Almost every day, federal and state courts issue opinions that affect taxpayers. The IRS and state taxing authorities also publish guidance on myriad topics.

Each month, this column will review a selection of recent court cases or guidance that tax professionals should know about when advising their clients and preparing tax returns.

For more extensive detail on any of these items, please feel free to reach out to the author.

**Notice 2021-25** – Clarification of Temporary 100-Percent Deduction for Business Meal Expenses

**Section 201(a) of the Taxpayer Certainty and Disaster Tax Relief Act of 2020** added IRC section 274(n)(2)(D) to the Internal Revenue Code, which provides for a temporary 100 percent deduction for food and beverages provided by a restaurant that are paid or incurred after December 31, 2020, and before January 1, 2023. This provision was intended to help restaurants that are struggling due to the pandemic by encouraging businesses to start having meetings out again. The Service recently issued Notice 2021-25 to provide guidance on the application of this new provision.

IRC section 274 has several general limits on deductions for certain meal and entertainment expenses.

While IRC section 274(a)(1) generally disallows deductions for expenses for entertainment, amusement, or recreation, Treas. Reg. section 1.274-11 clarifies that this disallowance does not apply to food or beverages provided at an entertainment activity if the food or beverages are separately purchased from the entertainment activity, or the cost of the food or beverages is separately stated from the cost of the entertainment in an invoice, bill, or receipt.

IRC section 274(k) places an overall limit on deductions for food and beverages, limiting deductions to those expenses that are not lavish or extravagant under the circumstances. It requires that the taxpayer (or an employee of the taxpayer) is present when the food or beverages are being consumed, thus discouraging a taxpayer from simply sending clients out for a fancy dinner on their own without at least one employee of the taxpayer being present.

IRC section 274(n)(1) then limits the allowable deduction for any expense for food or beverages to 50 percent of the amount that would otherwise be deductible under these various tests.

IRC section 274(n)(2) provides certain exceptions to this 50-percent limitation of deductions for food or beverage expenses. The newly enacted IRC section 274(n)(2)(D) provides a temporary exception to the 50-percent limitation for expenses for food or beverages provided by a restaurant for amounts paid or incurred after December 31, 2020, and before January 1, 2023. The term “restaurant” for this purpose is defined in the Notice as “a business that prepares and sells food or beverages to retail customers for immediate consumption, regardless of whether the food or beverages are consumed on the business’s premises.”

The Notice specifically states that the definition of a restaurant for these purposes does not include “a business that primarily sells pre-packaged food or beverages not for immediate consumption, such as a grocery store; specialty food store; beer, wine, or liquor store; drugstore; convenience store; newsstand; or a vending machine or kiosk” and thus the 50-percent limitation will continue to apply for any deductible expense paid or incurred for food or beverages acquired from such a business.
The Notice also pointed out, to put employers on notice, that for these purposes, a restaurant does not include any eating facility located on the business premises of the employer that is used in furnishing meals excluded from an employee’s gross income or any employer-operated eating facility treated as a de minimis fringe benefit, even if such eating facility is operated by a third party.

*Takeaway:* Once employers are comfortable having employees back in their offices again, the next step will be meetings with clients. By allowing 100% deduction for meals eaten out, the government is encouraging employers to have those meeting in restaurants as a way to help out the struggling industry.

Still time to claim those unclaimed refunds

The Internal Revenue Service announced on April 5, 2021 that unclaimed income tax refunds worth more than $1.3 billion are outstanding for an estimated 1.3 million taxpayers who had not yet filed a Form 1040 federal income tax return for 2017. Due to the extended 2020 filing deadlines, taxpayers have until May 17, 2021 to claim these refunds. Although many of these refunds are estimated to be small, the midpoint for the potential refunds for 2017 is approximately $865, taxpayers should act quickly to make sure the funds are not lost forever. They simply have to file a tax return to the proper address and make sure that it is postmarked by May 17.

Besides getting their refunds, many low- and moderate-income workers may be eligible for the Earned Income Tax Credit (EITC), which for 2017 was worth as much as $6,318. A tax return must be filed to claim this credit.

*Takeaway:* If you have a client who hasn’t filed the 2017 income tax return, there is still a few weeks left to claim any refunds or credits they might be entitled to.

New **NYC Voluntary Disclosure Process** – finally, an online system.

On April 6, 2021, the New York City Department of Finance (DOF) announced a welcome change to its Voluntary Disclosure and Compliance Program (VDCP). The program, which is available to taxpayers who owe taxes to New York City and have not filed the related tax returns, will limit the amount of past-due returns that a taxpayer must file and will result in the Department waiving all delinquency-related penalties.

While voluntary disclosure is not a new concept for New York City, now any taxpayer or practitioner can apply electronically by accessing the Voluntary Disclosure portal within the DOF e-Services menu at www.nyc.gov/eservices. This is much simpler than the prior system under which the taxpayer or its representative would have to write and mail a letter to DOF to begin the lengthy process. Now the applicant will receive immediate feedback as to the accuracy and completeness of the application.

Unlike the voluntary disclosure program of New York State and the IRS, the New York City program still allows an anonymous initial application. Once the initial application is submitted, the applicant will receive an anonymous VDCP draft agreement from the DOF without the involvement of any audit personnel. Once the draft agreement is created, the taxpayer then has thirty days to review it and decide if they want to submit the application. Although you must input the taxpayer's name and address in order to generate the draft agreement, disclaimers all over the website advise that the DOF will have no access to the application or any of the information therein (i.e. the taxpayer's name or identifying information) unless and until the taxpayer submits the draft agreement during the thirty day- review period. At that time, DOF’s Voluntary Disclosure and Compliance Program coordinator will review and either approve or modify the draft agreement, and the applicant will receive a final agreement by email.
Most taxpayers have been able to use the New York State voluntary disclosure program for unreported liabilities that impacted both their State and City liabilities. This new program is especially useful for those taxpayers who only owed New York City taxes, such as the unincorporated business tax or the commercial rent tax.

*Takeaway:* The new New York City voluntary disclosure program adopts the ease of the State's online application process while still allowing the process to be started anonymously.

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**TSB-A-20(50)S** – Sales tax on yogurt depends where you eat it

The New York sales and use tax laws are the most fact dependent body of law. The rules should be reviewed for every transaction you are considering since the answers are not always self-evident and definitely do not always appear to be consistent. They are silent with respect to some broad categories while others are described in minute detail. One good example is the recent ruling TSB-A-20(50)S where the Department of Taxation and Finance considered the taxpayer’s question as to whether its sales of individual 8-ounce yogurt cups are subject to sales tax.

Taxpayer’s numerous locations throughout New York State have both indoor and outdoor seating for customers. The indoor seating typically consists of 3-4 booths and the outdoor seating typically consists of 2 picnic tables. The individual 8-ounce yogurt cups (“product”) in question are located in both open-face coolers at the front of its stores and in closed coolers at the rear of its stores. The product is sold in an individual serving size container that can be directly consumed by the customer, although the product is covered with a lid so the customer may eat it either on or off the taxpayer's premises. The taxpayer explained that the product is identical to yogurt cups that are typically sold in grocery stores.

Generally, receipts from retail sales of food, food products, beverages, dietary foods and health supplements, sold for human consumption, are exempt from New York State sales and use taxes under Tax Law §1115(a). However, Tax Law §1105(d)(i)(1) provides that sales of food or drink are taxable when sold in a restaurant for consumption on the premises where it is sold. But Tax Law §1105(d)(i)(3) provides an exception to this exception for sales of food or drink by a restaurant where the sale is for consumption off the premises of the vendor and the food or drink (other than sandwiches) is sold in an unheated state, and is an item that is commonly sold for consumption off the premises and in the same form and condition, quantities and packaging as it is usually in food stores, other than those stores principally engaged in selling prepared foods, ready to be eaten.

The ruling held that the mere presence of tables and chairs to eat prepared food does not make all of the taxpayer's sales taxable. Additionally, whether the product is placed in an open cooler in front of the store or in a closed cooler in the rear of the store has no impact on whether or not the product is subject to tax. Instead, the ruling held that the yogurt cups are not subject to New York State and local sales taxes if sold for off-premises consumption, but if the taxpayer is selling them for on-premises consumption, they would be subject to sales tax.

*Takeaway:* If you are concerned that something might be subject to sales tax in New York, spend a few minutes to do the research and see if there is a ruling on that particular item. The obvious answer is not always the correct one.

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