Buffalo Law Review

Volume 17 | Number 3 Article 22

4-1-1968

Taxation—"Overnight Rule" of Commissioner of Internal Revenue Service is Valid Under § 162(a)(2) of Int. Rev. Code of 1954

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admitted directly rather than continuing to sanction the same result achieved by less respectful means.

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TAXATION—"OVERNIGHT RULE" OF COMMISSIONER OF INTERNAL REVENUE SERVICE IS VALID UNDER § 162(a)(2) OF INT. REV. CODE OF 1954

Respondent was a traveling salesman for a wholesale grocery company in Tennessee. He lived in Fountain City, Tennessee, about 450 miles from his employer's place of business. The respondent would customarily leave his residence about 5 a.m. in order to be in his sales territory at the start of the business day. He ordinarily traveled a total of 150 to 175 miles daily, returning home by 5:30 p.m. The respondent ate breakfast and lunch on the road in customers' restaurants. On his income tax returns for 1960 and 1961 he deducted the cost of these meals as traveling expenses "while away from home" under section 162(a)(2) of the Internal Revenue Code of 1954.[1] The Commissioner disallowed the deduction and the respondent paid the tax. Suing for a refund in the District Court, the taxpayer received a verdict in his favor, which was affirmed by the Court of Appeals for the Sixth Circuit.[2] On certiorari to the Supreme Court of the United States, it was *held* that the "sleep or rest" rule of the Commissioner of Internal Revenue, allowing a deduction for the cost of meals only when the taxpayer is away from home overnight, is valid under section 162(a)(2). *United States v. Correll*, 389 U.S. 299 (1967).

The Revenue Act of 1918 allowed a deduction for ordinary and necessary business expenses.[3] At first, this provision was strictly construed as denying any deduction for "traveling expenses" such as meals and lodging, unless these expenses could be deemed within the "ordinary and necessary" language of the Act.[4] Later, however, taking a more liberal view, the Treasury Department allowed a deduction of such traveling expenses "in excess of any expenditure ordinarily required for such purposes at home."[5] In a further liberalization

1. Int. Rev. Code of 1954, § 162(a)(2) reads in part:
(a) In General: There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—
. . .
(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business;
. . .
2. 369 F.2d 87 (6th Cir. 1966).
3. Rev. Act of 1918, § 214(a)(1), 40 Stat. 1066, reads in part:
. . .
(a) That in computing net income there shall be allowed as deductions:
(1) all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . .
4. Treas. Reg. 45, art. 292 (1920 ed.).
5. T.D. 3101, 1920-3 Cum. Bull. 191.

of the policy, the Revenue Act of 1921 provided a specific deduction for "traveling expenses (including the entire amount expended for meals and lodging) while away from home in pursuit of a trade or business."[6] This provision has been carried over into the 1939 and 1954 Internal Revenue Codes and has remained substantially unchanged.[7]

The concept of traveling away from home has been a major cause of controversy in the allowance of a deduction for traveling expenses. Much of this controversy has centered around the meaning of "home" for purposes of the statute. Even prior to the 1921 Act, "home" was construed for purposes of a traveling expense deduction both in its ordinary sense as a permanent residence, and also as meaning business headquarters.[8] As early as 1927, the Board of Tax Appeals held that the provision in the 1921 Act was intended to permit a deduction for traveling expenses incurred while the taxpayer was away from his post of duty or place of employment.[9] The word home thus became a term with a meaning different from its normal usage as residence, domicile, or dwelling place, and the concept of a "tax home" was created.

The Commissioner has continually followed this rationale, stating that "a taxpayer's home for purposes of [section 162(a)(2)] is located at the place where he conducts his trade or business,"[10] and the courts have usually upheld this determination.[11] However, in *Wallace v. Commissioner*,[12] the Ninth Circuit Court of Appeals rejected the "tax home" doctrine and held that the traveling expenses of a taxpayer who regularly lived in San Francisco, but visited Los Angeles for long periods on business, met the statutory requirement that traveling expenses be incurred while away from home. In *Wallace*, the court stated unequivocally that "home" as used in the statute should be given its

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6. Rev. Act of 1921, § 214(a)(1).

7. Int. Rev. Code of 1939, § 23(a)(1)(A), 53 Stat. 12; Int. Rev. Code of 1954, § 162(a)(2). The only change has been to delete the words "entire amount" and in lieu thereof to allow a deduction for the amounts expended for meals and lodging "other than amounts which are lavish or extravagant under the circumstances." Rev. Act of 1962, § 4 b, 26 U.S.C. 162.

8. The concept that a business trip must be away from one's permanent residence and also away from his business headquarters is found in two service pronouncements prior to the 1921 Act. *See*, T.D. 3101, 1920-3 Cum. Bull. 191; O.D. 864, 1921-4 Cum. Bull. 211, 212.

9. Mort L. Bixler, 5 B.T.A. 1181 (1927).

10. Rev. Rul. 54-497, 1954-2 Cum. Bull. 75, 77. Where a taxpayer is engaged in business in two or more separate localities, his "home" is deemed to be at his principal or regular post of duty. *Id. See also* Rev. Rul. 56-49, 1956-1 Cum. Bull. 152; Rev. Rul. 60-189, 1960-1 Cum. Bull. 60 (taxpayer is not "away from home" if he has no home for traveling expense purposes, which is his principal or regular place of employment.); Rev. Rul. 60-314, 1960-2 Cum. Bull. 48; I.T. 3314, 1939-2 Cum. Bull. 152.

11. *See* Frank N. Smith, 21 T.C. 991 (1954), [Place of business was "home" for purposes of determining whether taxpayer was "traveling away from home" and any transportation expenses within the area of such "home" were not deductible under the 1939 Code.]; Joseph M. Winn, 32 T.C. 220 (1920) [For tax purposes, an individual's home means his place of business or post at which he is employed.]; Fred G. Armstrong, 43 T.C. 733 (1965), [When movement of the place where a railroad worker performs his duties is the only "travel" involved, he is not in a travel status for purposes of § 162(a)(2).].

12. 144 F.2d 407 (9th Cir. 1944).

ordinary and usual meaning.[13] A chance to resolve the conflict as to the meaning of "home" was before the Supreme Court in *Commissioner v. Flowers*.[14] In that case, the Court set forth three conditions which must be satisfied before a traveling expense deduction would be allowed under section 23(a)(1)(A) of the 1939 Code.[15] However, the Court found it unnecessary to define "home," as it was decided that there was no direct connection between the taxpayer's expenditures and the carrying on of his employer's business. Therefore, the expenses of the taxpayer incurred in traveling from the city of his residence to the city where his office was located were not deductible under the statute.[16] The Tax Court recognized situations where the "tax home" doctrine would be too restrictive, and recognized an exception to it in situations where the taxpayer's employment "away from home" was temporary, in which case a deduction was allowed for expenses, including meals and lodging, incurred at his temporary post of duty.[17] Where the employment was "indefinite," however, a deduction was denied.[18]

A second opportunity to clarify the "home" controversy arose in *Peurifoy v. Commissioner*,[19] before the Supreme Court on the question of the scope of the "temporary" employment exception. However, no such clarification was forthcoming, and the Court merely assumed the validity of the temporary-indefinite rule, specifically avoiding a definition of the word "home." The Commissioner accepted this distinction, and has merely recognized it as an exception to his rule that a taxpayer's home is his place of employment or principal post of duty in determining if he is away from home for purposes of section 162(a)(2).[20]

For purposes of the traveling expense deduction, the problem of "home" is coupled with the consideration of the "overnight rule."[21] The Commissioner of Internal Revenue and the courts have been in conflict over this rule almost since the introduction of the provision allowing the deduction. Under the 1939

13. *Id.* at 410.
14. 326 U.S. 465 (1946).
15. (1) The expense must be a reasonable and necessary travel expense as that term is generally understood. This includes such items as transportation, food and lodging expenses incurred while traveling. (2) The expense must be incurred "while away from home." (3) The expense must be incurred in the pursuit of business. A direct connection is required between the expenditure and the carrying on of the trade or business of the taxpayer or his employer. *Id.* at 470.
16. *Id.* at 473.
17. Walter F. Brown, 13 B.T.A. 832 (1928); Coburn v. Commissioner, 138 F.2d 763 (2d Cir. 1943).
18. Willard S. Jones, 13 T.C. 880 (1949).
19. 358 U.S. 59 (1958), *aff'g* 254 F.2d 483 (4th Cir. 1957). *See also* Harvey v. Commissioner, 283 F.2d 491 (9th Cir. 1960) (The Court applied the temporary-indefinite rule, with no definition of "home."); Wright v. Hartsell, 305 F.2d 221 (9th Cir. 1962).
20. Rev. Rul. 55-604, 1955-2 Cum. Bull. 49; Rev. Rul. 60-189, 1960-1 Cum. Bull. 60, 62; Rev. Rul. 60-314, 1960-2 Cum. Bull. 48; Rev. Rul. 61-95, 1961-1 Cum. Bull. 749; Rev. Rul. 63-64, 1963-1 Cum. Bull. 30.
21. *See* Rev. Rul. 54-479, 1954-2 Cum. Bull. 76; Note, 1962 Duke L.J. Rev. 457. *See generally*, Note, 38 N.D. Law. 447, 457 (1963).

Code, the Commissioner disallowed expense deductions for transportation, meals and lodging, unless the taxpayer was away from home overnight in the pursuit of a trade or business.[22] However, as far as transportation was concerned, the courts overruled the Commissioner and allowed a deduction for the expense, notwithstanding the fact that the taxpayer was not away from home overnight.[23] These allowances were based mainly on what the courts called the "plain, ordinary and popular sense of the statute," which had no such overnight rule written into it.[24] In *Chandler v. Commissioner*,[25] the court allowed the taxpayer to deduct the cost of transportation from his home[26] to his secondary place of employment as traveling expenses while away from home, even though the taxpayer was not away from home overnight. The court refused to accept the Commissioner's overnight rule, stating that it was "more in the nature of legislation than interpretation, and accordingly . . . beyond the rule-making authority of the Internal Revenue Service."[27] The constant refusal of the courts to adopt the Commissioner's interpretation with respect to the deduction for transportation expenses led to the ruling that such deductions under the 1939 Code would no longer be contested.[28] Under the 1954 Code, this problem does not arise. A deduction is now allowed for business transportation expenses even though these expenses are neither reimbursable by the employer nor incurred while traveling away from home.[29]

Under section 162(a)(2) meals and lodging are also included among travel expenses. Lodging ordinarily presents no unusual problems,[30] but the deduction for meal expenses has been the subject of much litigation. The Commissioner has considered the two expenses conjunctively,[31] and has allowed a deduction for meal expenses only when the taxpayer is required to take lodging as well.[32] On trips where the taxpayer was away from home, for purposes of deducting transportation expenses, and yet not away from home overnight, the Commissioner has ruled that the meal expenses were personal, and not deductible.[33] The Tax Court

22. *See* Int. Rev. Code of 1939, § 22(n)(2).

23. Kenneth Waters, 12 T.C. 414 (1949); Scott v. Kelm, 110 F. Supp. 819 (D.C. Minn. 1953); Horace E. Podems, 24 T.C. 21 (1955). *See also* Frank N. Smith, 21 T.C. 991 (1954).

24. Kenneth Waters, 12 T.C. 414, 416 (1949).

25. 226 F.2d (1st Cir. 1955).

26. The taxpayer's home and place of business were located in the same vicinity. Hereinafter, "home" will be referred to in its more technical sense, as principal place of employment.

27. 226 F.2d 467, 470 (1st Cir. 1955). The court also stated that overnight should not be the "definitive minimum limit short of which the statutory requirement could not be met as a matter of law." *Id. See also* Joseph M. Winn, 32 T.C. 220 (1959).

28. Rev. Rul. 60-147, 1960-1 Cum. Bull. 682.

29. Int. Rev. Code of 1954, §§ 162, 62(2)(C). *See* S. Rep. No. 1622, 83d Cong., 9, 69 (1953); H.R. Rep. No. 1337, 83d Cong., 9, A-19 (1953). *See also* Huffaker, 22 Inst. on Fed. Taxation 869, 876 (1964); Rev. Rul. 63-239, 1963-2 Cum. Bull. 87.

30. If lodging is required by the taxpayer, it is evident that he has been "away from home overnight," under the Commissioner's interpretation of the statute, and the deduction is permitted. *See, e.g.*, Joseph H. Sherman, Jr., 16 T.C. 332 (1951).

31. *See generally* Huffaker, *supra* note 29.

32. *See* I.T. 3395, 1940-2 Cum. Bull. 64.

33. *See generally* Haddleton, *Traveling Expenses "Away from Home,"* 17 Tax L. Rev.

has generally supported the Commissioner's determination, usually on a basis that the taxpayer who purchases a meal during a one-day business trip is essentially in the same position as the taxpayer who does not travel, and is merely unable to have one of his meals at home.[34] In *Williams v. Patterson*,[35] the Court of Appeals for the Fifth Circuit refused to comply with the overnight rule, stating that such a rule has no basis in the statute or in the congressional intent behind the statute.[36] However, the court in a sense formulated a "sleep or rest" rule which was not too far removed from the Commissioner's rule. According to the *Williams* court, the taxpayer would be allowed a deduction for traveling expenses if it was reasonable for him to be released from his duties to obtain substantial sleep or rest "in order to meet the exigencies of his employer or the business demands of his employment."[37] In essence, the Commissioner's rule had not been abandoned, and he therefore acquiesced in this modification.[38]

Subsequently, the Court of Appeals for the Eighth Circuit, in *Hanson v. Commissioner*,[39] held that the overnight rule, even in its modified form, was not a viable concept.[40] Noting that neither Congress nor the regulations had ever used the word "overnight" in connection with travel expenses,[41] the court concluded that the overnight rule was simply "arbitrary line-drawing having no basis in the statute. . . ."[42] Consequently, the taxpayer was permitted to deduct the cost of his meals on a one-day business trip. The Commissioner adhered to his position, however, and refused to follow the *Hanson* decision.[43] The First Circuit Court of Appeals subsequently adopted the Commissioner's position. *Bagley v. Commissioner*[44] involved a taxpayer who normally traveled from 70 to

261 (1962). *See, e.g.*, Rev. Rul. 61-221, 1961-2 Cum. Bull. 34; Rev. Rul. 60-147, 1960-1 Cum. Bull. 682; Rev. Rul. 56-508, 1956-2 Cum. Bull. 126. *See also* Joseph M. Winn, 32 T.C. 220 (1959); Kenneth Waters, 12 T.C. 414 (1949).

34. *See* Fred Marion Osteen, 14 T.C. 1261, 1262 (1950); Al J. Smith, 33 T.C. 861, 862 (1960); Summerour v. Allen, 99 F. Supp. 318 (D.C. Ga. 1951). *See also* Louis Drill, 8 T.C. 903 (1947).

35. 286 F.2d 333 (5th Cir. 1961).

36. *Id.* at 335.

37. *Id.* at 340. *See also* David G. Anderson, 18 T.C. 649 (1952), wherein the Tax Court had allowed the traveling expense deduction for a taxpayer who was a railroad employee. However, he was not on a "turn-around run" between his home and away from home terminals, and was released from his duties to obtain rest during the layover before the return trip. *But see* Sam J. Herrin, 28 T.C. 1303 (1957), where the deduction was denied for a taxpayer on a "turn-around run" even though he was away from his home terminal for a period substantially longer than an average workday, yet was not required to obtain sleep or rest prior to completion of the journey.

38. Rev. Rul. 61-221, 1961-2 Cum. Bull. 34.

39. 298 F.2d 391 (8th Cir. 1962). *See generally* Mott, *Eighth Circuit Deals Blow to IRS Rule Disallowing Meals Unless "away overnight,"* 16 J. Taxation 308 (1962).

40. 298 F.2d, at 396.

41. *See* Treas. Reg. §§ 1.162-2(a), 1.162-17(b)(3)(ii), (b)(4), (c)(2) [1967]. Any reference to "overnight" in these sections seems to be mainly incidental, and concerned primarily with the question of reimbursements. The "overnight" references do not refer to the allowance of at traveling expense deduction.

42. 298 F.2d 391, 396 (8th Cir. 1962).

43. Rev. Rul. 63-239, 1963-2 Cum. Bull. 87. *See generally* Steiner, *IRS Will not Abandon "Overnight" Rule Despite Recent Court Defeats*, 19 J. Taxation 370 (1963).

44. Commissioner v. Bagley, 374 F.2d 204 (1st Cir. 1967).

150 miles daily, and ate all his meals away from home. The court stressed the complexity of the problems involved with the application of section 162(a)(2) and reasoned that a line must be drawn in distinguishing between the expense for meals as a personal expense and as a business expense.[45] The court felt that no other practical test had been offered by either the *Hanson* court[46] or the Court of Appeals in *Correll*.[47] Consequently, the *Bagley* court adhered to the Commissioner's overnight rule as the fairest and most convenient test of determining when a taxpayer is "away from home" for purposes of section 162(a)(2).[48]

Prior to *United States v. Correll*,[49] the Supreme Court had never ruled on the question of the deduction of meal expenses by a taxpayer on a non-overnight business trip. Speaking for the majority in *Correll*, Justice Stewart maintained that the Commissioner's overnight rule avoids wasteful litigation and uncertainty inherent in a purely case-by-case approach, though the rule does make some arbitrary distinctions.[50] According to the Supreme Court, the overnight rule has achieved ease and certainty of application of the statute, as well as substantial fairness. It places all one-day travelers on a similar footing, rather than discriminating against intracity travelers and commuters who cannot deduct the cost of the meals they eat on the road.[51] The Court saw only those taxpayers who must stop for sleep or rest as incurring significantly higher living expenses, and therefore was willing to extend the provisions of section 162(a)(2) only to these people.[52] Justice Douglas dissented,[53] claiming that the statute speaks only in terms of geography. The implementation of a rule injecting a time element into the words "away from home" was not intended by the statute, and is unrelated to the question of whether travel expenses are related to the taxpayer's business.[54]

It is apparent that the Supreme Court has attempted to justify the overnight rule as the most practical and convenient manner of administering justice under the statute. However, an important point in the controversy surrounding the deduction of meal expenses under section 162(a)(2) was not considered by the Court in *Correll*. That is, the traveling expense deduction was added to the Internal Revenue Code as a liberalizing provision, allowing the specific deduction of meal and lodging expenses where no such deduction had previously been allowed.[55] The businessman who travels must ordinarily incur expenses which either duplicate or are greater than those incurred at home. Consequently, to relieve such a taxpayer from some of the added burdens of carrying on his

45. *Id.* at 207.
46. 298 F.2d 391 (8th Cir. 1962).
47. 369 F.2d 87 (6th Cir. 1966).
48. 374 F.2d 204, 208-09 (1st Cir. 1967).
49. 389 U.S. 299 (1967).
50. *Id.* at 302.
51. *Id.* at 303.
52. *Id.* at 304-05.
53. Black & Fortas, JJ., concurring with Douglas, J.
54. *Id.* at 307.
55. *See* text accompanying *supra* notes 5-7.

business, Congress saw fit to allow him to deduct the extra cost of his business travel. The overnight rule as it has been formulated has what appears to be an unjustifiable limiting effect on the statute. The rule, stated the Court, "places all one-day travelers on a similar tax footing,"[56] thereby obviating the necessity of determining whether the taxpayer was really away from home as required by the statute, or was merely a commuter or an intracity traveler.[57] It is submitted, however, that if a meal expense deduction is to be allowed the distinction between the commuter and the one-day traveler must be made. The taxpayer who travels for one day is as much within the statutory language as is the overnight traveler. The arbitrary overnight rule bears no relation to whether a taxpayer is "away from home" for purposes of section 162. In fact, the Court never attempted to justify the overnight rule as the *proper* means of determining when a taxpayer is away from home, but only as the most practical administrative test.[58]

Continuing its attempted justification of the overnight rule, the *Correll* Court stated that "only the taxpayer who must stop for sleep or rest incurs significantly higher living expenses. . . ."[59] and, therefore, only this taxpayer should be allowed the deduction for his meal expenses. It would appear that the overnight traveler's expenses differ from those of the one-day traveler only by the amount expended for lodging; the expense for meals does differ not too greatly between the two. Consequently, if this "justification" of the overnight rule were to be carried to its logical conclusion, all meal expense deductions should be denied. Only a deduction for the expenses of lodging should be permitted under this rationale, since it is this expense which supposedly causes the overnight traveler's expenses to be so much higher than those of the one-day traveler.[60]

It has been suggested that the meal expense deduction be limited to a deduction for the cost of meals in excess of what would have been expended had the taxpayer remained at home.[61] Prior to the enactment of what is now section

56. United States v. Correll, 389 U.S. 299 (1967).

57. Under the *Flowers* rationale, the commuter is not traveling away from home in the pursuit of a trade or business. His expenses are not a matter of business necessity, but rather, a matter of personal preference in his choice of residence. *But cf.* Wright v. Hartsell, 305 F.2d 221 (9th Cir. 1962). The intra-city traveler receives a deduction for his transportation expenses under the Int. Rev. Code of 1954, but is not entitled to a deduction for his meal expenses since he is not "away from home" when he merely travels in the same general vicinity of his business headquarters.

58. The Court itself mentioned that there may be other tests which could be employed in determining whether the taxpayer is away from home. "For example, respondent suggested that § 162(a)(2) be construed to include taxpayers who travel away from their home town or outside the . . . metropolitan area" of their residence. 389 U.S. at 303 n.14.

59. *Id.* at 304-05.

60. It is conceivable that the traveler who is on the road several days a week, and must purchase his meals, but does not stay away overnight would incur significantly higher living expenses than the traveler who is away overnight only once or twice during the week. Is it therefore the amount of time spent traveling which really determines which traveler would have higher expenses, not whether or not he must spend money for lodging.

61. Mott, *supra* note 39, at 309.

162(a)(2), the Commissioner had promulgated a regulation to that effect.[62] However, the difficulties involved in calculating the "excess" under this regulation proved so onerous that Congress was persuaded to grant a deduction for the entire amount expended for meals and lodging.[63] This, in turn, led to the implementation of the overnight rule as a means of administering the statute.

It is submitted that the overnight rule, though perhaps having its administrative advantages, is nevertheless an inequitable solution to the problem considered herein. Recognizing the inherently personal nature of meals, regardless of where or when consumed, perhaps the better solution would be to deny the meal expense deduction to all taxpayers, and allow only a deduction for the expenses of transportation and lodging. A deduction for meal expenses seems to bear no relation to the extra burden of expense which the statute is designed to alleviate. A taxpayer must eat, and would incur this meal expense whether he remained at home, or traveled. The expense for meals on a business trip, whether for one day or overnight, is not a duplication of any expense, as a lodging expense is for a taxpayer on an overnight trip.[64] Consequently, the denial of a deduction for meals, as being a personal expense, would not be unjust. In fact, it is difficult to perceive how this inherently personal expense becomes a "business" or "travel" expense simply because it is incurred away from home.

The distinction between the one-day traveler and the overnight traveler seems unwarranted under the present wording of the statute. A clarification of the language by Congress particularly as to what is meant by "away from home," would enable the Commissioner and the courts to formulate a more positive test for administering the statute, and allowing the deduction for travel expenses.

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62. Treas. Reg. 45, art. 292 (1920 ed.).

63. Rev. Act of 1921, § 214(a)(1), ch. 136, 42 Stat. 227. *See also* Commissioner v. Bagley, 374 F.2d 204, 206 (1st Cir. 1967).

64. Lodging may be a personal expense, but is always a duplication of an expense incurred by the taxpayer at home, regardless of whether he travels. That is, the taxpayer who travels and must incur a lodging expense on the overnight trip still has a lodging expense at his home, for that same period. It is this duplication of expense that the statute is designed to prevent.