on which the company carries on some of its business activities."[187] Applying this rule to the facts, the Court concluded that the petitioner's home was part of the business premises of the employer, because the lot was owned by the employer.[188]

In *Winchell v. United States*, the petitioner was hired as president of a college.[189] The Board of Directors insisted that the petitioner move into a home owned by the school, which was located four miles from the main campus of the school.[190] Moreover, the petitioner was permitted to live

179 *Id.* at 68.
180 *Id.* at 67.
181 *Id.*
182 *Anderson*, 371 F.2d at 67.
183 *Id.*
184 Lindeman v. Comm'r., 60 T.C. 609, 609-12 (1973).
185 *Id.* at 616.
186 *Id.*
187 *Id.* at 615.
188 *Id.* at 617.
189 Winchell v. U.S., 564 F. Supp. 131, 133 (1983).
190 *Id.*

in this home without having to pay rent to the school.[191] Occasionally, the school used the petitioner's residence for events such as outdoor classes, student picnics, athletic events, and "college commencement exercises."[192] The Court concluded that the housing provided by the school "is not geographically integrated with the business property of the College."[193] In addition, the Court noted that neither the petitioner nor his employer carried out a significant portion of their activities or duties at the residence.[194]

The aforementioned cases were decided on the proximity of the property in relation to the business, which was an influential factor in the courts' decisions because the petitioners could not establish that they performed a significant portion of their duties on the properties. If the petitioners in the aforementioned cases established that they performed a significant portion of their duties on the properties, then they would have been able to make a "functional business premises" claim. Moreover, the majority of courts seem to favor the idea that "functional rather than spatial unity is determinative" in deciding if an area constitutes part of the employer's premises.[195]

2. Functional Business Premises

In *U.S. Junior Chamber of Commerce v. United States*, the plaintiff was a nonprofit corporation, which set out to "promote and foster the growth of young men."[196] The plaintiff provided rent-free housing in Tulsa, Oklahoma to the president of the organization during his term.[197] During the year, the president spent half of his time traveling and the other half in Tulsa "directing Plaintiff's various programs."[198] The house provided to the president included an office, which he used for "conducting staff meetings," "briefings by subordinate officials," and providing entertainment for the plaintiff's business.[199] The Court focused on where the duties of the employee were performed to determine the business premises of the employer.[200] The Court concluded that "part of plaintiff's official activities were carried out at the House which it

191 *Id.*

192 *Id.*

193 *Id.* at 136.

194 *Id.* at 136–37.

195 Bob Jones University v. U.S., 229 Ct. Cl. 340, 355 (1982) (citing Adams v. United States, 218 Ct. Cl. 322, 332 (1978)).

196 U.S. Junior Chamber of Commerce v. U.S., 167 Ct. Cl. 392, 394 (1964).

197 *Id.* at 395.

198 *Id.* at 395-96.

199 *Id.* at 396

200 *Id.* at 400.

owned" and therefore the residence constituted the business premises of the employer.[201]

In *Adams v. United States*, the plaintiff was the president of Mobil Sekiyu Kabushiki Kaiasha.[202] The plaintiff was provided rent-free living in a house located three miles from his business headquarters.[203] The plaintiff's company had a policy of providing its president with housing because, in Japan, the "effectiveness of a president of a company is influenced by the social standing."[204] The plaintiff regularly "worked in the house in the evenings and on weekends," "held small meetings there for mixed business and social purposes," provided business entertainment, and used the telephone in the house for business purposes.[205] Focusing on the duties performed by the plaintiff, the Court held that the residence constituted the business premises of the employer.[206]

An essential case to the Bruins' argument is *Mabley v. Commissioner*. The issue in this case was whether the petitioner may exclude from gross income, under Section 119, "the fair market value of meals furnished to him by his employer during that year."[207] During the 1960 tax year, the Petitioner was the vice president of Island Creek Coal Company, which was located in the Chafin Building.[208] The president of the company had a policy that he would hold "daily luncheon conferences with his staff," which included the executive vice president, several vice presidents, and general counsel.[209] These daily lunch meetings allowed the staff members to report on their various departments and disclose any new information that had arisen since the prior meeting, enabling the president and the staff to stay informed on the current day-to-day activities of the company.[210] In order to effectuate the president's lunch meeting policy, the company needed to provide meals to the staff; however, "there were no dining facilities in the Chafin Building, with the exception of a stand-up snack bar which would accommodate only a few people."[211]

The lack of dining facilities prompted the company to enter into a

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201 *Id.*
202 Adams v. U.S., 218 Ct. Cl. 322, 324 (1978).
203 *Id.* at 325.
204 *Id.*
205 *Id.* at 326.
206 *Id.* at 333-34.
207 Mabley v. C.I.R., 24 T.C.M. (CCH) 1784, at *1 (1965).
208 *Id.*
209 *Id.*
210 *Id.* at *2.
211 *Id.*

rental agreement with the owner of the Prichard Hotel, which was "located approximately one-half block from the Chafin Building."[212] Pursuant to the agreement, the company paid the Prichard Hotel for a suite "suitable for dining purposes."[213] Furthermore, the rental agreement provided that the hotel would "provide the company meals from the hotel kitchen" during the meetings, which were served in the suite, and the meals would paid for by the company.[214] Sometimes these daily lunch meetings were attended by "out-of-town business guests of the company" and occasionally "the suite was used to provide dinner for such guests."[215] The petitioner in *Mabley* was determined by the IRS to have a deficiency in income because the gross income on the petitioner's tax return omitted the fair market value of these daily meals.[216] However, the Court held that, in light of the aforementioned facts, the leased hotel suite constituted the business premises of the employer.[217] The Court reasoned that "the rented hotel suite in which the meals were furnished was acquired and actually used for the conduct of businesses of the company, the furnishing of the meals being merely incidental."[218] Thus, even though the hotel was not located on the business premises of the employer, the Court found that the employees conducted a significant amount of business at the hotel, which enabled it to be considered the business premises of the employer for Section 119 purposes.

Lastly, in a Revenue Ruling, the IRS provided an example of when a location is considered a business premise of the employer by virtue of the employer performing substantial work at the location.[219] The situation presented to the IRS involved a bank that had several branch offices and a main office in a city.[220] The main office and some of the branch offices furnished meals free of charge to the employees of the company.[221] However, some of the branches did not have an eating facility, which caused the employees of those branches to go to the main office or one of the other branches that had a dining facility for lunch. The IRS held that the employees who "work in a branch office having no

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212 *Id.* at *1 (The Prichard Hotel was "the nearest hotel that had dining facilities.").

213 Mabley v. Commissioner, 24 T.C.M. (CCH) 1794 (1965).

214 *Id.* at *2 ("At daily luncheons conferences each staff member ordered from the regular hotel menu.").

215 *Id.* at *2 (stating that there were also times where a business meeting would occur in the suite and no meals were served).

216 *Id.* at *2.

217 *Id.* at *3.

218 *Id.*

219 Rev. Rul. 77-411, 1971-2 C.B. 103.

220 *Id.*

221 *Id.*

eating facilities but who go to a branch that has eating facilities are considered to have received their meals on the premises of their employer," because "a significant portion of the employer's business is carried on at the place where the employees receive the meals."[222]

Under the functional view, the courts have varied in the amount of work that needs to be conducted by the employer or the employee in order to convert a property into the business premises of the employer. In *Adams*, the Court required that there be "some substantial segment" of business activity to have the property be classified as the business premises of the employer.[223] Other courts, such as the one in *Anderson*, require that a "significant portion" of the employer's or employee's duties occur at a location in order to convert that location into the business premises of the employer.[224] However, a few courts, such as the court in *Dole v. Commissioner*, require that only "some" business activities occur on the property in order for a property to be considered the business premises of the employer.[225]

3. Business Premises of the Boston Bruins

As previously discussed, the business premises of the employer is either "the premises where the employer conducts a significant portion of his business," even if the employee does not perform any of his duties at this location, or "a place where the employee performs a significant portion of his duties," even if it is not at the location where the employer conducts his business operations.[226] Moreover, "functional rather than spatial unity is determinative" in deciding if an area constitutes the employer's premises.[227]

The Boston Bruins will be able to satisfy either one of these tests when the team travels for away games. With respect to the premises where the employee performs a significant amount of his duties, the Boston Bruins' players perform a significant amount of their duties at the hotel in the away city. During the players' stay at the hotel, they are required to attend meetings where they "go over the game plan" and watch film on their opponent.[228] If players miss any of these meetings or if they miss a curfew, the team reserves the right to fine the players for

222 *Id.*
223 Adams v. U.S., 218 Ct. Cl., 332, 332 (1978).
224 Comm'r. v. Anderson, 371 F.2d 59, 65 (6th Cir. 1966).
225 Dole v. Comm'r., 43 T.C. 697, 707 (1965).
226 *Anderson*, 371 F.2d at 67.
227 Bob Jones University v. U.S., 229 Ct. Cl. 340, 355 (1982).
228 Br. for Pet'r, *supra* note 1, at 7.

failure to abide by the team's rules.[229] The time the players spend preparing for the games in the hotel "is substantial, and far greater than the 60 minutes of ice time that each away game requires."[230] Furthermore, the players receive all necessary medical treatment and physical therapy while staying at the hotel.[231] An analogous situation to the Boston Bruins' case is provided by the legislative history of IRC Section 119: the Senate provided that "meals furnished to a cowhand while herding his employer's cattle on leased lands, or on national forest lands used under a permit, would also be regarded as furnished on the business premises of the employer."[232] Essentially, the players are the cowhands and the hotel is the land leased, pursuant to a short-time lease, by their employer. This example provided by the legislative history makes it clear that the Boston Bruins should be able to exclude its players' meals from its gross income.

In regards to the second test where the business premises is the property where the employer performs a significant amount of his business, the Boston Bruins will be able to satisfy this test. When traveling to an away city, the Boston Bruins set up a "base of operations at a local hotel."[233] This hotel is used extensively by the team to further its business purposes.[234] For instance, the team requires the hotel to provide "private meeting rooms," "eating facilities," and "space for physical therapy and medical treatment."[235] The Boston Bruins' situation is similar to that in *Mabley*. Both *Mabley* and the Boston Bruins conduct business at a hotel, which is leased or rented by the company.[236] Furthermore, in both of these cases, the location of the property where the business meeting is held is not at the main headquarters of the company.[237] The only difference between these two cases is the amount of time that the company has rights to the property and the distance of the property with respect to the headquarters of the business.[238] In *Mabley*, the hotel where the business meetings were held was only one and a half

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229 Br. for Pet'r, *supra* note 1, at 6.

230 Br. for Pet'r, *supra* note 1, at 7.

231 Br. for Pet'r, *supra* note 1, at 6.

232 H.R. REP. NO. 83-2543, at 26 (1954) (Conf. Rep.).

233 Br. for Pet'r, *supra* note 1, at 6.

234 Br. for Pet'r, *supra* note 1, at 6-7.

235 Br. For Pet'r, *supra* note 1, at 6-7.

236 *See generally* Mabley v. Comm'r., 24 T.C.M. (CCH) 1784 (1965); *see also* Br. for Pet'r, *supra* note 1, at 6-7.

237 *See generally Mabley*, 24 T.C.M. (CCH) 1784 (1965); *see also* Br. for Pet'r, *supra* note 1, at 6-7.

238 *See generally Mabley*, 24 T.C.M. (CCH) 1784 (1965); *see generally* Br. for Pet'r, *supra* note 1.

blocks from the offices of the company, and the company used the hotel on a daily basis.[239] But the location of the Boston Bruins' hotel could be anywhere where there is a professional hockey team, and the team will likely stay at the hotel for a only few days. However, the distance of the property from the main offices should not matter because "functional rather than spatial unity is determinative" in deciding if an area constitutes the employer's premises.[240] Additionally, the amount of time that a property has to be used by the employer or employee has not been considered a determinative factor for the business premises test. In light of the aforementioned, the Boston Bruins will be able to establish that the hotel is functionally its business premise.

V. CONCLUSION

The Boston Bruins should be entitled to deduct 100 percent of the away game meal expenses that the team incurs. As mentioned above, the team is able to satisfy all the requirements of Tax Code Sections 162, 274, and 132. The most difficult issue for the team is establishing that the away city hotel constitutes its business premises. However, the legislative history and case law strongly indicate that the team will be able to meet this burden.

The implications of the Boston Bruins winning this case are immense. If the court finds in favor of the Boston Bruins, the IRS will lose out on millions of dollars from all major sports teams in the United States. A favorable ruling for the Boston Bruins would essentially encourage professional sports teams to provide their players with meals during away games because the teams would be able to fully deduct the amount spent on the meals. Moreover, the IRS risks losing tax revenue from "industries involving mobile employers" because those industries will use this case as precedent.[241]

239 *Mabley*, 24 T.C.M. (CCH) 1784, at *1-2 (1965).

240 Bob Jones University v. U.S., 229 Ct. Cl. 340, 355 (1982).

241 Velarde, *supra* note 7.