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A TAXPAYER'S HOME—A MATTER OF CHOICE

EMIL JOSEPH VENUTI*

IN AN area of legislation not unknown for sophisticated text and highly complicated, interrelated provisions, the language of section 162(a)(2) of the Internal Revenue Code of 1954—source of the now famous travel expense deduction—approaches a simplicity of noteworthy accomplishment. Yet, this apparent virtue has not resulted in facility of application. On the contrary, interpretation of the statutory language and its application to the wide variety of factual situations which have arisen remains a dynamic challenge for the courts and a continuing source of tribulation for the taxpayer.

The travel expense provision is now approaching the end of its fifth decade as an integral part of the Internal Revenue Code.¹ In this long interim, it has proven a prolific source of litigation. It would appear reasonable to suppose that analysis of the statutory policy and the problems raised by the copious volume of cases should afford sufficient material to identify the underlying problem, formulate the seemingly illusive solution and test the correctness of the suggested answer. The materials which follow are dedicated to this multiple task.

The Internal Revenue Code of 1954 provides a deduction for travel expenses in the following language:

(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—

(1) . . . ;

(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business. . . .²

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¹The Revenue Act of 1918 allowed a general deduction for ordinary and necessary expenses. (Rev. Act 1918, § 214(a)(1); 40 Stat. 1066 (1918)). The travel expense deduction incorporating the "away from home" language first appeared in 1921. (Rev. Act 1921, ch. 136, § 214(a)(1), 42 Stat. 239 (1921)). See also SEIDMAN, LEGISLATIVE HISTORY OF FEDERAL INCOME TAX LAWS 1938-1861, 822 (1938).

²INT. REV. CODE of 1954, § 162(a)(2).

The requirements established by this law are no longer a matter of conjecture. In the case of *Commissioner v. Flowers*,³ the United States Supreme Court interpreted the above language as setting forth three conditions, each a prerequisite in qualifying for deduction. These conditions were stated to be the following:

1. The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This term includes such items as transportation fares and food and lodging expenses incurred while traveling.
2. The expense must be incurred "while away from home."
3. The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade.⁴

Defining their content has not proven equally facile.

The first condition of the *Flowers* rule happily poses no interpretative problems. It merely sets forth the type of expenses which may be deducted. By stating that traveling expenses consist of transportation fares and food and lodging costs, it pronounces an unequivocal term that which is implicit and explicit in the statute.⁵

The second *Flowers* condition—the "away from home" requirement—is, on the contrary, a continuing source of judicial and doctrinal controversy. Essentially the interpretative problem concerns the meaning to be ascribed to the word "home" as used in this provision.

The Revenue Service has consistently defined the term "home" as the taxpayer's work post or principal place of business.⁶ This inter-

³ 326 U.S. 465 (1946).

⁴ *Id.* at 470. A comparison of the text of section 162(a)(2) and the three conditions now referred to as the *Flowers* rule renders immediately apparent that the Supreme Court has simply made a more detailed restatement of the Revenue Code. The Court has been criticized for "bringing down the 'ordinary and necessary'" clause from section 162(a) to subparagraph (2). See the dissenting opinion of Mr. Justice Rutledge in *Commissioner v. Flowers*, *supra* note 3. Repetition of this requirement in the third condition of the *Flowers* rule would not, however, appear to add an element not already controlling. Traveling expenses, like any other business expense, must be ordinary and necessary to qualify for deduction.

⁵ Originally, the Treasury denied a deduction for meals and lodgings regardless of the business purpose. "If the trip is on business, the railroad fares becomes business instead of personal expenses, but meals and lodgings continue to be living expenses and are not deductible in computing net income." (Treas. Reg. 45, art. 292, 21 Treas. Dec. Int. Rev. 241 (1919)). The law was broadened in 1921 to specifically include a deduction for food and lodging. (Rev. Act. of 1921, § 214(a)(1), 42 Stat. 239 (1921)). It has been included in the subsequent Codes of 1939 and 1954 as sections 23 and 162(a)(2) respectively.

⁶ See 1956 Rev. Rul. 56-49, 1956 INT. REV. BULL. No. 8, at 6; 1955 Rev. Rul. 55-604, 1920-2 CUM. BULL. 49; 1954 Rev. Rul. 54-497, 1920-2 CUM. BULL. 75; G.C.M. 23672, 1943 CUM. BULL. 66; I.T. 3314, 1939-2 CUM. BULL. 152.

pretation, which confers a special tax sense to the word, is commonly referred to as the "tax home" or "duty post" definition. It has found approval in the Tax Court and in the Fourth Circuit.⁷ In contrast to this view, the Second, Fifth, Eighth and Ninth Circuits all boast decisions which have preferred a literal interpretation of the term "home" and have equated it with the residence of the taxpayer.⁸

The situation has not remained one of clear dichotomy. The conflict has been further complicated by the introduction of exceptions to the "duty post" definition. These exceptions consist principally of the acceptance and use of the "residence" definition under certain conditions.⁹ In addition, circuits which originally espoused the "residence" interpretation appear to have accepted the "duty post" definition in more recent years.¹⁰ The Supreme Court has chosen not to clarify the resulting ambiguity although it has had repeated occasion to do so.¹¹

The current state of the law is one where the contradictory "work post" and "residence" definitions of "home" continue to find official recognition in the nation's forums. Although it appears that the "duty post" definition has gained supremacy,¹² a growing list of exceptions recognize the taxpayer's residence as his "home." Consequently, confusion and instability reign in this important area of tax law.¹³

⁷ *Barnhill v. Comm'r*, 148 F.2d 913 (4th Cir. 1945); *A. Cunningham*, 22 T.C. No. 906 (1954); *M. J. Carroll*, 20 T.C. No. 382 (1953); *Walter J. Priddy*, 43 B.T.A. 18 (1940); *Mort L. Bixler*, 5 B.T.A. 1181 (1927).

⁸ *Comm'r v. Janss*, 260 F.2d 99 (8th Cir. 1958); *O'Toole v. Comm'r*, 243 F.2d 302 (2d Cir. 1957); *Flowers v. Comm'r*, 148 F.2d 163 (5th Cir. 1945), *rev'd on other grounds*, 326 U.S. 465 (1946); *Wallace v. Comm'r*, 144 F.2d 407 (9th Cir. 1944).

⁹ *Chandler v. Comm'r*, 226 F.2d 467 (1st Cir. 1955); *Emmert v. United States*, 146 F. Supp. 322 (S.D. Ind. 1955); *E.G. Leach*, 12 T.C. 20 (1949); *Harry F. Schurer*, 3 T.C. 544 (1944).

¹⁰ *See O'Toole v. Comm'r*, 243 F.2d 302 (2d Cir. 1957) as opposed to *Coburn v. Comm'r*, 138 F.2d 763 (2d Cir. 1943).

¹¹ *Peurifoy v. Comm'r*, 358 U.S. 59 (1958); *Comm'r v. Flowers*, 326 U.S. 465 (1946).

¹² The *Wallace* and *Flowers* (5th Cir.) decisions, and the *Coburn* decision have not been expressly overruled. Each stands as authority for the "home equals residence definition." Yet, there appears to have been only one mention of the residence definition since the Supreme Court handed down its opinion in the *Flowers* case. *See Summerour v. Allen*, 99 F. Supp. 318 (M.D. Ga. 1951). In contrast, the idea of a special tax meaning of "home" as equivalent to "duty post" has been present in most decisions. *See also*, 43 VA. L. REV. 59, 62-63 (1957).

¹³ "Despite the plain language of Section 162(a)(2), I.R.C. 1954, allowing meals and lodgings while away from home in pursuit of business, application of the statutory provisions in a way that makes economic sense has often proven difficult. Efforts of taxpayers, the Commissioner of Internal Revenue and the Courts have produced a hodgepodge of rules, tests and theories, thus leaving a series of irreconcilable decisions." *Suzanne Waggener v. Comm'r*, 22 CCH Tax Ct. Mem. 9 (1963).

Finally, we come to the third condition of the *Flowers* rule. The "in pursuit of business" requirement should actually involve negligible problems of interpretation. It simply requires that the cause of traveling expenses be a business rather than a personal one. In the words of the *Flowers* opinion: "This means that there must be a direct connection between the expenditure and the carrying on of the trade or business. . . ."¹⁴ Non-fulfillment of this requirement was held to be the basis for disallowing a deduction in the *Flowers* case. In speaking to the issue, the Court suggested a test for determining compliance with this requirement. It stated that the "exigencies of business rather than the personal conveniences and necessities of the traveler must be the motivating factors" of the expense.¹⁵ It would appear, therefore, that the matter has been settled by judicial pronouncement from the nation's highest tribunal.

Some commentary is required, however; for, although the "business" requirement has not sparked great controversy, it would appear to be the basis of the confusion and contradiction encountered in the decisions. It is submitted that it has been misunderstood and misapplied. In many cases it has been so widely interpreted as to usurp the function of the "away from home" requirement while in others, so narrowly construed as to engender still further problematical subareas. The functions of the "home" and "in pursuit of business" conditions are, in reality, closely interrelated. Clarification of the former will automatically place the latter condition in proper perspective.

"HOME"—THE DEFINITIONAL PROBLEM

From a technical standpoint, the definitional controversy surrounding "home" is relatively unimportant. It is clear that either the "work post" or "residence" interpretation provides a mechanical test which permits an expedient resolution of the cases. In contrast, its substantive reflections are critical. The existing state of the law is the symptom of an urgent problem—the search for a definition of "home" which is capable of consistently effectuating statutory policy.

If the "duty post" and "residence" definitions had been born as a result of differing appraisals of legislative policy, the task of defining "home" would be comparatively simple. One would evaluate the alter-

¹⁴ *Comm'r v. Flowers*, 326 U.S. 465, 470 (1946).

¹⁵ *Id.* at 474.

native views, adopt the most valid and espouse the respective definition. The cases, however, lead to the troubling conclusion that, in general, the courts have acted upon a similar understanding of the statute's policy. This is made clear by the example of the Tax Court. A traditional bastion of the "work post" definition, it was also instrumental in introducing an important exception to that rule which recognizes the taxpayer's residence as his "home."¹⁶ In doing so, however, it did not abandon its original concept of the tax policy involved. On the contrary, the continued use of both definitions by the same court is a tacit admission that neither the "duty post" nor "residence" definition is exclusively capable of effectuating the statute's policy, and that both, in fact, are currently being employed to do so.

In the light of this consideration, the ultimate problem of defining "home" assumes its proper perspective. It becomes immediately apparent that the conflict between the contending "work post" and "residence" definitions is more illusory than real. The fallacious question of which is to prevail can therefore be set aside. Instead, inquiry must be directed to isolating the touchstone which induces the courts to use the alternative definitions under varying circumstances. The term "home" quite evidently cannot refer to a single physical situs; rather, it appears to be expressive of a relationship between the taxpayer and a given locality. The challenge of defining "home" is embodied in the task of identifying the essence of this relationship. The definition of "home" to be adopted must consist of a test or method of analysis which will incorporate the criterion so identified.

LEGISLATIVE POLICY

Our concern with the meaning of "home" and "in pursuit of business" takes us first to the primary fount of statutory interpretation—legislative history. Consultation of the available materials, admittedly scant, indicates that the travel expense deduction was originally envisioned as a relief section, motivated by the plight of a particular segment of the taxpaying population—traveling salesmen and other commercial travelers.¹⁷

¹⁶ The exception referred to is the so-called temporary-indefinite exception which made its appearance in the cases of *Harry F. Schurer*, 3 T.C. 544 (1944) and *E. G. Leach*, 12 T.C. 20 (1949).

¹⁷ Discussion with regard to the instant deduction in the House of Representatives referred to this legislation as a relief section in relation to salesmen and other commercial

Despite this point of departure, Congress did not restrict the deduction to salesmen. As indicated by its generic language, section 162(a)(2) was drafted to provide relief for all taxpayers meeting certain objective requirements. Thus, every taxpayer who meets the three conditions of the *Flowers* rule is entitled to a deduction.¹⁸

Although the policy of section 162(a)(2) may be characterized as generically remedial, the answer to its specific purpose requires an understanding of the particular tax inequity which was sought to be abolished. The injustice in question was most frequently suffered by commercial travelers and epitomized in the case of the traveling salesman. Since a comparison of the latter's situation with non-traveling taxpayers was primarily instrumental in focusing attention on the problem, it would follow that the same comparison should once again provide the key to the specific problem demanding resolution, hence, the legislative policy.

THE NON-TRAVEL OR "AT HOME" SITUATION

As a general rule, transportation, food and lodging costs are considered personal, non-deductible expenses.¹⁹ The theory underlying their non-deductible status is that they are dictated by the personal needs or desires of the taxpayer and are unrelated to the production of income. This is fundamentally true of the so-called living expenses (food and lodging) since the need which gives rise to them occurs independently of work or business exigencies. It is true to a lesser extent with reference to the sums expended on transportation to and from work, commonly referred to as the commuting expense. It might well be observed when speaking of these expenses that the transportation cost would not be encountered "but for" the taxpayer's work and business activities. The commuting expense bears inherent qualities of a business character. Despite this, it may and generally does reflect facets which lend to it a predominantly personal nature.

travelers. It was believed that in such cases, travel expenses were a proper deduction and that the cost of meals and lodgings should also be allowed deduction. See 61 CONG. REC. 5201, 6673 (1921); SEIDMAN, *supra* note 1, at 822 (1938); see also 21 MO. L. REV. 183 (1956); 43 VA. L. REV. 59, 60 (1957).

¹⁸ The legislative history is far from clear concerning which particular classes of workers other than traveling salesmen were meant to be satisfied. It appears that Congress did mean to give a tax benefit to those whose jobs required them to incur extra expenses because of the practical necessity of living away from home. See SEIDMAN, *supra* note 1, at 822. See also 107 U. PENN. L. REV. 871 (1959).

¹⁹ INT. REV. CODE OF 1954, § 262.

The personal aspect of the commuting expense is readily evident in the case of the non-traveling or "at home" taxpayer. He may be described as the person who lives in the general vicinity of his work and commutes daily to his work. The cost of commuting, like food and lodging costs, will vary widely from one taxpayer to another. These variations may be due to personal reasons such as taste, need or financial position. Personal considerations influence the individual's yearly cost of transportation either through the mode of travel used or the distance involved. Thus, a taxpayer may prefer to commute by auto or taxi rather than public transportation in order to enjoy greater comfort or privacy; he may be forced to utilize such transportation for reasons of health; or he may simply be able to afford the convenience. Again, the taxpayer may prefer to reside in a particular metropolitan or suburban area to enjoy the benefit of climatic differences, social prestige or other advantages. These examples illustrate the fact that commuting costs can and do vary depending upon considerations of an entirely personal nature. To allow a deduction for these expenses would, in effect, enable the taxpayer to charge off the cost of such personal needs to the federal government, that is, ultimately, to his fellow taxpayers. Obviously, tax equity would militate against such a policy.

In the non-travel situation, both commuting and living expenses are hallmarked as predominantly personal expenses, a fact which justifies their inclusion in this non-deductible category.

THE TRAVEL OR "AWAY FROM HOME" SITUATION

Let us now examine the identical expenses within the context of the traveling salesman or travel situation. Taxpayer *T* (traveler), like his counterpart taxpayer *NT* (non-traveler), is a resident in the same city in which they are both employed. Unlike taxpayer *NT*, however, whose job never requires him to leave the city, taxpayer *T* must venture into distant territories for a substantial part of each year. His transportation, food and lodging expenses on these trips are not reimbursed.

For that portion of the year in which both *T* and *NT* are working in the city of their residence, their tax positions are similar. Both maintain a residence at which they incur the bulk of their living expenses and both meet transportation expenses, all of which are non-deductible.

For the period in which taxpayer *T* is on selling trips outside of the city, however, their respective positions alter radically. Taxpayer *NT* simply continues to incur his normal living and commuting expenses. In contrast, taxpayer *T*, in addition to the usual living expenses associated with his residence, must sustain essentially duplicatory costs at the various localities which he visits. In fact, he incurs hotel and restaurant expenses and considerably inflated transportation costs. The result is that for a considerable portion of each year, taxpayer *T* is subjected to a situation which at worst may be described as equivalent to the burden of maintaining two residences and which at best involves increased living expenses and higher transportation costs than would ordinarily be encountered. Under these circumstances, Congress was evidently persuaded that the cost of food, lodging and transportation had become a business expense which was properly deductible. The considerations supporting this conclusion conceivably were those set forth below.

At least one factor which causes otherwise personal transportation, food and lodging expenses to become business expenses is the consideration that they arise in connection with the taxpayer's work or business and are directly caused by it. Thus, although these expenses continue to satisfy highly personal needs, they constitute an increased expense necessitated primarily by a business rather than a personal requirement.

This fact alone, however, could never be sufficient to transform a personal expense into a business expense. If it were, then few such expenses related to a business situation would fail to so qualify. One need only consider the case of any taxpayer called upon to work in an area outside of the general vicinity of his former employment. Simply by continuing to maintain his former residence, each taxpayer might consider himself entitled to the deduction. To permit a deduction under such circumstances, however, would be flagrantly improper. The taxpayer in the above described situation, as most taxpayers actually do, could easily avoid the increased expenses simply by moving to the area of his new work post. This very important possibility, however, is denied to the taxpayer in the hypothetical traveling salesman case. The latter is in no position to avoid the increased expenses in question because he is away for such a short period of time and it would be unreasonable to expect him to move his residence to each of his temporary posts.

The fact is that the taxpayer whose work does not deny him the

alternative of relocation is not forced to sustain additional living and transportation costs for business reasons; where not avoided, they are incurred for motives of personal benefit or pleasure and are thereby non-deductible. Conversely, where the taxpayer is denied the choice of uniting his residence and his work area, for example where his work is of short duration, he clearly does not incur additional expenses by virtue of personal preference; they are unavoidable. Therefore, to rise to the stature of a business expense, the cost of food, lodging or transportation must fulfill two conditions; it must arise in connection with the taxpayer's work or business and be unavoidable.

The special problem which section 162(a)(2) sought to resolve is now clear. The traveling salesman or other taxpayer who was unable to deduct costs which met the above qualifications was incurring valid business expenses, but was being denied the corresponding deduction. The policy of the travel expense deduction may then be described as that of relieving the taxpayer of the burden of sustaining increased food, lodging and transportation expenses which have become valid business expenses.

HOME—THE REASONABLE CHOICE ANALYSIS

In keeping with the foregoing interpretation of legislative policy, we should expect to find the dual requirements for its implementation incorporated into section 162(a)(2). It is not surprising, therefore, to recognize these factors as comprising the second and third conditions of the *Flowers* rule.

The "in pursuit of business" requirement is self-evident. As indicated in the preceding discussion, it merely requires that the expenses in question arise in connection with the taxpayer's work, trade or business, as opposed, for example, to a vacation or other non-business endeavor. The element of unavoidability, perhaps somewhat less obviously, is embodied in the "away from home" requirement of that same rule. It will be remembered that in comparing the "at home" and the "away from home" hypothetical situations, the factor which definitely distinguished the latter from the former was the unavoidability of the expenses, derived from the taxpayer's lack of choice in making his residence at the work post under discussion. Consequently, a taxpayer is "at home" with regard to a particular duty post when he has the choice of making his residence there; he is "away from home" with regard to

that same duty post if such a reasonable choice is lacking. In essence, a taxpayer's "home" is a matter of choice.

An application of this "choice analysis" to the cases would take the following line of reasoning. The law presumes that a taxpayer will establish his residence in close proximity to his work. That is to say, it presumes that the taxpayer enjoys the reasonable choice of so acting. It follows as a matter of course that the taxpayer's duty post will be considered his "home." It also follows that where such a choice exists, the duty post will represent the taxpayer's "home" regardless of whether or not he actually exercises his prerogative.

The presumption that the taxpayer enjoys a reasonable choice of locating his residence near his work post, however, is rebuttable. Situations will arise, as exemplified by the case of the traveling salesman, in which the taxpayer is denied this choice. If the onus of rebutting the presumption is successfully borne by the taxpayer, his residence rather than his work post will then qualify as his "home."

In the following pages some of the most important and controversial cases to have come before the courts are subjected to the microscope of legal commentary and re-examined through the lens of the "reasonable choice" analysis.

THE "AT HOME" SITUATION—LONG TERM EMPLOYMENT

The classic example of the indefinite or regular employment situation is presented in the case of *Flowers v. Commissioner*.²⁰ The taxpayer (Mr. Flowers), an attorney, was employed as general counsel for a large railroad company. This position apparently constituted his entire professional activity.²¹ The taxpayer's office was located at the railroad's headquarters in Mobile, Alabama; he resided in Jackson, Mississippi. The distance between these two cities varied between 230 and 329 miles, depending upon the mode of transportation employed to make the trip. In the years 1939 and 1940, the taxpayer made thirty-three and forty trips respectively, for a total number of sixty-six and 102 days spent in Mobile, his work post. The taxpayer was not reimbursed for the transportation, food and lodging expenses incurred on these trips, an understanding to this effect having been reached at

²⁰ 3 CCH Tax Ct. Mem. 803 (1944).

²¹ *Id.* at 806. The opinion states with regard to his Jackson law firm that he no longer participated in the firm's business or shared in its profits.

the time he accepted employment. Mr. Flowers claimed a travel expense deduction for the pertinent expenditures.

This deduction was initially refused by the Commissioner and the decision was approved in the Tax Court.²² On appeal to the Fifth Circuit, however, the Tax Court's holding was reversed, the Court of Appeals being of the opinion that the proper definition of "home" was not a taxpayer's place of business, but rather his place of residence.²³ By virtue of the latter definition, the taxpayer qualified as being "away from home" when the expenses were incurred.

In the Supreme Court, the Fifth Circuit was in turn reversed. In confirming the Tax Court, however, the Supreme Court approved neither the "duty post" definition of "home" employed by the Commissioner and the Tax Court nor the "residence" definition used by the Court of Appeals. It skillfully avoided arraigning itself with either view. Instead, it preferred to rest its decision on the theory that the taxpayer had failed to meet the statutory requirement that the expenses be incurred in the pursuit of a trade or business.²⁴

The considerations which prompted the Court to classify the expenditures as personal rather than business in nature are expressed in the opinion as follows:

Jackson was . . . [the taxpayer's] regular home. Had his post of duty been in that city the cost of maintaining his home there and of commuting or driving to work concededly would be non-deductible living and personal expenses lacking the necessary direct relation to the prosecution of the business. The character of such expense is unaltered by the circumstance that the taxpayer's post of duty was in Mobile, thereby increasing the cost of transportation, food and lodging. Whether he maintained one abode or two, whether he traveled three blocks or three hundred miles to work, the nature of these expenditures remained the same.²⁵

The opinion then proceeded to indicate that the expenses were incurred solely as the result of the taxpayer's desire to maintain a home in Jackson while working in Mobile and that the expenditures were not for the benefit or at the request of the employer. In view of these facts, the Supreme Court concluded that the expenses were motivated not by exigencies of the business, but rather by the personal desires and necessities of the taxpayer. Mr. Flowers was thus denied a deduc-

²² 3 CCH Tax Ct. Mem. 803 (1944).

²³ *Flowers v. Comm'r*, 148 F.2d 163, 164 (5th Cir. 1945).

²⁴ *Comm'r v. Flowers*, 326 U.S. 465 (1946).

²⁵ *Id.* at 473.

tion for having failed to satisfy the "in pursuit of business" requirement.

Let us now evaluate these same facts under the "reasonable choice" analysis. An expense satisfies the "in pursuit of business" requirement when there is a causal relation between the taxpayer's work and the expense, and this relation exists when the expense arises in connection with the trade or business of the taxpayer. Since the expenses under discussion did so arise, it would appear that they were incurred "in pursuit of business."

The crucial question is whether they also qualify as having been incurred "away from home." Beginning with the legal presumption that the taxpayer enjoyed the reasonable choice of making his residence at his work post in Mobile, we proceed to consider any evidence which would successfully rebut it. None presents itself. The post was of long term duration, eliminating the possibility of temporary work as an obstacle to the exercise of the taxpayer's choice; nor do other factors which might render it unreasonable to expect the taxpayer to relocate suggest themselves.²⁶ Consequently, the taxpayer did not qualify as being "away from home" when the expenses were incurred.

Application of the choice analysis, interestingly enough, does not result in a different decision. On the contrary, it supports the view that a deduction was properly disallowed because the expenses were of a personal nature. The difference lies in the basis on which said expenditures are judged to be personal expenses.

It must be remembered that only the fulfillment of both the "away from home" and "in pursuit of business" conditions enables an expense to qualify as a business expense: it follows that a given expense will remain personal in character if it fails to qualify with regard to either of these two conditions. When the Supreme Court concluded that the taxpayer's expenses were personal because motivated solely by Mr. Flowers' desire to maintain a residence in Jackson, it was actually concerned with the "avoidability" of the expenses, hence the "away from home" requirement. The expenses were personal not because incurred other than in pursuit of business but rather because not incurred away from home.²⁷

²⁶ In substantial agreement, see Comment, *Traveling Expenses While Away from Home*, 33 S. CAL. L. REV. 307, 310 (1960) where the author notes that Mr. Flowers' permanent employment permitted him to move his residence to Mobile.

²⁷ The following cases also concern situations of indefinite employment in which the

It is clear that the "in pursuit of business" requirement was actually utilized to accomplish the work of the "away from home" requirement. In a case of lesser import, this would have been of small consequence. In a landmark decision such as the *Flowers* case, it automatically assured a long chain of conforming decisions, each adding the weight of its authority to the confusion which was glossed over by the inherent justice of the *Flowers* precedent.

THE "AWAY FROM HOME" SITUATION—TEMPORARY OR
SHORT TERM EMPLOYMENT

The regular employment or "at home" situation illustrated in the *Flowers* case epitomizes the type of situation in which the taxpayer enjoys the reasonable choice of uniting his residence and his duty post. Those cases where this choice may be lacking are now deserving of some attention.

The factor which most frequently denies the taxpayer the critical choice is the one which was present in the hypothetical case of the traveling salesman discussed above—the temporary aspect of the work post. It might be said to have inspired the tax provision under discussion. It also constitutes a recurring common denominator in the construction trade cases and others which deal with commercial travelers in all echelons of the business world. As might be expected, the temporary factor posed an almost constant challenge to the uncompromising "home" equals "duty post" definition promulgated by the Commissioner and the Tax Court. As such, it served as protagonist in the development of various methods of evading the harsh thrust of the aforementioned rule. The result was a line of cases which culminated in the now famous temporary-indefinite exception.

The vanguard of the decisional sequence, referred to above, produced a minor current of federal court opinions which interpreted "home" as being equivalent to the taxpayer's residence. One such case was *Coburn v. Commissioner*.²⁸ Mr. Coburn, a movie actor whose

taxpayer was properly disallowed a deduction: *LeTowt v. Comm'r*, 328 F.2d 621 (3d Cir. 1964); *Ford v. Comm'r*, 227 F.2d 297 (4th Cir. 1955); *Hammond v. Comm'r*, 213 F.2d 43 (5th Cir. 1954); *Carragan v. Comm'r*, 197 F.2d 246 (2d Cir. 1952); *Andrews v. Comm'r*, 179 F.2d 502 (4th Cir. 1950); *York v. Comm'r*, 160 F.2d 385 (D.C. Cir. 1947); *Benson v. Goodwin*, 164 F. Supp. 70 (E.D. Ark. 1958); *Raymond E. Kershmer*, 14 T.C. 168 (1950); *B. H. Albert*, 13 T.C. 129 (1948); *Virginia Ruis Carranza (Zuri)*, 11 T.C. 224 (1948); *William W. Todd*, 10 T.C. 655 (1948).

²⁸ 138 F.2d 763 (2d Cir. 1943).

principal place of business and residence were both situated in the New York area, spent a total of 263 days making a movie on the West Coast. While on location, he returned to New York twice for business reasons. At the year's end, he claimed a deduction for the cost of his transportation to and from California, as well as food and lodging expenditures incurred there. The deduction, disallowed by the Tax Court,²⁹ was allowed by the Court of Appeals of the Second Circuit.³⁰ The latter court decided that the taxpayer had incurred the expenses while "away from home." In referring to this issue, the court said: "In the ordinary meaning of the word, Mr. Coburn's "home" was in New York, not in California . . . and . . . nothing in the statute bears evidence of any unusual meaning. . . ." ³¹

The truth is that the court was facing one of its first encounters with a fact situation involving temporary employment.³² The rigid "duty post" definition of "home" was incapable of allowing the deduction to which the court believed that the taxpayer was entitled. The fact that the court considered and then discarded the use of the "duty post" definition is suggested by its comments to the effect that:

[A]ssuming that the words of the statute may be given a special "tax sense," we are convinced that a taxpayer's home, even in such a sense, ought to be limited to the place where he is regularly employed or customarily carries on business during the taxable year.³³

Despite this suggestion to modify the "duty post" definition, the Second Circuit Court of Appeals based its decision on a literal interpretation of the statute. This may have presented itself as the most expedient and acceptable manner of justifying the deduction which it felt compelled to allow.

A similar fact situation came before the Ninth Circuit. In *Wallace v. Commissioner*,³⁴ the taxpayer, a movie star, was a resident of San Francisco, California. She worked in Hollywood, 500 miles away, for six months while making a film. Also espousing a literal interpretation of the word "home," the court of appeals allowed the deduc-

²⁹ Charles Coburn, 46 B.T.A. 1280 (1942).

³⁰ Coburn v. Comm'r, 138 F.2d 763 (2d Cir. 1943).

³¹ *Id.* at 764.

³² For a similar evaluation of the fact situation see *Barnhill v. Comm'r*, 148 F.2d 913 (4th Cir. 1945).

³³ Coburn v. Comm'r, *supra* note 30, at 764.

³⁴ Wallace v. Comm'r, 144 F.2d 407 (9th Cir. 1944).

tion. Once again, the temporary aspect of the work was in all probability the factor which motivated the court to permit the deduction.

Interestingly enough, the identical result would have ensued pursuant to the use of the "reasonable choice" analysis. In both cases, the taxpayer would also have been found to be "away from home" while at his duty post. The important difference lies in the basis of this determination. The taxpayers were not "away from home" because the statute should be read literally. On the contrary, the word "home" as used in the travel expense provision definitely has a special tax meaning which is dependent upon the choice factor. It is submitted that the taxpayer qualified as "away from home" because the temporary character of his work denied him the reasonable choice of establishing a residence at this particular work post.³⁵ Thus, one apparent benefit to be derived from the use of the choice analysis is the avoidance of a substitute basis of decision which will necessarily prove limited and inadequate in future situations.³⁶

THE TEMPORARY-INDEFINITE EXCEPTION

The *Coburn* and *Wallace* decisions remained the principle exponents of that judicial current which supported a literal interpretation of the taxpayer's "home" as equivalent to his residence. This faction was not destined to find a strong following in its role of opposition to the "duty post" interpretation of "home." It did, however, serve the extremely useful function of pointing up the inadequacy of the "duty post" definition in resolving some cases and focused attention on the problem posed by the temporary employment situation for which the said "duty post"

³⁵ The following cases also deal with temporary employment situations which denied the taxpayer the reasonable choice of relocating his residence to a given work post and in which the deduction was properly allowed: *Schreiner v. McCrory*, 186 F. Supp. 819 (D.C. Neb. 1960); *Scott v. Kelm*, 110 F. Supp. 819 (D.C. Minn. 1953); *Alvis Joseph Weidekamp*, 29 T.C. 16 (1957); *Frank Fisher*, 24 T.C. 269 (1955); *Horace E. Podems*, 24 T.C. 21 (1955); *E. G. Leach*, 12 T.C. 20 (1949). In the following cases the deduction was denied but should have been allowed: *James v. United States*, 176 F. Supp. 270 (D.C. Nev. 1959); *Grover Tyler*, 13 T.C. 186 (1949); *Moses Mitnick*, 13 T.C. 1 (1949); *Mort L. Bixler*, 5 B.T.A. 1181 (1927); *Kenneth Armstrong*, 22 CCH Tax Ct. Mem. 1179 (1963).

³⁶ It is worth noting at this point that any conflict between the *Flowers* decision and the *Coburn* and *Wallace* opinions is merely apparent. The former case properly denied a deduction because having the choice of making his residence at his duty post, Mr. Flowers qualified as "at home"; a denial of this same choice to taxpayers *Coburn* and *Wallace* deriving from the temporary aspect of their work properly permitted them to be classified as "away from home" and entitled them to a deduction.

definition made no provision. The problem, unsatisfactorily resolved by a literal interpretation of "home," subsequently found a more practical and responsive answer in the temporary-indefinite rule.

The so-called temporary-indefinite rule, as such, appears to have first been formulated in the case of *Harry Schurer*.³⁷ This taxpayer, a journeyman plumber, had resided and worked in the Pittsburgh, Pennsylvania area for many years. In 1941 he was requested by his union to work outside this area. He accepted, working at various sites in Pennsylvania, Maryland and West Virginia for periods of four, nine and thirty-three weeks respectively. Relying heavily upon the *Coburn* opinion, the court adopted the modified "regular area of employment" definition originally suggested by the Second Circuit. In effect, it held that a temporary employment post away from this area would be "away from home."

The case of *Leach v. Commissioner*³⁸ followed the *Schurer* case. In this case, the taxpayer and his wife resided in Florence, Alabama where they had lived with their one child for a number of years. Mr. Leach was employed by a construction company in 1945 to erect structural steel. He had no station of regular employment for that year. His work required him to be away from Florence for forty-nine weeks in 1945 and for other, shorter periods at places so remote from Florence that he had to rent lodgings at each place. The court allowed a deduction for travel expenses. In finding the taxpayer "away from home," it said:

The petitioner had no regular post of duty or place of regular employment during 1945 away from Florence which could be called his "home" or which he could be required to regard as his home for the purposes of Sec. 23 (a)(1)(A). None of the places at which he had temporary employment during the year was his "home." The expenses were unavoidable, reasonable and necessary while away from "home" in pursuit of his trade.³⁹

Once again, the court had held a temporary post as being "away from home."

The approach of the *Schurer* and *Leach* cases was preferable to that of *Coburn* and *Wallace*. It discarded the residence interpretation of "home" which could only prove equally as rigid and inadequate as the categorical "duty post" definition.

The contribution of these decisions did not, however, terminate here.

³⁷ 3 T.C. 544 (1944).

³⁸ 12 T.C. 20 (1949).

³⁹ *Id.* at 21.

One of their most significant accomplishments lay in the fact that they first expressly acknowledged the temporary factor as one which prevented a given duty post from being considered as a taxpayer's "home." In addition, with the *Leach* case, the determination of the "away from home" status first transferred its emphasis from the situs which could qualify as "home" to that which could not. Thus, in the *Schurer* case, the taxpayer had a regular work post which qualified as "home" from which the taxpayer was away while at his temporary employment post. But in the *Leach* case, the taxpayer had no regular duty post from which he was away. Nonetheless, the court found him "away from home" at his temporary post simply because the latter post could not qualify as a regular or "home" post. In effect, attention was focused upon the relationship between a taxpayer and the duty post in question rather than the fact that the taxpayer was away from a given situs. The result was that in the *Leach* case, if the taxpayer did have a "home," only his residence could qualify as such. The decision implicitly recognized that both the taxpayer's regular duty post and his residence may be his "home," depending on the regular or temporary aspect of the post in question.

As in the cases of *Coburn* and *Wallace*, the choice analysis would result in taxpayers Schurer and Leach being permitted a deduction. In the latter as well as the former, the temporary aspect of each taxpayer's work post was instrumental in denying him the reasonable choice of bringing his abode to his work post.

Although none of these cases had spoken in terms of the choice analysis, the temporary factor had thus far been properly viewed as relating to the question of "home" and the "away from home" requirement. Then came the *Peurifoy* case, however, in which the Supreme Court seemed instead to have considered the temporary-indefinite rule as an exception to the "in pursuit of business" requirement.⁴⁰ The rationale behind this conclusion was supposedly the following. There was an initial assumption that the "in pursuit of business" requirement meant "in pursuit of the employer's business." According to this interpretation, all expenses incurred at the employer's behest would automatically qualify as "in pursuit of business"; none of the expenses incurred at the taxpayer's direction could so qualify. The Supreme Court then took up consideration of the temporary-indefinite rule, which in permitting a

⁴⁰ *Peurifoy v. Comm'r*, 358 U.S. 59 (1958).

travel expense deduction had indirectly decided that taxpayer motivated expenses qualified as "in pursuit of business." The Court concluded that this constituted an exception which had been engrafted to the third condition of the *Flowers* rule by the Tax Court and that its thrust was to allow non-employer motivated expenses to qualify as "in pursuit of business" when encountered at a temporary work post.

The fact is that the "in pursuit of business" condition should not be restricted to the employer's needs or exigencies. On the contrary, the requirement was specifically intended to permit a deduction for expenses dictated by the needs of the taxpayer's business. The Supreme Court itself underscored this in discussing the essence of the "in pursuit of business" requirement in the *Flowers* opinion when it said: "there must be a direct connection between the expenditure and the carrying on of the trade or business of the *taxpayer* or his employer."⁴¹ Judicial language could not aspire to greater clarity.

Further, a consideration of the ultimate consequences of this interpretation in a practical situation convincingly illustrates its untenability. Let us assume that on January first a taxpayer employed in a midwestern office was transferred by his employer to the company's New York offices to replace a man who had been drafted for military service. The transfer was made with the understanding that the taxpayer would be returned to his former post immediately upon the return of the individual he was replacing. The taxpayer lived in New York City hotels while his family remained in the Midwest inhabiting the family residence in that area. The above stated interpretation of the third *Flowers* rule would allegedly permit a deduction for New York living expenses on the theory that employer-motivated travel expenses are incurred "in pursuit of business." Yet in the case from which the above facts were taken, the deduction was denied.⁴²

A deduction would also be denied were the decision taken pursuant to the choice analysis. It is agreed that the expenses were incurred "in pursuit of business." This determination would be independent, however, of the indefinite or temporary aspect of the work post. Actually, the latter consideration should never affect that determination

⁴¹ *Comm'r v. Flowers*, 326 U.S. 465, 470 (1946).

⁴² See *John D. Johnson*, 8 T.C. 303 (1947). Conversely, in the case of *Crowther v. Comm'r*, 28 T.C. 1293 (1957), a deduction was permitted and thus considered as in pursuit of business despite the fact that it was in the sole interest of the employee and was not temporary.

since the element of time should go to the question of avoidability of the expense (away from home requirement) rather than the question of causation (in pursuit of business requirement). Since the taxpayer's assignment in this case was of long term or indefinite duration and because no other factors denied him the choice of relocating to New York, he would have been "at home" at his duty post. He thus would be disqualified for deduction, having failed to satisfy the pivotal second condition of the *Flowers* rule.

The assumption that "in pursuit of business" should be read as "in pursuit of the employer's business" cannot but fail.⁴³ No distinction should be made between employer and employee motivated expenses and no exception is needed to qualify non-employer motivated expenditures under the "in pursuit of business" requirement.⁴⁴

At this point it is natural to inquire into how such a misconception could have arisen. The answer would appear to be found in the *Flowers* opinion. A reading of its language uncovers words to the effect that Mr. Flowers' expenses were personal because they were not required by his employer. In then disallowing a deduction on the theory that said expenses failed to meet the "in pursuit of business" requirement, the implication was that travel expenses had to arise by virtue of the employer's needs in order to qualify as having been incurred "in pursuit of business." As noted in the foregoing discussion of the *Flowers* opinion, however, the expenses there *did* satisfy the "in pursuit of business" requirement and failed to qualify as a deductible business expense only because avoidable and thereby not incurred "away from home." Business expenditures must meet both the "home" and "business" requirements. Failure to meet either condition means that the expense remains a personal one. Thus, the fact that Mr. Flowers sustained certain transportation and living expenses by choice prevented them from qualifying as business expenses but did not prevent them from meeting the "in

⁴³ The following cases wrongfully disallowed a deduction on the basis of a mistaken interpretation of the "business" condition: Grover Tyler, 13 T.C. 186 (1949); Walter G. Pauley, 13 CCH Tax Ct. Mem. 1033 (1954); Vern W. Pratt, 11 CCH Tax Ct. Mem. 335 (1952); Robert L. Brassfield, 11 CCH Tax Ct. Mem. 582 (1952); John W. Ground, 11 CCH Tax Ct. Mem. 484 (1952).

⁴⁴ The view that there should be no distinction made between employer-employee motivated expenses has been submitted, Comment, *supra* note 26. The position that the temporary factor should apply to neither is hereby endorsed if qualified to mean that it is not relevant to compliance with the "in pursuit of business" requirement. It does remain valid, however, with respect to the "away from home" question, in which case it applies equally to employer and employee motivated expenditures.

pursuit of business" requirement. The distinction is a narrow one but crucial in its ramifications. The gloss is understandable but if avoided, would have spared considerable confusion and contradiction in the subsequent case law.

A perusal of the Court's reaction to the temporary employment situation has permitted us to trace the genesis of the temporary-indefinite exception. As demonstrated in the course of the discussion, keeping in mind its exclusive relevance to the "away from home" condition, the temporary factor remains a consideration of primary importance in determining the taxpayer's "away from home" status under the choice analysis.

THE "AWAY FROM HOME" SITUATION—THE DUAL BUSINESS FACTOR

Still another situation in which the taxpayer will frequently be found to maintain his residence in an area other than that of a given work post is the dual business situation. This type of case is well illustrated by *Chandler v. Commissioner*.⁴⁵ The taxpayer, a high school principal, was employed and resided in Attleboro, Massachusetts. He was simultaneously employed in teaching night school at a university in Boston, approximately thirty-seven miles distant. In issue were the transportation expenses connected with the Boston teaching post. The Tax Court disallowed the taxpayer's claim but the First Circuit Court of Appeals reversed this decision and granted the deduction.⁴⁶

An examination of these facts under the choice analysis indicates that the first and third conditions of the *Flowers* rule would clearly be fulfilled. The only question in issue would be the taxpayer's "away from home" status. The legal presumption that the taxpayer establish his residence near his duty post was not rebutted by the duration of his secondary job since it was long term and posed no difficulty in this regard. Nonetheless, a problem lay in the fact that the taxpayer was blessed with two such regular posts and the exercise of a choice with regard to one automatically precluded such action with regard to the

⁴⁵ *Chandler v. Comm'r*, 23 T.C. 653 (1955).

⁴⁶ *Chandler v. Comm'r*, 226 F.2d 467 (1st Cir. 1955). The Chandler opinion relied heavily upon the case of *Sherman v. Comm'r*, 16 T.C. 332 (1951). In that case, the taxpayer was required to spend substantial amounts of time in each of two cities and it was held that he was entitled to deduct the expenses incurred at the business removed from his residence because of the impossibility of being in two widely separated business localities at the same time.

other. Mr. Chandler was thereby denied the reasonable choice of living in the vicinity of at least one post by the existence of a second. Consequently, he would be properly considered "away from home" at his Boston teaching post and granted a deduction.⁴⁷

The *Chandler* case presented a situation in which each business post was connected with a different employment.⁴⁸ A variation of these facts occurs when the taxpayer has dual posts arising from a single employment as in the case of *Moss v. United States*.⁴⁹ Mr. Moss, a Public Service Commissioner, had his main office at Columbia, South Carolina. He lived in York, South Carolina, however, the district from which he was elected and in which the law required him to maintain his residence. His work required him to perform a part of his duties in Columbia and a part of them in York. Mr. Moss was allowed a deduction for the meals, lodgings and transportation costs connected with his Columbia, South Carolina post. The court appears to have based its decision on the "necessity doctrine."⁵⁰ It expressly found that the taxpayer did not maintain his abode in York by choice or for reasons of personal convenience but rather because the law required him to do so in relation to the obligations of his employment. Actually, the case also presents a dual business post situation. The taxpayer would have suffered an equally compelling denial of choice in view of the fact that York also constituted a duty post. Thus, although the "necessity doctrine" provides a valid rationale for the decision, it is not the exclusive basis on which a deduction could have been allowed. The taxpayer would have been "away from home" regardless of the legal necessity that he maintain a residence in York.⁵¹

The single employment case which may originally require only

⁴⁷ In contrast to the cases involving temporary work posts where the choice-denying factor is unreasonableness or relative impossibility, in the dual business situation the taxpayer is prevented from making his residence at his work post by physical impossibility.

⁴⁸ See also Joseph W. Powell, 34 B.T.A. 655 (1936).

⁴⁹ 145 F. Supp. 10 (W.D.S.C. 1956).

⁵⁰ The "necessity doctrine" is discussed *infra* in connection with the cases which involve this particular factor.

⁵¹ If the case had been decided as a dual duty post case, the necessity of maintaining an abode in New York would have been relevant in only one respect, the determination of which of the taxpayer's two posts should qualify as "home." As a rule, the taxpayer's principal place of business is designated as his "home" and if Columbia had so qualified, then the necessity factor would have been crucial in making an exception to this rule and justifying the designation of York as "home."

desultory travel can also develop to the point where the travel between two or more fixed posts becomes so regular that the situation is indistinguishable from the dual work post cases. The change, however, is of little importance from the viewpoint of taxability because in either case the taxpayer is entitled to a deduction.

In some instances, the post originally visited only temporarily in the course of employment may become the taxpayer's new single duty post. The case of *Chester D. Griesemer*⁵² presents such a development. Mr. Griesemer, who resided in Brooklyn, worked with a company whose principal offices were in New York City. As manager of the firm's European interests, the taxpayer was based in New York, but yearly made several trips abroad. In 1918 he was compelled to remain in France because of business difficulties and he continued to live in Europe throughout 1919 and 1920. During this period, he continued to maintain his Brooklyn residence where he supported his mother and sister. In Europe, he first lived in a hotel but later took an apartment with a cook and housekeeper. The taxpayer claimed as a deduction the excess of his European expenses over his ordinary expenditures at his Brooklyn residence. It was initially disallowed by the Commissioner but was later permitted by the Tax Court.

The result would have been much less to the taxpayer's liking had the case been decided pursuant to the choice analysis. Although the trip may have been temporary when originally contemplated, it became indefinite or long term in duration at some point during the taxpayer's three year permanence in Europe, probably when he foresaw the feasibility of taking an apartment with a cook and housekeeper. As such, France became his "home" under the choice analysis, for neither considerations of time nor dual employment effectively denied the taxpayer the choice of making his residence there.⁵³ The taxpayer's "home" being in France, none of the expenses incurred there would qualify for deduction. The residence which he continued to maintain in Brooklyn for his mother and sister would be a purely personal expense, completely unconnected with his work. The expenditures related to this second

⁵² 10 B.T.A. 386 (1928).

⁵³ It would be difficult to sustain the deduction on the theory that this was a dual business situation since there is no evidence that the taxpayer was required to spend or actually spent any portion of his time in New York. In effect, his duty post had moved abroad and with it his "home."

abode would likewise be non-deductible, for they now fail to meet both the second and third requirements of the *Flowers* rule. Consequently, the taxpayer would be entitled to no deduction.⁵⁴

THE NECESSITY DOCTRINE—LEGAL IMPOSSIBILITY

The case of *Emmert v. United States*⁵⁵ presented a fact situation very similar to that of the *Flowers* case. Justice Emmert, a member of the Supreme Court of Indiana, had a single duty post and maintained his residence in an area far removed from that post. In fact, he held court in the state capital but lived in the distant judicial district from which he had been elected. The distinguishing characteristic between this case and *Flowers* was the fact that in the *Emmert* case, the taxpayer was required by state law to maintain his residence in the locality from which he had been elected.

Justice Emmert traveled to and from work almost daily, despite the distance involved. The issue was whether his transportation costs and living expenses in the capital could be considered deductible traveling expenses. The court reasoned that since the taxpayer was required by law to maintain his residence in an area removed from his work post, he could not be considered a commuter and he was therefore granted a deduction.

In addition to the temporary and dual business consideration, still another factor which denies the taxpayer the reasonable choice of uniting the area of his work and residence now presents itself—the legal necessity of maintaining a residence away from his work area.

*United States v. La Blanc*⁵⁶ presented essentially similar facts. Here the taxpayer, a resident of Napoleon, Louisiana, situated some seventy-five miles from New Orleans, was made an associate judge of the Supreme Court of Louisiana. The state constitution required that he continue to maintain his residence in the district from which he had been elected. His work caused him to spend approximately nine months of each year in New Orleans. The question was whether the taxpayer was entitled to a deduction for the rental costs of his New Orleans apart-

⁵⁴ The *Griesemer* case has often been cited along with *W. F. Brown*, 13 B.T.A. 832 (1928) and *Joseph W. Powell*, 34 B.T.A. 655 (1936), as a dual business case. It may be this apparent mis-classification which has engendered some confusion in its regard.

⁵⁵ 146 F. Supp. 322 (S.D. Ind. 1955).

⁵⁶ *United States v. LaBlanc*, 278 F.2d 571 (5th Cir. 1960).

ment. The government opposed the deduction on the grounds that the taxpayer maintained his residence in Napoleon by personal choice. In support of its position, it cited language from *O'Toole v. Commissioner*⁵⁷ and *Carragan v. Commissioner*⁵⁸ to the effect that traveling expenses which "arise from the taxpayer's choice not to bring his home close to his place of work" are not deductible. The court of appeals agreed that the "Supreme Court has steadfastly refused to say that traveling expenses are incurred in pursuit of business when they stem from the (taxpayer's) refusal to bring his home close to his job."⁵⁹ It pointed out, however, that in the instant case the taxpayer did not have a choice in the matter. The state constitution imposed upon him the obligation of maintaining a residence in the district from which he was elected and made abandonment of such residence tantamount to vacation of the office. As a result, the deduction was allowed.⁶⁰

Both cases would find an identical solution under the "reasonable choice" analysis. Both taxpayers had long term positions so that the length of employment did not pose an obstacle to the relocation of their residences in the area of their respective courts. Their choice to so act, however, was proscribed by the legal mandate that they maintain their residence in areas other than their duty post situs. As a result, their residences and not their duty posts would be their "home."⁶¹

In noting that its decision was in harmony with *Flowers* and with *Emmert*, the *La Blanc* opinion also emphasized that its holding was not inconsistent with the *Barnhill* case, which concerned a Justice of the Supreme Court of North Carolina.⁶² As in the *Emmert* and *La Blanc* cases, the taxpayer's duty post was the courthouse in the state capital,

⁵⁷ *O'Toole v. Comm'r*, 243 F.2d 302 (2d Cir. 1957).

⁵⁸ *Carragan v. Comm'r*, 197 F.2d 246 (2d Cir. 1952).

⁵⁹ *Supra* note 56, at 574.

⁶⁰ The *LaBlanc* opinion clearly indicates that the element of choice is the controlling factor in its decision. A distinction should be noted, however, between the use of the choice criteria in this case and the use of the same criteria within the context of the "choice analysis." In the *LaBlanc* decision as in *Flowers* and other cases, the Court believed that a taxpayer's refusal to relocate disqualified him under the "in pursuit of business" requirement of the *Flowers'* rule. As illustrated in preceding pages, the element of choice goes to the issue of whether or not the taxpayer may be considered as being "away from home."

⁶¹ The case of *Moss v. United States*, 145 F. Supp. 10 (W.D.S.C. 1956) exemplifies the necessity doctrine within the framework of a dual business fact situation. It has been discussed *supra* in relation to the latter.

⁶² *Maurice V. Barnhill*, 3 CCH Tax Ct. Mem. 514 (1944).

Raleigh; but he maintained his residence in Rocky Mountain, sixty miles away. The facts differ from both the aforementioned cases in that neither a legislative nor constitutional mandate required Justice Barnhill to maintain his residence in a particular district. There did exist, however, an unwritten tradition that each justice maintain his legal residence in that section of the state where he resided at the time of his elevation to the bench. The *Barnhill* opinion indicates that the court was in full agreement with the "home equals duty post" definition.⁶³ It did not believe that the established tradition with regard to residence for supreme court justices required a different conclusion in this case.⁶⁴ Consequently, it denied the taxpayer the deduction claimed.⁶⁵

If this case were to be decided pursuant to the "reasonable choice" analysis, the result could well be different. It might be argued that a tradition of this kind in connection with the high public office of justice of a state supreme court would deny the taxpayer the requisite choice of locating his residence in the state capital as effectively as if this requirement emanated from legislation or from a state constitution. Further, it is clear that a state need only enact such legislation to confer upon its established tradition the power of qualifying a supreme court justice for the travel expense deduction, bringing such cases within the *Emmert* and *La Blanc* precedents. This consideration aside, however, it is submitted that tradition or custom, long established and serving the same purpose as laws which require similar comportment, is unwritten law whose pressures upon the taxpayer are no less exacting than a statute and that it denies the taxpayer the reasonable choice as completely as a statutory or constitutional provision.

Equally as troublesome as Justice Barnhill's situation was that of United States Senators and Congressmen, as exemplified in the case of

⁶³ The court went further and pointed out that the regulations prohibit a deduction for commuting expenses, a directive which would be completely unauthorized were "home" to be given its ordinary meaning. It noted that this provision was maintained through successive enactments of the statute, followed in the Tax Court and was settled administrative practice. It then stated that under these circumstances, the regulation must be deemed to have received implied legislative approval. *Helvering v. Winnill*, 305 U.S. 79, 83 (1938).

⁶⁴ The court noted that there was no difference between this case and that of members of Congress who find themselves in a similar predicament. Since this decision, however, section 162 has been amended to qualify the residence of a member of Congress situate in his Congressional district as his "home." See the discussion of *George W. Lindsay*, 34 B.T.A. 840 (1936), *infra*.

⁶⁵ For analogous facts see *Winborne v. Comm'r*, 3 CCH Tax Ct. Mem. 544 (1944).

George Lindsay v. Commissioner.⁶⁶ Congressman Lindsay claimed a deduction for his hotel expenses in Washington and the cost of rail transportation between the capitol and his Brooklyn constituency. The deduction was denied. It was the court's view that "home" meant "duty post" as used in the Act. Since a Congressman's work post was Washington, it followed that the national seat of government was his "home." In effect, nothing denied the taxpayer the choice of moving his residence to his single work post in Washington; nothing, that is, but the tradition of maintaining his residence in the state and district from which he had been elected. The court thus used the same reasoning found in the *Barnhill* decision.

Equity was achieved through legislation. Congress included a comprehensive paragraph in section 162 of the Revenue Code which provides that the taxpayer's residence in the state, congressional district, territory or possession which he represents in Congress shall be considered his "home."⁶⁷ Except for the \$3,000 limitation which it places upon any deduction claimed, this provision does no more than reflect the practical and moral considerations which could have resulted in allowance of the deduction under the choice analysis.

THE NECESSITY DOCTRINE—PHYSICAL IMPOSSIBILITY

In addition to being denied a reasonable choice of relocation by legal factors, a number of cases illustrate situations where physical factors have denied the taxpayer this option. In *Crowthers v. Commissioner*,⁶⁸ the taxpayer, a timber feller, worked at logging sites approximately forty miles from his residence. No living accommodations existed at the work sites and there was no public transportation. The taxpayer claimed a deduction for transportation expenses on the theory that the lack of accommodations at his work site and the lack of transportation facilities made it necessary for him to reside a substantial distance from his work. Obviously, the taxpayer was attempting to bring himself within

⁶⁶ 34 B.T.A. 840 (1936).

⁶⁷ INT. REV. CODE OF 1954, § 162(a). "For purposes of the preceding sentence, the place of residence of a Member of Congress (including any delegate or Resident Commissioner) within the State, congressional district, Territory or possession which he represents in Congress shall be considered his home, but amounts expended by such Members within each taxable year for living expenses shall not be deductible for income tax purposes in excess of \$3,000."

⁶⁸ 28 T.C. 1293 (1957).

the ambit of the "necessity doctrine" of the *Emmert* case. The strategy was successful. In accepting the taxpayer's argument, the court extended the necessity doctrine from cases of legal necessity to those involving physical necessity. Speaking to this aspect of its decision, the court said:

In this case there was the necessity of traveling back and forth to the "layout," although the necessity was caused not by the law as in *Emmert*, but by the lack of living accommodations at the log site and by the necessity of carrying tools back and forth to be repaired.⁶⁹

In cases presenting analogous facts, however, deductions have been denied. The case of *Edward Mathews v. Commissioner*⁷⁰ is one in point. Mr. Mathews, another taxpayer who worked in the logging trade, lived some twenty miles from his job sites. Once again, housing facilities, stores, schools and other necessities were absent in the actual work area or any other more closely situated to the logging sites. Unlike *Crowthers*, however, this taxpayer did not transport tools to and from town for repairs. This fact induced the court to distinguish the case and to deny a deduction.

In another case, *Allenby v. Commissioner*,⁷¹ the taxpayer was a "chopper" in the logging trade. He lived with his wife in Fort Bragg, California, the area of closest living accommodations to the work site. This arrangement required that the taxpayer travel thirty miles daily to work. On these trips he also transported tools to and from Fort Bragg for repairs. In winter, the taxpayer lived in a primitive one-room shack at the logging site. It was necessary to do so because the roads became impassable and he would otherwise have been unable to reach the work site. In his tax return, the taxpayer claimed a deduction for living expenses incurred at the shack and his auto expenses during the year. The Tax Court allowed only a percentage of the auto costs on the theory that these costs were for the dual purposes of commuting and the transportation of tools. It completely disallowed the cost of living expenses incurred at the shack on the basis that staying there was for

⁶⁹ 269 F.2d 292, 298 (9th Cir. 1957). The *Crowther* case would appear to indicate a change of views in the Ninth Circuit since its implicit acceptance of the "home equals duty post" definition contradicts its acceptance of the residence definition in the case of *Wallace v. Comm'r*, 144 F.2d 407 (9th Cir. 1944).

⁷⁰ 36 T.C. 483 (1961).

⁷¹ 16 CCH Tax Ct. Mem. 937 (1957). The case was appealed by the taxpayer to the Ninth Circuit but it was dismissed.

the personal convenience of the taxpayer. It concluded that the third condition of the *Flowers* rule had not been satisfied. The *Allenby* decision thus follows the precedent of *Crowthers* while also incorporating the reasoning of *Mathews*.

The question posed by these cases is whether a lack of civilized habitation entitles the taxpayer to a travel expense deduction on the theory that it denies him the "choice" of making his residence at his work post. To begin, it is suggested that the tool transportation factor present in both the *Crowthers* and *Allenby* cases should be discounted. At best, this could qualify the pertinent auto costs as ordinary and necessary business expenses but would not be pertinent to qualifying the taxpayers as "away from home" at their respective posts. To further relieve the cases of complex elements, it is assumed that in each case the taxpayer's actual place of residence was outside the physical limits of the work or "home" area.⁷²

These considerations aside, all three cases present a fact situation in which the taxpayer's work post was in an area where physical conditions (lack of civilized habitation) prevented him from bringing his family to or making his residence at this site. Each taxpayer was thereby placed in a position analogous to that of Justices Emmert and La Blanc. Effectively being denied a reasonable choice of relocation by virtue of the physical situation at the duty post, each taxpayer should have qualified as "away from home" and been entitled to a deduction for transportation expenses.⁷³

The decision in the *Allenby* case was probably due to a misinterpretation of the *Flowers* decision. Actually, the expenses were incurred in pursuit of business in all three cases. The usual residence expenses were not deductible in any of them because no increase was registered in these expenditures. In the *Allenby* case, however, once the taxpayer began living at the work site for the winter months, his living expenses

⁷² In the cases discussed to this point, the question of the physical limits of the "home" area has not arisen. It is an issue of some importance, however, and appears particularly pertinent to the cases here under discussion since the only factor which prevents the taxpayer from living near his work is the lack of housing facilities. It is important to ascertain that this factor actually forced the taxpayer to live so far distant as to be outside the general duty post area.

⁷³ See also *Hartsell v. Wright*, 182 F. Supp. 725 (E.D. Idaho 1960). The taxpayer, a plumber, was employed at an atomic energy site and the nearest habitable site was some forty-six miles distant. The court permitted the deduction for the transportation expenses claimed.

were increased, and being unavoidable because of his "away from home" status, these too should have qualified for deduction.

In the cases examined above, the physical necessity of maintaining a residence outside the general work area sprang from a lack of civilized habitation. There is another line of cases in which it has been impossible for the taxpayer to live at his duty post because of a housing shortage. Here too the taxpayer is denied a choice of relocating his residence at his work post. These cases have generally been grouped with the temporary employment cases due to the fact that it was upon this theory that the taxpayer initially sought to qualify for deduction. In reality, they comprise a segment of the physical impossibility cases. In discussing them, it is again assumed that the taxpayer was residing outside of the "duty post" or "home" area.

In the case of *Henry C. Warren*,⁷⁴ the taxpayer, a pipe fitter, resided at Cornelia, Georgia. From 1943 to 1945 he was employed at the United States Navy Shipyards in Charleston, South Carolina, three hundred miles away. Finding no housing accommodations in Charleston for his family, the taxpayer's wife and children continued to reside in Cornelia and the taxpayer lived in barracks, taking his meals in restaurants. The court deemed the claimed travel expenses to be personal. In countering the taxpayer's argument that the continued maintenance of his residence at Cornelia was caused by the Charleston housing shortage, the court answered that "that consideration was irrelevant to the prosecution of the employer's business."⁷⁵

In another case, *Willard S. Jones*,⁷⁶ the taxpayer, a construction worker, resided at Bakewell, Tennessee. Beginning in 1945 he worked at Oak Ridge, Tennessee, seventy-five miles away, for 377 days, remaining at his post for some thirty months. The taxpayer was unable to bring his family to Oak Ridge because the thousands of persons living and working there made living quarters meager and scarce. Paraphrasing the *Warren* opinion, the court found that the housing shortage was irrelevant to the employer's business.

A vigorous dissent lodged by Judge Murdock proposed allowance of the deduction in the *Jones* case, based in the main on the consideration that Mr. Jones had no choice in the matter rendering the expenses

⁷⁴ 13 T.C. 205 (1949).

⁷⁵ *Id.* at 207.

⁷⁶ 13 T.C. 880 (1949).

unavoidable.⁷⁷ The element of choice was also specifically considered in the case of *York v. Commissioner*.⁷⁸ In this case the taxpayer, who formerly lived in Atlanta, Georgia, went to work in Washington, D.C., in 1943. He moved his family to the capital as soon as he was able to find living quarters; he claimed a deduction for his Washington expenses incurred prior to his family's arrival. He argued that his case was distinguishable from *Flowers* because in the latter case the taxpayer had maintained a remote abode by choice, implying the absence of such choice in his own case. The court ruled that this difference was immaterial and affirmed the Tax Court in disallowing a deduction.⁷⁹

It cannot be doubted that the taxpayer was denied a choice to relocate by a cause beyond his control or that the expenses were incurred in relation to business. Thus, it might appear at first glance that the choice analysis would permit the deduction. It is suggested, nonetheless, that the statute was not intended to permit a deduction under these circumstances and that, in fact, the choice analysis would actually prohibit it. This view is based upon the following considerations. The travel expense deduction was provided to unburden taxpayers from duplicated or increased living expenses which arise in connection with work or business and are unavoidable. As made evident from the traveling salesmen cases—the temporary post situation—and others heretofore examined, the choice-denying factor must spring from the work itself. Thus, we have encountered work of short duration, the simultaneous existence of more than one, widely separated business post, a condition of the taxpayer's work which requires that he maintain his residence in an area other than where he works, and particular lines of work which take the taxpayer into an area in which people do not generally work and live and hence lacks the necessary facilities for residential life. In each of these cases, the choice-denying factor is inherent in the work situation itself. This is not so in the housing shortage situation. In the latter, we are concerned with that wide gambit of employment which denies the taxpayer nothing with respect to the location of his residence. On the contrary, it is a purely social phenomena—the housing

⁷⁷ *Id.* at 883.

⁷⁸ 160 F.2d 385 (D.C. Cir. 1947).

⁷⁹ For the other decisions involving a housing shortage fact situation in which a deduction was disallowed see the following: Sidney B. Carragan, 10 CCH Tax Ct. Mem. 259 (1951); Charles T. Andrews, 8 CCH Tax Ct. Mem. 559 (1949); William Laubach, 8 CCH Tax Ct. Mem. 105 (1949).

shortage—which prevents the taxpayer from making his residence in his work area.

In effect, we are now in a position to further refine our understanding of the character of the factors whose action in denying the taxpayer a choice of relocation will be taken into consideration by the law. It must not only be an impersonal factor, but it must also spring or derive from the nature of the work or business situation rather than from a social condition.

The deduction should not then be denied in these cases for the reason that the housing shortage is irrelevant to the employer's business, as set forth in the opinions. This line of reasoning indicates once again a misinterpretation of the "in pursuit of business" requirement. The choice-denying factor need not derive from the needs of the employer. The issue should be avoidability of the expense and its reflections upon the "away from home" status. Although the housing shortage does deny the taxpayer a choice of residence near his work post, it is here submitted that protection from this particular cause is not within the purview of the statute. Admittedly, the increase in living and transportation costs which a housing shortage may produce is unfortunate. One is readily inclined to agree that provision be made to alleviate it. Relief, however, should not be granted and actually cannot be granted under the travel expense provisions because it does not constitute the type of risk against which this provision was meant to provide relief.

THE PHYSICAL DISABILITY CASES

In still other cases, the issue has been whether the taxpayer could properly claim a "travel expense" deduction for expenditures incurred because of a personal physical condition. These cases fall into several groups. One such group concerns persons who incur higher transportation costs because their physical disability prevents them from using public transportation. Another group concerns persons who have relocated their residence in an area or state far removed from their business interests because their health demanded such a transfer.

In the first group of cases where physical affliction prevents the taxpayer from taking advantage of public transportation there is no question of the taxpayer's "home." On the contrary, the taxpayer generally maintains his residence in his work area. The issue has been whether the additional cost of transportation borne by the taxpayer might some-

how enjoy deductibility under section 162(a)(2). The courts have answered negatively on the theory that the additional expenses do not alter the commuter status of the taxpayer. Clearly, no other answer was or is possible even under the "choice" analysis. The taxpayer has complied with the legal presumption that he will reside in the vicinity of his duty post; no condition or other factor has denied him the exercise of his choice. Consequently, the taxpayer is "at home" and fails to fulfill one of the three conditions for qualification under the law. The fact that his transportation costs are higher than they might otherwise be does not alter this situation. The cause of the expense is of a personal nature and may differ from other personal consideration only in that it is an indispensable rather than an optional need of the taxpayer. If the government wishes to aid these particular taxpayers, the proper avenue of aid would be special legislation. In no sense can they be held to come within the policy goals of the travel expense deduction.

The fact that the taxpayer has placed his residence distant from his business area because of physical needs does not help his standing before the court even under the "choice" analysis. Here too, the taxpayer has properly been disallowed any deduction.⁸⁰ There is a total absence of non-personal factors which might be held to deny the taxpayer a choice of maintaining his residence near his business interests. Failing to qualify as "away from home," the taxpayer fails to make a case for allowance of any deduction.

CONCLUSION

It is respectfully submitted that the foregoing application of the choice analysis to the cases aids in dispelling the confusion and contradiction heretofore surrounding both the "away from home" and "in pursuit of business" requirements. It permits a full appreciation of the separate functions of these conditions. It would further appear to substantiate the ability of the choice analysis to produce decisions which effectuate statutory policy and which are simultaneously consistent among themselves. Its demonstrated capacity to fulfill these missions

⁸⁰ Illustrative of this type situation is the case of *Carey v. Comm'r*, 11 CCH Tax Ct. Mem. 943 (1942). The taxpayer was the manager of a girl's baseball team headquartered in Chicago. He maintained a Miami, Florida residence, lived there six months of each year, also doing work from there. He was denied a deduction for Chicago expenses on the theory that Chicago was his "home." The sinus condition which allegedly forced him to live in Florida was not held to alter this evaluation of the case.

and to avoid or resolve the decisional difficulties which have plagued the past history of this deduction testify to its usefulness and argue for its acceptance.

The "choice" analysis is not submitted as the harbinger of perfect justice in this area of tax law. It can be instrumental, however, in bringing a measure of peace to a segment of tax law terrain which has been the scene of constant and indecisive battle and, hopefully, will prove equal to the challenge of yet embryonic situations germinating in our rapidly changing social environment.