

Recent Developments in the Tax Home Concept

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These proposed rules would undoubtedly aid in the resolution of the confusion that exists under today's rules relating to discovery of the attorney's "work product" and perhaps end the influx of numerous discovery cases into the district courts.



RECENT DEVELOPMENTS IN THE TAX HOME CONCEPT

Section 63(a) of the Internal Revenue Code of 1954 defines taxable income as gross income minus certain deductions. Among these deductions are listed all ordinary and necessary traveling expenses incurred while away from home in pursuit of a trade or business.¹ Whereas "away from home" seems a simple enough concept for even the layman to comprehend, it has caused a plethora of problems for the courts and for the Internal Revenue Service. Cases have developed in two separate areas of the law in order to arrive at a practical definition of "away from home." One line of cases has sought a meaning for the term "home" and thus has developed the "tax home" concept.² The second line of cases has focused on what "away" means as used in its statutory context.

In order to understand the present situation in this area and the direction in which the law is moving, it is necessary to develop each of these two areas separately. It seems plausible to begin with the term "home" and the way in which Congress, the courts and the Internal Revenue Service have construed it. Special emphasis in this area will be given to *Commissioner v. Stidger*,³ the most recent Supreme Court pronouncement concerning the "tax home" doctrine. Then, with at least a workable understanding of the "tax home" concept, the discussion will proceed to the related problem of how "away" is to be interpreted under the statute.

Tax Home

A deduction for travel expenses, including all expenditures for meals and lodging, was first included in Section 214(a) of the Revenue Act of 1921.⁴ Previously, Treasury Regulations promul-

¹ INT. REV. CODE OF 1954, § 162(a)(2).

² See Note, *A Renewed Assault on the Tax Home Doctrine*, 20 SW. L.J. 676 (1966).

³ 386 U.S. 287 (1967).

⁴ Revenue Act of 1921, ch. 136, § 214(a)(1), 42 Stat. 227.

That in computing net income there shall be allowed as deductions:

(1) . . . traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business.

gated in 1920 had permitted a deduction of only the amount by which the cost of meals and lodging incurred while away from home exceeded the cost at home.⁵ However, under earlier regulations none of this expense had been deductible.⁶

Transcripts of congressional debate indicate that Congress enacted the travel expense provision primarily for the benefit of traveling salesmen.⁷ It was designed to enable commercial travelers who were employed on a commission basis to compete with salaried employees by permitting a deduction for their traveling expenses. Thus, it was to be an encouragement to private enterprise.⁸

The Revenue Act required the presence of three factors before permitting a travel expense deduction. The expense was required to be: (1) reasonable and necessary; (2) incurred while "away from home"; and, (3) in the pursuit of a trade or business.⁹ These provisions have been reenacted in the 1939 and 1954 Revenue Codes.¹⁰

Although home is ordinarily considered synonymous with residence and dwelling place, and no mention was made by Congress that it was to be used as a word of art, soon after section 214(a) was enacted, the Commissioner of Internal Revenue sought to limit its scope by defining "home" as the taxpayer's principal place of business.¹¹ In 1927, the Board of Tax Appeals¹² incorporated the Commissioner's definition into law when it stated, in *Mort L. Bixler*,¹³

traveling and living expenses are deductible under the provisions of . . . section [214(a)(1)] only while the taxpayer is away from his place of business, employment, or the post or station at which he is employed, in the prosecution, conduct, and carrying on of a trade or business.¹⁴

What appears to have motivated the adoption of this unusual definition of home was the fear that under a less restrictive interpretation an individual could choose to maintain his residence at a location far removed from his place of employment, and then de-

⁵ T.D. 3101, 3 CUM. BULL. 191 (1920). Under earlier regulations none of this expense was deductible. Treas. Reg. 45, art. 292 (1920).

⁶ 21 TREAS. DEC. INT. REV. 241 (1919).

⁷ 61 CONG. REC. 6673 (1921) (remarks of Senator Walsh).

⁸ 61 CONG. REC. 5201 (1921) (remarks of Representative Hawley).

⁹ *Flowers v. Commissioner*, 326 U.S. 465 (1946).

¹⁰ Int. Rev. Code of 1939, ch. 1, § 23(a)(1), 53 Stat. 12; INT. REV. CODE OF 1954, § 162(a)(2). The section appears in substantially the same form as in the 1921 code.

¹¹ O.D. 1021, 5 CUM. BULL. 174 (1921).

¹² The Board of Tax Appeals (B.T.A.) was established in 1924, reorganized in 1926, and in 1942 was renamed the Tax Court (T.C.).

¹³ 5 B.T.A. 1181 (1927).

¹⁴ *Id.* at 1184.

duct his traveling expenses from his net income, thereby forcing the government to bear part of the burden of expenses incurred solely for the taxpayer's convenience.¹⁵ By its interpretation of the word "home," the Board of Tax Appeals in *Bixler* created what has since been referred to as the "tax home" doctrine.¹⁶

It was soon realized that a strict interpretation of the "tax home" doctrine would severely curtail the travel expense deduction and an exception to the doctrine was declared, allowing a deduction where the taxpayer's employment away from his residence was of a temporary nature.¹⁷ However, where the employee had no knowledge of the duration of his employment, even where it was impractical or impossible to move his family to his new job site, the employment was termed "indefinite" and no deduction was permitted.¹⁸ This exception was based on a realization that a taxpayer could not reasonably be expected to change his residence where his employment away from his residence would be of a short duration.¹⁹ An example of the way this "temporary" v. "indefinite" rule was applied is *James R. Whitaker*²⁰ in which petitioner deducted amounts expended for meals and lodging while working as a project engineer for a construction project in Greenland. His family resided in Indiana, and petitioner claimed that his principal place of business was in New York. He did not dispute the "tax home" interpretation. The Tax Court held that, although petitioner's family was not permitted to accompany him and the construction work had actually lasted less than one year, his employment was "indefinite" and the expenses incurred were personal living expenses and not business expenses.

Notwithstanding the general acceptance of this exception to the Commissioner's "tax home" concept, there has been considerable disagreement in the federal courts regarding the "tax home" doctrine itself. While most of the federal circuit courts have accepted

¹⁵ In *Bixler*, the maintenance of petitioner's home in a certain location was purely voluntary. While some of the expenses in question were incurred while petitioner was employed, the rest arose while he was in the process of seeking new employment.

¹⁶ See Note, *A Renewed Assault on the Tax Home Doctrine*, 20 Sw. L.J. 676 (1966).

¹⁷ E.g., *Coburn v. Commissioner*, 138 F.2d 763 (2d Cir. 1943); *Chester D. Griesemer*, 10 B.T.A. 386 (1928).

¹⁸ *James R. Whitaker*, 24 T.C. 750 (1955).

¹⁹ *Harvey v. Commissioner*, 283 F.2d 491, 495 (9th Cir. 1960).

²⁰ 24 T.C. 750 (1955).

the Commissioner's definition of "home" for tax purposes,²¹ the fifth,²² sixth,²³ and ninth²⁴ circuits have not.

The Court of Appeals for the Ninth Circuit first demonstrated its opposition to the Commissioner's definition of "home" for tax purposes in 1944. In *Wallace v. Commissioner*,²⁵ an actress, who had been living in New York and had leased an apartment there for three years, was engaged in the filming of a movie in Hollywood, California. Before filming had commenced, petitioner married a lawyer in whose house in San Francisco she took up residence upon completion of the film. She deducted from her income tax all expenses paid for meals and lodging while in Hollywood. It was the court's opinion that the definition given by the Tax Court to the term "home" (as the taxpayer's principal place of business), would thwart Congress' purpose of taxing net, rather than gross, income since it had the effect of denying the taxpayer a proper deduction. It was reasoned that commonly-used terms such as "home" should not be distorted by judicial or administrative interpretation.²⁶ Therefore, petitioner's "home" was held to be in New York prior to her marriage and thereafter became San Francisco, and such an interpretation enabled her to deduct all expenses incurred while in Hollywood.

The Supreme Court of the United States, on two occasions, had the opportunity to define the word "home" as it relates to the travel deduction section of the Internal Revenue Code. On both occasions it has chosen not to do so. *Commissioner v. Flowers*,²⁷ decided in 1946, concerned a taxpayer who had resided with his family in Mississippi since 1903. In 1939, petitioner was made vice-president of a railroad company which had its main office in Alabama. An arrangement was made with the company by which the taxpayer would continue to reside in Mississippi but would pay his own transportation expenses, including meals and lodging, on trips between the two states. The fifth circuit had permitted the taxpayer's deduction of expenditures while in Alabama under Section 23(a)(1)(A) of the Revenue Act of 1939, seeing no reason for giving the word "home" a meaning other than that of common usage.²⁸ The court reasoned that such action would be an invasion

²¹ See, e.g., *England v. United States*, 345 F.2d 504 (7th Cir.), cert. denied, 382 U.S. 986 (1965); *Cockrell v. Commissioner*, 321 F.2d 504 (8th Cir. 1963); *O'Toole v. Commissioner*, 243 F.2d 302 (2d Cir. 1957); *Andrews v. Commissioner*, 179 F.2d 502 (4th Cir. 1950); *York v. Commissioner*, 160 F.2d 385 (D.C. Cir. 1947).

²² *United States v. LeBlanc*, 278 F.2d 571 (5th Cir. 1960).

²³ *Burns v. Gray*, 287 F.2d 698 (6th Cir. 1961).

²⁴ *Wright v. Hartsell*, 305 F.2d 221 (9th Cir. 1962).

²⁵ 144 F.2d 407 (9th Cir. 1944).

²⁶ *Id.* at 411.

²⁷ 326 U.S. 465 (1946).

²⁸ *Flowers v. Commissioner*, 148 F.2d 163 (5th Cir. 1945).

of the legislative domain. The United States Supreme Court found it unnecessary to define the term "home." The deduction was disallowed on the ground that it did not satisfy the third criterion established by the statute, *i.e.*, the expense was not incurred while in pursuit of the taxpayer's business. The Court declared that in order for the taxpayer to be entitled to a deduction, "the exigencies of business rather than the personal conveniences and necessities of the traveler must be the motivating factors."²⁹

In 1958, the Supreme Court was once again confronted with the "tax home" issue in *Peurifoy v. Commissioner*.³⁰ The Court affirmed the circuit court's judgment³¹ that construction workers employed away from their permanent residences for periods of eight to twenty months³² were away from home "temporarily" and not "indefinitely." The majority considered the lower court's factual determination to have been based on reasonable grounds and therefore found no reason for intervening. Once again no mention was made of how "home" was to be construed.

In 1967, the Supreme Court granted certiorari to resolve a conflict between the fourth³³ and ninth circuits³⁴ involving the "tax home" issue. In *Commissioner v. Stidger*,³⁵ respondent, a Marine officer, was transferred from California, where he and his family resided, to a base in Japan for a standard fifteen-month tour of duty. Because a Marine Corps directive prohibited servicemen from taking their families abroad, respondent was forced to maintain his residence in California. Subsequently, in filing his 1958 income tax return, he deducted as "away from home" travel expenses the total cost of meals incurred during his overseas assignment. The United States Supreme Court, reversing the Court of Appeals for the Ninth Circuit, disallowed respondent's deduction and held that a military taxpayer is not "away from home" while at a permanent overseas duty station, regardless of whether it is feasible or permissible for his family to reside with him.

At the outset, the Court reiterated the three conditions which must be met before a travel expense deduction will be allowed. The Court found that two of these conditions were clearly satisfied. The expenditures were "ordinary and necessary" and there was a direct connection between the expense and the trade or business of the taxpayer. The only remaining question was whether the

²⁹ *Commissioner v. Flowers*, 326 U.S. 465, 474 (1946).

³⁰ 358 U.S. 59 (1958).

³¹ 254 F.2d 483 (4th Cir. 1957).

³² See 44 CORNELL L.Q. 270 (1959), where it is maintained that prior to *Peurifoy* a period of one year was used by the courts to distinguish between "temporary" and "indefinite."

³³ *Bercaw v. Commissioner*, 165 F.2d 521 (4th Cir. 1948).

³⁴ *Stidger v. Commissioner*, 355 F.2d 294 (9th Cir. 1965).

³⁵ 386 U.S. 287 (1967).

taxpayer was "away from home," within the meaning of section 162(a)(2), while stationed in Japan.

The Commissioner contended that Congress had tacitly confirmed his definition of "home" as the taxpayer's principal place of business. It was noted that, in 1936, the Board of Tax Appeals ruled that a Member of Congress, who is by law required to maintain a residence in the state or district which he represents, could not deduct his expenses incurred while in Washington, D.C.³⁶ Rather than change the statute to provide that "home" was to be synonymous with residence for all taxpayers, Congress carved an exception to cover the traveling problems inherent in serving as a national legislator.³⁷ The Commissioner also claimed that Congress had given its approval to his interpretation by re-enacting the phrase "away from home" in subsequent revisions of the 1921 Code.³⁸

However, the majority of the Court felt it unnecessary to decide whether Congress had tacitly given its approval to the manner in which "home" had been construed by the Commissioner. Rather, the Court chose to base its determination on the unique situation of a military taxpayer. The essential difference is that the Career Compensation Act of 1949³⁹ provides for tax-free allowances for subsistence,⁴⁰ quarters⁴¹ and additional travel and transportation allowances when the serviceman is away from his permanent station.⁴² These allowances have been adjusted as the financial burdens of the serviceman have increased.⁴³ Thus, a deprivation of the travel expense deduction does not fall as heavily on the military taxpayer as it does on his civilian counterpart.

The Commissioner of Internal Revenue has taken the position, since 1955, that no deductions for meals and lodging would be allowed to military taxpayers regardless of whether their families

³⁶ *Lindsay v. Commissioner*, 34 B.T.A. 840 (1936).

³⁷ INT. REV. CODE OF 1954, § 162(a):

For purposes of the preceding sentence, the place of residence of a Member of Congress . . . within the State, congressional district, Territory, or possession which he represents in Congress shall be considered his home, but amounts expended by such Members within each taxable year for living expenses shall not be deductible for income tax purposes in excess of \$3000.

³⁸ In *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U.S. 110 (1939), dealing with another section of the Code, it was decided that re-enactment was a sign of congressional approval and gave the administrative construction the force of law. *Accord*, *Cammarano v. United States*, 358 U.S. 498, 511 (1959). *But see* *Commissioner v. Acker*, 361 U.S. 87, 93 (1959); *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955).

³⁹ Career Compensation Act of 1949, ch. 681, 63 Stat. 802.

⁴⁰ 37 U.S.C. § 402 (1964).

⁴¹ 37 U.S.C. § 403 (1964).

⁴² 37 U.S.C. § 404 (1964).

⁴³ *See, e.g.*, H.R. REP. No. 779, 81st Cong., 1st Sess. 19 (1949).

were permitted to accompany them on an overseas assignment.⁴⁴ For military purposes the serviceman's home is considered to be his permanent post of duty. The Court recognized, however, that no parallel can be drawn between military life, with its frequent changes of location, and the permanence of location realized in civilian life. If the allowances were insufficient, the remedy lay with Congress and not the courts. In fact, in 1963, Congress directed itself to the problems of the instant case, *i.e.*, the separation of families and consequently the maintenance of two homes, and granted a flat sum allotment to the dependents involved.⁴⁵ These factors led the Court to agree with the Commissioner in labeling a military taxpayer's "home" his permanent duty station irrespective of whether it is feasible or even possible for him to have his family reside with him.

The dissenting justices reiterated the argument that "home" is where the taxpayer and his family actually reside and no strained meaning should be incorporated into the statute.⁴⁶ Although they recognized the complex factual issues which the Commissioner would have to consider if the rule for the travel deduction were not a rigid one, it was felt that the tax laws are sufficiently discriminatory, due mainly to the strengths of various pressure groups, without adding to their harshness. However, should a taxpayer decide to reside a great distance from his place of employment, the dissent agreed with the ninth circuit that he would be prevented from deducting his expenditures as travel expenses; they would not be "ordinary and necessary" since not dictated by business needs. It was further reasoned that, although certain allowances were made to Stidger,⁴⁷ the same allowances were given whether he was stationed in the Far East or in the United States. "There was no increase to help defray the increased expenses incurred by him while required to live away from his family."⁴⁸

The position taken by the Supreme Court in *Stidger*, although definitive, is a limited one. Henceforth, for tax purposes, a military taxpayer's "home" is his permanent duty station. Whether it is feasible or even possible for the serviceman's family to accompany him abroad is irrelevant. However, the fact that the military taxpayer is atypical of most taxpayers has allowed the Supreme Court to refrain from clear-cut acceptance of the "tax home" doctrine. The Court found it unnecessary to decide whether the Com-

⁴⁴ Rev. Rul. 55-571, 1955-22 CUM. BULL. 44.

⁴⁵ 37 U.S.C. § 427(b) (1964). See H.R. REP. No. 208, 88th Cong., 1st Sess. 29 (1963).

⁴⁶ *Stidger v. Commissioner*, 386 U.S. 287, 297 (1967) (dissenting opinion).

⁴⁷ Stidger received a tax-free quarters allowance of \$102.50 per month, and a tax-free subsistence allowance of \$42.50 per month.

⁴⁸ 386 U.S. at 297 (dissenting opinion).

missioner's interpretation of "home" was to be adopted "in all of its myriad applications since, in the context of the military taxpayer, the Commissioner's position has a firmer foundation."⁴⁹ That decision must be held in abeyance by the Court until the proper case is presented to it or until Congress gives an indication of its attitude toward this predicament. Consequently, the Court's decision in *Stidger* will have a substantial impact on only the taxpayers in the Armed Services. No certain predictions can be made as to the outcome of a similar case not involving the peculiarities of a military taxpayer's situation because the majority of the Court has not expressed itself on the point.

Away from Home - Away from Home Overnight

Assuming any definition of "home" we arrive at the second problematic area, that of discovering when a taxpayer is considered "away from home" for tax purposes. In this area as well, the Internal Revenue Service has adopted a viewpoint which would not be evident by a mere reading of the statute in question.⁵⁰

The position of the Service is that before a taxpayer can deduct the cost of his meals and lodging as "away from home" expenses, his absence on business from his principal or regular post of duty must be "overnight." Such absence need not be for an entire twenty-four hour day or throughout the hours from dusk until dawn, but it must be of such duration or nature that the taxpayer cannot leave from and return to that location at the start and finish of, or before and after, each day's work; or at least that he cannot reasonably be expected to do so without being released from duty for sufficient time to obtain substantial sleep or rest elsewhere.⁵¹

Thus the Service has chosen to regard "away from home" as meaning "away from home overnight."

In support of its view, the Service refers to the Congressional Reports published prior to the adoption of the 1954 Internal Revenue Code.⁵² The House Report, as a preface to its recommendation concerning Section 62 (2) (c) of the Code, stated that business transportation expenses were only deductible by an employee where they are reimbursed by the employer or where they are incurred while the employee is away from home overnight.⁵³ The recom-

⁴⁹ *Id.* at 292.

⁵⁰ See Int. Rev. Serv., U.S. Dep't of Treasury Pub. No. 300, Deduction for Traveling and Transportation Expenses (1956), reprinted in 5 CCH 1956 STAND. FED. TAX REP. ¶ 6347.

⁵¹ Rev. Rul. 239, 1963-2 CUM. BULL. 87.

⁵² 3 U.S. CODE CONG. & AD. NEWS 4033, 4638 (1954).

⁵³ For a discussion of the weight to be placed upon the mere mentioning of the "overnight" concept by Congress see William A. Bagley, 46 T.C. 176 (1966).

mentation made by the committee and adopted in the 1954 Code⁵⁴ enabled employees to deduct business *transportation* expenses without the necessity of incurring them while away from home. However, commuter expenses were not included in this deduction and "transportation" expenses were viewed as a much narrower concept than "travel" expenses, the latter including costs for meals and lodging. Consequently, difficulty in this area was limited by the above section because where an employee traveled and returned home within one day he was now permitted a deduction for any transportation cost incurred, whereas if the taxpayer took lodging for the night he was permitted the deduction under the old provisions. Therefore, the only cost of any consequence to the employee which was not tax deductible was the cost of meals on a trip where lodging proved unnecessary. A second argument made by the Internal Revenue Service in support of the "away from home overnight" concept was that meals and lodging are included in section 162(a)(2) in such a way that they must occur together in order to be entitled to a deduction.⁵⁵ However, the Court of Appeals for the Eighth Circuit⁵⁶ has noted that the "travel expense" section as it appears in section 62(2)(b) does not reveal the interpretation offered by the Service.

As with the "tax home" doctrine, the courts have not demonstrated uniformity in the "overnight" area. In *Kenneth Waters*,⁵⁷ the Tax Court allowed petitioner a deduction for expenses incurred while driving his automobile on business trips. The court declared that travel while away from home should be regarded in its "plain, ordinary and popular sense."⁵⁸ The court did not feel that there was any "overnight" connotation inherent in the statute or that Congress had intended any such connotation. In an oft-quoted passage, the Tax Court argued:

Surely it would be absurd to say that an employee who flew from Boston to Washington on business and returns to Boston the same day is not entitled to the deduction, but that if he takes two days for the whole trip, he is entitled to the deduction.⁵⁹

It must be noted here that the *Waters* court stated clearly that it was dealing with transportation expenses, not travel expenses.⁶⁰

⁵⁴ INT. REV. CODE OF 1954, § 62(1)(c).

⁵⁵ *Hanson v. Commissioner*, 35 T.C. 413, 417 (1960).

⁵⁶ *Hanson v. Commissioner*, 298 F.2d 391, 397 (8th Cir. 1962).

⁵⁷ 12 T.C. 414 (1949).

⁵⁸ *Helvering v. Rebsamen Motors, Inc.*, 128 F.2d 584 (8th Cir. 1942).

⁵⁹ *Kenneth Waters*, 12 T.C. 414, 417 (1949).

⁶⁰ *Waters* was a 1949 case. Because of it and other similar cases such as *Joseph M. Winn*, 32 T.C. 220 (1959), § 62(2)(b) of the 1954 Code was adopted, permitting deductions for this type of expense.

In *Fred Marion Osteen*,⁶¹ petitioner, a railway postal clerk, left his home railway station at 8:00 p.m. and arrived at his destination at 10:40 p.m. He ate his third meal of the day there before returning home at 2:15 a.m. The Tax Court decided not to allow him a deduction for this meal (incurred on a regular basis) because his work, in spite of being at night, was actually shorter than a regular working day and could be distinguished from *Waters* because the meal was clearly a personal expense and could not be classified as a business cost.

Both the fifth⁶² and eighth circuits⁶³ have asserted their denial of the Service's "overnight" doctrine. In *Williams v. Patterson*,⁶⁴ a railroad conductor brought an action to recover income taxes paid. Petitioner arose each morning at 5:00 a.m., left the railroad station in Alabama aboard his train at 7:40 a.m. and arrived in Atlanta, Georgia, at 12:15 p.m. He then took six hours off before returning to duty for a 6:15 p.m. departure. During the six hour break petitioner rented a room in a hotel, in which he rested and ate two meals, all of which expenses he attempted to deduct from his income tax return. The fifth circuit allowed him the deduction, declaring that the rest was necessary for the petitioner in order to insure the public's safety for which, as a railroad conductor, he was responsible. The court stated the correct rule to be:

If the nature of the taxpayer's employment is such that when away from home, during released time, it is reasonable for him to need and obtain sleep or rest in order to meet the exigencies of his employment, or the business demands of his employment, his expenditures (including incidental expenses, such as tips) for the purpose of obtaining sleep and rest are deductible traveling expenses under Section 162(a)(2) of the 1954 Revenue Code.⁶⁵

In *Hanson v. Commissioner*,⁶⁶ petitioner, a construction contractor and sole executive of his corporation, had his home office in one city in Iowa but maintained close contact with construction jobs scattered throughout the state. While on occasion he would stay overnight at the job site he frequently would, due to the exigencies of business rather than personal convenience, return to his home at night. Petitioner attempted to deduct the cost of meals incurred on these latter trips. The court alluded to several alternative methods for determining when a taxpayer was "away" from home,⁶⁷ yet it did not adopt any of these approaches. Al-

⁶¹ 14 T.C. 1261 (1950).

⁶² *Williams v. Patterson*, 286 F.2d 333 (5th Cir. 1961).

⁶³ *Hanson v. Commissioner*, 298 F.2d 391 (8th Cir. 1962).

⁶⁴ 286 F.2d 333 (5th Cir. 1961).

⁶⁵ *Id.* at 340.

⁶⁶ 298 F.2d 391 (8th Cir. 1962).

⁶⁷ *Id.* at 395 n.3.

though finding the Commissioner's "overnight" rule arbitrary and consequently granting petitioner's deductions, the court arrived at the rather unsatisfactory conclusion that each case must be decided on its own facts.

Because of the *Hanson* decision, the Internal Revenue Service reiterated its previous "overnight" approach and explicitly attacked the eighth circuit's judgment.⁶⁸ However, the Tax Court, as exemplified by *William A. Bagley*,⁶⁹ has chosen to adhere to the *Hanson* conclusion rather than exhibit accordance with the Service's views. The majority opinion disputed the 1963 Revenue Ruling's interpretation as to the importance of the congressional reference to the "overnight" rule on the ground that the House Committee's recommendation did not even deal with the "away from home" expense section.⁷⁰ However, in a concurring opinion, it was argued that a great deal of weight should be given the fact that Congress even mentioned the "overnight" doctrine, especially where it was unnecessary to do so.⁷¹

In a recent case, the Supreme Court has resolved the conflict by accepting the Commissioner's "sleep or rest" rule, *i.e.*, no deduction may be taken unless the necessary traveling expenses were accompanied by lodging.⁷² The Court acknowledged that the "overnight" concept was to a certain extent arbitrary but stated that any change in the area should be initiated by Congress rather than the courts. The Supreme Court was concerned that if there were a rigid rule, the purpose of the travel section, assumedly to equalize employees who must travel to earn their income with those employees who can pursue their livelihood near their homes, would be thwarted, granting the traveling employee a much greater benefit than was intended. Thus, the Supreme Court denied the deduction to salesmen who do not travel overnight, the very group the statute initially intended to aid.⁷³

Conclusion

If the courts, the Service, and Congress are to reach a viable solution in the travel expense area certain factors must be kept in mind. For one, the purpose of this deduction as it is now viewed must be emphasized. In *Harvey v. Commissioner*,⁷⁴ the Court of Appeals for the Ninth Circuit stated that the purpose of the travel expense deduction was to remove the inequalities existing between

⁶⁸ Rev. Rul. 63-2391, 1963-2 CUM. BULL. 87.

⁶⁹ 46 T.C. 176 (1966), *rev'd*, 374 F.2d 204 (1st Cir. 1967).

⁷⁰ *Id.* at 181.

⁷¹ *Id.* at 187 (concurring opinion).

⁷² *United States v. Correll*, U.S. (1967).

⁷³ 61 CONG. REC. 6673 (1921) (remarks of Senator Walsh).

⁷⁴ 283 F.2d 491 (9th Cir. 1960).

the taxpayer who is compelled to travel in order to earn a living and the taxpayer who is employed in the general vicinity of his permanent residence. These inequalities are said to arise because the former taxpayer must incur the cost of living accommodations while traveling and at the same time maintain a permanent residence. Thus, any acceptable solution to the "tax home" controversy must have as its goal the equalization of the tax burden borne by those taxpayers whose occupation requires them to travel with those whose occupation allows them to remain at home.

Professor Griswold, addressing himself to the deduction of all "ordinary and necessary" business expenses, has stated that this section must be given broad application. He emphasized that this broad application is necessary to achieve the obvious purpose of Congress, *i.e.*, to tax only net income. He also argued that a statute should not be construed so as to place the burden of proof upon the taxpayer.⁷⁵

Along the same line is a quote from *Helvering v. Rebsamen Motors, Inc.*,⁷⁶ which is applicable although dealing with a different tax area. There, the court stated that it

followed a rule that the use by a legislative body of words having definite meanings creates no ambiguity and that such words are to be taken and understood in their plain, ordinary and popular sense. We have come to realize that the rule is not always a safe guide to follow in construing the language of a taxing statute. . . . It is our understanding, however, that the rule is still to be applied unless it can clearly be seen that Congress used the words in question in a broader or different sense than that which would ordinarily be attributed to them. . . . One may honestly and reasonably believe that in drafting a taxing act Congress uses the language which most nearly expresses the legislative intent, and that if the language used fails properly to express that intent, correction should be made by Congressional action and not by Treasury regulations or by judicial construction.⁷⁷

These statements would appear to present a most logical viewpoint for not adhering to the strained definitions the Internal Revenue Service has supplied for ordinary terms. "Home" should therefore be applied in tax cases so as to mean the taxpayer's residence and not his principal place of business as the Service maintains. If there are sufficient reasons for not permitting certain individuals the travel deduction, such as the unique position of the serviceman, then this should be expressly pointed out without resorting to unusual interpretations of tax terms.

⁷⁵ Griswold, *An Argument Against the Doctrine that Deductions Should be Narrowly Construed as a Matter of Legislative Grace*, 56 HARV. L. REV. 1142 (1942).

⁷⁶ 128 F.2d 584 (8th Cir. 1942).

⁷⁷ *Id.* at 587.

Although the Court of Appeals for the Ninth Circuit has disputed the Commissioner's "tax home" concept, at the same time it has supported the distinction being made between "temporary" and "indefinite" employment. However, it has disagreed with the way this exception was being applied by the Tax Court. The ninth circuit's views were best demonstrated in *Harvey v. Commissioner*,⁷⁸ where taxpayer was employed by an aircraft company in Santa Monica, California. He was sent by the company to work at an Air Force base over one-hundred miles from Santa Monica. Although no representations were made to taxpayer regarding the period of his employment at the base, estimates had been made by the company of how long the project in which the taxpayer was involved would last. The estimates ranged from a few months to two years. Taxpayer did not include the amount received from his company on a per diem basis for expenses incurred while living at the Air Force base on his income tax return, considering this amount to be deductible as "away from home" travel expenses. The Tax Court⁷⁹ held that his employment was "indefinite" and the amount taxpayer received must be included as income. The Court of Appeals for the Ninth Circuit, in reversing, established a rule to determine when employment "away from home" is "temporary" as opposed to "indefinite." This rule was that "an employee might be said to change his tax home if there is a reasonable probability *known to him* that he may be employed for a long period of time at his new station."⁸⁰ The circumstances of each case must be taken into account in order to determine whether a taxpayer could reasonably have been expected to change his residence, and, consequently, not be entitled to a travel expense deduction.

The ninth circuit's distinction between "temporary" and "indefinite" employment away from one's residence should be adopted. Their idea would be to consider travel for business purposes "temporary" when it is not feasible for the taxpayer to relocate his home. Thus, where, as in *Harvey*, the taxpayer has adequate reason to believe that his employment will be of only short duration, he would not reasonably be expected to move his residence to his new job site. An approach similar to the reasonable man test could be used, *i.e.*, where a reasonable man would relocate his residence, no deduction would be permitted. But where the taxpayer has acted reasonably in not changing his residence, for example, where he is prohibited from having his family accompany him, then a deduction must be allowed. The two other requirements of section 162(a)(2)(1) that the expenses must be "ordi-

⁷⁸ 283 F.2d 491 (9th Cir. 1960).

⁷⁹ 32 T.C. 1368 (1959).

⁸⁰ *Harvey v. Commissioner*, 283 F.2d 491, 495 (9th Cir. 1960).

nary and necessary"; and (2) incurred while in the pursuit of a trade or business] would still have to be satisfied before a deduction would be allowed, and thus would seem to render unwarranted the fear that defining "home" as residence would create a complete change in the tax structure.

These requirements could also be used as a deterrent to any abuse in the "away from home overnight" area. "Away from home" should also not be given an unwarranted unique interpretation. The Supreme Court's acceptance of the Commissioner's artificial definitions sacrifices fairness for an easily-enforceable but arbitrary rule.