Private Letter Ruling 9148001

February 15, 1991

ISSUES:

1. Whether the payments of meal allowances by * * * (The Company) constitute taxable income to employees or, in the alternative, whether the allowances fit within the exception for "occasional meal money" under section 1.132-6T(d)(2) of the Temporary Income Tax Regulations for purposes of qualifying for exclusion as de minimis fringe benefits under *section 132(a)(4) of the Internal Revenue Code* (Code)".

2. If the allowances paid by the Company are includible in the gross income of the employees, whether these amounts constitute wages for federal employment tax purposes (federal income tax withholding and the Federal Insurance Contributions Act (FICA)) or, in the alternative, whether it was reasonable for the Company not to withhold and pay federal employment taxes with respect to these amounts. n1

FACTS:

The Company is headquartered in * * * and provides utility services for * * *. During 1985, the year at issue, [*2] approximately * * * members of the Company's workforce of over * * * belonged to a union.

The Company has a long-standing policy of providing meals to its employees in the form of actual meals, reimbursements for meals, and payments of meal allowances. This policy, which is incorporated in the Company's most recent collective bargaining agreement with the union, requires the Company to provide union employees with "a comparable substitute" for meals "when employees are prevented from observing their usual and average meal practices or are prevented from eating a meal at approximately the usual time therefor." Union Agreement, § * * *. The circumstances covered by this directive are specified in the agreement. For example, union employees receive "meals" at four-hour intervals for performing emergency work on non-work days or outside regular work hours on work days. In addition, they receive "meals" for working more than one hour beyond regular work hours and for performing emergency work on work days starting two or more hours before regular work hours. n2 According to the Company, union employees who work scheduled overtime also are entitled to meal money in limited circumstances. [*3]

Two procedures exist by which the Company fulfills its obligation to provide meals under the collective bargaining agreement. Union employees are entitled to a cash meal allowance of $ 11.00 for those meals which the Company is required to provide nearest the employee's regular quitting time. For meals nearest the employee's regular starting time or those required at mid-day, the Company provides a $ 5.50 meal allowance. Alternatively, the union agreement also provides that employees may purchase a meal and receive reimbursement by check for the actual cost of the meal. In practice, most union employees elect to take the cash meal allowance. To

receive a meal allowance, a voucher is submitted showing the employee's name and the date the overtime was performed. In return, the employee receives a cash payment from petty cash. n3 Since there is no requirement that an employee actually purchase a meal, he receives the full meal allowance even if he does not purchase a meal during or following the overtime period.

In contrast to the Company's arrangement with its union employees, non-union employees are limited to reimbursement by check for the actual cost of meals necessitated by "overtime [*4] or other circumstances preventing the normal meal practice." In general, the Company states that non-union employees are entitled to reimbursements in any situation in which a union employee would receive a reimbursement. Unless the cost of the meal exceeds $ 25, there is no requirement to provide a receipt to the Company.

Although the Company has a computerized accounting system, its accounting data for meal allowances and reimbursements is not integrated with its payroll system. As a result, the number or amount of meal allowances and reimbursements received by individual employees in 1985 cannot be readily determined. Additionally, because the meal allowances and reimbursements paid to employees were taken from petty cash, the Company does not have records reflecting the total amount of meal allowances and reimbursements paid. However, after examining the Company's personnel, overtime, and accounting records (particularly the Company's accounting classifications for "Overtime Meals" and "Meals and Lodging"), Service personnel were able to estimate that the total amount of meal allowances paid by the Company in 1985 equalled at least * * *.

The Company did not report these payments [*5] on the employees' Forms W-2, Wage and Tax Statements, and did not withhold and pay federal employment taxes on the payments. The Company maintains that the payments qualify as de minimis fringe benefits under *section 132(a)(4) of the Code*, and that, even if the Service concludes that the payments should have been included in income, withholding liability should not be imposed upon the Company because it had a reasonable belief that the payments would qualify for exclusion under *section 132*. It further argues that any adverse technical advice should be limited to prospective application only.

APPLICABLE LAW -- Issue 1

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

Section 1.61-2T(a)(2) of the Temporary Income Tax Regulations n4 provides that to the extent a particular fringe benefit is specifically excluded from gross income pursuant to another section of subtitle A of the Code, that section shall govern the treatment of the fringe benefit.

Section 132(a)(4) of the Code provides that gross income shall not include any fringe benefit [*6] that qualifies as a de minimis fringe.

Under *section 132(e) of the Code*, the term "de minimis fringe" is defined as any property or service the value of which is (after taking into account the frequency with which similar fringes are provided by the employer to the employer's employees) so small as to make accounting for it unreasonable or administratively impracticable.

Section 1.132-6T(b) generally provides that the frequency with which similar fringes are provided by the employer to the employer's employees is determined by reference to the frequency with which the employer provides the fringe to each individual employee. However, where it would be administratively difficult to determine frequency with respect to individual

employees, the frequency with which similar fringes are provided by the employer to the employer's employees is determined by reference to the frequency with which the employer provides the fringes to the employees and not the frequency with which individual employees receive them.

Section 1.132-6T(d)(2) of the temporary regulations provides a limited exception to the general rule of section 1.132-6T(c) that the provision of any cash fringe benefit is not [*7] excludable as a de minimis fringe. Specifically, section 1.132-6T(d)(2) provides that occasional meal money provided to an employee because overtime work necessitates an extension of the employee's normal workday is excluded as a de minimis fringe.

Section 132(j) of the Code provides that *section 132* (other than *subsection (e)*) shall not apply to any fringe benefits of a type the tax treatment of which is expressly provided for in any other section of Chapter 1 of Subtitle A.

RATIONALE -- Issue 1

The Company maintains that the meal allowances paid to its employees qualify for the limited exception in section 1.132-6T(d)(2) of the temporary regulations which excludes from gross income occasional meal money provided to an employee because overtime work necessitates an extension of the employee's normal workday. In addressing the issue of whether the meal allowances were provided occasionally, the Company asserts that the special rule in section 1.132-6T(b) of the regulations is applicable. Section 1.132-6T(b) permits the employer to measure frequency based on an aggregate of employees rather than on an individual employee basis when it would be administratively difficult to determine [*8] frequency with respect to individual employees.

In support, the Company contends that it is administratively difficult to determine frequency with respect to individual employees because the meal allowances and reimbursements are paid through the Company's petty cash voucher system. In other words, the Company assumes that a determination of administrative difficulty is dependent on the employer's method of payment and choice of procedures used to account for the benefits. If this interpretation were valid, an employer could tailor its procedures to be administratively difficult for purposes of achieving de minimis treatment under *section 132(e)*. We believe that the special rule in section 1.132-6T(b) was intended to give administrative relief to employers when the costs associated with determining frequency on an individual employee basis would exceed the nominal tax revenue generated by including the value of the benefits in income. We do not believe the rule was intended as an invitation to employers to choose not to account for benefits on an individual basis and then to allege that their failure to do so was the result of administrative difficulty.

Other than complaining that [*9] it would be administratively difficult within the meaning of the regulation for the Company to have to collect and tabulate all the petty cash vouchers submitted for meal allowances and reimbursements, the Company makes no effort to objectively demonstrate why it would be administratively difficult to track the payments. In addition, the Company has failed to show what the costs associated with tracking the benefits would be. It does speculate, however, that the petty cash voucher system is such an intrinsic part of its agreement with the union, that the union's consent would be required to change it. While the union's interest in how the meal allowances are paid to its members may be a subject of future negotiation, we do not believe that this is a justification for the Company's failure to integrate its accounting data for meal allowances and reimbursements with its payroll system.

The meal allowances and reimbursements provided by the Company were routinely paid. During the year at issue, the Company has a computerized accounting system which was able to classify meal expenditures, for purposes of its business expense deductions, as falling into one of two categories, "Overtime [*10] Meals" or "Meals and Lodging." Thus, the Company's argument that it was too difficult to track cash meal allowances and reimbursements on an individual employee basis lacks substance when considered in light of its apparent ability to track the payments for other purposes.

Even if the Company's reasons for relying on the special rule in section 1.132-6T(b) to determine frequency were justified, the rule does not permit the Company to attempt to reduce the value of the meal allowances to a de minimis level by calculating an "average [value] per employee." The purpose of the rule is to determine the frequency with which benefits are provided, not to reduce their value for purposes of achieving de minimis treatment. Heedless of this distinction, the Company asserts that since it is measuring frequency on the basis of its entire workforce, it is likewise permitted to determine the value of the meal allowances paid to employees by averaging the total amount paid * * * across the entire workforce, resulting in an monthly average of $ 10 per employee. The Company also estimates that the monthly average meal allowance per employee is $ 14 if only union employees are considered to be in the [*11] employee group. In either event, the Company argues that the smallness of these amounts demonstrates that the benefits were provided only "occasionally". n5

In addition to disregarding the distinction between frequency and value, the Company in making its average-per-employee calculations has not addressed the issue of whether all employees within the workforce or the union actually received benefits or were even eligible for benefits. For example, employees who perform emergency repair work are more likely to receive overtime meal allowances than are clerical employees. If the employer relies on the special rule in section 1.132-6T(b), the average number of times an employee within a group receives the benefit will decrease as the employee group increases in size. Thus, it is to the employer's advantage to inflate the size of the group as much as possible. The Company's argument that its calculated "averages per employee" accurately demonstrate that the benefits were provided occasionally is disputed by its own records which fail to define which employees were included in the group. During the year at issue, the Company employed over * * * employees within its * * * operating divisions. [*12] There is a wide disparity among the divisions with regard to the payment of meal allowances and reimbursements. For example, when the number of employees per division is compared to the meal allowances paid per division, it is revealed that some divisions received more meal allowances per employee than others. In short, the Company's calculations are unreliable when considered in the face of records indicating that some employees may not have received any benefits at all and that some may have received substantially more benefits than others.

The Company next contends that the meal allowances and reimbursements were paid occasionally because they were paid on an "irregular" basis, usually when overtime work was in response to emergencies. Overtime work and emergencies are a routine part of the Company's business. The Company has an established practice of providing meal allowances and reimbursements in these events. Every time a union or non-union employee works a single hour of overtime or performs services on a non-work day or outside normal work hours, that employee is entitled to receive a "meal". The likelihood that meal allowances and reimbursements will be provided is so well-established [*13] that it is incorporated into the Company's collective bargaining agreement with the union -- the result being that meal allowances and reimbursements are contractually mandated payments.

To confirm that the meal allowances are nothing more than mandatory compensatory payments, one only has to look to the disparate treatment of non-union employees. Non-union employees are only entitled to be reimbursed by check for amounts actually spent on meals when overtime work interferes with normal meal practice. In contrast, the union employee is entitled to receive a cash payment which he is not obligated to spend on a "comparable substitute", but is free to use in any way he pleases.

The Company also maintains that, compared to its total payroll of * * *, the estimated * * * total of meal allowances is de minimis. Even though the Company admits that * * * "may seem significant in absolute terms," it appears to argue that it should not have to account for an amount that is insignificant in relation to its total operations. The Company reasons that it would be administratively impracticable and costly for it to account for * * * in benefits, but offers no explanation of what it means by "costly." [*14] We believe that this complaint of costliness is without merit, not only because it is made without any effort to substantiate it, but because it is in apparent contradiction to the Company's affirmation that * * * is an insignificant amount.

The Company's argument that the value of the benefits should be compared to its total payroll also ignores the statutory definition of a de minimis fringe benefit. After taking frequency into account, "de minimis fringe" means any property or service the value of which is so small as to make accounting for it unreasonable or administratively impracticable. It is essentially a rule of administrative convenience for employers to permit them to exclude small, infrequent benefits, when the costs associated with treating these amounts as wages would exceed the nominal tax revenue generated. Whether a benefit is de minimis is determined by reference to the value of the benefits attributed to the individual employee and not whether the total amount of benefits provided by the employer to its employees is de minimis when compared to the employer's payroll, gross receipts, or total assets.

As a final argument against including the meal allowances and reimbursements [*15] in income, the Company asserts that Congress did not intend for the Company to modify its long-standing treatment of real money. The Company states that it has followed the rule set forth in O.D. 514, *2 C.B. 90 (1920)*, for over 50 years. n6 It argues that in enacting an exclusion for "'occasional' supper money" Congress sanctioned * * * practice of excluding meal allowances and reimbursements provided for overtime that is not "routine". The Company's reliance on O.D. 514 is misplaced, because it is clear that for the year at issue O.D. 514 no longer reflects the law in this area.

In *Commissioner v. Kowalski, 434 U.S. 77, 98 S. Ct. 315, 54 L. Ed. 2d 252 (1977)*, the Supreme Court held that New Jersey's cash reimbursements to its highway patrol officers for meals consumed while on patrol duty constituted income to the officers within the broad definition of gross income under *section 61(a) of the Code*, and, further, that those cash payments were not excludable under *section 119 of the Code* which relates to meals or lodging furnished for the convenience of the employer. In so concluding, the Court traced the long history of the development of the convenience-of-the-employer doctrine. [*16] The Court explained that the doctrine is not a tidy one and that the phrase "convenience-of-the-employer" first appeared in O.D. 265, 1 C.B. 71 (1919). *434 U.S. at 84*. The Court continued by explaining that O.D. 514, which was issued the following year and extended the convenience-of-the-employer doctrine to cash payments for "supper money", created an exclusion from income based solely on an employer's characterization of a payment as noncompensatory. *Id. at 85*.

The Kowalski Court concluded that Congress through its recodification of the Code in 1954 and its enactment of *section 119* unquestionably intended to overrule the reasoning behind rulings like O.D. 514 which rest on the employer's characterization of the nature of a payment.

434 U.S. at 92. In other words, the noncompensatory character of a benefit can no longer be inferred merely from its characterization by the employer. However, the Court, in a footnote, declined to decide whether, notwithstanding *section 119*, other grounds for excluding "supper money" existed. *434 U.S. at 93 n.28*. Fortunately, the issue of whether meal money could be treated as noncompensatory was finally resolved by section 531 of the Deficit Reduction Act of 1984 [*17] (DEFRA) which amended *section 61(a)* to include "fringe benefits" and added *section 132* to the Code to exclude certain fringe benefits from gross income. n7 Pub. L. 98-369. These sections make it clear that by the beginning of 1985, the tax year at issue, the general rule was that cash meal allowances and reimbursements were includible in gross income.

The examples in the legislative history to *section 132(e) of the Code* demonstrate that (1) the exclusion for de minimis fringe benefits is limited to situations in which the benefit provided is small in value and (2) the term "occasional" does not include situations in which the benefit is provided routinely:

For example, benefits which generally are excluded as de minimis fringes include the typing of a personal letter by a company secretary, occasional personal use of the company copying machine, monthly transit passes provided at a discount not exceeding $ 15, occasional company cocktail parties or picnics for employees, occasional supper money or taxi fare for employees because of overtime work, and certain holiday gifts of property with a low fair market value.

H.R. Rep. No. 861, 98th Cong., 2d Sess. 1168 (1984).

In [*18] light of the Supreme Court's finding in Kowalski that the treatment of "supper money" no longer depends on the employer's characterization of the benefit as noncompensatory, as well as the subsequent enactment of *section 132* along with its corresponding legislative history, we conclude that O.D. 514 is no longer valid for the proposition that "supper money" is excludable from gross income. Amendment to *section 61(a)* and the corresponding enactment of *section 132 of the Code* which provide that meal allowances and reimbursements are generally includible in gross income. Since the amounts paid by the company do not qualify as de minimis fringe benefits under *section 132(e)*, they are includible in the employees' gross income.

APPLICABLE LAW -- Issue 2

Sections 3121(a) and *3401(a) of the Code* and sections 31.3121(a)-1(b) and 31.3401(a)-1(a)(1) of the Employment Tax Regulations provide that, for purposes of FICA and federal income tax withholding, the term "wages" means all remuneration for employment with certain specified exceptions. n8

For purposes of FICA and federal income tax withholding, *sections 3121(a)(20)* and *3401(a)(19) of the Code* respectively, provide exceptions from the definition [*19] of "wages" for any benefit provided to an employee if at the time the benefit is provided it is reasonable to believe that the employee will be able to exclude the benefit from income under *section 132*. See also sections 31.3121(a)-1T and 31.3401(a)-1T of the temporary regulations. n9

Section 1.61-2T(a)(3) of the temporary regulations provides that a fringe benefit provided in connection with the performance of services shall be considered to have been provided as compensation for services.

In *Central Illinois Public Service Co. v. United States, 435 U.S. 21, 98 S. Ct. 917, 55 L. Ed. 2d 82 (1978)*, 1978-1 C.B. 310, the United States Supreme Court held that a $1.40 lunch "reimbursment" paid to employees on non-overnight travel in 1963 was not wages subject to federal income tax withholding. n10 The money was paid only to employees who purchased or

brought their lunches; no reimbursement was paid to employees who went home for lunch. The $1.40 rate, which had been established through negotiations with the union representing the employees, sometimes exceeded and sometimes fell short of the costs incurred. An accounting of actual expenses was made to the employer. The Court rejected the [*20] notion that the payments were remuneration for services and wages for federal income tax withholding purposes. The Court noted that no regulations or rulings required withholding on travel expense reimbursements in 1963 and concluded it was unfair to require an employer to fill this gap on its own.

RATIONALE -- Issue 2

The Company contends that even if the meal allowances and reimbursements were taxable to the employees, there was no requirement that it withhold taxes. Specifically, it argues that the meal allowances and reimbursements are excepted from the definition of wages by virtue of *sections 3121(a)(20)* and *3401(a)(19) of the Code*, because it had a reasonable belief that the amounts would be excludable under *section 132*. The Company relies on the Supreme Court's decision in Central Illinois to argue that its failure to withhold was reasonable due to the lack of clear guidance concerning "occasional" meal money.

For two reasons, we disagree with the Company's application of the holding in Central Illinois to justify its failure to withhold. First, we believe that the Company's case is distinguishable from the facts in Central Illinois. In evaluating the circumstances surrounding [*21] the payments in Central Illinois, the Court noted a complete absence of Service guidance on the status of lunch reimbursements in that there were no regulations or rulings in existence in 1963 that required withholding on any travel expense reimbursement. The Court also observed that the income tax status of the lunch reimbursements was even in doubt in 1963. n11 In addition, the facts of the case were such that the question of whether the reimbursements were reasonably related to the lunch expenses incurred was never raised. The amount of the payment appears to have been closely related to the actual cost to the employee, the employee gave an accounting to the employer, and the amount thereof was described by the Court as "modest", even in 1963. *435 U.S. at 23*.

This is in sharp contrast to the circumstances surrounding the meal allowances and reimbursements paid by the Company. The meal allowances and reimbursements were not paid at a time when guidance on their treatment was lacking. To the contrary, both were paid after Congress had enacted *section 132*. The meal allowances paid by the Company were not related to the actual cost because the employee was not required to purchase [*22] a meal with the allowance. There was no accounting to the employer of the meal allowances and reimbursements (not exceeding $25) and no substantiation of their amounts. Furthermore, the meal allowances could not be described as "modest."

In reaching its decision in Central Illinois, the Supreme Court rejected the notion that the lunch reimbursements at issue were "wages" under the circumstances. However, the Court observed that congressional "committee reports of the time [when the definition of "wages" was formulated] stated consistently that 'wages' meant remuneration 'if paid for services performed by an employee for his employer.'" *435 U.S. at 27* (emphasis supplied by the Court). The Court pointed out that Congress "'in the interest of simplicity and ease of administration,' confined the obligation to withhold to 'salaries, wages, and other forms of compensation for personal services.'" Id.

This explanation by the Court recognizes that, even though the lunch reimbursements in Central Illinois were not "wages under the circumstances, the term "wages" does include

payments received by employees for the performance of services. In the present case, the Company paid the meal allowances [*23] and reimbursements "for services performed by an employee for an employer" as part of the compensation package provided to employees. Thus, the Company's obligation to withhold on these amounts was not unreasonably imprecise or speculative.

Second, amendments made by DEFRA also bring into question the Company's reliance on Central Illinois to make the argument that it had a reason to believe that meal allowances and reimbursements paid in 1985 were not includible in gross income as compensation. As stated previously, DEFRA amended *section 61(a) of the Code* to include "fringe benefits" in the definition of gross income. Correspondingly, section 1.61-2T(a)(3) of the temporary regulations provides that a fringe benefit provided in connection with the performance of services shall be considered to have been provided as compensation for services.

In addition, DEFRA added *section 132* to the Code which provided a statutory approach for determining which employer-provided benefits should be excluded from income. The corresponding change to the employment tax provisions resulted in the addition of *sections 3401(a)(19), 3121(a)(20),* and *3306(b)(16)* to the Code. The legislative history accompanying [*24] the enactment of these provisions sets forth their purpose as follows:

"[T]he conference agreement sets forth statutory provisions under which (1) certain fringe benefits provided by an employer are excluded from the recipient employee's gross income for Federal income tax purposes and from the wage base (and, if applicable, the benefit base) for purposes of income tax withholding, FICA, FUTA, and RRTA, and (2) any fringe benefit that does not qualify for exclusion under the bill and that is not excluded under another statutory fringe benefit provision of the Code is includible in gross income for income tax purposes, and in wages for employment tax purposes, at the excess of its fair market value over any amount paid by the employee for the benefit. The latter rule is confirmed by clarifying amendments to Code *sections 61(a), 3121(a), 3306(b),* and *3401(a)* and section 209 of the Social Security Act."
H. R. Rep. 861, 98th Cong., 2d Sess. 1169, 1984-3 (Vol. 2) C.B. 1, 423.

As set forth in the legislative history, these provisions are intended to change prior law. As a result of DEFRA, only if the employer reasonably believes that the fringe benefit will be excludable from the gross income [*25] of the employee under *section 132* may the fringe benefit be excluded from wages for employment tax purposes. As previously discussed, the operative exclusion under *section 132* with respect to "occasional" meal money is *section 132(e)* which defines de minimis fringe benefits. In effect, unless an employer reasonably believes that an "occasional" meal allowance falls within the narrow definition of *section 132(e),* the allowance will be presumed to be income and subject to employment taxes. That Congress intended to address meal allowances and reimbursements by the DEFRA amendments is made clear in the committee report which states that:

"Since the statutory term "remuneration" is to be interpreted broadly to include compensation for services which have been performed, . . . benefits (such as allowances for meals when the employee is not away from home overnight) which are not excluded under the provisions of this bill or other statutory provisions are subject to these employment taxes."
H. R. Rep. No. 432, 98th Cong., 2d Sess. 1609 (1984) (emphasis added). This explicit reference to the factual issue present in Central Illinois indicates that the issue of whether meal allowances and [*26] reimbursements are wages had finally been resolved.

The exclusion from wages found in *sections 3121(a)(20)* and *3401(a)(19)* is not triggered merely by an employer's assertion that it applies. If an employer seeks to rely on the exclusion, it

is obligated to have, at minimum, an understanding of the law and to apply the law to the particular facts. In this way, the existence of a reasonable belief for excluding the benefits is based on a reasoned judgment.

If the Company had made an effort in 1985 to make such a judgment, it would have been aware of the limited exclusion for de minimis fringe benefits under *section 132(e) of the Code* and of the strict requirements for exclusion of meals and meal money under other provisions of the Code. Thus, the Company would have discovered that it was not reasonable for it to believe that the meal allowances and reimbursements were excludable from income under *section 132*. For example, in order for the reimbursement of meal expenses to be excluded as a trade or business expense under *section 162 of the Code*, the expenses must be incurred while the employee is on a trip away from home overnight. *United States v. Correll, Supra*. Also, under *section 119*, [*27] in order for meals to be excluded from the gross income of an employee, they must be provided in kind for the convenience of the employer on the employer's business premises. *Commissioner v. Kowalski, supra.* Finally, if the Company had examined its payments of meal allowances and reimbursements with reference to the limited exclusion for "occasional" meal money under *section 1.132-6(d)* of the temporary fringe benefit regulations, it would have been apparent to the Company that its meals allowances and reimbursements did not qualify as de minimis and, thus, should have been included as wages for employment tax purposes.

Accordingly, we conclude that the meal allowances and reimbursements were fringe benefits provided in connection with the performance of services and, therefore, were wages for purposes of FICA and federal income tax withholding.

CONCLUSIONS

1. Because the employees were entitled to receive meal allowances on a routine basis for overtime work, these payments were not provided on an occasional basis. Since these payments do not fit within the exception for "occasional meal money" under section 1.132-6T(d)(2) of the regulations, they are included in the gross income of [*28] the employees under *section 61 of the Code*.

2. The meal allowances constitute wages, subject to withholding, for purposes of the federal income tax and the FICA tax, since the Company did not have a reasonable basis for believing that the meal allowances would not be excludable under *section 132 of the Code*. Thus, the Company should have withheld federal income tax and the employee portion of the FICA tax with respect to these payments. Additionally, the Company should have paid the employer portion of the FICA tax on the payments.

3. The Company is not entitled to relief under *section 7805(b) of the Code*.

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

FOOTNOTES:

n1

In its request for technical advice, the District Director does not raise the issue of whether the meal allowances are wages for purposes of the Federal Unemployment Tax Act (FUTA). As specifically noted in this memorandum, the conclusions relating to whether the meal allowances constitute wages for income tax withholding and FICA purposes are applicable for purposes of FUTA.

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For convenience, the extra work described in the union agreement that requires the Company to furnish meals is referred to as "overtime" throughout this memorandum.

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The collective bargaining agreement does not explicitly require the payment of meal allowances out of petty cash. However, the Company maintains that it is a long-standing practice evolving from the desire to provide employees with prompt payments and, as a result, the procedure could not be altered without union consent.

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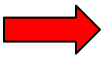
Sections 1.61-2T and 1.132-1T through 1.132-8T, the temporary regulations concerning the taxation and valuation of fringe benefits and exclusions from gross income for certain fringe benefits, were published December 23, 1985 and were effective from January 1, 1985, to December 31, 1988 with respect to fringe benefits provided before January 1, 1989.



n5

This argument overlooks the distinction between frequency and value which are separate elements in determining whether benefits are de minimis. For example, if an employer provides an employee with a single annual benefit of $ 1,000, the benefit has been provided occasionally. However, since it is not small in value, it does not qualify for de minimis treatment under *section 132(e)*. Likewise, if an employer provides an employee with bus fare each work day, the benefit in the aggregate may not be great in value, but it is not de minimis because it violates the statutory directive that frequency is a relevant factor when determining whether the exclusion under *section 132(a)(4)* applies. Thus, in order to determine whether the cash meal allowances provided by the Company qualified as de minimis, it would have been necessary for the Company to look separately at whether the benefits were small after determining the frequency with which they were provided to employees. By using its employee averages, the Company evades the distinction set forth in *section 132(a)(4)*.

n6

O.D. 514 provides: "Supper money" paid by an employer to an employee, who voluntarily performs extra labor for his employer after regular business hours, such payment not being considered additional compensation and not being charged to the salary account, is considered as being paid for the convenience of the employer and for that reason does not represent taxable income to the employee.

n7

For several years subsequent to the decision in Kowalski, Congress precluded the Service from issuing regulations or rulings altering the tax treatment of nonstatutory fringe benefits. Pub.L. 95-427, § 1 (1978); Pub. L. 96-167, § 1 (1979); Pub.L. 97-34, § 801 (1981). Following the expiration of the moratorium extended by the Economic Recovery Tax Act of 1981, Pub.L. 97-34, Treasury announced that the Service, pending

Congressional action, would refrain from issuing regulations or rulings in the area and, accordingly, would not change its existing administrative practice prior to January 1, 1985. On July 18, 1984, Congress enacted section 531 of the Deficit Reduction Act of 1984, Pub.L. 98-369, that amended *section 61(a) of the Code* to include "fringe benefits" in the definition of gross income and added *section 132* to the Code, effective January 1, 1985.

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Sections 3306(b) of the Code and 31.3306(b)-1(b) of the employment tax regulations provide a similar definition of "wages" for FUTA purposes.

n9

Sections 3306(b)(16) of the Code and 31.3306(b)-1T of the temporary employment tax regulations provide similar exceptions from the definition of "wages" for purposes of FUTA.

n10

The Supreme Court explained that the income tax issue was not before the Court and that the issue was whether the lunch reimbursements were or were not "wages" subject to withholding, even though it was unclear at the time whether these reimbursements might be held to constitute taxable income to employees under the Court's recent decision in *Kowalski, supra*. *435 U.S. at 24*.

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The tax year at issue in Central Illinois pre-dated the Court's decision in *United States v. Correll, 389 U.S. 299, 88 S. Ct. 445, 19 L. Ed. 2d 537 (1967),* which according to the Court's own characterization in Central Illinois, "dispelled some of the confusion" concerning the income tax aspects of meal reimbursements. *435 U.S. at 25*. (In Correll, the Court restricted the travel expense deduction for meals under *section 162(a)(2)* to "overnight" trips.) The Court went on to state in Central Illinois that until its recent decision in *Kowalski, supra,* it was not entirely clear that such reimbursements were income to the recipients under *section 61* and *119 of the Code*. Id.