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Volume 51 | Number 1

Article 7

2018

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Brendan Zwaneveld, Comment, Four Walls Do Not an Eating Facility Make: Arguing Against the U.S. Tax Court's Unprecedented Jacobs v. Commissioner Decision, Loy. L.A. Rev. 321 (2018).

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Four Walls Do Not an Eating Facility Make: Arguing Against the U.S. Tax Court's Unprecedented *Jacobs v. Commissioner* Decision

Cover Page Footnote

J.D. Candidate, May 2019, Loyola Law School, Los Angeles; B.A., Political Science, University of California, Los Angeles. I would like to thank Professor Ellen Aprill for her guidance and thoughtful feedback throughout the writing process. Thank you to the editors and staff of the Loyola of Los Angeles Law Review their hard work to help bring this Comment to publication, especially Richard Gano for bringing this case to my attention. Finally, thank you to my family for their unconditional love and support.

FOUR WALLS DO NOT AN EATING FACILITY MAKE: ARGUING AGAINST THE U.S. TAX COURT'S UNPRECEDENTED *JACOBS V.* *COMMISSIONER* DECISION

*Brendan Zwaneveld**

I. INTRODUCTION

June 26, 2017 is a day that Boston Bruins owner Jeremy Jacobs will likely never forget. After owning Boston's professional hockey franchise since 1975, the Hockey Hall of Fame announced that Jacobs was to be inducted into their Class of 2017.¹ While induction into the Hockey Hall of Fame is a significant achievement, on that same day Jacobs and his team won an important legal victory away from the ice.²

On June 26, 2017, the Bruins scored a victory against the Internal Revenue Service when the United States Tax Court held that Jacobs's team, the Boston Bruins, was entitled to deduct all of the expenses for feeding players and other employees while traveling for away games.³ It is commonplace for businesses to deduct some of the costs of feeding their employees on the job, but the Bruins's deduction stemmed from unique circumstances.⁴ The Bruins were allowed a deduction under section 132(e)(2) of the Internal Revenue Code for meals provided in conference rooms at away game hotels because they

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1. Boston Bruins, *Bruins Owner Jeremy Jacobs to be Inducted into the Hockey Hall of Fame*, NHL.COM (June 26, 2017), <https://www.nhl.com/b Bruins/news/b Bruins-owner-jeremy-jacobs-to-be-inducted-into-the-hockey-hall-of-fame/c-290162742>.

2. Peter J. Reilly, *Billionaire Bruins Owner Beats IRS on Tax Deductions for Away Game Meals*, FORBES (June 27, 2017, 8:29 AM), <https://www.forbes.com/sites/peterjreilly/2017/06/27/jeremy-jacobs-beats-irs-in-tax-court-on-bruins-meal-deductions/#4554629265a1>.

3. *Id.*

4. See I.R.C. §§ 132(e) (2011), 162(a)(2) (2012), 274(n)(2)(A-B) (2017).

successfully argued the hotels constituted the team's "business premises" and that the conference rooms were "eating facilities."⁵ The U.S. Tax Court sided with the Bruins and granted the full deduction.⁶

This decision not only saved the team money on its taxes, but also opened the section 132(e)(2) deduction to a wide group of taxpayers.⁷ In fact, major accounting firms like PricewaterhouseCoopers already foresee how this ruling may allow their corporate clients to secure 100% deductions for meals provided to employees traveling for business purposes.⁸ After *Jacobs*, gone is the notion that an "eating facility" is limited to a company cafeteria or office dining room.⁹ And now a company's "business premises" can be lifted and transplanted every couple of days to a new city far from its main facilities.

This Comment argues that the U.S. Tax Court's holding in *Jacobs v. Commissioner*¹⁰ excessively expanded the scope of the de minimis fringe deduction under Internal Revenue Code section 132(e)(2) beyond prior authorities, setting a new company-friendly standard for employer-provided meal deductions that has implications beyond professional hockey. Part II explains the legal background for the Bruins's deduction in *Jacobs*. Part III sets out the facts of *Jacobs v. Commissioner* and the U.S. Tax Court's reasoning in deciding the case. Part IV argues that the U.S. Tax Court erred in its ruling by incorrectly concluding the Bruins's travel meals were taken on their "business premises," by relying on a non-precedential Tax Court Memorandum as authority, and by going against Congress's intended definition of an "eating facility." Part V concludes by considering *Jacobs*'s ramifications on all taxpayers.

5. Pretrial Memorandum for Petitioners at 16, 22, *Jacobs v. Comm'r*, 148 T.C. No. 24 (2017), 2017 WL 2733795 (No. 19009-15) (T.C. 2017).

6. *Jacobs v. Comm'r*, 148 T.C. No. 24 (2017), 2017 WL 2733795 (No. 19009-15), at *10 (T.C. 2017).

7. Reilly, *supra* note 2.

8. Rick Farley, *Tax Court Allows Full Deduction for Certain Meals Provided to Employees on Business Travel*, INSIGHTS FROM PEOPLE AND ORG. (Aug. 3, 2017), <https://www.pwc.com/us/en/tax-services/publications/insights/assets/pwc-court-gives-full-deduction-for-certain-travel-meals-for-employees.pdf>.

9. *Jacobs v. Comm'r*, 148 T.C. No. 24 (2017), 2017 WL 2733795 (No. 19009-15), at *31 (T.C. 2017).

10. 148 T.C. No. 24 (2017), 2017 WL 2733795 (No. 19009-15) (T.C. 2017).

II. LEGAL BACKGROUND

The Internal Revenue Service has long recognized the ability of businesses to deduct “ordinary and necessary” business expenses.¹¹ In the area of employer-operated eating facilities, the Tax Code “prescribes a complex and not-always-intuitive formula” for determining deductibility.¹² The employer-operated eating facility deduction itself is contained within section 132(e)(2), but to arrive at that section, a taxpayer has to first show that the meals qualify for a deduction under section 162.¹³ Section 162 business meals are then limited to a 50% deduction by section 274(n).¹⁴ Finally, section 132(e)(2) is invoked as an exception to section 274(n)’s 50% limitation on deductibility.¹⁵ Then, section 119 can be implicated as a safe-harbor for section 132(e)(2)’s revenue/operating costs requirement.¹⁶

A. Section 162

Under section 162(a), taxpayers are allowed a deduction for “ordinary and necessary expenses paid or incurred . . . in carrying on any trade or business.”¹⁷ This section is expansive, containing specific guidance regarding the deductibility of everything from employee salaries to illegal bribes and kickbacks.¹⁸ Regardless, as long as a business expense is “ordinary and necessary,” that expense is deductible. What constitutes an “ordinary and necessary” expense, however, is very fact specific.¹⁹

Of importance here, section 162(a)(2) includes “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

11. I.R.C. § 162 (2012).

12. Syd Gernstein, *Boston Bruins Raise Controversy by Arguing that Meals are Deductible, Team is “World Class,”* BLOOMBERG TAX: FED. TAX BLOG (Aug. 12, 2015), <https://www.bna.com/boston-bruins-raise-b17179934636/>.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. I.R.C. § 162(a) (2012).

18. *Id.* §§ 162(a)(1) and (c).

19. See *Welch v. Helvering*, 290 U.S. 111, 115 (1933) (“One struggles in vain for any verbal formula that will supply a ready touchstone. The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle.”).

business” as deductible.²⁰ However, the analysis does not stop here. Section 274 disallows or places limitations on some deductions “otherwise allowable” under section 162.²¹

B. Section 274

Section 274 is a wide-ranging provision of the Tax Code that places restrictions on many types of otherwise deductible expenses.²² Section 274(e) then provides a number of specific exceptions to expenses restricted under section 274(a), including “[e]xpenses for food and beverages (and facilities used in connection therewith) furnished on the business premises of the taxpayer primarily for his employees.”²³ While certain employer provided meals are specifically allowed by section 274(e)(1), section 274(n) places a 50% limitation on all otherwise deductible business meals paid for by an employer.²⁴

Business meals fall into a gray area between business and personal expenses.²⁵ On one hand, meals consumed on the job can be necessary for conducting business, but on the other hand people need to eat regardless of whether or not they are working.²⁶ To account for the inherently personal portion of business meals, Congress implemented a 50% limitation on otherwise deductible costs as a compromise between the joint business and personal nature of business meals.²⁷ However, this 50% limitation contained in section 274(n) is subject to certain exceptions.²⁸

Section 274(n) limits allowable deductions to 50% for “food or beverages” unless “such expense is excludable from the gross income of the recipient under section 132 by reason of subsection (e) thereof

20. I.R.C. § 162(a)(2) (2012).

21. I.R.C. § 274(a)(1) (2017).

22. *Id.* §§ 274(a)(1) (restriction of “entertainment, amusement, or recreation” expenses not related to business), (a)(3) (restriction of membership fees for “any club organized for business, pleasure, recreation, or other social purpose”), (b)(1) (restriction of gifts greater than \$25.00).

23. *Id.* § 274(e)(1).

24. *Id.* § 274(n).

25. Thomas D. Griffith, *Theories of Personal Deductions in the Income Tax*, 40 HASTINGS L.J. 343, 367 (1989).

26. BORIS I. BITTKER & LAWRENCE LOKKEN, *FEDERAL TAXATION OF INCOME, ESTATES, AND GIFTS* ¶ 21.2.2.9 (3d ed. 1999).

27. *Id.*

28. Marianna Dyson & Michael Chittenden, *Tax Court Expands Section 119 Exclusion in Boston Bruins Decision*, Tax Withholding & Reporting Blog (June 27, 2017), <https://twrblog.com/tag/jacobs-v-commissioner/>.

(relating to de minimis fringes).”²⁹ Therefore, if the meal qualifies as a de minimis fringe benefit under section 132(e), it is not subject to the 50% limitation.³⁰

C. Section 132

Prior to 1984, “income tax treatment of nonstatutory fringe benefits was a patchwork of Service rulings, surprisingly few regulations, and a sprinkling of cases.”³¹ In an attempt to fix this lack of guidance, Congress passed the Deficit Reduction Act of 1984, which created a new section 132 that “supplied a comprehensive list of specific fringe benefits excluded from income and general authority for excluding de minimis fringe benefits.”³²

The general definition of a de minimis fringe benefit is “any property or service the value of which is . . . so small as to make accounting for it unreasonable or administratively impracticable.”³³ Typical de minimis fringe benefits include “occasional cocktail parties, group meals, or picnics for employees and their guests; traditional birthday or holiday gifts of property (not cash) with a low fair market value. . . .”³⁴ In addition, section 132(e)(2) explicitly states that “[t]he operation by an employer of any eating facility for employees shall be treated as a de minimis fringe.”³⁵

Section 132 requires that the eating facility be “located on or near the business premises of the employer.”³⁶ Second, the “revenue derived from such facility” must “equal[] or exceed[] the direct operating costs of such facility” (“revenue/operating costs test”).³⁷ Furthermore, access to the facility must be “available on substantially the same terms to each member of a group of employees” and cannot “discriminate in favor of highly compensated employees.”³⁸

Although section 132 clearly sets out these requirements, the corresponding Treasury Regulations outline a four-part test for

29. I.R.C. § 274(n) (2017).

30. *Id.*

31. Wayne M. Gazur, *Assessing Internal Revenue Code Section 132 After Twenty Years*, 25 VA. TAX REV. 977, 982 (2006).

32. *Id.* at 979.

33. I.R.C. § 132(e)(1) (2011).

34. Treas. Reg. § 1.132-6(e) (2014).

35. I.R.C. § 132(e)(2) (2011).

36. *Id.* § 132(e)(2)(A) (2011).

37. *Id.* § 132(e)(2)(B) (2011).

38. *Id.* § 132(e)(2) (2011).

determining if an employer-operated eating facility qualifies for the de minimis fringe deduction: (i) The facility is owned or leased by the employer; (ii) The facility is operated by the employer; (iii) The facility is located on or near the business premises of the employer; and (iv) The meals furnished at the facility are provided during, or immediately before or after, the employee's workday.³⁹

Therefore, the employer-operated eating facility de minimis fringe test is essentially a five-pronged test: the four requirements from the section 132 regulation explained above, plus the section 132(e)(2)(B) requirement that the revenue derived from the facility equals or exceeds the facility's operating costs.

However, Treasury Regulation § 1.132-7(a)(ii)(2) provides a safe-harbor from the section 132(e)(2)(B) revenue/operating costs requirement: the revenue/operating costs requirement of section 132(e)(2) will be deemed satisfied if an employee eating at the facility can exclude the value of the meal provided from his or her own gross income under section 119.⁴⁰ Accordingly, a taxpayer can either prove that the meal was excludable from its employee's gross income under section 119, or it can satisfy the revenue/operating costs requirement to qualify for a deduction under section 132(e)(2).

D. Section 119

Section 119 allows an employee to exclude the value of any "[m]eals and lodging furnished to employee" from his or her gross income as long as it was provided "for the convenience of the employer" and "the meals [were] furnished on the business premises of the employer."⁴¹ Meals are furnished for the convenience of the employer if, "upon an examination of all the surrounding facts and circumstances, . . . such meals are furnished for a substantial noncompensatory business reason."⁴² The scope of what constitutes an employer's business premises, however, is very fact dependent.⁴³ As will be discussed in subsequent sections, there is a significant amount of case law interpreting the extent of an employer's business premises.

39. Treas. Reg. § 1.132-7(a)(2)(i)–(iv) (2016).

40. *Id.* § 1.132-7(a)(1)(ii) (2016).

41. I.R.C. § 119(a)(1)–(2) (2000).

42. Treas. Reg. § 1.119-1(a)(2)(i) (2018).

43. *Id.* § 1.119-1(a)(1) (2018).

III. *JACOBS V. COMMISSIONER*: FACTS AND REASONING OF THE COURT

A. *The Parties and Issue Before the Court*

Jeremy and Margaret Jacobs (“Petitioners” or “Bruins”) are the owners of the Boston Bruins, a professional hockey team playing in the National Hockey League.⁴⁴ Petitioners brought suit against the Commissioner of the Internal Revenue Service (“Respondent”) to fight the \$45,205 and \$39,823 deficiencies in their 2009 and 2010 federal income tax payments.⁴⁵

The IRS claimed these deficiencies were a result of the Bruins’s failure to apply the 50% limitation on the deduction of meal expenses under section 274(n).⁴⁶ The Bruins, however, argued that they were entitled to deduct 100% of the away game meal costs because the meals qualified as a de minimis fringe expense as defined in section 132(e)(2).⁴⁷ Because section 274(n)(2)(B) exempts de minimis fringe expenses under section 132(e) from the 50% haircut, the Bruins claimed that 100% of their away game meal expenses were deductible.⁴⁸ Therefore, the court had to decide whether the Bruins were entitled to deduct the full cost of the pregame meals or whether the deduction was limited to 50% by section 272(n)(1).⁴⁹

B. *Key Facts of the Case*

Due to the unique facts of *Jacobs*, the court devoted a sizable portion of its decision to explaining the NHL’s travel and scheduling policies, the Bruins’s internal travel procedures, and the Bruins’s game day schedule for away games.⁵⁰

1. NHL Scheduling and Travel Policies

The NHL season begins with preseason games in September and usually concludes the following June with the Stanley Cup playoffs.⁵¹ During the regular season, every team plays eighty-two games: forty-

44. *Jacobs v. Comm’r*, 148 T.C. No. 24 (2017), 2017 WL 2733795 (No. 19009-15), at *1 (T.C. 2017).

45. *Id.* at *1.

46. *Id.* at *4–5.

47. Pretrial Memorandum for Petitioners at 16, 22, *Jacobs v. Comm’r*, 148 T.C. No. 24 (2017), 2017 WL 2733795 (No. 19009-15) (T.C. 2017).

48. *Id.*

49. *Jacobs*, 2017 WL 2733795 at *5.

50. *Id.* at *2–4.

51. *Id.* at *2.

one at their home arena and forty-one at arenas in other cities.⁵² At the conclusion of the regular season, eight teams from each of the two conferences qualify for the postseason.⁵³ There are then four rounds of best-of-seven series, meaning that a team that played every possible playoff game could play in 28 additional games.⁵⁴

For away games, the NHL requires visiting teams to arrive six hours prior to the start of the game.⁵⁵ Furthermore, the collective bargaining agreement between the NHL and the NHL Players' Association requires that teams travel to an away city the day before a game if the flight is longer than 150 minutes.⁵⁶ Accordingly, it is necessary for teams to stay in hotels for certain away games.

2. The Bruins's Travel Arrangements

For each away game, the Bruins bring a large group of employees, including "between 20 and 24 players, the head coach, assistant coaches, medical personnel, athletic trainers, equipment managers, communications personnel, travel logistics managers, public relations/media personnel, and other employees" ("traveling hockey employees").⁵⁷ This same group typically travels to every away game during a season.⁵⁸

Once the NHL releases the Bruins's schedule, the team contracts with hotels in each away city for sleeping accommodations and banquet facilities to host team meals and snacks.⁵⁹ Obviously comfortable sleeping arrangements are important for the Bruins, but the team also ensures that the hotel is capable of providing specific types and quantities of food to fuel the team to "avoid players' having gastric problems during the game."⁶⁰ After contacting the hotel, the hotel sends the Bruins a banquet event order ("BEO") which outlines the "date, time, meal room, number of guests, menu, and pricing for each pregame meal" to guarantee the accommodations will be correct

52. *Id.*

53. *Playoff Formats*, NHL.COM, <http://www.nhl.com/ice/page.htm?id=25433> (last visited Jan. 18, 2018).

54. *Id.*

55. *Jacobs*, 2017 WL 2733795 at *2.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at *3.

when the team arrives.⁶¹

3. The Bruins's Game Day Schedule

When the Bruins are scheduled to play an evening game, the players have mandatory breakfast between 8:00 and 10:00 AM in the room designated in the BEO.⁶² During breakfast, in addition to eating, players often conduct team business like meeting with coaches to discuss game strategy or talking with the Bruins's public relations team regarding media inquiries.⁶³ Following breakfast, the Bruins usually hold a pregame practice session at the arena before returning to the hotel for lunch.⁶⁴

Lunch is structured similarly to breakfast, with the coaches often pulling groups of players aside as they eat to watch game film or review the upcoming game plan.⁶⁵ After lunch, the players are afforded free time until the team leaves for the arena that evening.⁶⁶ During their free time at the hotel, players can meet with the Bruins's athletic training staff to receive medical treatment, physical therapy, or strength and conditioning training.⁶⁷ Then, two hours and twenty-five minutes before the game, all traveling hockey employees board a bus to travel to the arena for the game.⁶⁸

Although the NHL typically schedules games during the evening, games are occasionally played earlier in the day.⁶⁹ If the Bruins have an afternoon game, their game day schedule is similar, but the team holds a mandatory brunch instead of both a breakfast and lunch.⁷⁰

C. Holding and Reasoning of the Court

To determine whether section 274(n)(1) limited the Bruins's deduction to 50%, the court had to resolve whether the Bruins's pregame meals met all the requirements to qualify as an employer-operated eating facility under section 132(e)(2).

61. *Jacobs v. Comm'r*, 148 T.C. No. 24 (2017), 2017 WL 2733795 (No. 19009-15), at *3 (T.C. 2017).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at *4.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

As explained above, before the Bruins could qualify for the de minimis fringe exception under section 132(e)(2), the team first had to show that their pregame meals qualified as ordinary and necessary under section 162. However, in *Jacobs*, the IRS did concede that “the Bruins’[s] pregame meal expenses are associated with the active conduct of petitioner’s trade or business,” so the court did not rule on this issue.⁷¹ Therefore, the court went straight to applying the section 132(e)(2) test to the case.

For simplicity, the court applied a five-part version of the section 132(e)(2) test as distilled from the case *Boyd Gaming Corp. v. Commissioner*.⁷² As explained in Part II of this Comment and in *Boyd*, to qualify as an employer-operated eating facility under section 132(e)(2) and its corresponding regulations, the facility must meet the following requirements: (1) it must be owned or leased by the employer; (2) it must be operated by the employer; (3) it must be located on or near the business premises of the employer; (4) the meals furnished at the facility must be provided during, or immediately before or after, the employee’s workday; and (5) the annual revenue derived from the “facility [must] normally equal[] or exceed[]” the direct operating costs of the facility.⁷³

Before applying the five-part test, the court analyzed whether the Bruins’s eating facility was “available on substantially the same terms” to all of the team’s traveling hockey employees.⁷⁴ The court found that the Bruins “provided credible testimony that the pregame meals were made available to all Bruins’[s] traveling hockey employees—highly compensated, nonhighly compensated, players, and nonplayers—on substantially the same terms.”⁷⁵ Therefore, the court held that the Bruins satisfied the “nondiscriminatory manner requirement of section 132(e)(2).”⁷⁶

71. *Id.* at *5.

72. *Jacobs v. Comm’r*, 148 T.C. No. 24 (2017), 2017 WL 2733795 (No. 19009-15), at *6 (T.C. 2017) (citing *Boyd Gaming Corp. v. Comm’r*, 106 T.C. 343 (1996)).

73. *Boyd*, 106 T.C. at 348 (1996) (citing I.R.C. § 132(e)(2) (2011) and Treas. Reg. § 1.132-7(a) (2016)).

74. I.R.C. § 132(e)(2) (2011).

75. *Jacobs*, 2017 WL 2733795 at *10.

76. *Id.* at *6.

1. Did the Bruins Own or Lease Their Eating Facilities?

Following the five-part test, the *Jacobs* court first analyzed if the Bruins “owned or leased” the hotel conference rooms in which the team provided pregame meals. The court correctly pointed out that the Treasury Regulations do not define the word “lease” in the context of employer-operated eating facilities.⁷⁷ Therefore, the court applied a fundamental canon of statutory interpretation to define “lease”: “unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.”⁷⁸ To find the common meaning of “lease,” the court used the definition from Black’s Law Dictionary: “[a] contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration.”⁷⁹

The banquet event orders and other contracts between the Bruins and their away hotels were never explicitly identified as leases, but the *Jacobs* court found that “the Bruins are paying consideration in exchange for ‘the right to use and occupy’ the hotel meal rooms.”⁸⁰ Accordingly, the court found “these agreements [were] substantively leases,” and therefore satisfied the first prong of the section 132(e)(2) test.⁸¹

2. Were the Eating Facilities Operated by the Bruins?

Unlike “lease,” the Treasury Regulations do provide a definition of “operated” in the context of section 132(e)(2): “If an employer contracts with another to operate an eating facility for its employees, the facility is considered to be operated by the employer for purposes of [section 132(e)(2)].”⁸² The Bruins contract with each hotel to ensure that meal preparation and service meet the team’s requirements.⁸³ The hotel then provides the food service staff for the Bruins’s meal room and charge a service fee as part of the banquet event orders.⁸⁴ Because the Bruins set requirements for their meals and the hotel charged a

77. *Id.*

78. *Id.* (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

79. *Id.* (citing *Lease*, BLACK’S LAW DICTIONARY (9th ed. 2009)).

80. *Id.*

81. *Jacobs v. Comm’r*, 148 T.C. No. 24 (2017), 2017 WL 2733795 (No. 19009-15), at *6 (T.C. 2017).

82. Treas. Reg. § 1.132-7(a)(3) (2016).

83. *Jacobs*, 2017 WL 2733795 at *7.

84. *Id.*

service fee in return, the court reasoned that the banquet event orders constituted “contract[ing] with another to operate an eating facility for its employees.”⁸⁵

3. Were the Away Hotel Eating Facilities on the Bruins’s Business Premises?

The majority of the cases interpreting the definition of an employer’s “business premises” have done so in the context of a section 119 analysis; not section 132.⁸⁶ However, as the *Jacobs* court explained, because Congress did not give any direction to the contrary, case law dictates that the court should connote the same meaning to the phrase “business premises” in both section 119 and section 132.⁸⁷ Therefore, the *Jacobs* court drew on section 119 “business premises” cases to make its determination.

Citing *Benninghoff v. Commissioner*, the *Jacobs* court explained that an “employer’s business premises is a place where employees perform a significant portion of duties or where the employer conducts a significant portion of business.”⁸⁸ The court continued on, stating: “An inquiry regarding business premises infers a functional rather than spatial unity and is not limited by questions of geography or quantum of business activities.”⁸⁹

To illustrate the principle that a company’s business premises are based on where the work is done, not based on where the company is located, the court compared the facts before it to those of *Mabley v. Commissioner*.⁹⁰ In *Mabley*, the U.S. Tax Court was faced with the issue of whether the Island Creek Coal Company’s leased hotel space for lunch meetings qualified as the company’s business premises under section 119.⁹¹ The *Mabley* court concluded “that the rented hotel suite in which the meals were furnished was acquired and actually used for the conduct of business of the company, the furnishing of the

85. *Id.*

86. See *Lindeman v. Comm’r of Internal Revenue*, 60 T.C. 609, 614 (1973), *Benninghoff v. Comm’r*, 71 T.C. 216, 218 (1978), *Adams v. United States*, 585 F.2d 1060, 1066-67 (Ct. Cl. 1978), *Vanicek v. Comm’r*, 85 T.C. 731, 739 (1985).

87. *Jacobs*, 2017 WL 2733795 at *7 n. 12 (citing *W. Nat’l Mut. Ins. Co. v. Comm’r*, 102 T.C. 338, 359 (1994), *aff’d*, 65 F.3d 90 (8th Cir. 1995)).

88. *Jacobs*, 2017 WL 2733795 at *7 n. 12 (citing *Benninghoff*, 71 T.C. at 220).

89. *Jacobs*, 2017 WL 2733795 at *7 n. 12 (citing *Adams*, 585 F.2d at 1066) (emphasis omitted).

90. *Jacobs*, 2017 WL 2733795 at *8.

91. *Mabley v. Comm’r*, 24 T.C.M. 1794 (1965).

meals being merely incidental.”⁹² Therefore, the hotel suite qualified as the company’s business premises under section 119.⁹³

Turning to the facts at hand, the *Jacobs* court explained that because of the NHL’s scheduling requirements, the Bruins’s traveling employees “perform[ed] . . . significant business duties at away city hotels.”⁹⁴ The court explained that because the NHL mandates that teams play games in away cities, “an integral part of the Bruins’[s] professional hockey business involves traveling throughout the United States and Canada.”⁹⁵ Therefore, the court believed, the Bruins have to conduct important business activities in away city hotels to ensure their success.⁹⁶

Moreover, similar to how the company in *Mabley* used company lunches to review business issues, the *Jacobs* court reasoned that the Bruins’s meals “serve[d] as a forum for the Bruins to maximize preparation time and conduct team business” while nutritionally fueling the team.⁹⁷ Furthermore, sometimes the Bruins’s “trainers use[d] hotel space to provide players with medical treatment, physical therapy, and massages.”⁹⁸ Accordingly, because of the similarities to *Mabley* and the variety of preparatory activities conducted at the hotels, the *Jacobs* court held that the hotels constituted the Bruins’s business premises.⁹⁹

4. Did the Bruins Satisfy the Revenue/Operating Cost Test?

As explained in Part II, a taxpayer can satisfy the revenue/operating costs test under section 132(e)(2)(B) if the employee receiving the meal can exclude its value from his or her gross income under section 119.¹⁰⁰ Accordingly, the *Jacobs* court needed to determine if the Bruins’s away pregame meals were “(1) furnished for the convenience of the employer and (2) furnished on the business premises of the employer.”¹⁰¹ The court had already completed its analysis of the Bruins’s business premises, so it only had

92. *Id.* at 1797.

93. *Id.*

94. *Jacobs*, 2017 WL 2733795 at *8.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at *9.

99. *Id.* at *9–10.

100. *Id.* at *9.

101. I.R.C. § 119(a)(1) (2000).

to determine whether the meals were provided for the Bruins's convenience.¹⁰²

Applying Treasury Regulation § 1.119-1(a)(2)(i), the *Jacobs* court analyzed whether the Bruins provided away meals for a "substantial noncompensatory business reason."¹⁰³ The evidence established that the Bruins fed their traveling hockey employees primarily for nutritional performance reasons, but also to maximize preparation time in an otherwise hectic schedule.¹⁰⁴ The court explained that it should "not second-guess [the Bruins's] business judgment," and that therefore the evidence provided showed a substantial business reason for the meals.¹⁰⁵ Thus, the Bruins satisfied the revenue/operating costs test.

5. Were the Meals Furnished Before, During, or After the Employee's Workday?

The IRS conceded that the Bruins provided their traveling hockey employees with meals during their workday.¹⁰⁶ Consequently, the court did not conduct an in-depth analysis of this prong.¹⁰⁷

IV. ANALYSIS

In *Jacobs*, the U.S. Tax Court creatively applied various authorities in order to come to a very taxpayer-favorable decision. Although the court properly decided many aspects of the case, the court should not have found that the section 132(e)(2) test was satisfied because the Bruins did not consume the meals on their "business premises." Therefore, the employer-operated eating facility deduction should have been denied.

A. The Bruins's Meals Were Not Provided on Their Business Premises

As mentioned above, a key requirement for the employer-operated eating facility deduction is that the meals are provided on the "business premises of the employer."¹⁰⁸ While the phrase "business

102. *Jacobs*, 2017 WL 2733795 at *9–10.

103. *Id.* at *10.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. Treas. Reg. §§ 1.132-7(a)(2)(iii) (2016), 119(a)(1) (2018).

premises of the employer” appears in sections 274(e)(1), 132(e)(2), and 119(a)(1), most analysis of the meaning of the phrase has been in the context of section 119.¹⁰⁹ Under traditional statutory interpretation rules, “a court should assume that Congress uses language in a consistent manner, unless otherwise indicated.”¹¹⁰ Accordingly, a court conducting a section 132(e)(2) analysis can look to how other courts have interpreted business premises in both section 119 and 274 cases.

As mentioned above, the *Jacobs* court relied on *Mabley* as the leading authority interpreting the extent of an employer’s business premises. In this memorandum decision, the Tax Court rejected an IRS challenge as to whether the Island Creek Coal Company’s daily lunch meetings at a hotel a half-block from its office satisfied the business premises requirement of section 119.¹¹¹ These daily meetings “frequently lasted longer than three hours” and each department reported on matters of interest to the company.¹¹² The court reasoned that as a result of the amount of business discussed during lunch, “the rented hotel suite in which the meals were furnished was acquired and actually used for the conduct of business of the company, the furnishing of the meals being merely incidental.”¹¹³

Relying on this Tax Court Memorandum decision, the *Jacobs* court likened the Bruins’s rental of hotel space for pre-game meals to the lease of a hotel suite for daily business meetings in *Mabley*.¹¹⁴ However, the facts in *Jacobs* are easily distinguishable from those of *Mabley*.

In *Mabley*, the Island Creek Coal Company leased an entire suite in the hotel on an annual basis and provided some of its own furniture for the suite.¹¹⁵ While the primary purpose of the suite was for holding the daily lunch meetings, the company also held some regular business meetings and client dinners in the suite.¹¹⁶ The hotel suite operated as a semi-permanent annex of the company’s office space.

109. *Jacobs*, 2017 WL 2733795 at *11 n.12.

110. *W. Nat’l Mut. Ins. Co. v. Comm’r*, 102 T.C. 338, 359 (1994), *aff’d*, 65 F.3d 90 (8th Cir. 1995).

111. *Mabley v. Comm’r*, 24 T.C.M. 1794, 1794 (1965).

112. *Id.* at 1795.

113. *Id.* at 1797.

114. *Jacobs*, 2017 WL 2733795 at *8.

115. *Mabley*, 24 T.C.M. at 1795.

116. *Id.*

The *Mabley* court held that because the suite was “acquired and actually used for the conduct of business of the company,” it was therefore the business premises of the company.¹¹⁷ The company’s regular meetings in the leased hotel suite allowed managers and executives to discuss the crucial business matters necessary for the company to operate.¹¹⁸

The only support the *Mabley* court provided for its conclusion came at the end of the opinion, where the court stated “under the peculiar facts of this case we hold that such suite constituted ‘the business premises of the employer.’”¹¹⁹ The brevity of the court’s analysis suggests that it believed the suite was obviously the business premises of Island Creek Coal Company because of the extent of use, the duration of the lease, and other factors explained above. Furthermore, by referring to the facts as “peculiar,” the court implies that its decision was very dependent on the facts.

Unlike the company in *Mabley*, the Bruins entered into separate agreements with each away hotel for the short-term rental of a dining room, meeting rooms, and catering of meals.¹²⁰ While the Bruins may return to the same hotel for games in the future, the team does not enter into a long-term lease of space with any of the hotels like the company in *Mabley*.¹²¹

Furthermore, the Bruins do not conduct a “significant portion” of their business activities at away hotels. In *Mabley*, the Island Creek Coal Company executives and managers essentially operated the company from their hotel suite meetings.¹²² In contrast, especially compared to the actual performance of a professional hockey game, the Bruins hotel activities fall short of the “quantum and quality” degree of significance test from *McDonald v. Commissioner*.¹²³

In *McDonald*, the taxpayer was provided with housing accommodations while he worked for the Gulf Oil Company in Tokyo, Japan.¹²⁴ To determine whether the taxpayer’s housing was

117. *Id.* at 1797.

118. *Id.* at 1796–97.

119. *Id.* at 1797.

120. *Jacobs*, 2017 WL 2733795 at *2–3.

121. *Id.* at *2.

122. *Id.* at *8.

123. 66 T.C. 223 (1976); Pretrial Memorandum for Petitioners at 16, 22, *Jacobs v. Comm’r*, 148 T.C. No. 24 (2017), 2017 WL 2733795 (No. 19009-15) (T.C. 2017).

124. *McDonald*, 66 T.C. at 225.

excludable from his income under Internal Revenue Code section 119, the court applied the “significant portion of business” test.¹²⁵ The taxpayer conducted some business activities at his employer-provided residence, such as entertaining business guests and making business-related phone calls.¹²⁶ However, compared to the overall scope of his job, the court found that these activities did not “constitute the requisite quantum or quality of activities” to qualify as a “significant portion” of his business duties.¹²⁷

Because of the significant differences in the facts of *Mabley* and *Jacobs*, the *Jacobs* court erred in extending *Mabley*’s fact-specific guidance to this case. Furthermore, the Bruins’s business activities conducted at the hotel fall short of the “quantum and quality” necessary to qualify as a “significant portion of its business.”¹²⁸ Thus, the *Jacobs* court should not have found that the Bruins satisfied the business premises requirement of section 132(e)(2). Moreover, the *Jacobs* court should not have relied on the *Mabley* opinion at all because it is a non-precedential Tax Court Memorandum.

*B. The Jacobs Court Erred in Relying on a
Non-Precedential Tax Court Memorandum*

The U.S. Tax Court is comprised of nineteen judges that are appointed by the President of the United States and confirmed by the Senate.¹²⁹ A single chief judge divides associate judges into divisions to hear cases.¹³⁰ After hearing a case, an associate judge drafts a report on the case and presents it to the Chief Judge for review.¹³¹ The Chief Judge then decides whether the case should undergo further review, whether to enter the opinion as a Tax Court Decision, or enter the opinion as a Tax Court Memorandum.¹³²

The option to issue a Memorandum opinion was intended to “allow Tax Court judges to decide clear-cut cases without worrying about the dangers of establishing precedent.”¹³³ These “Memo”

125. *Id.* at 230.

126. *Id.* at 231.

127. *Id.*

128. *Id.* at 230.

129. I.R.C. § 7443 (2012).

130. I.R.C. § 7444 (2012).

131. Amandeep S. Grewal, *The Un-Precedented Tax Court*, 101 IOWA L. REV. 2065, 2079 (2016).

132. *Id.*

133. *Id.* at 2067.

opinions “involve only heavily factual determinations or applications of settled law” and are “not regarded as binding precedent” even though “parties may cite to them.”¹³⁴ Because citations to Memo opinions are still permissible, courts are often confused as to their value in deciding a case.¹³⁵ However, that does not change the fact that Memo opinions are not supposed to have any precedential value.¹³⁶

Because *Mabley v. Commissioner* is a Tax Court Memorandum opinion, the *Jacobs* court acted inconsistent with its own rules by using the Memo as precedential guidance for its analysis of the Bruins’s business premises. As noted above, the Tax Court rules allowed the Bruins to cite to the Memo in their briefs, but the *Jacobs* court went against its own policy by applying the reasoning in *Mabley* to the facts at hand.

C. The Jacobs Ruling Went Against Congress’s Intent Regarding Section 132(e)(2)

Section 132 was enacted as part of the Deficit Reduction Act of 1984.¹³⁷ In the thirty-three years that section 132 has been in force, no case law has interpreted the meaning of “eating facilities” under section 132(e)(2).¹³⁸ However, in 2011, the IRS Chief Counsel’s office issued advice to an airline on the deductibility of flight crew members’ in-flight meals that discussed the definition of “eating facility” under section 132(e)(2).¹³⁹ The Chief Counsel explained that Treasury Regulations and case law “imply that an ‘eating facility’ means an identifiable location that is designated for the preparation and/or consumption of meals,” such as a dining room or cafeteria.¹⁴⁰ Accordingly, the IRS advised that an airplane cabin did not constitute

134. *Id.* at 2066–67; *Dunaway v. Comm’r*, 124 T.C. 80, 87 (2005).

135. Grewal, *supra* note 131, at 2068.

136. *Id.* at 2067.

137. The Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (codified as amended in scattered sections of 2 U.S.C., 4 U.S.C., 5 U.S.C., 26 U.S.C., & 42 U.S.C.).

138. Pretrial Memorandum for Petitioners at 16, 22, *Jacobs v. Comm’r*, 148 T.C. No. 24 (2017), 2017 WL 2733795 (No. 19009-15) (T.C. 2017).

139. Memorandum from Lynne Camillo, Chief, Employment Tax Branch 2, Division Counsel/Associate Chief Counsel, to James L. May, Jr. Senior Attorney, Office of Chief Counsel (Aug. 31, 2011) (on file at <https://www.irs.gov/pub/irs-wd/1151020.pdf>).

140. *Id.* at 6; *see* Treas. Reg. § 1.132-7(a)(1)(ii) (2016) (“each dining room or cafeteria in which meals are served is treated as a separate eating facility”); Treas. Reg. § 1.132-7(b)(ii)(2) (2016) (“direct operating costs test may be applied separately for each dining room or cafeteria”); Treas. Reg. § 1.132-7(a)(ii)(4) (2016) (“Assume that a not-for-profit hospital system maintains cafeterias for the use of its employees and volunteers”).

an “eating facility” for flight crew under section 132(e)(2).¹⁴¹

Similarly, the Bruins did not provide their team meals in an “eating facility” as intended under section 132(e)(2). When traveling for away games, the Bruins rented “banquet or conference rooms” at their team hotel to serve meals.¹⁴² Furthermore, these rooms did not contain any permanent dining fixtures and were temporarily set up to accommodate the team’s buffet-style meals.¹⁴³ The Bruins’s repurposed conference rooms certainly do not constitute “dining rooms” or “cafeterias” as envisioned by the Treasury Regulations. Therefore, the *Jacobs* court went against Congress’s intended definition of “eating facility” by allowing the Bruins’s hotel meal deduction under section 132(e)(2).

V. CONCLUSION

The U.S. Tax Court’s ruling in *Jacobs v. Commissioner* gave companies and organizations across the nation the ability to claim a deduction for meals never intended to qualify as de minimis fringe benefits. Accounting firms and tax pundits foresaw new circumstances that could fall under this new interpretation of section 132(e)(2).¹⁴⁴ For example, law firms, consultants, and other business services providers that send deployment-style teams out of town to their clients’ offices could claim the same meal deduction as the Bruins for meals at hotels.¹⁴⁵ Just as the Bruins were fueling for their games and reviewing film during team meals, it could be argued that lawyers are fueling for their long day at a client site and discussing negotiation strategy. With *Jacobs* standing as precedent, a law firm with traveling teams of lawyers may be able to deduct their team’s meals while on the road. If this type of deduction would have become widespread, it could have

141. Memorandum from Lynne Camillo, Chief, Employment Tax Branch 2, Division Counsel/Associate Chief Counsel, to James L. May, Jr. Senior Attorney, Office of Chief Counsel (Aug. 31, 2011) (on file at <https://www.irs.gov/pub/irs-wd/1151020.pdf>).

142. *Jacobs v. Comm’r*, 148 T.C. No. 24 (2017), 2017 WL 2733795 (No. 19009-15), at *2 (T.C. 2017).

143. Pretrial Memorandum for Petitioners at 16, 22, *Jacobs v. Comm’r*, 148 T.C. No. 24 (2017), 2017 WL 2733795 (No. 19009-15) (T.C. 2017).

144. Rick Farley, *Tax Court Allows Full Deduction for Certain Meals Provided to Employees on Business Travel*, INSIGHTS FROM PEOPLE AND ORG., <https://www.pwc.com/us/en/tax-services/publications/insights/assets/pwc-court-gives-full-deduction-for-certain-travel-meals-for-employees.pdf>; Reilly, *supra* note 2.

145. *See* Reilly, *supra* note 2.

led to a loss of millions in tax revenue collected from taxpayers.¹⁴⁶

On December 22, 2017, President Donald Trump signed the Tax Cuts and Jobs Act into law in an effort to overhaul the American tax system.¹⁴⁷ Section 13304(b)(1) of the Act struck down the 100% deduction for employer-operated eating facilities.¹⁴⁸ Under the Tax Cuts and Jobs Act, employer operating eating facility expenses are limited to a 50% deduction under §274(n) through the year 2025 and will not be deductible beyond 2025.¹⁴⁹ By passing these limitations on the employer operating eating facility deduction, Congress took a necessary step to prevent tax revenue loss from the broad *Jacobs* decision from becoming widespread. While the Tax Cuts and Jobs Act was not solely intended to close the deduction loophole opened by *Jacobs*, the Act will stop taxpayers from taking advantage of the *Jacobs* court's ill-conceived interpretation of what constitutes an "eating facility."

146. Andrew Velarde, *News Analysis: Are the Bruins About to Hip-Check the IRS on Meal Expenses?*, TAX NOTES (Aug. 31, 2015), <https://www.taxnotes.com/tax-notes/exemptions-and-deductions/news-analysis-are-bruins-about-hip-check-irs-meal-expenses/2015/08/31/15260291>.

147. Sally P. Schreiber, *President Signs New Tax Overhaul into Law*, J. OF ACCOUNTANCY (Dec. 22, 2017), <https://www.journalofaccountancy.com/news/2017/dec/president-signs-tax-cuts-jobs-act-201718112.html>.

148. H.R. REP. NO. 115-466, at 74 (2017) (Conf. Rep.).

149. H.R. REP. NO. 115-466, at 407 (2017).