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Deduction for Home Office Used by Clients: Frankel v. Commissioner

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DEDUCTION FOR HOME OFFICE USED BY CLIENTS: *FRANKEL V. COMMISSIONER*

THE Commissioner of Internal Revenue determined a deficiency in Mr. and Mrs. Frankel's income tax returns for 1977 and 1978 arising from deductions for their home office. Mr. Frankel, editorial page editor of *The New York Times*, performed substantial work in the home office and accepted frequent telephone calls there from various public figures who had important information or whose views he believed he should hear.[1] The Commissioner did not contest that Mr. Frankel used the home office exclusively and on a regular basis for business purposes. The Tax Court found that since Mr. Frankel would need to remain at the *Times* offices almost twenty-four hours a day to complete his work and be available for the phone calls received in the home office, his use of the home office was for the convenience of his employer.[2] Moreover, the public figures who called him in the home office qualified as clients or customers of the *Times*.[3] Nevertheless, no deduction was allowed for 1977 or 1978 based on Mr. Frankel's use of the home office, because all the requirements of I.R.C. § 280A(c)(1)(B) were not met. *Held*: In order to support a deduction under I.R.C. § 280A(c)(1)(B), a home office must be physically used by patients, clients, or customers in meeting or dealing with the taxpayer; telephonic contacts are insufficient. *Frankel v. Commissioner*, 82 T.C. 318 (1984).

I. DEVELOPMENT OF INTERNAL REVENUE CODE SECTION 280A

In 1976 Congress added section 280A[4] to the Internal Revenue Code with the goal of establishing definitive rules limiting the deductibility of home office expenses.[5] Sections 162, 212, and 262 previously governed

1. Mr. Frankel had a special, unlisted telephone line at home, paid for by the *Times*, which he used for calls from political officials and public figures. Many of these individuals represented important constituencies of the *Times*'s readers. They called Mr. Frankel at home because they believed that he would be a more receptive listener there or because either he or they were busy during the day. In addition, Frankel used the telephone to consult with other *Times* employees during evening hours regarding changes in the late edition of the *Times*, which was printed at approximately 11:30 p.m. Mr. Frankel also used the home office in the morning to read the newspaper, clip items from it, and write memoranda for following editorials or other work. Mr. Frankel also used the home office on weekends for work on weekend editions of the *Times*.

2. Frankel v. Commissioner, 82 T.C. 318, 325 (1984).

3. *Id.*

4. I.R.C. § 280A was added by the Tax Reform Act of 1976, Pub. L. No. 94-455, § 601, 90 Stat. 1569.

5. *See* H.R. REP. NO. 658, 94th Cong., 2d Sess. 1, 157, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 2897, 3051, *and in* 1976-3 C.B. (Vol. 2) 695, 849; S. REP. NO. 938, 94th

these deductions, which were allowed only for ordinary and necessary business expenses.[6] In their application to home office expenses, these sections were given conflicting interpretations by the Tax Court and the Commissioner of Internal Revenue. The Tax Court derived its standard for applying these sections to home office expenses from the Supreme Court's definition of "necessary" as "appropriate and helpful."[7] Under this rubric

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Cong., 2d Sess. 1, 144, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 3439, 3576, *and in* 1976-3 C.B. (Vol. 3) 49, 182; STAFF OF THE JOINT COMM. ON TAX'N, 94TH CONG., 2D SESS., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976, at 136 (Comm. Print 1976), *reprinted in* 1976-3 C.B. (Vol. 2) 1, 148. These documents give substantially similar accounts of the concerns prompting the enactment of § 280A. The House, Senate, and Joint Committee reports cite a number of cases exemplifying the lenient Tax Court standards for home office deductions: Hall v. United States, 387 F. Supp. 612 (D.N.H. 1975); Gill v. Commissioner, 34 T.C.M. (CCH) 10 (1975); Anderson v. Commissioner, 33 T.C.M. (CCH) 234 (1974); Bodzin v. Commissioner, 60 T.C. 820 (1973), *rev'd*, 509 F.2d 679 (4th Cir.), *cert. denied*, 423 U.S. 825 (1975); Gino v. Commissioner, 60 T.C. 304 (1973); Newi v. Commissioner, 28 T.C.M. (CCH) 686 (1969), *aff'd*, 432 F.2d 998 (2d Cir. 1970). The legislative history of § 280A indicates that a need existed for "definitive rules" to resolve the conflict between the Tax Court and the IRS, to relieve the administrative burden on the IRS entailed by application of the subjective "appropriate and helpful" standard propounded by the Tax Court, and to preclude deductions when expenses were properly attributable to personal use and only minor incremental expenses had been incurred in order to accommodate business activities. One of few notable differences between the House and Senate reports is that the Senate's proposed amendments included a provision allowing deduction of home office expenses for an employee if his employer provided no work space for him. *See* SEN. REP. NO. 938, *supra*; *cf.* Note, *The Deduction of Home Office Expenses Under Section 280A: Personal Convenience vs. Business Necessity*, 36 TAX LAW. 1199, 1199-224 (1983) [hereinafter cited as Note, *The Deduction of Home Office Expenses*] (proposing new criteria for home office deductions, including "business necessity" such that "[n]o home office should be considered necessary if the taxpayer already has an office at his place of employment." *Id.* at 1215); *see also* Kulsrud, *Recent Statutory and Judicial Developments Have Liberalized Home-Office Deductions*, 56 J. TAX'N 344 (1982) (current status of home office deduction, with discussion of requirements); Pearle, *Practitioner's Guide to Home-Office Deductions Under Tough TRA 1976 Rules*, 46 J. TAX'N 238 (1977) (brief discussion of 1976 § 280A requirements); Ward, *Home Office Deductions: The Development and Current Status of Section 280A(c)(1)*, 13 CUM. L. REV. 195 (1982) (development of home office deduction, with attention to recent changes); Note, *Home Office Deductions*, Curphey v. Commissioner, 60 NEB. L. REV. 619 (1981) [hereinafter cited as Note, *Home Office Deductions*] (detailed history of home office deduction).

6. I.R.C. § 163 (1982) reads: "There shall be allowed as a deduction all the *ordinary and necessary* expenses paid or incurred . . . in carrying on any trade or business . . . ." (Emphasis added.) The ordinary and necessary requirement also controls *id.* § 212 (deduction of expenses incurred for production of income or for maintenance or management of property held for the production of income) and *id.* § 262 (no deduction allowed for personal, living, or family expenses).

7. Welch v. Helvering, 290 U.S. 111, 113 (1933). The taxpayer in *Welch* attempted to rehabilitate the credit of his involuntarily bankrupt employer by repaying the debts of the company so far as he was able, and to that end he paid substantial amounts during a five-year period. The taxpayer sought to deduct the payments as ordinary and necessary business expenses under the predecessor to current § 162. The Supreme Court disallowed the deductions. 290 U.S. at 115. Writing for the Court, Justice Cardozo stated, "[w]e may assume that the payments to creditors of the Welch Company were necessary for the development of the petitioner's business, at least in the sense that they were appropriate and helpful." *Id.* at 113. The Court did not consider the payments to be "ordinary," but rather "in a high degree extraordinary." *Id.* at 114. Although the Court's definition of "necessary" as "appropriate and helpful" was only a dictum, it was relied on by the Second Circuit the following year in Blackmer v. Commissioner, 70 F.2d 255, 256 (2d Cir. 1934) (deduction allowed to actor for amounts spent for entertainment and publicity as an ordinary and necessary business expense). *Welch* was cited for the "appropriate and helpful" test by the

the Tax Court allowed deductions even when the taxpayer's employer provided him with adequate work space and did not require or request that he do work at home.[8] The Commissioner, however, argued for a stricter standard, requiring the taxpayer to show that he had to provide his own work space as a condition of his employment.[9]

Congress resolved this conflict between the Tax Court's and the Commissioner's application of sections 162 and 212 by enacting section 280A, which provides an even more austere standard than that proposed by the Commissioner. As advocated by the Commissioner, section 280A would require regular use of the home office for business activities, and if the taxpayer is an employee, the use must be for the convenience of his employer. Section 280A, however, further restricts home office deductions by requiring exclusive use of the home office for trade or business purposes[10]

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dissent in Davis v. Commissioner, 38 T.C. 175, 185 (1962), and was regularly relied on by the Tax Court thereafter. *See, e.g.*, Bodzin v. Commissioner, 60 T.C. 820, 825 (1973), *rev'd*, 509 F.2d 679 (4th Cir.), *cert. denied*, 423 U.S. 825 (1975); Newi v. Commissioner, 28 T.C.M. (CCH) 686 (1969), *aff'd*, 432 F.2d 998 (2d Cir. 1970); Bischoff v. Commissioner, 25 T.C.M. (CCH) 538, 539 (1966).

8. *See* Bodzin v. Commissioner, 60 T.C. 820, 826 (1973), *rev'd*, 509 F.2d 679 (4th Cir.), *cert. denied*, 423 U.S. 825 (1975); Gino v. Commissioner, 60 T.C. 304, 315 (1973); Bischoff v. Commissioner, 25 T.C.M. (CCH) 538, 539 (1966).

9. Rev. Rul. 62-180, 1962-2 C.B. 52. The positions of the Tax Court and the Commissioner varied more than this brief summary suggests. *See* Note, *Home Office Deductions, supra* note 5. In 1962 the Internal Revenue Service issued Revenue Ruling 62-180, which stated that the taxpayer must be required to provide his own office space as a condition of his employment and that his use of the home office must be regular. In Peiss v. Commissioner, 40 T.C. 78 (1963), the Commissioner contended that the home office must be used exclusively for business purposes; the Tax Court, however, disagreed. *Id.* at 84. In Bischoff v. Commissioner, 25 T.C.M. (CCH) 538 (1966), the Tax Court stated that it was not necessary that the home office be required as a condition of the taxpayer's employment for the deduction to be allowed and returned to the *Welch* "appropriate and helpful" test for "necessary." *See supra* note 7. In O'Connell v. Commissioner, 31 T.C.M. (CCH) 837, 843 (1972), the Tax Court disallowed the deduction because the use of the home office was purely for personal convenience, but the court continued to disregard Revenue Ruling 62-180. In Anderson v. Commissioner, 33 T.C.M. (CCH) 234, 237-38 (1974), the Tax Court allowed a deduction based on the taxpayer's use of a family room for managing his investments. The Tax Court retreated in Meehan v. Commissioner, 66 T.C. 794, 808 (1976), using an analysis similar to that in Fausner v. Commissioner, 413 U.S. 838, 839 (1973), that no deduction is allowable if the taxpayer did not incur any additional expense because of the business use. In Sharon v. Commissioner, 66 T.C. 515, 524 (1976), the Tax Court held that § 162 was limited by § 262; therefore, the "appropriate and helpful" test was not applicable when the use was mixed between personal and business.

10. *See* Curphey v. Commissioner, 73 T.C. 766, 775 (1980) (in order to amount to a "trade or business," the activity must be "sufficiently systematic and continuous"). In *Curphey* the taxpayer, a dermatologist, was employed full-time at a hospital and maintained a home office, which he used exclusively in managing six rental units that he owned. The Tax Court held that management of rental property may amount to a trade or business and that if a taxpayer has more than one trade or business, he may be entitled to a "principal place of business" for each. *Id.* The Commissioner conceded that if the taxpayer's rental activities amounted to a trade or business, the home office would be its principal place of business. *Id.* at 776 n.11. *But cf.* Cristo v. Commissioner, 44 T.C.M. (CCH) 1057, 1066 (1982), in which the Commissioner did not concede that the home office would be the principal place of business for the taxpayers' rental activities, and the Tax Court disallowed the deduction on the ground that the rental property itself was the principal place of business, even though it contained no space for an office. Congress amended § 280A(c)(1)(A) to affirm the Tax Court's holding in *Curphey* that a taxpayer may have a principal place of

and by limiting the amount of any deduction to the excess of gross income derived from use of the home office over the allocable deductions allowable without regard to business use, such as interest and taxes.[11] The taxpayer must satisfy one of three requirements to receive the deduction. The home office must be: (1) the taxpayer's principal place of business; (2) used by patients, clients, or customers in meeting or dealing with the taxpayer; or (3) housed in a separate structure unattached to the taxpayer's residence.[12] These three provisions represent an attempt by Congress to tie deductibility of home office expenses to objectively verifiable circumstances, in contrast to the overly subjective assessment called for by the Tax Court's "appropriate and helpful" test.[13]

The Tax Court rigorously applied the "definitive" new rules of section

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business for each business. Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, § 113(c), 95 Stat. 1635, 1641-42. *See* Ward, *supra* note 5, at 207. Prior to the amendment, § 280A(c)(1)(A) read "(A) as the taxpayer's principal place of business." The heading of the section of the Act amending § 280A reads "Principal Place of Business Applies to Any Trade or Business."

11. I.R.C. § 280A(c)(5) (1982).

12. I.R.C. § 280A(c) (1982) provides:

> (c) EXCEPTIONS FOR CERTAIN BUSINESS OR RENTAL USE; LIMITATION ON DEDUCTIONS FOR SUCH USE.
>
> (1) CERTAIN BUSINESS USE.—Subsection (a) [generally prohibiting deductions with respect to home offices] shall not apply to any item to the extent such item is allocable to a portion of the dwelling unit which is exclusively used on a regular basis—
>
> (A) [as] the principal place of business for any trade or business of the taxpayer,
>
> (B) as a place of business which is used by patients, clients, or customers in meeting or dealing with the taxpayer in the normal course of his trade or business, or
>
> (C) in the case of a separate structure which is not attached to the dwelling unit . . . .
>
> In the case of an employee, the preceding sentence shall apply only if the exclusive use referred to in the preceding sentence is for the convenience of his employer.
>
> . . . .
>
> (5) LIMITATIONS ON DEDUCTIONS.—In the case of a use described in paragraph (1) . . . the deductions allowed under this chapter for the taxable year by reason of being attributed to such use shall not exceed the excess of—
>
> (A) the gross income derived from such use for the taxable year, over
>
> (B) the deductions allocable to such use which are allowable under this chapter for the taxable year whether or not such unit (or portion thereof) was so used.

Under § 280A no deduction is allowed based on investment activities unless these amount to a trade or business of the taxpayer. *See supra* note 10. Expenses claimed under § 280A must still satisfy the requirements of §§ 162 and 262. *See supra* note 6.

13. *Frankel*, 82 T.C. at 333 (Dawson, C.J., dissenting); *id.* at 442 (Wilbur,J., dissenting). Subsequent to the reversal of its decision in Bodzin v. Commissioner, 509 F.2d 679, 681 (4th Cir. 1975), *rev'g* 60 T.C. 820 (1973) (home office not for convenience of employer when employer provided office available evenings and weekends), the Tax Court seemed prepared to follow a stricter treatment of home office deductions. *See* Sharon v. Commissioner, 66 T.C. 515, 524 (1976), *aff'd per curiam*, 591 F.2d 1273 (9th Cir. 1978), *cert. denied*, 442 U.S. 941 (1979) ("[t]he 'appropriate and helpful' concept is not a litmus test"). The enactment of § 280A, however, preempted further refinement of the "ordinary and necessary" analysis previously used.

280A, but considerable litigation of home office issues continued, centering on the provisions of sections 280A(c)(1)(A), the principal place of business requirement, and 280A(c)(1)(B), the requirement that the home office be used by clients in meeting or dealing with the taxpayer. In *Baie v. Commissioner*[14] the Tax Court originated the "focal point" test for determining a taxpayer's principal place of business. In *Baie* and other cases the court tended to define the focal point of a taxpayer's trade or business as the place from which the taxpayer distributed the goods or services that produced his income.[15] For example, in *Moretti v. Commissioner*[16] the Tax Court allowed a deduction based on the operation of a freelance envelope stuffing business from the taxpayers' home.[17]

An important case defining the limitations of home office deductions, *Drucker v. Commissioner*,[18] involved a concert musician employed by the Metropolitan Opera. The Opera did not provide its musicians with space for individual practice; indeed, it expected them to practice off the premises. The taxpayer spent more time working in a practice studio in his home than in all of the other places combined where he worked for the Opera. The Tax Court held that the taxpayer's trade or business was not that of a concert musician but rather that of an employee of the Opera; the Opera was the focal point of his activities and thus his principal place of business.[19] The deduction for his studio was disallowed.[20] The Second

14. 74 T.C. 105 (1980). In *Baie* the taxpayer used portions of her residence for office work and for food preparation for her hot dog stand, the "Gay Dog," because the stand itself was too small to accommodate those activities. The Tax Court concluded "that what Congress had in mind was the focal point of the taxpayer's activities, which, in the case before us, would be the Gay Dog itself," because it was her sales at the stand that generated her income. *Id.* at 109.

15. *See, e.g.*, Jackson v. Commissioner, 76 T.C. 696, 700 (1981) (court not convinced real estate salesperson's principal place of business not broker's office); Anderson v. Commissioner, 44 T.C.M. (CCH) 1305, 1309 (1982) (anesthetist's services generated income; therefore, focal point was hospitals where services rendered); Cristo v. Commissioner, 44 T.C.M. (CCH) 1057, 1065 (1982) (apartment house was focal point of taxpayer's rental activity); Strasser v. Commissioner, 42 T.C.M. (CCH) 1125, 1127 (1981) (focal point was school even though teacher worked more time in home office); Weightman v. Commissioner, 42 T.C.M. (CCH) 104, 108-09 (1981) (focal point of professor's employment was university); Chauls v. Commissioner, 41 T.C.M. (CCH) 234, 236 (1980) (teaching classes generated income; therefore, focal point was school); Kastin v. Commissioner, 40 T.C.M. (CCH) 1071 (1980) (deduction denied high school athletics coach even though the school provided him no office space, on the ground that the school was his principal place of business); Proposed Regs., 45 Fed. Reg. 52399, § 1.280A-2(b) (1980), and 48 Fed. Reg. 33320, § 1.280A-2(b) (1983). *But see* Drucker v. Commissioner, 715 F.2d 67 (2d Cir. 1983), *rev'g* 79 T.C. 605 (1982), *discussed infra* notes 18-24 and accompanying text.

16. 44 T.C.M. (CCH) 1200 (1982).

17. *Id.* at 1203.

18. 79 T.C. 605 (1982), *rev'd*, 715 F.2d 67 (2d Cir. 1983).

19. 79 T.C. at 612. The Tax Court cited Primuth v. Commissioner, 54 T.C. 374 (1970), as authority for its finding that inquiry into whether the taxpayer was in the trade or business of being an employee is relevant to determining his principal place of business. In *Primuth* the Tax Court allowed a deduction for fees paid by the taxpayer to an employment service for advice, resumé preparation, and mailing of brochures and letters in order to obtain a new position, on the ground that the taxpayer was in the trade or business of being a corporate executive. In his dissent in *Drucker*, however, Judge Körner pointed out that the thrust of *Primuth* was that an employee can carry on his own trade or business without

Circuit, however reversed this ruling[21] and held that the studio was the taxpayer's principal place of business.[22] Without disturbing the Tax Court's holding that the taxpayer's trade or business was that of an employee, the Second Circuit found that in rare situations the employee's principal place of business may differ from his employer's location.[23] *Drucker* was such a rare situation because the Opera conditioned employment on musician preparedness. The place of practice was immaterial if the musician was prepared, and in this case most of the taxpayer's preparation occurred at home.[24]

Other cases have interpreted the "meeting or dealing" requirement of section 280A(c)(1)(B). In *Cousino v. Commissioner*[25] a teacher claimed a home office deduction because he used a portion of his mobile home to grade students' papers and to speak with parents on the telephone. The Tax Court held that the taxpayer's students did not use his home office to deal with petitioner merely because he graded their papers at this office. The court also held that telephoning parents from the office did not constitute client use of the office within the meaning of section 280A(c)(1)(B).[26] A little over a year after its decision in *Cousino*, however, the Tax Court allowed a section 280A(c)(1)(B) deduction on facts similar to those in *Cousino*. In *Green v. Commissioner*[27] the taxpayer was an account executive managing seven condominiums for a real estate development corpora-

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regard for any compensation received from a particular employer. 79 T.C. at 624 (Körner, J., dissenting); *see Primuth*, 54 T.C. at 378.

20. 79 T.C. at 615. Judge Wilbur, dissenting, argued that the focal point should not always be the place where the "goods" are delivered and paid for. "Rather, it is where [the taxpayer] continually and regularly devotes his time and effort." 79 T.C. at 615-16. Under that interpretation, however, the principal place of business requirement would apparently duplicate the requirement of § 280A(c)(1) that the taxpayer use the home office for business purposes on a regular basis. Since Drucker's circumstances were not part of the problem at which § 280A was aimed, his claiming the deduction should not be drawn into any judicial interpretation of that section. These arguments foreshadowed the Second Circuit's opinion. *See also* Note, *The Deduction of Home Office Expenses, supra* note 5 (further analysis of Tax Court's decision in *Drucker*).

21. Drucker v. Commissioner, 715 F.2d 67 (2d Cir. 1983).

22. *Id.* at 69.

23. *Id.*

24. *Id.* The Second Circuit also reasoned that its holding accorded with the legislative history of § 280A, because that section was not aimed at taxpayers such as Drucker. Although the Tax Court's use of the phrase "condition of employment" appeared incidental, the Second Circuit adopted the phrase as a major basis of its holding. The phrase does not appear in § 280A, but it did emerge in Rev. Rul. 62-180, 1962-2 C.B. 52 (applying I.R.C. § 162 to home office deductions before enactment of § 280A). The Second Circuit presumed that the meaning of "convenience of his employer" for purposes of § 280A is the same as the harsh meaning developed in Commissioner v. Kowalski, 434 U.S. 77 (1977). 715 F.2d at 70. Under *Kowalski*, and Treas. Reg. § 1.119-1(b)(3) (1964), a requirement for excluding the value of lodging provided by an employer from gross income is that the employee accept the lodging as a condition of his employment. 434 U.S. at 91.

25. 41 T.C.M. (CCH) 722 (1981), *aff'd*, 679 F.2d 604 (6th Cir.), *cert. denied*, 459 U.S. 1038 (1982).

26. 41 T.C.M. (CCH) at 723; *cf.* Chauls v. Commissioner, 41 T.C.M. (CCH) 234, 236 (1980) (Tax Court did not consider taxpayers' students to be "patients, clients, or customers" of taxpayers).

27. 78 T.C. 428 (1982), *rev'd*, 707 F.2d 404 (9th Cir. 1983).

tion. His employer provided him with an office, but the taxpayer spent much of the day elsewhere. As a condition of employment, therefore, the employer required the taxpayer to accept telephone calls from clients during evenings at home. The taxpayer used a room in his home exclusively as an office. He spent two-and-a-half hours on five evenings a week using the telephone in his home office, but clients did not visit the taxpayer at his home office. The Tax Court held that the clients' calls satisfied section 280A(c)(1)(B) and allowed a deduction because the clients dealt with the taxpayer in the office, even though by telephone.[28] In reviewing the legislative history of section 280A, the court noted Congress's goal of preventing personal expenses from being deducted as business expenses.[29] The court found no suggestion either in the legislative history of, or in the proposed regulations promulgated under, section 280A[30] that clients must deal with the taxpayer "in person" to satisfy section 280A(c)(1)(B).[31] The court reasoned that "the word 'dealing,' used disjunctively, connotes a less immediate contact such as by telephone call."[32] Seven judges dissented,[33] contending that a person who calls the taxpayer on the telephone does not use the room in which the taxpayer sits and that when Congress wrote "meeting or dealing with," it envisioned the physical presence in the home office of persons other than the taxpayer.[34] Judge Wilbur pointed out that anything less defeated Congress's goal of requiring objectively verifiable criteria.[35] Judge Chabot wrote succinctly:

> The majority's holding treats the statute as though subparagraph (B) reads as follows:
>
> (B) as *a place of business which is used by the taxpayer* in meeting or dealing with patients, clients, or customers . . .
>
> One may agree with, or quarrel with, the policy of the majority's view of the statute, but that is not what the Congress wrote and enacted.[36]

The appeals of these two cases helped to resolve the conflict that they created. The Sixth Circuit affirmed the Tax Court's holding in *Cousino*,[37] because the taxpayer could not show that he used his home office for the convenience of his employer.[38] Moreover, the court found no reason or

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28. 78 T.C. at 434-35.

29. *Id.*

30. Proposed Regs., 45 Fed. Reg. 52399, § 1.280A-2(b) (1980), and 48 Fed. Reg. 33320, § 280A-2(b) (1983) (final regulations have not yet been adopted).

31. 78 T.C. at 434-35. *But see id.* at 443 n.8 (suggesting that it would have taken considerable imagination to have anticipated the Tax Court's interpretation of "dealing with" (Wilbur, J., dissenting)).

32. *Id.* at 435. In his persuasive concurrence, Judge Sterrett pointed out that a telephone is the lifeline of some businesses. *Id.* at 437.

33. Judges Scott, Wilbur, and Chabot authored separate dissents.

34. 78 T.C. at 438 (Scott, J., dissenting); *id.* at 441 (Wilbur, J., dissenting); *id.* at 445 (Chabot, J., dissenting).

35. *Id.* at 442 (Wilbur, J., dissenting).

36. *Id.* at 444 (Chabot, J., dissenting) (emphasis in original).

37. Cousino v. Commissioner, 679 F.2d 604 (6th Cir. 1982). The Sixth Circuit failed to note the Tax Court's decision in *Green* as authority for Cousino's position.

38. *Id.* at 604.

authority for the taxpayer's contention that students "used" his home office without visiting it.[39] On appeal the Ninth Circuit reversed *Green*.[40] The court explained that the ordinary understanding of use involves a requirement that is not fulfilled when clients merely call on a phone located in the claimed home office.[41] The Ninth Circuit considered the legislative history of section 280A, concluding that Congress intended to limit deductions to situations in which the taxpayer's business use of his home resulted in substantial expense.[42] Finally, the court stated that if the Tax Court's majority interpretation were accepted, the IRS would be faced with an impossible task of policing home office deductions, because anyone who accepted business calls at home could claim a deduction for a telephone room.[43]

II. *FRANKEL V. COMMISSIONER*

The Frankels based their home office deductions on sections 280A(c)(1)(A) and (B). Judge Nims, writing for the majority, first addressed the Frankels' claim that Mr. Frankel's use of the home office to handle telephone calls justified their deductions under section 280A(c)(1)(B).[44] The court required that the home office be: "(1) exclusively used (2) on a regular basis (3) as a place of business used by [the taxpayer's] employer's patients, clients, or customers (4) in meeting or dealing with the taxpayer (5) in the normal course of his trade or business; (6) and the exclusive use must be for the convenience of his employer."[45] The Commissioner conceded that Mr. Frankel's use was exclusively for business and on a regular basis.[46] After considering the remaining elements, the court held that Mr. Frankel's use of the home office satisfied all but one.[47]

The court first considered the issue of whether the political officials and public figures who called Mr. Frankel at the home office qualified as "clients or customers" of the *Times*. The Commissioner argued that "clients or customers" should refer to ordinary readers and subscribers of the

39. *Id.* at 605.
40. Green v. Commissioner, 707 F.2d 404 (9th Cir. 1983).
41. *Id.* at 406.
42. *Id.* at 407, referring to H.R. REP. No. 658, *supra* note 5, at 160. The Ninth Circuit apparently interpreted "incremental" to mean "small" rather than "additional."
43. 707 F.2d at 407. Judge Sterrett replied to this argument in his concurrence, stating that the taxpayer's burden of proving exclusivity should defeat such abuse. 78 T.C. at 438. The majority opinion did not address Judge Sterrett's stance.
44. 82 T.C. at 323.
45. *Id.* at 326. Although the court did not cite authority for these criteria, the requirements were clearly drawn directly from the statutory language of § 280A(c)(1)(B).
46. Nevertheless, the Tax Court discussed the application of the regular basis requirement of § 280A(c)(1) to Mr. Frankel's circumstances. Since Mr. Frankel's conversations on the telephone with public figures averaged one a night and each discussion sometimes required several calls to complete, the court concluded that the calls were sufficient to fulfill the regular basis requirement. *Id.* at 325. The court stated, however, that the issue had been conceded. *Id.* at 325-26.
47. *Id.* at 323.

Times. The Commissioner contended that most of the calls to Mr. Frankel were from fellow employees and that the public figures who did call Mr. Frankel were not ordinary readers or subscribers. The Tax Court disagreed, as is illustrated by its finding of fact that most of the calls were not from fellow employees and that the public figures eminently qualified as *Times* readers and subscribers because these individuals would not otherwise know or care what the *Times* printed.[48] Since nothing in the legislative history of section 280A or the regulations contravened this interpretation, the court held that the public figures qualified as clients of the *Times* for purposes of section 280A(c)(1)(B).[49]

The court then concluded that the taxpayer met the "convenience of his employer" requirement.[50] The court found that Mr. Frankel's job required his availability twenty-four hours a day, 365 days a year, and stated its belief that Congress did not intend taxpayers with such a job to sleep on an army cot at their employer's office.[51] The fact that the *Times* paid for a telephone line at Mr. Frankel's house strengthened the conclusion that the taxpayer conducted these telephone conversations for the convenience of the *Times*.[52]

The issue of whether the home office was "used by" clients in "dealing with" Mr. Frankel raised the most vigorous argument.[53] The court first cited the legislative history of section 280A as interpreted in *Green*.[54] The court noted that both the Ninth Circuit in *Green*[55] and the Sixth Circuit in *Cousino*[56] held that section 280A(c)(1)(B) does not permit a deduction if patients, clients, or customers do not physically visit the home office.[57] Upon reviewing the Ninth Circuit's opinion in *Green*, the court quoted the Ninth Circuit's interpretation of the legislative history of section 280A as evincing congressional intent to tie deductions to substantial expense.[58] The court stated that the Frankels would prevail if deductibility flowed solely from a finding of substantial expense, since they bought their residence because it contained a room for an office and they furnished that room solely for use as an office.[59] The Tax Court, however, agreed with the Ninth Circuit's interpretation of the plain language of the statute, conditioning deductibility upon client use of the office and incorporating only physical contact into use.[60] After quoting from Judge Chabot's dissent to

48. *Id.* at 324.
49. *Id.* at 325.
50. *Id.* at 326.
51. *Id.* at 325.
52. *Id.* at 325-26. The court cited its opinion in *Green*, 78 T.C. at 434, and the Second Circuit's in *Drucker*, 715 F.2d at 69-70, as support for its holding that the home office was for the convenience of the employer.
53. *Id.* at 327. The Frankels conceded that clients did not meet Mr. Frankel there.
54. 82 T.C. at 326 (citing *Green*, 78 T.C. at 431).
55. *See supra* notes 40-43 and accompanying text.
56. *See supra* notes 37-39 and accompanying text.
57. 82 T.C. at 327.
58. *Id.* at 327 (quoting *Green*, 707 F.2d at 407).
59. 82 T.C. at 328.
60. *Id.; see supra* note 41 and accompanying text.

its majority opinion in *Green*,[61] the Tax Court noted that clients could have also dealt with Mr. Frankel if he had used extensions in the kitchen or bedroom.[62] Overruling the opinion in *Green*, the Tax Court held that since the taxpayer's use did not meet the requirements of section 280A(c)(1)(B), no deduction was allowed on that basis.[63]

Seven judges dissented, five of whom joined in Chief Judge Dawson's dissent.[64] The chief judge disagreed with the majority's holding that the phone calls Mr. Frankel received in the home office did not fulfill the requirements of section 280A(c)(1)(B).[65] The dissent stated that the doctrine of stare decisis required that the court not overrule its holding in *Green*.[66] The dissent then noted that in this case, the facts more persuasively supported the deduction than did those present in *Green*.[67] Furthermore, the Ninth Circuit based its reversal in *Green* on nothing more than that already fully considered by the Tax Court.[68] Chief Judge Dawson explicitly disagreed with the Ninth Circuit's interpretation of the legislative history of section 280A; the purpose of sections 280A(c)(1)(A) through (C) was to provide objective criteria for the deduction, not to establish that the taxpayer had incurred substantial expense.[69] As for the Ninth Circuit's interpretation of the plain language of the statute, the dissent now criticized the majority for focusing on "use," while ignoring its interpretation of "dealing with" in *Green*.[70] Even if "used by" were the crucial language, that requirement was satisfied when the clients initiated the calls.[71] Chief Judge Dawson argued that the Sixth Circuit's affirmance in *Cousino* afforded weak support for the majority, because the taxpayer in that case failed to establish that he used his home office for the convenience of his em-

61. 82 T.C. at 328; *see supra* note 36 and accompanying text.

62. 82 T.C. at 328. The opinion thereby implied that clients could not have "used" the home office. As Chief Judge Dawson pointed out in his dissent, the majority conceded that clients "dealt with" Mr. Frankel. *Id.* at 333 n.2. Thus, the language crucial to the majority's holding that phone calls do not suffice is "used by."

63. *Id.* at 329; *see Green*, 78 T.C. at 436. The Tax Court did, however, allow the Frankels a deduction for the home office under § 280A(c)(1)(A) based on Mrs. Frankel's use of the office as her principal place of business. 82 T.C. at 329. Mrs. Frankel, a freelance technical writer, used the home office to write a study contracted for by the United States Comptroller of Currency. The Comptroller did not provide Mrs. Frankel with any workspace. Although the contract with the Comptroller specified that the study would take thirty-five days to complete, Mrs. Frankel worked on it during most of 1978. The Commissioner conceded that the taxpayer met all of the requirements for the thirty-five-day period stated in the original contract, but sought to prorate the deduction based on that period. The Tax Court, in concluding that Mrs. Frankel's business was that of a freelance technical writer and not that of an employee hired to do piece work, held that the Frankels were entitled to deduct their home office expenses for the entire year. *Id.* at 330.

64. 82 T.C. at 331. Judges Fay, Goffe, Sterrett, Körner, and Swift joined in the dissent authored by Chief Judge Dawson. Judge Shields dissented without filing a separate opinion.

65. *Id.*

66. *Id.* (Dawson, C.J., dissenting); *see Green*, 78 T.C. at 428.

67. 82 T.C. at 331.

68. *Id.* at 332.

69. *Id.* at 333; *cf. supra* notes 29-35 & 42 and accompanying text.

70. 82 T.C. at 333; *see supra* note 62.

71. *See* 78 T.C. at 435 n.11. *But see id.* at 439, 443 (Wilbur, J., dissenting).

ployer.[72] Finally, the dissent argued that the Tax Court should follow its holding in *Green* and allow the deduction because Mr. Frankel's use met the six requirements set forth in the majority opinion.[73]

III. CONCLUSION

Section 280A imposes severe restrictions on the deductibility of home office expenses. Taxpayers have sought to loosen the limits of the section since its addition to the Code in 1976. In *Green* the Tax Court held that clients who called the taxpayer at his home office used the office to deal with him, thereby fulfilling the requirements of section 280A(c)(1)(B). Taxpayers who welcomed that holding will be disappointed by *Frankel*, in which the Tax Court, aligning itself with the Sixth and Ninth Circuits, overruled its decision in *Green* by holding that in order to support a deduction under section 280A(c)(1)(B) the home office must be physically visited by patients, clients, or customers. Section 280A supports the result in *Frankel*. Considering, however, that Mr. Frankel incurred legitimate and unavoidable business expenses, the result appears inequitable. A better system would allow deductions to taxpayers like Mr. Frankel, while preserving the congressional goal behind section 280A of tying deductions to objectively verifiable criteria. Such a system, however, has yet to be devised.

Carolyn Sortor

72. 82 T.C. at 334; *see supra* note 38 and accompanying text.
73. 82 T.C. at 334; *see supra* note 45 and accompanying text.