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## Renewed Assault on the Tax Home Doctrine, A

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## A Renewed Assault on the Tax Home Doctrine

Federal income tax laws have long permitted a deduction for traveling expenses required by the exigencies of business.<sup>1</sup> These provisions effectuate the apparent intent of Congress that money allocated for the ordinary and necessary expenses of earning a livelihood should not be subject to federal tax.<sup>2</sup> The fact that expenditures for meals and other travel necessities may be considered personal maintenance expenses is deemed no bar to deductibility if they (1) withstand the ordinary and necessary test and (2) are incurred in pursuit of a trade or business (3) while the taxpayer is away from home.<sup>3</sup>

A plethora of litigation spread over the forty-year history of the travel expense deduction manifests a widespread difference of opinion concerning both the theory and application of these statutory provisions. In particular, the requirement that travel expenses must be incurred "away from home" has been a frequent source of frustration to taxpayers.<sup>4</sup>

### I. RESIDENCE VS. POST OF DUTY

To the layman the word "home" is subject to little equivocation. Its usual and natural synonym is residence; it is a dwelling place, a family habitat. It follows that Congress might well have intended that connotation when it enacted the Revenue Act of 1921.<sup>5</sup> Such an interpretation seems consistent with its apparent intent to allow a deduction for traveling expenses only if necessitated by business exigencies. The requirement that they must be incurred away from home provides an objective means of screening out expenses not within that general intent, for expenses incurred at home are normally personal, not concomitant expenses of earning a livelihood, (and, indeed, being at home necessarily implies "not traveling"). Hence, the layman's approach not only is the natural and logical one, but it is completely in harmony with the apparent aim and purpose of Congress.

But after the word appeared in the tax statutes "home" became a semantic football. In *Mort L. Bixler*<sup>6</sup> the Commissioner rejected the ordinary connotation of home and insisted that Congress intended to

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<sup>1</sup> The first such deduction was included in the Revenue Act of 1921, § 214(a), art. 101(a). The provision was reenacted without substantial change in the 1939 [FCA 26 § 23(a)] and 1954 [§ 162(a)(3)] codes.

<sup>2</sup> See BITTKER, FEDERAL INCOME, ESTATE AND GIFT TAXATION 204 (2d ed.).

<sup>3</sup> INT. REV. CODE OF 1954, § 162(a)(2).

<sup>4</sup> See annotation to 26 U.S.C.A. 162.

<sup>5</sup> The evidence obtainable from committee hearings and reports is inconclusive regarding Congress' own definition of "home."

<sup>6</sup> 5 B.T.A. 1181 (1927).

permit a deduction for traveling expenses only if incurred while the taxpayer is away from his "post of duty." The Commissioner was seeking to close what he obviously considered to be a potential loophole in the statute, that a taxpayer could maintain his residence at a remote distance from his place of business and take a deduction for living expenses incurred "away from home" while he remained at the job site. The Board of Tax Appeals was sympathetic to the Commissioner's point of view: "[T]raveling and living expenses are deductible under the provisions of this section 214(a)(1) [now section 162(a)(2)] 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."<sup>7</sup>

The task was to distinguish legitimate business expenses from personal ones in the context of section 214(a)(1), and the Commissioner, with the Board's acquiescence, purported to accomplish the demarcation for all cases by the simple—if arbitrary—expediency of equating "home" with "post of duty." But although the Board of Tax Appeals embraced the Commissioner's rule in *Bixler*, the opinion belied that court's distrust of a rigid test of deductibility. Presaging objections later to be raised by other courts, the Board added: "[T]he deduction of amounts expended for transportation, meals, and lodging, as ordinary and necessary expenses, depends in each case upon the relation of such expenditures to the trade or business . . . and no hard and fast rule can be laid down for all cases."<sup>8</sup>

It was not until 1944 and the Ninth Circuit's opinion in *Wallace v. Commissioner*<sup>9</sup> that the Commissioner's rule was seriously challenged. The taxpayer lived in San Francisco but regularly commuted to Los Angeles to pursue his business affairs. The court unequivocally took the position that "home" as used in the statute should be given its common and usual meaning,<sup>10</sup> and the taxpayer was allowed a deduction for travel expenses necessitated by such visits. Since the expenses were ordinary and necessary and were incurred in pursuit of business while the taxpayer was away from his residence in San Francisco, the statutory requirements were held to

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<sup>7</sup> *Id.* at 1184.

<sup>8</sup> *Ibid.*

<sup>9</sup> 144 F.2d 407 (9th Cir. 1944).

<sup>10</sup> "The plain, obvious and rational meaning of a tax statute is always to be preferred to any narrow or hidden sense that nothing but the exigency of a hard case justifies, and while the meaning to be given to terms used will be determined from the character of their use by the legislature in the statute under consideration, words in common use should not be distorted by administrative or judicial interpretation." *Id.* at 410.

have been satisfied. The tax home doctrine, espoused by the Commissioner, was expressly repudiated.<sup>11</sup>

With the battle lines thus defined, the Commissioner and the Ninth Circuit began to draw adherents to their respective positions. Authoritative support for the Commissioner came almost immediately from the Fourth Circuit in *Barnhill v. Commissioner*,<sup>12</sup> followed by the Eighth Circuit's sanction of the tax home doctrine in *Ney v. United States*.<sup>13</sup> And, after earlier vacillation,<sup>14</sup> the Second Circuit joined the Commissioner's ranks with its decision in *O'Toole v. Commissioner*.<sup>15</sup>

The Tax Court, which had generally applied the tax home doctrine since *Bixler*, continued to rely on this criterion. But long before the *Wallace* decision it had developed an ameliorating corollary to the doctrine by refusing to disallow the deduction in cases where the post of duty was a brief or temporary one.<sup>16</sup> Implicit in this corollary is the Tax Court's belief that a strict application of the tax home doctrine would defeat a large portion of legitimate deductions. If the tax home doctrine were not thus modified, the destination of the business traveler, however brief his stay, might always be considered to be his place of business and, therefore, his tax home. Eventually, the Commissioner yielded to this modification,<sup>17</sup> but he never conceded that the doctrine itself needed an overhaul.

The Ninth Circuit remained adamant. It had received immediate support from the previously uncommitted Fifth Circuit in *Flowers v. Commissioner*.<sup>18</sup> However, the next opportunity for an airing of its views was long in coming, and then the discussion was restricted to the validity of the temporary-indefinite corollary developed earlier by the Tax Court. In *Harvey v. Commissioner*<sup>19</sup> both parties had stipulated that "home" means place of employment. The Tax Court had ruled that because taxpayer's tour of duty at Edwards Air Force Base was of indefinite duration, Edwards became his tax home, and a deduction for expenses incurred there should be disallowed. The court of

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<sup>11</sup> "To judicially innovate a meaning of 'home' as the taxpayer's 'place of business, employment, or the post or station at which he is employed,' as the Tax Court has done, would we think, operate to thwart the obvious purpose of Congress to tax *net* income and would in many cases tax the gross instead of the net income of individuals." *Id.* at 411.

<sup>12</sup> 148 F.2d 913 (4th Cir. 1945).

<sup>13</sup> 171 F.2d 449 (8th Cir. 1948).

<sup>14</sup> See *Coburn v. Commissioner*, 138 F.2d 763 (2d Cir. 1943).

<sup>15</sup> 243 F.2d 302 (2d Cir. 1957).

<sup>16</sup> *Chester D. Gricsemer*, 10 B.T.A. 386 (1928).

<sup>17</sup> *I.R.S. Pub. No. 300*, 5 CCH 1956 STAND. FED. TAX. REP. ¶ 6347; Rev. Rul. 189, 1960-61 CUM. BULL. 60, 65.

<sup>18</sup> "There is no indication in the statute of a legislative intention to give the word an unusual or extraordinary meaning. For the court to do so would be an invasion of the legislative domain." 148 F.2d 163, 165 (5th Cir. 1945).

<sup>19</sup> 283 F.2d 491 (9th Cir. 1960).

appeals chided the inflexible, arbitrary character of the temporary-indefinite test<sup>20</sup> and posed instead what it conceived to be the crucial test of deductibility: Is it reasonable to expect the taxpayer to move his residence to his place of employment?<sup>21</sup> Though technically of "indefinite" duration, the taxpayer's tenure in the *Harvey* case was considered by the court to be so uncertain that it would be unreasonable to require the taxpayer to move his home, and the deduction was allowed.

The Ninth Circuit followed *Harvey* with *Wright v. Hartsell*<sup>22</sup> in which the commuting expenses of a taxpayer who worked at Atomic Energy Commission research sites located in a remote desert area seventy miles from his residence were held to be deductible. Applying the criterion developed in *Harvey*, the court reasoned that in view of the general uninhabitability of the area, it would be unreasonable to require the taxpayer to move to his place of employment.<sup>23</sup> Further, the court reiterated its rejection of the tax home doctrine and measured the deduction with reference to expenses incurred between the research site and the nearest habitable community (to which the taxpayer could reasonably be expected to move his home), not his place of employment.<sup>24</sup>

Throughout the entire tax home controversy the Supreme Court has continually avoided a confrontation with the issue. When *Flowers v. Commissioner*<sup>25</sup> came up from the Fifth Circuit, the Court identified the conflict but carefully circumscribed it by holding that the taxpayer's expenses, whether incurred away from home or not, were not incurred in pursuit of business.<sup>26</sup> Later, in *Puerifoy v. Com-*

<sup>20</sup> "The taxpayer who is away from home for short periods of time has the burden both of maintaining his home abode and of meeting the living expenses of his place of employment. . . . The Tax Courts' test does not further the legislative purpose of eliminating the double burden imposed upon such taxpayers." *Id.* at 495.

<sup>21</sup> In effect, the court attempted to alter the indefinite-temporary test by shifting the inquiry from the foreseeability of termination within a short period of time to the question whether the employee expected to be employed for a reasonably long period of time. Only if the latter question may be answered in the affirmative would it be reasonable to require the taxpayer to move closer to mitigate his expenses.

<sup>22</sup> 305 F.2d 221 (9th Cir. 1962).

<sup>23</sup> "The fundamental question in determining if an expense claimed as a travel expense is dictated by the 'exigencies of business' is whether it would be reasonable to expect the particular taxpayer to move his home nearer to the place where he is working." *Id.* at 225.

<sup>24</sup> "We conclude that a taxpayer's inability to live near his job site is a valid ground for deduction as a travel expense of the resulting cost of his transportation, food and lodging. . . . This is not to suggest that a taxpayer need not mitigate his expense by moving as near to the job site as is reasonable; the amount of the deduction must be gauged in that light." *Ibid.*

<sup>25</sup> 326 U.S. 465 (1946).

<sup>26</sup> "We deem it unnecessary to enter into or to decide this conflict. . . . Thus, even if the Tax Courts' definition of the word 'home' was . . . erroneous, its judgment must be sustained here if it properly concluded that the necessary relationship between the expenditures and the . . . business was lacking." *Id.* at 467.

*missioner*<sup>27</sup> the Court merely followed the lower court's assumption as to the validity of the temporary employment exception, but there was no indication that it approved of the tax home doctrine. Hence, previous opinions of the Court permit no inference as to its views on the definitional question involved in the principal case.

## II. STIDGER V. COMMISSIONER<sup>28</sup>

Stidger, the taxpayer, was a captain in the United States Marine Corps, who, after having been stationed in El Toro, California, for over two years, was assigned to duty in Japan. He had maintained a residence with his family for some time in Santa Ana, California, but because of Marine Corps orders he was prohibited from taking them abroad. Consequently, his wife and children remained at the family home in Santa Ana during his entire stay in the Far East.

Stidger's principal duty station was Iwakuni, Japan. There he received free lodging, but during 1958, except for a period of forty-nine days,<sup>29</sup> he was required to pay for his own meals at a cost of \$650, which expense he deducted on his 1958 return. The Commissioner disallowed the deduction, and Stidger petitioned the Tax Court. That court ruled that petitioner's "tax home" during his stay in the Far East was Iwakuni, his principal "post of duty."<sup>30</sup> It added that since his stay there was "indefinite, indeterminate, or permanent and not temporary," the court would not apply the temporary employment corollary and concluded that the travel expenses sought to be deducted were not incurred "away from home."<sup>31</sup>

The Ninth Circuit, quite expectedly, was unwilling to accept the premises of the Tax Court. Presenting its best reasoned and most vigorous assault upon the tax home doctrine yet, the court argued that "by placing the emphasis on the ordinary and necessary requirement of the statute, there is no necessity for attributing any special 'tax sense' to the word 'home.'"<sup>32</sup> The ordinary and necessary test is fully satisfied, the court urged, if under the circumstances it is unreasonable to expect the taxpayer to move his home closer to his employment. Since Stidger's orders prohibited him from establishing a home for his dependents in Japan, he was disposed to continue maintaining a home in Santa Ana. It follows that he could not reasonably be expected to

<sup>27</sup> 358 U.S. 59 (1958).

<sup>28</sup> 355 F.2d 294 (9th Cir. 1965).

<sup>29</sup> During this brief period taxpayer was placed on "travel status" while absent from Iwakuni and reimbursed for travel expenses. Throughout the remainder of the year he was, militarily speaking, on permanent assignment.

<sup>30</sup> 40 T.C. 896 (1965).

<sup>31</sup> *Id.* at 899.

<sup>32</sup> Stidger v. Commissioner, 355 F.2d 294 (9th Cir. 1965).

move his home closer to his employment; he was prevented from doing so. Hence, his "home" being Santa Ana, not Iwakuni, the expenses were incurred in pursuit of business "away from home."<sup>33</sup>

The dissent did not challenge the majority on the definitional question. Its first objection was that the Tax Court's determination that the taxpayer was not "traveling" should be binding. However, the majority pointed out that he was "traveling" to the same extent as a public official who must maintain his home elsewhere than his official place of employment. It has been held repeatedly that the travel expense deduction is not foreclosed to such persons merely because they are not en route when the expense is incurred.<sup>34</sup> Implicit in the majority's position is the contention that traveling expenses should not be restricted to "in transit" expenses.

Secondly, the dissent sought to undermine the majority's application of section 162(a)(2) to the living expenses of servicemen receiving tax exempt subsistence allowances. During the taxable year Stidger had received a forty-two dollar and fifty cent monthly allowance for subsistence which was free from federal income tax.<sup>35</sup> Although this amount materially reduced his \$650 expense for meals, the majority disregarded it in computing his deductible expense. The dissent, noting that Congress had made special provision for the serviceman's cost of subsistence,<sup>36</sup> saw in the statutory scheme a congressional intent "that the soldier assigned to overseas duty shall not sustain significant financial loss and that any such loss shall be prevented by the direct payment of travel expenses and increased allowances rather than by a tax deduction which might properly be claimed by others for whom no specific increased benefits are provided."<sup>37</sup> Unfortunately, this issue was not commented upon by the majority.

Oddly enough, neither opinion considered the relevance of section 265(a), which precludes a deduction of expenses allocable to tax exempt income.<sup>38</sup> It would seem that a commensurate part of the expenditures for meals was "allocable" to the subsistence pay within the meaning of this code provision, as interpreted by existing case law. Invoking this provision would have alleviated somewhat the tenuous character of the dissent's "congressional intent" argument.

<sup>33</sup> *Id.* at 299.

<sup>34</sup> *United States v. LeBlanc*, 278 F.2d 571 (5th Cir. 1960); *Moss v. United States*, 145 F. Supp. 10 (W.D.S.C. 1956); *Emmert v. United States*, 146 F. Supp. 322 (S.D. Ind. 1955).

<sup>35</sup> *Treas. Regs.* § 1.61-2(b); T.D. 3274, C.B. IV-2, 136 (1925); *Jones v. United States*, 60 Ct. Cl. 552 (1925).

<sup>36</sup> *Career Compensation Act of 1941*, ch. 681, § 303(b), 63 Stat. 813.

<sup>37</sup> *Stidger*, 355 F.2d 294, 361-402 (9th Cir. 1965).

<sup>38</sup> "No deduction shall be allowed for . . . any amount otherwise allowable as a deduction which is allocable to one or more classes of income . . . wholly exempt from the taxes imposed by this subtitle . . ." INT. REV. CODE OF 1954, § 265(a).

But conceding the applicability of section 265, the principal issue would still be open as to the excess of expenses over the subsistence allowance.

### III. CONCLUSION

Whether *Stidger* is to be the vehicle through which the "tax home" controversy is resolved remains to be seen.<sup>39</sup> The Supreme Court has granted certiorari, but the complications arising from the fact that the taxpayer is a United States serviceman may afford the Court an opportunity to avoid the definitional issue involved. But certainly the proponents of the opposing views have developed their positions to a point where a resolution of the issue seems highly desirable, if not imminent.

In construing statutory language, it is inevitable that courts look for the legislative intent, and the ultimate decision in the tax home controversy may be expected to explore that question. But no one has been able to produce convincing evidence as to the original intent of Congress in regarding the definition of "home." There is general agreement, however, with respect to Congress' objective in enacting the travel expense deduction:<sup>40</sup> Congress has attempted to put taxpayers who must travel because of their business activities on an equality with those who do not. The Ninth Circuit urges that this "balancing" should take place free of an arbitrary test of deductibility unrelated to the objective, that it should result from a case by case inquiry whether business exigencies or personal convenience has necessitated the travel expense. In its view, the business traveler should not be denied the deduction in any case where it would be unreasonable to require him to mitigate the expense. In other words, the conclusive inquiry is whether the expense is ordinary and necessary.<sup>41</sup>

It may be argued that while the Ninth Circuit's test seems preferable to the Commissioner's in abstraction, the tax home doctrine can be applied to reach similar results.<sup>42</sup> If this were always true, administrative convenience in applying section 162(a)(2) would better be served by retaining the familiar and simple rule. But too often the

<sup>39</sup> The government's petition for certiorari was granted by the Supreme Court on October 10, 1966. The case is docketed No. 173. 35 U.S.L. WEEK 3111 (U.S. Oct. 11, 1966).

<sup>40</sup> Compare *Barnhill v. Commissioner*, 148 F.2d 913 (4th Cir. 1945) with *Harvey v. Commissioner*, 283 F.2d (9th Cir. 1960).

<sup>41</sup> See *Harvey v. Commissioner*, 283 F.2d 491, 493 (9th Cir. 1960).

<sup>42</sup> For example, applying the tax home doctrine to the principal case, it may be argued that the taxpayer's tenure in Japan was "temporary" and, hence, deductible. Of course, the Tax Court did not accept this argument, but conceivably the same result could be reached under either approach.

tax home doctrine has produced inconsistent and inequitable results.<sup>43</sup> Further, as the Ninth Circuit pointed out in *Harvey*, the rational and ordinary meaning of a tax statute is much preferred to a strained interpretation which "the exigency of a hard case justifies" but which develops a rule too far removed from the objective.<sup>44</sup>

So few cases have been decided under the Ninth Circuit's test that the effects of its universal application can scarcely be projected. But the Commissioner's fear that commuter expenses and other personal expenses would become deductible items seems unwarranted. As the Supreme Court demonstrated in *Commissioner v. Flowers*,<sup>45</sup> the business-pursuit requirement is as formidable a barrier to the deduction of personal expenses as the tax home doctrine.

Furthermore, the Ninth Circuit does not seek to make new *kinds* of travel expenses eligible for deduction; it merely proposes a more equitable means of ascertaining deductibility. Concededly, the Ninth Circuit's test would in some cases produce results different from those formerly obtained under the tax home doctrine, but only because that doctrine has long sacrificed the congressional objective in deference to administrative convenience. The Ninth Circuit has campaigned ceaselessly to vindicate that objective. Perhaps a resolution of the conflict will not be long in coming.

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<sup>43</sup> Lawrence P. Dowd, 37 T.C. 43 (1961) (holding that a taxpayer teaching in Japan for twenty-one months on a Fulbright grant was "away from home"); Josette J.F. Verrier Friedman, 37 T.C. 55 (1961) (holding that a taxpayer working as a secretary in French Morocco for approximately the same period was not "away from home.")

<sup>44</sup> 283 F.2d 491, 493 (9th Cir. 1960).

<sup>45</sup> 326 U.S. 465 (1946).