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William D. Popkin
Indiana University Maurer School of Law, popkin@indiana.edu

Deduction of Traveling Expenses by the Two-Worker Family—An Inquiry into the Role of the Courts in Interpreting the Federal Tax Law

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Professor Popkin urges that courts interpret section 162 of the Internal Revenue Code, which permits a deduction for business expenses, also to permit a two-worker family to deduct that part of their transportation costs and living expenses attributable to a second job. After tracing the current state of the law, he contends that the implicit assumption of the Code—that married taxpayers live together and constitute a single consumption unit—should allow deduction of some commuting costs and living expenses, much as a single taxpayer is allowed a deduction for transportation to and living expenses at a secondary place of business. Last, Professor Popkin argues that courts need not defer to the legislature before allowing the deduction.

As it has become more common for both spouses to work,[1] an ability to deduct additional expenses that result from the decision of both husband and wife to work has increased in importance. Attention first focused on the deduction of child-care and household expenses incurred by the two-worker family,[2] and Congress responded by permitting the deduction of these expenses under standards that have been continually liberalized.[3] In addition

* Professor of Law, Indiana University School of Law (Bloomington). A.B. 1958, LL.B 1961, Harvard.

1. In 1970 and 1973 the percentage of husband-and-wife families with both spouses workin exceeded the percentage with only a working husband. *See* BUREAU OF CENSUS, U.S. DEP'T O COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 364 (96th ed. 1975) (Table 564).

2. *See, e.g.*, Feld, *Deductibility of Expenses for Child Care and Household Services: Ne Section 214*, 27 TAX L. REV. 415 (1972); Hjorth, *A Tax Subsidy for Child Care: Sec. 210 of t Revenue Act of 1971*, 50 TAXES 133 (1972); Klein, *Tax Deductions for Family Care Expenses*, 1 B.C. INDUS. & COM. L. REV. 917 (1973); Popkin, *Household Services and Child Care in the Incon Tax and Social Security Laws*, 50 IND. L.J. 238 (1975); Schaffer & Berman, *Two Cheers for t Child Care Deduction*, 28 TAX L. REV. 535 (1973).

3. *See* Tax Reform Act of 1976, Pub. L. No. 94-455, § 501(a) (1) (Oct. 4, 1976) (codified I.R.C. § 44 A); Revenue Act of 1974, Pub. L. No. 93-490, § 2, 88 Stat. 1466; Revenue Act 1971, Pub. L. No. 92-178, § 210(a), 85 Stat. 518; Revenue Act of 1964, Pub. L. No. 88-27 § 212(a), 78 Stat. 49.

Although most taxpayers will benefit by the 1976 amendments, some taxpayers may be hu The benefit arises principally because a tax credit replaces a deduction once unavailable taxpayers who elected the standard deduction. The deduction might have been more valuabl high-income taxpayers, however, than the new credit. A married taxpayer who earned $35,

to child-care and household expenses, however, the two-worker family may confront additional expenses for transportation and living expenses over and above the costs a one-worker family would incur. For example, two married individuals might live together but work apart. The husband might work in a Chicago suburb near the family's residence, but the wife might take a job that requires her to commute to work in downtown Chicago. Or if a husband and wife temporarily live and work apart while they search for suitable jobs in the same location, they would incur the extra living expense of maintaining two abodes. This duplication of expenditure might occur if a wife accepts a job as a professor in one city, but her husband, although hoping to get a teaching job in the same location, finds his best professional opportunity in another city. The spouses might thus live separately for a short period of time while searching for professionally satisfying work in the same city.

This article addresses whether the additional transportation and living expenses that arise when both spouses work are deductible. The Government argues that the determination whether expenses are deductible because they exceed normal commuting and living expenses as a result of a work decision or whether they are not deductible because the result of personal choice should be made without consideration of an individual's marital status.[4] This article argues the alternative view that marriage is relevant in making this determination. Part I discusses the rules applicable to the deduction of transportation and living expenses by a single taxpayer. Part II discusses the arguments for and against treating married individuals differently from single taxpayers and concludes that marriage should be relevant in determining whether the two-worker family has deductible traveling expenses. Last, Part III applies that conclusion to fact situations that typically present added transportation and living expenses for a two-worker family.

I. The Single Taxpayer's Deduction for Traveling Expenses

A. *Transportation Expenses*

If an individual's residence and principal place of business are in different locations, *Commissioner v. Flowers*[5] presumed that the difference arose because of a personal decision to live apart from the principal place of

and spent $4000 on child care provided in the home would have saved $840 in taxes. *See* I.R.C. § 1(a); Tax Reduction Act of 1975, Pub. L. No. 94-12, § 206, 89 Stat. 32; Revenue Act of 1971, Pub. L. No. 92-178, § 210(a), 85 Stat. 518. The credit, which is 20% of the expenditures, might be $800 or less depending on the number of dependents in the household. I.R.C. § 44A(a).

4. *See* Chwalow v. Commissioner, 470 F.2d 475 (3d Cir. 1972); Hammond v. Commissioner, 213 F.2d 43 (5th Cir. 1954); Robert A. Coerver, 36 T.C. 252 (1961), *aff'd per curiam,* 297 F.2d 837 (3d Cir. 1962); C. Raymond Shafer, 20 Tax Ct. Mem. Dec. 977 (1961).

5. 326 U.S. 465 (1946).

work.[6] The expenses of commuting to the principal place of business are therefore not deductible.[7] Expenses of transportation from the principal place of work to a secondary place of business are, however, deductible if the travel is required by business need,[8] because it is unreasonable to expect the taxpayer to move his or her residence to the secondary business location.

In most cases, the distinction between a principal and secondary place of business is clear, but some problems do occur.[9] When the time spent and income received in connection with both places of work are substantial, there may be no easy way to identify the principal place of work. Faced with this uncertainty, the taxpayer should be allowed to deduct the expenses for travel to the business farthest from the taxpayer's residence. When two businesses rival each other for prominence, the taxpayer cannot reasonably be required to choose which of the jobs is the principal one, and the taxpayer cannot be expected to move closer to any job except the one closest to his or her residence. The expenses of transportation to the business farthest from the residence are therefore attributable to a business rather than a personal decision.[10]

Considerable controversy arises over the precise method for computing additional transportation expense resulting from travel to the secondary place

6. "[The commuting costs] were incurred solely as the result of the taxpayer's desire to maintain a home in Jackson while working in Mobile . . . ." *Id.* at 473.

7. 26 C.F.R. § 1.162-2(e) (1976).

8. Rev. Rul. 453, 1976-47 I.R.B. 6, 7-8 (effective date changed to July 1, 1977, 1977-7 I.R.B. 31) (Examples 3, 7, 8, & 11). For a discussion of the correct computation of the deduction for additional transportation expenses arising from a second place of business, see text accompanying notes 11-21 *infra*.

The rule disallowing the deduction of commuting expenses to the principal place of work applies even if a taxpayer has no reasonable way to move closer to his or her work. *See* Sanders v. Commissioner, 439 F.2d 296 (9th Cir.), *cert. denied*, 404 U.S. 864 (1971); United States v. Tauferner, 407 F.2d 243 (10th Cir.), *cert. denied*, 396 U.S. 824 (1969). This rule eliminates litigation over whether a taxpayer possibly could move closer to the worksite and treats all taxpayers alike for commuting expenses. Taxpayers who commute to a temporary job also may not deduct their transportation costs because that would unfairly distinguish between two taxpayers at the same job, only one of whom was on temporary duty. *See* Turner v. Commissioner, 56 T.C. 27, 33 (1971) ("Commuting is commuting . . . ."); Rev. Rul. 453, 1976-47 I.R.B. 6.

9. Identifying the principal place of business permits the determination whether transportation expenses are personal expenses. The deduction for transportation expenses does not depend on a taxpayer being away from "home" and, therefore, does not depend on whether the term "home" in I.R.C. § 162(a)(2) means "principal place of business." *See* Turner v. Commissioner, 56 T.C. 27, 30-31 (1971).

10. *See* Joseph H. Sherman, Jr., 16 T.C. 332, 337 (1951) (taxpayer has "roots" at business closer to residence). *See also* Abe Brenner, 26 Tax. Ct. Mem. Dec. 1210, 1214-15 (1967). The Government may not agree with this approach because of its preoccupation with the taxpayer's principal place of business. *See* Rosenspan v. United States, 438 F.2d 905, 910-12 (2d Cir.), *cert. denied*, 404 U.S. 864 (1971); Rev. Rul. 67, 1961-1 C.B. 25; Rev. Rul. 147, 1954-1 C.B. 51.

In the remainder of this article, references to a secondary place of business include the business furthest from the taxpayer's residence when the identification of the principal and secondary place of work is unclear.

of business. There are two approaches to computing the amount of these expenses. One approach, which the Government adopts, allows a deduction for the expenses of going from the principal place of work (place *1*) to the secondary place of work (place *2*) but for no other commuting expenses.[11] For example, if a taxpayer goes from home to place *1*, then to place *2*, and finally home again, he or she may deduct the cost of travel from place *1* to place *2*, but not the other transportation expenses between home and place *1* and between place *2* and home. If a taxpayer goes home after working at place *1* and then commutes to place *2* and returns home, no deduction would be allowed because all the trips were between the taxpayer's home and a place of work and are therefore considered nondeductible commuting expenses.[12]

The second and, in my view, correct approach identifies deductible transportation expenses by subtracting the cost of a round trip between home and place *1* from the cost of going from home to place *1* to place *2* and home again. The expense to go from home to place *1* and return is a personal expense and should be subtracted from whatever total expense the taxpayer incurred. This approach correctly identifies the additional expense required by the second place of work by taking into account the actual location of place *2* in relation to both the taxpayer's home and place *1*, but the Government's approach focuses only on the travel between place *1* and place *2*.

A few examples easily demonstrate that the Government's approach is both over- and under-generous in certain situations. Generosity is most obvious when a taxpayer's second place of business is on the way back home from the principal place of work. In the extreme case, place *2* lies on a direct line between place *1* and home.[13] Assume that place *1* is eight miles from a taxpayer's home and place *2* is three miles from place *1* on a direct line back home. If the taxpayer stops at place *2* on the way home, the Government's

11. *See* Rev. Rul. 453, 1976-47 I.R.B. 6, 8 (Examples 7 & 8). In an earlier revenue ruling, modified by the 1976 ruling, the Government conceded the possibility of deducting the cost of going from place *2* to home if it exceeded the cost of going from place *1* to home. Rev. Rul. 109, 1955-1 C.B. 261, 263. The case law supports the most recent Government position that the taxpayer may deduct only the cost of going from place *1* to place *2*. *See* Adelberg v. Commissioner, 30 Tax Ct. Mem. Dec. 68, 70 (1971); Alvah I. Winslow, 23 Tax Ct. Mem. Dec. 1978, 1979 (1964); James A. Kistler, 40 T.C. 657, 663, 665 (1963); Clarence J. Sapp, 36 T.C. 852, 854-55 (1961).

12. Rev. Rul. 453, 1976-47 I.R.B. 6, 8 (Example 10). Under Rev. Rul. 109, 1955-1 C.B. 261, 264, *modified*, Rev. Rul. 453, 1976-47 I.R.B. 6, the Government allowed a deduction for the cost of going from home to place *2* and back home again to the extent that it did not exceed "the transportation expenses [the taxpayer] would have incurred had he gone directly from one such business location to the other." *James A. Kistler* accords with the 1955 Ruling, but *Marvin Adelberg* takes the approach in the 1976 Ruling. The Government allows a deduction for transportation expenses from home to a secondary business destination, however, if the business is in a city different from the principal place of work. Rev. Rul. 453, 1976-47 I.R.B. 6, 7 (Example 3).

13. This appears to be the situation in Alvah I. Winslow, 23 Tax Ct. Mem. Dec. 1978 (1964).

approach would allow a deduction for the cost of the trip from place *1* to place *2*. But not all expenses away from the principal place of business are business expenses. Those expenses that would constitute nondeductible commuting expenses, going from place *1* to home, are nondeductible personal expenses regardless of whether the taxpayer stops at a second place of business.[14] Under the preferable formula these normal commuting expenses are subtracted to determine deductible transportation expenses and, in the above example, no deduction would result.[15]

The approach suggested in this article is sometimes more generous than the Government's approach; for example, if the trip from place *2* to home exceeds the distance from place *1* to home. Assume that place *2* is ten miles from home and place *1* is eight miles from home, and the distance between place *1* and place *2* is three miles. In the preferable approach, the round trip cost of the eight mile journey between home and place *1* would be subtracted from the cost of making the circuit from home to place *1* to place *2* and home again; the taxpayer thus should be able to deduct the cost of going from place *2* to home to the extent that it exceeds the cost of going home directly from place *1* because the difference is an expense that arose from having a second place of business. This approach results in a deduction for the cost of two miles more than the Government would allow, since the Government would limit the deduction to the cost of the three-mile trip between place *1* and place *2*.[16]

The two approaches also lead to different results when a taxpayer goes home from place *1* before traveling to place *2*. The Government disallows the deduction of all resulting transportation expenses because the taxpayer never travels away from a principal place of business, except to return home,[17] unless the second place of business is in a city other than the location of the principal place of work.[18] The preferable approach attributes some portion of

14. For a discussion of a similar problem arising when a taxpayer's secondary place of business and residence are the same, see text accompanying notes 32-33 *infra*.

15. The distance from home to place *1* (eight miles) to place *2* (three miles) to home (five miles) totals sixteen miles. If the round trip commuting distance from home to place *1* and back home again (sixteen miles) is subtracted from the sixteen miles traveled, no travel is attributable to the second place of business. If the distance from place *2* to home were five-and-one-half miles, a deduction would be allowed for the cost of traveling one-half mile because that represents the actual travel distance required by the second business in excess of normal commuting.

16. The deduction would be for a five-mile trip, which represents the three miles between place *1* and place *2* and the extra two-mile distance to travel from place *2* to home rather than from place *1* to home.

17. Rev. Rul. 453, 1976-47 I.R.B. 6, 8 (Example 10).

18. *Id.* (Example 3); *see* Rev. Rul. 497, 1954-2 C.B. 75, 82. The Government's position allowing a deduction for transportation costs incurred to go out of town suffers from the same confusion as its position allowing a deduction when the taxpayer goes from place *1* to place *2* and

the expense of traveling to place *2* to business need because the taxpayer cannot be expected to eliminate the gap between his residence and both places of work, regardless of whether the two businesses are in the same city. The amount attributable to business need should be the expense that would have been deductible if the taxpayer had not indulged his personal preference for going home first but had instead gone from place *1* to place *2* and then home.[19]

The error in the Government's approach to the taxpayer who returns home from place *1* before going to place *2* becomes manifest in the example of a taxpayer whose home and two businesses lie in a straight line. Assume that place *1* is eight miles due east of the taxpayer's residence and place *2* is ten miles due west of the residence. Under the Government's approach, a trip from place *1* to place *2* results in a deduction of the cost of the eighteen-mile trip if the taxpayer does not stop at home but no deduction results if the taxpayer stops at home.[20] Such disparate consequences depending on whether the taxpayer stops at his or her residence make no sense and are avoided by the suggested alternate formula. That approach computes the mileage of traveling from home to place *1* to place *2* and back home again (thirty-six miles), subtracts the cost of commuting from home to place *1* and back home again (sixteen miles), and allows a deduction for a twenty-mile trip—the extra travel required by the existence of place *2*, over and above the cost of going from home to place *1* and back home again.[21]

then home. The theoretically correct deduction, the Government argues, is subject to a ceiling amounting to the cost of a trip from place *1* to place *2* and back to place *1* again. But this ceiling fails to take into account the possibility that place *2* is on the way back home and that the full cost of going from place *1* to place *2* may not be attributable to business need. *See* text accompanying notes 11-15 *supra*. The example in the 1976 ruling states that because the personal portion of the transportation expenses of an out-of-town trip is de minimis, no need exists to determine the theoretically proper way to compute the amount of deductible transportation expenses described above. Rev. Rul. 453, 1976-47 I.R.B. 6, 7. The 1954 ruling makes no such assumption, however.

19. This approach is similar to that in the 1955 ruling, Rev. Rul. 109, 1955-1 C.B. 261, since it would allow a deduction when the taxpayer returns home before going to place *2* up to the amount that would have been deductible if the taxpayer had gone from place *1* to place *2* to home. But this approach differs in the computation of the deduction if the taxpayer had gone from place *1* to place *2* and then home. *See* text accompanying notes 11-16 *supra*.

20. Rev. Rul. 453, 1976-47 I.R.B. 6, 8 (Examples 7 & 8).

21. The following example applies the reasoning in the text when the home, place *1*, and place *2* are not on a straight line. Suppose that the taxpayer lives eight miles from place *1*, and ten miles from place *2*, and the distance between place *1* and place *2* is three miles. If the taxpayer went home after working at place *1* and before going to place *2*, the full cost of the 20-mile trip to place *2* and home again should not be a deductible expense because it results from the personal decision to go home first. The business portion of the trip to place *2* and back home again represents the extra travel required by having a business at place *2*, which is computed by assuming that the taxpayer had gone to place *2* from place *1* instead of going home first. That amount is the cost of a five-mile trip, which is the twenty-one-mile trip from home to place *1* to place *2* and home again, less the sixteen-mile round trip from home to place *1* and home again.

B. *Living Expenses*

The deduction for living expenses depends on the same analysis as that applied to transportation expenses—expenses are deductible when it is unreasonable to require the taxpayer to move his residence to the business destination to reduce expenses.[22] A deduction, therefore, usually is allowed when the taxpayer works at a secondary or temporary place of business[23] or when the principal place of business is not easily identifiable, and the taxpayer works at the business farthest from his residence.[24] This rule is qualified, however, by the requirement that business travel continue long enough to require sleep or rest.[25] This qualification prevents taxpayers who are away on business for a short time from deducting expenses similar to the nondeductible living expenses of the taxpayer who is not away on business.[26]

The deduction for living expenses encounters a second difficulty in the statutory requirement that a taxpayer not only have a business purpose but also be "away from home."[27] For many years the Internal Revenue Service interpreted "home" to mean "principal place of business" rather than "residence," on the theory that this interpretation was necessary to ensure that only business expenses would be deducted.[28] The Service never provided an adequate justification for this divergence from the plain meaning of "home."[29] The requirement that the living expenses serve a business purpose, combined with the Agency's flexibility in framing rules to implement that requirement, adequately protects the Government from the deduction of expenses with a personal purpose.[30] More recently the Government

22. If, however, the taxpayer's stay at the new post of business is to be temporary . . . it is not reasonable to expect him to move his residence; so if he incurs living expenses at the temporary post, these are traveling expenses required by the trade or business rather than by personal choice, and they are therefore deductible.

Ronald D. Kroll, 49 T.C. 557, 562-63 (1968).

23. *See* Rev. Rul. 189, 1960-1 C.B. 60. The deduction is only "usually" allowed because it should not be allowed when the taxpayer's residence is located at the secondary place of business. *See* note 32 *infra* & accompanying text.

24. *See* note 10 *supra* & accompanying text.

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

26. *Id.* at 303-04.

27. I.R.C. §§ 62(2)(B), 162(a)(2).

28. Rosenspan v. United States, 438 F.2d 905, 910-12 (2d Cir.), *cert. denied*, 404 U.S. 864 (1971).

29. *Cf. id.* at 910 ("proper analysis of the problem has been beclouded").

30. "Home" need not mean "principal place of business" to prevent the deduction of commuting expenses. *See* note 9 *supra*. In the case of living expenses, defining "home" as "residence" may allow the taxpayer to argue that the maintenance of two permanent residences, one of which is at the principal place of business, is not the result of personal choice. The argument might be plausible if the taxpayer works in a war zone, but the agency can formulate rules to deny such deductions without distorting the meaning of the word "home." *Cf.* Commissioner v. Stidger, 386 U.S. 287 (1967) (military taxpayer's permanent duty station is his home for tax purposes).

has agreed that "home" means "residence" when a taxpayer takes up temporary work,[31] which suggests that the Government will no longer define "home" as "principal place of business" when the result does not accord with the underlying purpose of the statute.

In one situation, however, the taxpayer should not be entitled to deduct living expenses at a secondary place of work. When the taxpayer's residence is situated at the secondary business location, the additional living expenses should be nondeductible personal expenses. Establishing a residence away from the principal place of business causes extra living expenses, but these expenses are the result of a personal decision to live away from the principal place of work. The expenses at a taxpayer's residence are no less personal expenses because the taxpayer takes a second job near his or her residence. The Government does not agree with this conclusion.[32] Its generosity towards the taxpayer arises, however, from a preoccupation with defining "home" as the "principal place of business," which in this case results in an allowance of a deduction for living expenses whenever the taxpayer leaves the principal work location. As noted above, this definition of "home" seems to be passing from the scene, and the Government therefore seems likely to reverse its position and rule that living expenses at the secondary place of work are not deductible.[33]

Last, deductible living expenses place a ceiling on the amount of deductible transportation expenses resulting from a secondary place of business if the taxpayer returns home before the business has been completed. In the particular situation of a taxpayer who is away from his residence, but returns for brief intermittent periods before completing the work at the secondary place of business, the taxpayer is expected to minimize the cost of having a second place of business. If the taxpayer returns home from a second place of work while that business activity is still in progress, the deductible transportation expenses for his visit home cannot exceed the living expenses that would have been deductible if the taxpayer had stayed at the second place of business instead of returning home.[34]

31. Rev. Rul. 529, 1973-2 C.B. 37, 38.

32. Rev. Rul. 604, 1955-2 C.B. 49, 50-51; Rev. Rul. 497, 1954-2 C.B. 75, 80-81; Rev. Rul. 147, 1954-1 C.B. 51, 53.

33. *See* note 31 *supra*. Those taxpayers who have substantial expenses at their residence while conducting one of two businesses often may be those who have difficulty identifying the principal and secondary places of business; the taxpayer can therefore deduct the living expenses associated with the business farthest from the residence. *See* text accompanying notes 9-10, 24-25 *supra*.

34. Rev. Rul. 597, 1954-2 C.B. 75, 82, reaches the same conclusion on living expenses. The 1954 ruling has been modified by the 1976 ruling for the temporary business traveler, but not for the traveler with two places of work. Rev. Rul. 453, 1976-47 I.R.B. 6, 8 (Example 5).

II. The Relevance of Marriage for Defining Deductible Traveling Expenses

The central concern of this article is whether a married individual should be treated differently from a single individual in the determination of traveling expenses attributable to a business purpose. The previous discussion of single taxpayers demonstrated that expenses a taxpayer could reasonably be expected to avoid are attributed to personal purposes, and that expenses in excess of that amount resulting from the decision to travel on business are deductible traveling expenses. If marriage makes a difference in determining whether a taxpayer has deductible traveling expenses, then the distinction between nondeductible personal expenses and deductible traveling expenses would depend on what could reasonably be expected of a married individual. The crucial difference in reasonable expectations for single and married individuals is that a single individual reasonably can be expected to live close to his or her principal place of work, but a married individual cannot be expected to move closer to his or her principal place of work if that would mean being separated from a spouse. The normal life style of a married couple is to live together at the same residence, and married individuals can only be expected to move their residence close to the principal place of work for the marital unit. If marriage makes a difference in defining deductible traveling expenses, then the additional transportation and living costs resulting from the marital unit's having a second place of work would be deductible, just as the single individual can deduct expenses attributable to his or her second place of work.

The argument for identifying deductible traveling expenses by reference to the assumption that married individuals usually live together and cannot be expected to live separately in order to live closer to their respective places of work receives support from the rate structure in the Internal Revenue Code, which already accepts this pattern of behavior as the norm for married individuals. Two features of the tax law make this apparent. First, the Code treats married individuals as a single consumption unit, taxed at the same rates regardless of the contribution of each spouse to the total income of the marital unit,[35] unless evidence shows that the marriage has disintegrated.[36] Second, the tax rate on married individuals who both contribute significantly to the total income of the unit is higher than the tax rate applicable to two single individuals earning incomes identical to each of the married individuals.[37]

35. *See* I.R.C. § 1(a).

36. Sections 71 and 215 of the Internal Revenue Code split the marital unit's income in accordance with the actual allocation of income between the spouses when the marital unit has separated. A decree of separate maintenance or a written separation agreement must provide proof of the separation. I.R.C. § 71(a) (1)-(2).

37. I.R.C. §§ 1(a), (c); Bittker, *Federal Income Taxation and the Family,* 27 STAN. L. REV. 1389, 1429-31 (1975).

Although this "tax on marriage"[38] inevitably results from the legislature's decision to lower the tax on a single individual vis-à-vis the tax on a marital unit with the same total income as the single individual and the legislature's decision to tax all marital units alike,[39] the "tax on marriage" derives support from the assumption that married individuals achieve economies of scale by living together.[40]

Arguably, however, the source of a married taxpayer's extra traveling expense is the personal decision to marry; and expenses originating in personal decisions are nondeductible personal expenses.[41] Certainly, if the taxpayers were not married, the expenses could not be attributed to a secondary business activity of a marital unit; instead the expenses would be related to the individual taxpayer's principal place of business and would not be deductible. But to dismiss marriage as just another personal decision is inconsistent with the treatment of marriage in the Code. The Code adopts a separate rate structure that reduces the rates for marital units below those applied to a single individual with the same total income as the marital unit.[42] The rationale for this rate reduction is that the cost of living for the two spouses exceeds that of the single individual and that those costs should not be included in the tax base.[43] The tax law treats the expenses incident to marriage, like medical expenses,[44] as simply maintaining the taxpayer at a baseline of utility,[45] rather than as expressing the particular tastes and

38. *Cf.* Bittker, *supra* note 37, at 1429 ("marriage penalty").

39. As long as married individuals were taxed as though they were two single individuals each earning one-half of the marital unit's total income, marriage did not increase the tax on two individuals who married. By lowering the tax on a single individual relative to a marital unit with the same income as the single individual, however, the possibility arose that marriage would increase taxes. For example, under the law prior to 1969, a marital unit with $20,000 of income was taxed as though it had two $10,000 income earners. *See* Revenue Act of 1964, Pub. L. No. 88-272, § 111(a), 78 Stat. 19. If two single individuals with $10,000 or with any combination adding to $20,000 married, the tax could not increase. Under the Tax Reform Act of 1969, the tax on single individuals was lowered so that the advantage for the marital unit would be reduced, but the tax on marital units was not changed. *See* Tax Reform Act of 1969, Pub. L. No. 91-172, § 803(a), 83 Stat. 678 (codified at I.R.C. § 1). As a result, when two single individuals with $10,000 incomes marry, their total tax goes up. Only if one spouse has a small amount of income relative to the marital unit's total income will the effect of the lower taxes on single individuals adopted in 1969 be offset by the fact that the rates on the total income of married individuals are lower than on a single individual with the same total income. This problem could, of course, be avoided by taxing married individuals as though they were unmarried, but then marital units with the same total income would be treated differently. For a more detailed explanation of this problem, see Bittker, *supra* note 37, at 1429-31.

40. Bittker, *supra* note 37, at 1422-25. Professor Bittker questions assumptions about economies of scale for high income taxpayers.

41. *See, e.g.*, United States v. Gilmore, 372 U.S. 39 (1963).

42. I.R.C. §§ 1(a), (c).

43. Bittker, *supra* note 37, at 1420-22.

44. I.R.C. § 213; *see* Andrews, *Personal Deductions in an Ideal Income Tax,* 86 HARV. L. REV. 309, 331-43 (1972).

45. For a discussion of the concept of a baseline level of utility, see Note, *Federal Income*

preferences that make up the tax base. Allowing a business deduction for those traveling expenses that result from a taxpayer's marriage is, therefore, consistent with the statutory structure. Indeed, the Government sanctions such an approach for the temporary business traveler. In deciding whether a temporary business traveler has additional living expenses attributable to business need at the business destination, the taxpayer's marriage is one element in determining whether the taxpayer reasonably incurred such expenses and, therefore, whether they are deductible business expenses.[46]

The argument that a personal decision to marry originates the claim for deducting traveling expenses and therefore taints all subsequent related expenses as nondeductible personal expenses cannot be so easily dismissed, however. Although the Code treats marriage as a personal decision that does not give rise to taxable expenditures, the precise issue under consideration is whether the additional traveling expenses incurred by the two-worker family are deductible business expenses. Expenses that originate in a personal decision may be deductible, but the legislature, not the courts, generally makes that decision. Arguably, judges are unsuited to decide which personal expenses reflect merely an effort to maintain a baseline standard of living[47]—and should therefore be deductible in determining the tax base—and which personal expenses are taxable indulgences of personal tastes and preferences. The history of the deduction of child-care expenses incurred to enable the taxpayer to work can be cited in support of the proposition that the legislature rather than the courts should decide when expenses originating in the personal sphere of activity should be deductible. Although having children, like marrying, possibly does not represent the type of personal decision that should place all expenditures flowing from the initial decision to have children in the taxable sphere of activity, courts rejected this view and held that child-care expenses were not deductible business expenses, even if incurred to enable the taxpayer to work.[48] Legislative action,[49] designed both to implement tax equity and to deal with the social implications of denying the deduction, was necessary to allow the deduction of child-care expenses.[50]

The pivotal question then becomes whether the law governing deductible business expenses should be interpreted in the light of the statutory structure that does not treat marriage as a taxable indulgence and treats living

Taxation of Employee Fringe Benefits, 89 HARV. L. REV. 1141, 1147 (1967). *See also* Andrews, *supra* note 44, at 335-37.

46. *See* Rev. Rul. 529, 1973-2 C.B. 37, 38. The Service provides no concrete guidance on the exact effect of marital status, however.

47. *See* note 45 *supra.*

48. Henry C. Smith, 40 B.T.A. 1038 (1939), *aff'd mem.*, 113 F.2d 114 (2d Cir. 1940).

49. *See* note 3 *supra.*

50. *See generally* Klein, *supra* note 2.

together as the normal condition for married individuals, or whether expenses that originate in the decision to marry can only be deducted if the legislature specifically provides for the deduction. In my view, the appropriate allocation of authority between the courts and the legislature requires the courts to hold marriage relevant in deciding whether the traveling expenses of the two-worker family are deductible. Three reasons support this conclusion.

First, the adoption by the legislature of a separate preferential rate structure for married individuals—which recognizes that marriage is a personal decision that does not give rise to taxable expenditures—obviates the usual problem of requiring a court to identify a nontaxable sphere of activity. The court need only make use of that legislative judgment about marriage in interpreting section 162[51] of the Code. The analogy to child-care expenses can be distinguished because no separate rate structure for taxpayers with children existed in 1939 when the Board of Tax Appeals settled the question of deductibility against the taxpayer.[52]

Second, although section 162 deals with business expenses, judicial interpretation of that section may appropriately incorporate a legislative judgment about personal expenses that lie outside the taxable sphere of activity. Reductions in the tax base for personal expenses often serve the same function as the deduction for business expenses in defining the fair tax base.[53] The Code sections that accomplish this function—for example, section 1(a), which reduces the tax rates for marital units—stand in pari materia with the business expense deduction;[54] therefore it is proper to use those provisions to define deductible business expenses.[55]

51. I.R.C. § 162 provides in pertinent part:

> (a) In general.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—
>
> . . . .
>
> (2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business....

52. *See* Henry C. Smith, 40 B.T.A. 1038 (1939), *aff'd mem.*, 113 F.2d 114 (2d Cir. 1940). The 1954 Code provided a separate preferential rate structure for unmarried heads of households with resident children. I.R.C. §§ 1(b), 2(b). By 1954, however, legislative action on child-care deductions preempted the field, and there was no room for judicial interpretation of §162 to include child-care expenses beyond the explicit provisions of the statute. *See* note 57 *infra* & accompanying text.

53. *See* Andrews, *supra* note 44, at 330-31.

54. Section 213, which allows a deduction for medical expenses, is another example of a reduction in the tax base that serves the same function as the business expense deduction. Reading sections such as § 213 in pari materia with § 162 would allow a business deduction for the expenses of commuting to work by a taxpayer who was required to take a taxicab for medical reasons. *Contra,* John C. Bruton, 9 T.C. 882 (1947).

55. This approach to interpreting the Code calls for an aggressive judicial role that will not be accepted by courts reluctant to impose their own view of the tax law because they fear they do not understand it. Learned Hand's comments about the tax law epitomize this fear, Hand, *Thomas*

Last, the existing legislation dealing with married taxpayers provides no justification for the court to defer to the legislature in deciding whether the traveling expenses of the two-worker family should be deducted. Existing legislation should occasion judicial reticence only if some reason exists to believe that existing legislation preempts the field. But the rate structure for marital units does not deal with the special problems of the two-worker family. It provides lower rates for marital units regardless of the work status of the spouses and leaves unresolved the problem of the added expenses of the two-worker family. Thus, traveling expenses differ from child-care expenses after the adoption of a child-care deduction in 1954.[56] The 1954 Code contained a legislative judgment that only couples with income below a certain amount could deduct child-care expenses,[57] which strongly suggested that any judicial discretion to expand the right to the deduction to other couples would violate the legislative intent.

III. Identifying the Deductible Traveling Expenses of the Two-Worker Family

This section provides examples of the deductions that would be allowed if the assumption that married individuals normally live together were to determine the deductibility of traveling expenses. In addition, the section considers the argument that the administrative burden imposed by claims for these deductions would be so great that the courts should avoid an interpretation of the tax law imposing those burdens on the Service.

A. Examples of Deductible Traveling Expenses

1. Living Expenses.—If a husband and wife live together and one spouse commutes daily to another location and returns home at night while the other spouse works near the marital residence, none of the family's living expenses would be deductible because all living expenses are incurred at the spouse's residence.[58] This puts to rest the court's concern in *Hammond v. Commissioner,*[59] which concerned a husband who worked at the marital

Walter Swan, 57 YALE L.J. 167, 169 (1957), although he certainly never shied away from interpreting the tax law creatively. *See* Gilbert v. Commissioner, 248 F.2d 399, 410 (2d Cir. 1957) (dissenting opinion); Helvering v. Gregory, 69 F.2d 809 (2d Cir. 1934), *aff'd*, 293 U.S. 454 (1935). Judicial reticence is apparent in Commissioner v. Brown, 380 U.S. 563 (1965), in which the Court adopted a dictionary definition of the term "sale" in preference to a more purposeful interpretation. *See also* Malat v. Riddell, 383 U.S. 569 (1966).

56. *See* note 3 *supra*.

57. The mechanism effecting this policy was a provision that the deduction would gradually disappear as income rose over $4500. Int. Rev. Code of 1954, Pub. L. No. 591, ch. 736, 68A Stat. 3, 70-71. The income levels were raised substantially in 1964, 1971, and 1975. *See* note 3 *supra*.

58. *See* text accompanying notes 32-33 *supra*.

59. 213 F.2d 43 (5th Cir. 1954).

unit's principal place of business in Baton Rouge, but lived at the marital unit's residence in New Orleans, where the wife also worked. The court refused to consider marriage relevant in determining the deductible traveling expenses of the two-worker family because of its concern that the wife's living expenses at the unit's secondary place of business would be deductible.[60] Because the wife incurred her living expenses at the marital unit's residence, however, the expenses would not be deductible even under the proposed approach.

If the husband and wife do not live together at the marital residence, but are only temporarily living apart, living expenses would be deductible if incurred either at the business destination that is the marital unit's secondary place of business or, if neither business seems clearly primary, at the business destination farthest from the marital unit's residence.[61] This might occur, for example, during a period when both spouses are working in different cities while looking for work in the same city. Such a rule may result in a large deduction, but the Code permits the deduction of all living expenses and the size of the deduction causes problems in the context of single taxpayers as well.[62] The solution lies in a legislative ceiling on the amount of the deduction, as in the case of Congressmen,[63] not a disallowance of the deduction altogether.

The proposed deduction for living expenses of one spouse who lives at a business destination affects only those couples who undertake a temporary business-related separation, because the argument for deducting additional living expenses caused by professional exigencies derives its strength from the assumption that married couples normally live together. If the couple resolves to separate on a more permanent basis, their life style has departed from the assumption embodied in the rate structure that they will live together; their tax base thus should be determined on the same basis as a single taxpayer. The Government took this approach in *Six v. United States*.[64] *Six* concerned a marital unit in which one spouse had set out on a business trip, but a more permanent split between the husband and wife later developed.[65] The court remanded the case to the trial court for a determination whether the taxpayer was still temporarily absent from her home where her husband worked or whether her home had moved.[66]

60. *Id.* at 44.
61. *See* text accompanying notes 9-10, 24-25 *supra*.
62. *See, e.g.*, Dowd v. Commissioner, 37 T.C. 399 (1961).
63. I.R.C. § 162(a) (last sentence).
64. 450 F.2d 66 (2d Cir. 1971).
65. *Id.* at 68.
66. *Id.* at 69-70. The court considered the effect of the taxpayer's marriage on the location of the taxpayer's home, but did not adopt or reject the view in this article that the marital unit

The example of spouses who temporarily work in different cities while looking for work together does not differ in theory from the more typical business trip. The only complication in the case of two spouses who consciously decide to live apart temporarily, as opposed to the case of one spouse who sets out on a business trip, is that identification of the marital residence may be more difficult in the former situation. Because living expenses are deductible only if incurred away from the marital residence, ascertaining which spouse's expenses are deductible may pose the same complexity as determining which living expenses are deductible for a single taxpayer who has two businesses of more or less equal scope.[67] If one abode is much smaller than the other and the spouse living at the smaller establishment visits the other spouse regularly, then the larger, more stable residence emerges as the marital unit's residence. If the facts do not clearly identify the marital residence, the more expensive establishment should be treated as the marital residence; this choice minimizes the possibility that taxpayers would abuse the right to deduct living expenses, although the requirement that the separation be temporary already reduces the risk of abuse.

To summarize, the spouse who temporarily lives away from the marital residence can deduct living expenses if that place of work is either the marital unit's secondary place of business, or when neither business clearly emerges as principal or secondary, if that place of work is the business farthest from the marital residence.

2. Transportation Expenses.—The greatest impact on tax administration of the approach advocated in this article would be the allowance of a deduction for some portion of the commuting expenses of the two-worker family. Assume that a husband works two miles from the family's home in a Chicago suburb, that the wife commutes ten miles to Chicago, and that the distance between the two places of work is nine miles. If the wife's job is the marital unit's secondary place of work, the couple could deduct the extra traveling expense caused by the wife's daily trips to the unit's secondary work site. The deduction of the wife's commuting expense results from the formula advocated in Part I for computing a single taxpayer's deduction for trips to the secondary place of business: the cost of traveling from the home to the

generally should be the reference point for determining deductible traveling expenses. *Id.* Possibly the fact of marriage might be relevant for determining the location of a spouse's "home," thus resulting in a deduction of living expenses, but irrelevant for determining whether the spouse's business is a secondary place of work so that transportation expense would be deductible. In my view, however, no basis exists for accepting the relevance of marriage for defining "home" without also admitting the relevance of marriage for determining the deductibility of transportation expenses attributable to a secondary place of work.

67. *See* text accompanying notes 9-10 *supra*.

husband's place of work to the wife's place of work and back home again (twenty-one miles) less the round trip distance between home and the husband's place of work (four miles).[68] If the location of the wife's job were the marital unit's principal place of work, a deduction would be allowed for the cost of traveling attributable to the husband's job, which is the cost of traveling twenty-one miles minus the twenty-mile round trip to the wife's job and back home again. If neither job seemed clearly primary, the taxpayers could deduct the cost attributable to traveling to the Chicago job because that job is farthest from the residence.

The Government might argue against this result by asserting that "commuting is commuting"[69] and that commuting expenses are never deductible.[70] The Government might rationalize such a rule on the ground that taxpayers should not receive disparate treatment of their commuting expenses because of inconsequential differences in their circumstances.[71] But that argument cannot be applied to the married couple without reopening the entire issue whether marriage should make a difference in defining deductible traveling expenses. The difference between the single commuter and the married commuter is the fact of marriage, which results in the business activities of the spouses being viewed as two businesses conducted by the marital unit rather than single businesses separately carried on by each spouse. From the perspective of a married unit, the commuting expenses attributable to the unit's secondary business activity are no different from the deductible commuting expenses attributable to a single individual's second place of work.

A final problem concerns the spouse who is away from the marital unit's residence, but returns home periodically to visit the other spouse. The deduction of transportation expenses to make periodic visits home is subject to the same ceiling that applies to the single individual who returns home from a secondary place of work. No more than the living expenses that would have been incurred at the second place of business should be deductible because the taxpayer cannot deduct any greater amount than actually necessary to complete work at the business destination.[72]

B. Effect of Administrative Problems on the Interpretation of the Tax Law

The examples of traveling expenses deductible if marriage is relevant in determining the deductions of the two-worker family indicate the numerous

68. *See* text accompanying notes 11-21 *supra*.
69. Commissioner v. Turner, 56 T.C. 27, 33 (1971).
70. *See* note 8 *supra*.
71. This reasoning leads to disallowance of a deduction for the cost of transportation to a temporary job, presumably on the ground that the commuting expenses of workers with temporary and permanent jobs were too similar. *See* Rev. Rul. 453, 1976-47 I.R.B. 6.
72. *See* text accompanying note 34 *supra*.

factual issues that might arise, including: (1) the location of the principal place of business of the marital unit; (2) the identification of deductible traveling expenses if no one business is obviously the marital unit's principal place of business; (3) the distances between home and the various places of work; (4) the location of the marital residence; and (5) whether the spouses live apart "temporarily." These disputes will undoubtedly burden the Service, especially since these expenses would be deductible whether or not the standard deduction is elected.[73]

Arguably, administrative problems of the Service are no concern of the courts, and incorporation of these concerns into the tax law should occur by Treasury regulations or agency ruling.[74] But that argument makes unrealistic demands on the administering agency. The regulations process is already overburdened,[75] and although the process for adopting revenue rulings may be modified to approximate the process for adopting regulations,[76] the Internal Revenue Service cannot be relied on as the only institution to be concerned with administrative problems. Nonetheless, the circumstances in which courts should consider administrative problems must be carefully circumscribed. A prudential concern with administration must be weighed against an individual's claim that a statute creates rights for the individual. That weighing process should be left to institutions other than the courts,[77] unless very few claims are likely to be justified or two interpretations of the statute seem equally plausible. Claims by two-worker families to deduct traveling expenses satisfy neither of these conditions.

First, as pointed out earlier,[78] the refusal to consider marriage relevant to defining deductible traveling expenses is not as plausible as taking into account that married couples usually live together. Second, many claims by taxpayers concerning the factual issues set out above are likely to be justified. These issues raise close questions of fact that can be decided in various ways—as illustrated by litigated court cases and revenue rulings indicating how to resolve the difficult factual disputes that might arise if marriage were relevant.[79] The proper role for the courts, therefore, is to allow the deduc-

73. I.R.C. §§ 62(2)(B), (C).

74. *See* 26 C.F.R. § 601.601 (1976) (description of regulations and rulings).

75. *See* Field, *The Regulations Backlog: A Difficult Problem Remains Unsolved*, TAX NOTES, Nov. 22, 1976, at 3.

76. *See* 26 C.F.R. § 601.601(f) (1976).

77. *Cf.* Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975) (criticizes tendency of courts to defer in due process cases).

78. *See* text accompanying notes 51-57 *supra*.

79. The factual issues that can arise if marriage is relevant for defining deductible traveling expenses have occurred in the following contexts: (1) standards for locating the principal place of business, *see* Rev. Rul. 67, 1961-1 C.B. 25; Rev. Rul. 147, 1954-1 C.B. 51; (2) identification of deductible traveling expenses if no single business is obviously the principal place of business,

tion for the additional traveling expenses of the two-worker marital unit based on the assumption that married individuals normally live together and let the agency or the legislature respond, if they consider it appropriate, by adopting rules that deny the deductions.

see Abe Brenner, 26 Tax Ct. Mem. Dec. 1210 (1967); Joseph H. Sherman, Jr., 16 T.C. 332 (1951); (3) distance between home and various business locations, Rev. Rul. 453, 1976-47 I.R.B. 6; (4) whether separation of spouses is temporary, *see* Six v. United States, 450 F.2d 66 (2d Cir. 1971). The only factual issue that arises if marriage is relevant and that presently finds no direct parallel in the litigation and revenue rulings dealing with deductible traveling expenses is the identification of the marital residence to determine which spouse can deduct living expenses when the spouses are temporarily separated. *See* text accompanying note 67 *supra*. Other situations, however, also require identification of a taxpayer's principal residence. *See, e.g.*, I.R.C. § 1034 (nonrecognition of gain when principal residence sold if another principal residence purchased within a certain period of time).