

118 T.C. No. 27

UNITED STATES TAX COURT

BEECH TRUCKING COMPANY, INC., ARTHUR BEECH, TAX MATTERS PERSON,  
Petitioner v.  
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 16452-99

Filed May 23, 2002.

P, a trucking company, leases its drivers from an affiliated company. P compensates the drivers at a rate of 24 to 26 cents per mile dispatched, of which amount 6.5 cents is designated as a per diem allowance. R does not dispute that P's per diem payments are ordinary and necessary business travel expenses that are deemed substantiated pursuant to Rev. Proc. 94-77, 1994-2 C.B. 825, and Rev. Proc. 96-28, 1996-1 C.B. 686.

Held: On the facts involved herein, P is the common law employer of the drivers and therefore is subject to the 50-percent limitation of sec. 274(n), I.R.C., to the extent the per diem payments are for the drivers' meal expenses. Held, further, pursuant to Rev. Proc. 94-77, supra, and Rev. Proc. 96-28, supra, the per diem payments are treated as being for the drivers' meal expenses and thus are subject to the sec. 274(n), I.R.C. limitation.

The substantiation methods described in the Revenue Procedures and relied upon by petitioner are not mandatory. See Rev. Proc. 96-28, sec. 1, 1996-1 C.B. at 686. Beech Trucking could have used actual allowable expenses if they were properly substantiated with adequate records or other sufficient evidence. See *id.*; see also *Johnson v. Commissioner*, 115 T.C. 210, 228 (2000). <sup>19</sup> In that event, properly substantiated nonmeal travel expenses might have been deductible without limitation by section 274(n). Instead, Beech Trucking elected to use the deemed substantiation method provided by the Revenue Procedures. Having made this election, Beech Trucking cannot avail itself of the benefits of the Revenue Procedures without adhering to the conditions the Commissioner has imposed. See

*Bob Wondries Motors, Inc. v. Commissioner*, 268 F.3d 1156, 1160-1161 [88 AFTR 2d 2001-6489] (9th Cir. 2001) (taxpayers who elected, pursuant to a revenue procedure, to defer prepaid service income on warranty contracts were required to adhere to the revenue procedure's condition regarding the manner of accounting for insurance expenses associated with the warranty contracts), *affg.* *Toyota Town, Inc. v. Commissioner*, T.C. Memo. 2000-40 [TC Memo 2000-40]; *Mulholland v. United States*, 28 Fed. Cl. 320, 344 [71 AFTR 2d 93-1916] (1993) (taxpayers' failure to

Petitioner cites Johnson v. Commissioner, 115 T.C. 210

(2000), to support his contention that section 274(n) is inapplicable to the extent the per diem allowances represent reimbursements for incidental expenses. <sup>31</sup> Petitioner's reliance on Johnson is misplaced. In Johnson, the taxpayer, a merchant marine, incurred and paid incidental travel expenses that were not reimbursed by his employer. The issue was whether, pursuant to Rev. Proc. 96-28, 1996-1 C.B. 686, the taxpayer could deduct these incidental expenses using the full Federal per diem rates. Resolution of this issue in Johnson turned upon the proper interpretation of section 4.03 of Rev. Proc. 96-28, 1996-1 C.B. at 688, which provides an optional method whereby employees and self-employed individuals may deduct meal and incidental expenses incurred for travel away from home by using an amount computed at the Federal M&IE rate for the locality of travel. This Court held that under section 4.03 of Rev. Proc. 96-28, supra, the taxpayer was entitled to a portion of the claimed deductions, as limited by applying the incidental expense portions of the applicable Federal M&IE rates. Johnson v. Commissioner, supra at 216-217.

Unlike the case at hand, Johnson did not address the payment of a per diem allowance, the tax treatment of the payment to the payor, the deemed substantiation of such a per diem payment under the applicable Revenue Procedures, the validity or application of section 4.02 or 6.05 of the Revenue Procedures, or the application of section 274(n) to such a per diem payment. In Johnson, the taxpayer-employee incurred no meals or lodging expenses. Consequently, the section 274(n) limitation was inapplicable. <sup>32</sup>