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DISSECTION OF A MALIGNANCY: THE CONVENIENCE OF THE
EMPLOYER DOCTRINE

I. Introduction

Section 61(a) of the Internal Revenue Code of 1954 [hereinafter referred to as the "Code"] states that "[e]xcept as otherwise provided . . . gross income means all income from whatever source derived . . ." This definition readily lends itself to the interpretation that compensation received in a form other than cash may also be considered gross income. In accordance with this interpretation, the Internal Revenue Regulations [hereinafter referred to as the "Regulations"] have long held that the fair market value of a thing taken in payment for services rendered is to be included as income.¹ Gross income may be realized, therefore, in the form of cash, services, meals, lodging, stock, or other property.²

A determination of the amount of gross income is the starting point for computation of the personal income tax. The sum total of all income items included in gross income must be reported when an individual files his tax return, and taxable income is then computed by subtracting allowable deductions from this reported amount.³ Thus, it is vital to initially determine whether a particular item is included or excluded from gross income.⁴ The Code and attending Regulations provide for numerous exclusions of items from taxable gross income,⁵ regardless of whether the income item was received in cash or in an equivalent of cash.⁶ Of specific concern to this Note are the exclusions in the Code or Regulations pertaining to meals or lodging given to an employee: (a) the rental value of lodging furnished or rental allowance paid to a minister;⁷ (b) the value of quarters and subsistence or allowances received therefor by members of the Armed Forces, Coast and Geodetic Survey, and Public Health Service;⁸ (c) amounts received as cost-of-living allowances by government civilian employees stationed outside the continental United States and by personnel of the Foreign Service;⁹ and, (d) meals or lodging furnished for the convenience of the employer.¹⁰

1 Compare Treas. Reg. § 1.61-2(d)(1) (1957) with Treas. Reg. 33, art. 4 (1918).

2 Treas. Reg. § 1.61-1(a) (1957).

3 See 1 J. RABKIN & M. JOHNSON, FEDERAL INCOME, GIFT AND ESTATE TAXATION § 1.02 (1969); Lipton, *Gross Income — The Starting Point in the Preparation of Any Return*, 68 DRCK. L. REV. 169 (1964); Wren, *New Concepts of Income Under the Internal Revenue Code of 1954*, 8 OKLA. L. REV. 59 (1955).

4 There are important distinctions between a reduction of gross income and a deduction: Although the proposition [sic] is dubious enough in history, equity, and economics, the Supreme Court's view has long been that deductions are a matter of "legislative grace." Therefore, the taxpayer must be able to point to the specific statutory language which grants the deduction. Moreover, he must be prepared to establish that there is no public policy which would be "frustrated" by the deduction. Finally, a deduction is allowable only within the strict rules of payment or accrual, not in relation to the item of income to which it is related. For any one of these reasons, therefore, it may be important to distinguish between a mere "deduction" and an item which is actually a reduction of gross income.

5 J. RABKIN & M. JOHNSON, *supra* note 3, § 1.02(5).

6 See, e.g., INT. REV. CODE of 1954, §§ 101-21 and Treas. Reg. § 1.101-1 to 1.121-4 (1967).

7 2 J. MERTENS, THE LAW OF FEDERAL INCOME TAXATION § 11.01 (rev. ed. 1967) [hereinafter cited as MERTENS].

8 INT. REV. CODE of 1954, § 107; Treas. Reg. § 1.107-1 (1963).

9 Treas. Reg. § 1.61-2(b) (1957).

10 INT. REV. CODE of 1954, § 912; Treas. Reg. § 1.912-1, -2 (1959).

11 INT. REV. CODE of 1954, § 119; Treas. Reg. § 1.119-1 (1964). Statutory subsistence

The development of these particular exclusions has taken different forms. The rental value of lodging furnished to a minister as part of his compensation has long been exempt from gross income by statute.¹¹ More recently, any rental allowance paid directly to a minister as part of his compensation has been added to this statutory exclusion, at least to the extent that such allowance is used by the minister to rent or provide himself with a home.¹² The exclusions pertaining to meals or lodging furnished to federal government civilian and military personnel,¹³ and to other employees for the convenience of their employers, initially developed as exceptions to the general rule that compensation paid in a form other than money was to be included in gross income, rather than as specific statutory exclusions from gross income.

The non-statutory origin for these latter exclusions, the "convenience of the employer doctrine," exempts benefits received in the form of meals or lodging from federal income taxation when such benefits are furnished by an employer primarily for his own convenience.¹⁴ One is hard pressed to find an expressed rationale for the concept either in case law or in the administrative and legislative history behind the now codified doctrine. The reason for the rule would seem to be grounded in the belief that an injustice would be visited upon an employee if he were required to pay a tax on the value of meals or lodging furnished to him by his employer, when such meals or lodging were provided more for the benefit and convenience of his employer than for himself.

This Note will discuss in detail the convenience of the employer doctrine, tracing its development through the case law and Regulations prior to its codification, examining the history of that codification, and dissecting the statutory doctrine according to its acknowledged requirements.

II. The Doctrine in Its Infancy

The convenience of the employer doctrine is not statutory in origin, but began as a product of administrative regulations and rulings. The general rule of imposing an income tax on the rental value of living quarters furnished to an individual, in addition to a salary, was proclaimed administratively as early as 1914.¹⁵ Importantly, the first evidence of the convenience of the employer doctrine also appeared in that year.¹⁶ The Commissioner was asked to make a ruling concerning the "[i]ncome tax liability and withholding requirements in connection with quarters . . . furnished or paid by the Government to officers and employees."¹⁷ After ruling that the money value of the number of rooms furnished should be reported as income, the ruling stated:

allowances given to police officers were also excluded from gross income for the taxable years 1954 through 1958. INT. REV. CODE of 1954, § 120, 68A Stat. 39 (repealed 1958); Treas. Reg. § 1.120-1 (1956).

11 Compare INT. REV. CODE of 1954, § 107(1) with Act of Nov. 23, 1921, ch. 136, § 213(b)(11), 42 Stat. 239.

12 INT. REV. CODE of 1954, § 107(2).

13 See text accompanying notes 15-40 *infra*.

14 See J. CHOMMIE, THE LAW OF FEDERAL INCOME TAXATION § 23 (1968).

15 T.D. 2090, 16 TREAS. DEC. INT. REV. 259, 263 (1914).

16 T.D. 2079, 16 TREAS. DEC. INT. REV. 249 (1914).

17 *Id.*

When quarters are furnished in kind, of a greater number of rooms than the number allowed by law, it is to be assumed that the excess number is assigned for the *convenience of the Government*, and the money equivalent only of the number of rooms allowed by law shall be returned as income.¹⁸ (Emphasis added.)

The government employee was not required to report as income the fair rental value of the quarters furnished for the benefit and convenience of his employer.

The first apparent application of the doctrine appeared five years later. The Bureau of Internal Revenue [hereinafter referred to as the "Bureau"] ruled that a person in the service of the American Red Cross, who received a maintenance allowance but no cash compensation, need only report as income the amount, if any, received for maintenance in excess of his actual living expenses.¹⁹ Following on the heels of this pronouncement, the Bureau specifically recognized the convenience of the employer doctrine in a ruling which dealt with seamen who were furnished board and lodging in addition to their regular cash compensation.²⁰ The doctrine finally found its way into the "law" of federal income taxation as an amendment to article 33 of Regulation 45:

When living quarters such as camps are furnished to employees for the convenience of the employer, the ratable value need not be added to the cash compensation of the employee, but where a person receives as compensation for services rendered a salary and in addition thereto living quarters, the value to such person of the quarters furnished constitutes income subject to tax.²¹

This language appeared virtually unchanged in every succeeding Regulation for the next twenty years.²²

While the early Regulations spoke only in terms of lodging furnished to an employee, it became evident that furnished meals were also within the scope of the convenience of the employer doctrine. A 1920 ruling held that "supper money" paid to an employee, who performed extra labor for the employer after business hours, was not considered to be additional compensation, but paid for the convenience of the employer.²³ A year later the Bureau held that where employees engaged in fishing and canning were furnished with meals and lodging by their employer for the latter's convenience, the value of such benefits need not be included in the computation of the employees' net income.²⁴ However, meals were not included in the Regulations concerned with the convenience of the employer doctrine until 1940.²⁵

18 *Id.*

19 O.D. 11, 1 CUM. BULL. 66 (1919).

20 Board and lodging furnished seamen in addition to their cash compensation is held to be supplied for the *convenience of the employer* and the value thereof is not required to be reported in such employees' income tax returns. O.D. 265, 1 CUM. BULL. 71 (1919) (emphasis added).

21 Treas. Reg. 45, art. 33 (1920 ed.), T.D. 2992, 2 CUM. BULL. 76 (1920).

22 Treas. Reg. 103, § 19.22 (a)-3 (1939); Treas. Reg. 101, art. 22(a)-3 (1939); Treas. Reg. 94, art. 22(a)-3 (1936); Treas. Reg. 86, art. 22(a)-3 (1935); Treas. Reg. 77, art. 53 (1933); Treas. Reg. 74, art. 53 (1929); Treas. Reg. 69, art. 33 (1926); Treas. Reg. 65, art. 33 (1924); Treas. Reg. 62, art. 33 (1922).

23 O.D. 514, 2 CUM. BULL. 90 (1920).

24 O.D. 814, 4 CUM. BULL. 84 (1921).

25 See text accompanying notes 83-85 *infra*.

In 1925 the first case dealing with the developing convenience of the employer rule — *Jones v. United States*²⁶ — made its way to the courts. The litigation involved a commissioned Army officer who was furnished government quarters while performing duties at the military post to which he was assigned, and given a cash allowance for the rental of quarters when his duties required him to live away from the post. The officer included, under protest, the rental value of quarters occupied by him at the military post and the cash received as commutation of quarters during a four-month absence from post as items of gross income on his tax return. In its analysis, the Court of Claims eliminated any distinction between quarters furnished in kind and allowances given to rent quarters by recognizing the inherent right of officers to public quarters when available at their military post and, when not so available, their right to commutation of quarters in money.²⁷ Special attention was given to the circumstances which accompany military life, including the fact that troops and officers are subject to call for service day and night, requiring the government to furnish housing facilities for troops and officers if an army is to be maintained.²⁸ The court concluded that no income had been realized by the officer in the form of quarters or allowance for quarters, stating that:

If the nature of the services require [*sic*] the furnishing of a house for their proper performance, and without it the service may not properly be rendered, the house so furnished is part of the maintenance of the general enterprise . . . and forms no part of the individual income of the laborer.²⁹

Although the convenience of the employer doctrine, was never mentioned by name, the rationale in *Jones* suggests an inherent recognition of the doctrine.

The Bureau subsequently issued rulings which expanded the exemption allowed for officers in *Jones* to include enlisted men and non-commissioned officers,³⁰ members of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service,³¹ the Army Nurse Corps and the Navy Nurse Corps,³² the National Guard,³³ and the Reserve Officers' Training Corps.³⁴ In 1926 the Regulations recognized, for the first time, an exemption for many of the above groups,³⁵ and the present Regulations contain reference to these government employees:

Subsistence and uniform allowances granted commissioned officers, chief warrant officers, warrant officers, and enlisted personnel of the Armed

26 60 Ct. Cl. 552 (1925).

27 *Id.* at 569.

28 *Id.* at 569-70.

29 *Id.* at 575.

30 I.T. 2219, IV-2 CUM. BULL. 41 (1925).

31 I.T. 2232, IV-2 CUM. BULL. 144 (1925). *See also* Mim. 3413, V-1 CUM. BULL. 29 (1926); I.T. 3823, 1946-2 CUM. BULL. 28.

32 I.T. 3420, 1940-2 CUM. BULL. 40.

33 Rev. Rul. 60-65, 1960-1 CUM. BULL. 21.

34 Rev. Rul. 66-3, 1966-1 CUM. BULL. 19.

35 The value of quarters furnished Army and Navy officers, members of the Coast Guard, Coast and Geodetic Survey, and Public Health Service, or amounts received as commutation of quarters by such officers or members, do not constitute taxable income. Treas. Reg. 69, art. 33 (1926).

Forces, Coast and Geodetic Survey, and Public Health Service of the United States, and amounts received by them as commutation of quarters, are to be excluded from gross income. Similarly, the value of quarters or subsistence furnished to such persons is to be excluded from gross income.³⁶

Government employees stationed outside the continental United States and those in certain fields of foreign service are also exempted from reporting as income meals or lodging furnished or cash allowances received in lieu of such benefits.³⁷ In 1930³⁸ and 1931³⁹ Congress enacted legislation authorizing the President and the Secretary of State to grant "post allowances" or "cost-of-living allowances" to those government employees working abroad. The initial test applied to determine whether to tax such allowances as income was the same one that was utilized in other early convenience of the employer cases: whether the prime purpose of such allowances or benefits in kind was to grant additional comforts to the employees, or to insure that the employees properly performed their duties for the employer. If the former was shown to be the purpose of the allowances, the value thereof had to be reported as income. If their purpose was shown to be for the convenience of the employer, they did not have to be reported as income.⁴⁰

Although the convenience of the employer doctrine is said to have its origin in *Jones* and the early rulings involving military personnel,⁴¹ the Code and Regulations came to treat the doctrine as distinct from the exemptions specifically granted to government personnel. A type of "per se" convenience of the employer doctrine has developed for the treatment of quarters and subsistence benefits furnished this latter group. Neither the Code nor Regulations providing the exemption for such benefits given to military personnel specify that quarters and subsistence benefits be for the convenience of the employer, but simply exempt all such benefits from gross income.⁴² In similar fashion, the exemption for cost-of-living allowances granted government employees stationed abroad has no requirement that the benefits be furnished for the convenience of the employer.⁴³ Despite the lack of specific language, the implication would seem to be that such benefits are inherently for the convenience of the government because of the peculiar circumstances present in the governmental employment situations under consideration.

Thus, despite common origins, application of the convenience of the employer doctrine itself finally came to center upon employees other than military personnel or those employed in the foreign service of the federal government. The various employment situations of these employees have provoked the development of the law surrounding the statutory doctrine today.

36 Treas. Reg. § 1.61-2(b) (1957).

37 INT. REV. CODE of 1954, § 912.

38 Act of June 26, 1930, ch. 622, 46 Stat. 818.

39 Act of February 23, 1931, ch. 276, § 3, 46 Stat. 1207.

40 See G.C.M. 12300, XII-2 CUM. BULL. 30 (1933); G.C.M. 13442, XIII-2 CUM. BULL. 119 (1934), *revoked* G.C.M. 14710, XIV-1 CUM. BULL. 44 (1935); G.C.M. 14836, XIV-1 CUM. BULL. 45 (1935).

41 See Gutkin & Beck, *Some Problems in "Convenience of the Employer,"* 36 TAXES 153, 154 (1958).

42 Treas. Reg. § 1.61-2(b) (1957).

43 INT. REV. CODE of 1954, § 912; Treas. Reg. § 1.912-1(a) (1959).

III. The Codified Doctrine and Its Requirements

The convenience of the employer doctrine was given statutory recognition in 1954 as a specific exclusion from gross income. This provision — section 119 of the Code — reads as follows:

There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer for the convenience of the employer, but only if —

(1) in the case of meals, the meals are furnished on the business premises of the employer, or

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation.

The statute has been construed to require six prerequisites which the taxpayer must fulfill in order to qualify for the exemption: (1) there must be an employer-employee relationship; (2) the benefits must be given for the convenience of the employer; (3) the employee must be required to accept lodging as a condition of his employment; (4) the benefits must be furnished without charge; (5) the meals or lodging must be furnished in kind; and (6) they must be furnished on the business premises of the employer.

A. *Employer-Employee Relationship*

In order for meals or lodging to be furnished to an employee for the convenience of the employer, and the statutory exclusion to apply, an employer-employee relationship must exist. A significant number of cases have considered the question of whether a partnership-partner relationship can qualify under the basic employer-employee requirement of the doctrine. The first case dealing with this question was a Tax Court decision — *George A. Papineau*.⁴⁴ It involved a partner who, as manager of a hotel for his partnership, received meals and lodging at the hotel, in addition to a salary for the managerial service he performed. In his income tax return the taxpayer did not report the value of such meals and lodging as income and, as a result, the Commissioner of Internal Revenue found a deficiency in the taxpayer's return. The Commissioner's argument was that the taxpayer could not rely on Regulations promulgating the convenience of the employer doctrine because he had received his meals and lodging as a partner, and a partner could not be considered an employee under the doctrine.⁴⁵ The court did not discuss the case in terms of "convenience of the employer" but chose instead to base its decision on precedent holding that a partner working for his partnership was, in fact, working for himself, and

⁴⁴ 16 T.C. 130 (1951).

⁴⁵ *Id.* at 131-32.

therefore could neither employ nor pay compensation to himself.⁴⁶ The court concluded:

It is at once apparent that if a partner is a proprietor who can not employ himself or compensate himself by a salary for services rendered to himself, neither can he compensate himself or create income for himself by furnishing himself meals and lodging.⁴⁷

Thus, although *Papineau* found that a partner could not be an employee of his partnership, the case allowed an exclusion for meals and lodging.

During the next few years, the Tax Court continued to follow the rationale of *Papineau*⁴⁸ but the Bureau and courts of appeal took another approach. In 1952, the Bureau issued a nonacquiescence in the decision,⁴⁹ and a year later Revenue Ruling 80 held that, in factual patterns such as the *Papineau* situation, meals and lodging furnished to a partner must be included in the manager-partner's share of net profits of the hotel business.⁵⁰ This administrative action was followed by decisions from four circuit courts of appeal, all in disagreement with the holding of *Papineau*. The first of these cases, *Commissioner v. Doak*,⁵¹ was heard by the Fourth Circuit and established the precedent for the cases that followed. The taxpayers, husband and wife, were partners in a hotel business and, because of their duties as co-operators of the hotel, they found it necessary to live and eat most of their meals there. On their tax return they deducted, as a business expense of the partnership, the expenses attributable to the meals and lodging they received at the hotel. The court held that this was not an allowable deduction,⁵² and then addressed itself to the question of whether the convenience of the employer doctrine was applicable under the circumstances presented in the case. It granted that, if the taxpayers occupied an employee status, they would be allowed an exemption under the convenience of the employer doctrine.⁵³ Nevertheless, it held that such an exemption was not available because "[t]hey were not . . . either employers or employees; instead they were husband and wife owning the entire business as partners."⁵⁴

The reasoning given in *Doak* was relied on in *Commissioner v. Moran*,⁵⁵ where the Eighth Circuit held that the convenience of the employer doctrine pertains only to situations wherein the employer and employee are two taxable entities, and that the doctrine has no application where the one furnishing meals and lodging is the same taxpayer receiving them.⁵⁶ The court found that a partner was not an entity distinct from the partnership; therefore, the convenience of the employer doctrine did not apply.⁵⁷ The philosophy behind these

46 See Estate of S. U. Tilton, 8 B.T.A. 914, 917 (1927).

47 George A. Papineau, 16 T.C. at 132 (1951).

48 See, e.g., Thomas Robinson, 31 T.C. 65, 69 (1958); Leo B. Wolfe, 24 P-H Tax Ct. Mem. 663, 664 (1955); Richard E. Moran, 24 P-H Tax Ct. Mem. 681 (1955); Everett Doak, 24 T.C. 569, 570-71 (1955).

49 1952-2 CUM. BULL. 5.

50 1953-1 CUM. BULL. 62.

51 234 F.2d 704 (4th Cir. 1956).

52 *Id.* at 709.

53 *Id.* at 707.

54 *Id.*

55 236 F.2d 595 (8th Cir. 1956).

56 *Id.* at 598.

57 *Id.*

two cases was given approval by the Tenth Circuit in *United States v. Briggs*⁵⁸ and by the Third Circuit in *Commissioner v. Robinson*.⁵⁹

It is to be noted that each of the above-mentioned cases dealt with taxable years before passage of the Code. The Code introduced two new concepts regarding the tax treatment given partnerships, and these have indirectly affected the application of section 119 in cases involving benefits provided to partners. One of the new provisions allows an unincorporated business enterprise to elect to be taxed as a domestic corporation.⁶⁰ Section 1361(c) provides that, if the election is made, each owner of an interest in the partnership is considered a shareholder of the "corporation."⁶¹ Since a shareholder and his corporation are separate entities,⁶² so long as the shareholder (partner) is functioning as an employee of the corporation (partnership), it appears he has, at least in form, fulfilled the employer-employee requirement of section 119. This statutory provision was applied to the convenience of the employer doctrine by the Internal Revenue Service⁶³ [hereinafter referred to as the "Service"] in a 1963 ruling. Revenue Ruling 63-32 stated that a partnership, if it has elected under section 1361 to be taxed as a domestic corporation, may deduct the cost of meals or lodging furnished to a partner-employee and the partner-employee is eligible for an exemption from gross income (provided, of course, that the other requirements of section 119 are fulfilled).⁶⁴ However, the section 1361 approach would seem to imply that, if a partnership did not choose to make the appropriate election, a partner could not be eligible for section 119 consideration.⁶⁵

The second provision of the Code, pertaining to tax treatment of partnerships, and the application of section 119 to them, is section 707. Subsection (a) of this provision states that:

If a partner engages in a transaction with a partnership other than in his capacity as a member of such partnership, the transaction shall . . . be considered as occurring between the partnership and one who is not a partner.⁶⁶

A 1968 Fifth Circuit case, *Armstrong v. Phinney*,⁶⁷ utilized this provision to overcome the arguments in the cases relying on *Doak*. The case involved a ranch manager who was five per cent owner of a partnership which operated a cattle ranch. The partner-manager did not report as income the value of meals and lodging furnished to him as manager of the ranch. In its interpretation of

58 238 F.2d 53, 54 (10th Cir. 1956).

59 273 F.2d 503, 504 (3d Cir. 1959), *cert. denied*, 363 U.S. 810 (1960).

60 INT. REV. CODE of 1954, § 1361.

61 *Id.* § 1361(c).

62 *See Wilhelm v. United States*, 257 F. Supp. 16, 20 (D. Wyo. 1966).

63 The title of the Bureau of Internal Revenue was changed in 1953 to the "Internal Revenue Service."

64 1963-1 CUM. BULL. 146, 147.

65 *Wilson v. United States*, 376 F.2d 280, 296 (Ct. Cl. 1967), a decision based on a taxable year after the passage of section 1361, failed to indicate that the partnership involved had elected to be taxed as a domestic corporation. On the issue of the exclusion of meals and lodging furnished to the partners as managers of a ranch, the court followed the pre-Code "Doak-Moran approach" that a partner could not be an employee of his partnership, and refused to allow the section 119 exclusion.

66 INT. REV. CODE of 1954, § 707(a).

67 394 F.2d 661 (5th Cir. 1968).

section 707, the court rejected the idea that a partnership and its partners were one inseparable legal unit. Section 707 was said to have adopted an "entity theory" whereby a partner could be viewed as distinct from the partnership if he acted in a capacity outside of his role as partner.⁶⁸ "Consequently, it is now possible for a partner to stand in any one of a number of relationships with his partnership, including . . . employee-employer."⁶⁹ Having established a partner's right to participate in such a relationship, the court remanded the case to see if the ranch manager was acting outside his capacity as partner.⁷⁰

Thus, the preceding discussion would indicate that there have been at least four different approaches to the problem of determining the availability of a section 119 exemption for partners: (a) the "Papineau approach"; (b) the "Doak-Moran approach"; (c) the "section 1361 election approach"; and (d) the "Armstrong approach." Until the other circuits have had the opportunity to consider the effect of section 707 on the employer-employee requirement, this particular aspect of the convenience of the employer doctrine will remain in a state of flux. This author would suggest that the "Armstrong approach" seems to be the better view and the one most likely to be followed today.

The legislative history accompanying section 707(a) states that the new provision

provides the general rule that a partner who engages in a transaction with the partnership, other than in his capacity as a partner, shall be treated as though he were an outsider. Such transactions include . . . the rendering of services by the partner to the partnership⁷¹

This language seems to indicate that the draftsmen of section 707 recognized the possibility of a partner having an employer-employee relationship with his partnership. This being true, the judicial approaches advanced in *Papineau*, *Doak* and *Moran* should yield to the *Armstrong* decision and the relationship it establishes.

Since the approach of section 1361 as pronounced in Revenue Ruling 63-32

68 *Id.* at 663.

69 *Id.* at 663-64.

70 *Id.* at 664.

71 S. REP. No. 1622, 83d Cong., 2d Sess. 386 (1954). The argumentative effect of this language might be mitigated by the following statement found in the Conference Committee Report:

Both the House provisions and the Senate amendment provide for the use of the "entity" approach in the treatment of the transactions between a partner and a partnership which are described above. No inference is intended, however, that a partnership is to be considered as a separate entity for the purpose of applying other provisions of the internal revenue laws if the concept of the partnership as a collection of individuals is more appropriate for such provisions. H.R. REP. No. 2543, 83d Cong., 2d Sess. 59 (1954) (emphasis added).
The *Armstrong* court implicitly refers to this portion of the legislative history with these remarks:

The terms "outsider" and "one who is not a partner" are not defined by Congress; neither is the relationship between section 707 and other sections of the Code explained. However, we have found nothing to indicate that Congress intended that this section is not to relate to section 119. *Armstrong v. Phinney*, 394 F. 2d 661, 663 (5th Cir. 1968).

In a footnote explaining this passage of the opinion, the court goes on to say: "We are convinced that section 119 is not a provision where 'the concept of the partnership as a collection of individuals is more appropriate'" *Id.* at 663 n.8.

assumes that the only time a partner can possibly claim an exemption under section 119 is when his partnership elects to be treated as a domestic corporation, it severely limits a partner's opportunity to take advantage of the convenience of the employer doctrine. The "Armstrong approach," in its application of section 707, totally avoids the limitations in qualifying for corporation-shareholder treatment under section 1361,⁷² and thus best represents the appropriate judicial rationale for allowing partners the statutory exclusion of section 119.

This new "entity theory" brought to the law of federal income taxation by section 707 is no panacea for partners seeking an exemption under the convenience of the employer doctrine. It must first be shown that the partner is acting outside his capacity as a member of the partnership for the existence of an employer-employee relationship to be established, and then the remaining prerequisites of section 119 must be proven before the partner-employee can be entitled to the exemption he seeks.

B. For the Convenience of the Employer

1. The Concept Prior to Section 119

The phrase "convenience of the employer" can be used in two senses, as a *doctrine* and as a *requirement*. As a doctrine, "convenience of the employer" represents the rule of taxation which allows the value of meals or lodging furnished to an employee by his employer to be excluded from gross income. As a requirement, "convenience of the employer" represents one or more of the elements needed to bring the doctrine into effect.⁷³ In order to properly analyze the convenience of the employer requirement, as well as the other requirements expressed in section 119, it is necessary to first discuss the convenience of the employer doctrine as it existed prior to the passage of the Code.

Beginning with early administrative rulings, it was found that some factual patterns were more susceptible than others to an application of the convenience of the employer doctrine. A 1921 ruling provides an excellent example of those factors which were found to be essential to the doctrine.⁷⁴ The Bureau had been asked whether meals and lodging furnished to hospital employees constituted additional compensation, and ruled that:

Where the employees of a hospital are subject to immediate service on demand at any time during the twenty-four hours of the day and on that account are required to accept quarters and meals at the hospital, the value of such quarters and meals may be considered as being furnished for

⁷² See INT. REV. CODE of 1954, § 1361(b) where the two major requirements that a partnership must meet to take advantage of the election are stated: the partnership may not consist of more than fifty members and no partner having more than a ten per cent share in the partnership may own more than a ten per cent interest in any other partnership taxable as a domestic corporation.

⁷³ This is a vital distinction because the phrase "convenience of the employer," before passage of the Code, had the connotation of both doctrine and requirement, *i.e.*, the requirement *was* the doctrine and vice versa. Under section 119 the convenience of the employer doctrine has many requirements, one of which is that meals or lodgings be furnished for the "convenience of the employer."

⁷⁴ O.D. 915, 4 CUM. BULL. 85 (1921). See I.T. 2253, V-1 CUM. BULL. 32 (1926).

the convenience of the hospital, and does not represent additional compensation to the employees. On the other hand, where the employees are on duty a certain specified number of hours each day and could, if they so desired, obtain meals and lodging elsewhere than in the hospital and yet perform the duties required of them by such hospital, the ratable value of the board and lodging furnished is considered additional compensation.⁷⁵

The early rulings also illustrated a negative element in the convenience of the employer doctrine — meals and lodging had to be furnished for non-compensatory reasons. In 1921 the Bureau held that, where board and lodging were received by a domestic servant as part of his compensation, the employee must report as income the amount which he would have to pay for such board and lodging outside his employer's household.⁷⁶ Similarly, in a situation where employees of the Indian Service were furnished buildings for occupancy, the Bureau ruled that the test to determine if such benefits were taxable would be based upon whether the appropriation providing for the expenditures was one set aside to fund compensation for employees:

If the value of such quarters has been charged to the appropriation from which the compensation of such employees is paid . . . then such rental value is additional compensation to the employees and should be included together with the cash compensation received as income.⁷⁷

This test gave way to one even more stringent: although the appropriations were not earmarked for compensatory purposes, if the Department of the Interior considered the value of quarters furnished to employees of the Indian Bureau as additional compensation, it had to be reported as income.⁷⁸

Judicial determinations dealing with the elements of the convenience of the employer doctrine initially were unconcerned with the compensatory elements involved in a given situation. The first case to clearly delineate the factual situations which lend themselves to a finding that certain benefits are provided for the convenience of the employer was *Arthur Benaglia*.⁷⁹ The taxpayer was the manager in charge of several resort hotels. He and his wife occupied a suite in one of the hotels and received their meals there. He failed to include the value of meals and lodging received in his computation of gross income and was issued a deficiency notice by the Commissioner. The court held that the meals and lodging were not given to the taxpayer as compensation nor for his personal convenience, comfort or pleasure, but solely because he could not otherwise perform his managerial duties.⁸⁰ His duties were continuous and hotel guests could demand his presence at any time, day or night. His residence in the hotel was a specific condition of his employment, for the owners of the hotel would not hire a manager unless he lived there. Together, these factors constituted

⁷⁵ O.D. 915, 4 CUM. BULL. 85-86 (1921).

⁷⁶ O.D. 874, 4 CUM. BULL. 348 (1921).

⁷⁷ O.D. 914, 4 CUM. BULL. 85 (1921). *See also* I.T. 2692, XII-1 CUM. BULL. 28 (1933) where Veterans Administration employees were furnished quarters paid for out of a "salaries and expenses" appropriation, and the value of the quarters had to be included in gross income.

⁷⁸ I.T. 2051, III-2 CUM. BULL. 55 (1924).

⁷⁹ 36 B.T.A. 838 (1937).

⁸⁰ 36 B.T.A. at 839.

"convenience of the employer."⁸¹ *Benaglia* was followed in two federal district court cases,⁸² which were similarly concerned with a manager subject to continuous and immediate call.

In 1940 the Regulations pertaining to "compensation paid other than in cash"⁸³ were amended with regard to the language governing the convenience of the employer doctrine:

If a person receives as compensation for services rendered a salary and in addition thereto living quarters or meals, the value to such person of the quarters and meals so furnished constitutes income subject to tax. If, however living quarters or meals are furnished to employees for the convenience of the employer, the value thereof need not be computed and added to the compensation otherwise received by the employees.⁸⁴

As explained by the Commissioner, the purpose of the amendment was to clarify the Bureau's position concerning the circumstances under which the value of meals or lodging could be excluded from gross income.⁸⁵ The language, although different from that used in previous Regulations governing the doctrine,⁸⁶ actually seemed to be a mere repetition of the philosophy expressed therein. In further explanation, however, the Commissioner stated that under these new Regulations the requirement of convenience of the employer would be satisfied if meals or lodging were furnished to an employee who was required to accept the items in order to perform his duties properly.⁸⁷ This did indeed help to clarify the requirements for the convenience of the employer doctrine.

Neither the regulations nor the Commissioner's subsequent explanation of them clarified one major question: Is the convenience of the employer doctrine applicable when meals or lodging are furnished not only for the employer's convenience, but also to compensate the employee?⁸⁸ A novel approach to this question was given in *Olin O. Ellis*.⁸⁹ The president of a realty corporation was given lodging in an apartment building owned by the corporation; he also assumed the duties of a day and night manager of the apartments. The court found that the taxpayer's managerial position required him to live in the apartment building, and held that the living quarters furnished to him "were to some

81 *Id.* at 841. *But see* Charles A. Frueauff, 30 B.T.A. 449 (1934); Fontaine Fox, 30 B.T.A. (1934); Ralph Kitchen, 11 B.T.A. 855 (1928).

82 *Greene v. Kanne*, 23 Am. Fed. Tax R. 1141, 1143 (D. Hawaii 1938); *Renton v. Kanne*, 23 Am. Fed. Tax R. 1143 (D. Hawaii 1938). *Cf.* Lloyd N. Farnham, 16 P-H Tax Ct. Mem. 898, 899 (1947). *But cf.* Herman Martin, 44 B.T.A. 185 (1941).

83 Treas. Reg. 103, § 19.22(a)-3 (1939).

84 T.D. 4965, 1940-1 CUM. BULL. 13.

85 Mim. 5023, 1940-1 CUM. BULL. 14.

86 See text accompanying notes 21 & 22 *supra*.

87 Mim. 5023, 1940-1 CUM. BULL. 14, 15; *accord*, R. Shad Bennett, 11 P-H Tax Ct. Mem. 1481, 1489 (1942).

88 Mim. 5023 does contain language that might be construed as answering this question: "If . . . the living quarters or meals furnished are not compensatory *or* are furnished for the convenience of the employer, the value thereof need not be added to the compensation otherwise received by the employee." 1940-1 CUM. BULL. 14, 15 (emphasis added). Although it could be implied that the word "*or*" is used disjunctively rather conjunctively, the explanation given by the Commissioner is too ambiguous to be relied upon as authority for the proposition that the convenience of the employer doctrine has application even when the meals or lodging have a compensatory purpose, in addition to being for the employer's convenience. *But cf.* Gutkin & Beck, *supra* note 41, at 155.

89 6 T.C. 138 (1946).

extent for his employer's convenience."⁹⁰ It was found that the case was to be distinguished from *Benaglia* which involved living quarters furnished "solely" for the convenience of the employer. Here the taxpayer even admitted that the living quarters were furnished partly for the corporation's convenience and partly to compensate him for his work.⁹¹ The court decided that the rental value of the apartment should be excluded from gross income to the extent that it was provided for the employer's convenience, and the remaining part should be reported as income to the taxpayer.⁹²

Ellis was exceptional for its time. The cases appearing shortly thereafter, for all practical purposes, ignored the compensatory nature of meals or lodging furnished for the convenience of the employer, and continued to place the emphasis on the more positive requirements of the doctrine.⁹³ Illustrative of this approach was a 1948 Tax Court decision — *Hazel W. Carmichael*.⁹⁴ The case involved five taxpayers who were employed at a government housing project by a public construction corporation. Each employee received his lodging free but failed to report it as income on his tax return. The rental value of the lodging was treated by the corporation as an expense for compensation paid to the employees; nevertheless, the court ignored the compensatory aspect and decided whether or not all the requirements for the convenience of the employer doctrine had been met by applying the following test:

"Convenience of the employer" has been generally heretofore interpreted as meaning not merely the request, direction or pleasure of the employer but that the inherent nature of the employment requires that the employee occupy premises supplied by the employer, in which the occupation of the designated quarters becomes an inherent part of the services performed. Under such circumstances the rental value of the quarters occupied is not included in the employees [*sic*] taxable income. However, if living in the supplied quarters is not an essential element of the taxpayer's employment, even though such occupancy may be requested by the employer, and convenient to the employer, the rental value of the occupied quarters becomes a part of the employees taxable income.⁹⁵

In 1950 the Bureau, in an attempt to establish a definite test for the convenience of the employer doctrine, issued Mim. 6472:

The "convenience of the employer" rule is simply an administrative test to be applied only in cases in which the compensatory character of such benefits is not otherwise determinable. It follows that the rule should not be applied in any case in which it is evident from the other circumstances involved that the receipt of quarters or meals by the employee represents compensation for services rendered.⁹⁶

The promulgation also contained an example of a situation in which the Bureau's

90 *Id.* at 139.

91 *Id.* at 140.

92 *Id.*

93 *See, e.g.,* Henry M. Lees, 22 P-H Tax Ct. Mem. 448 (1953); *McCarty v. Cripe*, 44 Am. Fed. Tax R. 978 (S.D. Ind. 1952).

94 17 P-H Tax Ct. Mem. 239 (1948).

95 *Id.* at 241.

96 1950-1 CUM. BULL. 15.

new approach could be utilized. The fact situation involved a state civil service employee who was required, by the conditions of employment at the institution in which he was employed, to live and eat at the institution. If the applicable state statute, civil service rules and regulations of the state, or the individual contract of employment considered such meals and lodging as part of the employee's compensation, then the value of these items had to be included in gross income.⁹⁷ The mimeograph left the inference that the Bureau's approach was not really a new one but was a return to the position it had taken almost thirty years earlier.⁹⁸ The Bureau had evidently made the decision that the convenience of the employer doctrine required more than a mere showing that meals or lodging were furnished in order to allow the employee to properly perform his duties.⁹⁹ Mim. 6472 indicated that whenever meals and lodging are shown by the circumstances surrounding the factual situation to serve a compensatory purpose, even though it might be a purpose secondary to the employer's convenience, the value of the items must be reported as income.¹⁰⁰

The Tax Court gave credence to the philosophy of Mim. 6472 in several cases, one of which, *Joseph L. Doran*,¹⁰¹ was of major significance. The case involved a maintenance man employed at a state military academy who was required to occupy living quarters on the college grounds as a condition of his employment. The employee received a rental allowance in addition to his base pay, and was required by statute to pay for his lodging. He attempted to exclude from gross income the amount he spent for lodging on the theory that he lived at the college for the convenience of his employer. The court found for the Commissioner and stated that:

It is undoubtedly true that the petitioner lives at his place of employment for his employer's convenience, but it does not necessarily follow from this that the value of his living quarters is not compensation. The weakness of the [taxpayer's] argument is that he considers "compensation" and "convenience of the employer" as necessarily alternative propositions. This is not so. The convenience of the employer rule is merely one test used to determine whether the value of living quarters furnished to an employee is compensation.¹⁰²

The district courts and courts of appeal were less receptive to Mim. 6472.¹⁰³

⁹⁷ *Id.* at 15-16.

⁹⁸ See text accompanying notes 76-78 *supra*. The administrative pronouncements suggesting a contrary conclusion were sufficiently emasculated by the following language:

Mimeograph 5023 and Mimeograph 5657 are hereby modified to the extent they imply that the "convenience of the employer" rule is applicable to situations in which it is otherwise evident that living quarters or meals are furnished to an employee as compensation for services rendered. Similarly, O.D. 265, O.D. 814, O.D. 915, and I.T. 2253 should not be relied upon as precedents in any case in which living quarters or meals are determined to be compensatory without reference to the "convenience of the employer" rule. Mim. 6472, 1950-1 CUM. BULL. 15, 16.

⁹⁹ Gutkin & Beck, *supra* note 41, at 155.

¹⁰⁰ See Bittker, *The Individual as Wage Earner*, N.Y.U. 11th INST. ON FED. TAX 1147, 1148-49 (1953).

¹⁰¹ 21 T.C. 374 (1958); accord, William H. Kenner, 30 P.H. Tax Ct. Mem. 195 (1961); Herman J. Romer, 28 T.C. 1228 (1957); Leslie Dietz, 25 T.C. 1255 (1956); Charles A. Brasher, 22 T.C. 637 (1954). *But cf.* George I. Stone, 32 T.C. 1021 (1959).

¹⁰² Joseph L. Doran, 21 T.C. 374, 376 (1953).

¹⁰³ See, e.g., *Saunders v. Commissioner*, 215 F.2d 768, 773 (3d Cir. 1954). See also *Powell v. White*, 58-2 U.S. Tax Cas. 68,527 (S.D. Ill. 1958).

*Gordon v. United States*¹⁰⁴ is illustrative. That case involved employees of a state hospital who, required by the terms of their employment to live at the hospital and to be available twenty-four hours a day, were furnished meals and lodging by their employer. The court found that the meals and lodging were furnished to the employees in order that they might be able to perform their duties with greater efficiency.¹⁰⁵ It noted that each of the employees received a definite economic advantage from receipt of these items but that “[t]here is no inherent contradiction between the existence of such economic advantage and the co-existence of the more important convenience to the State”¹⁰⁶ Therefore, the value of the meals and lodging furnished to the employees did not have to be included as gross income. Without specifically rejecting *Mim.* 6472, the court in *Gordon* evaded the philosophy behind it.

2. As a Section 119 Requirement

Mim. 6472 brought greater confusion to the already muddled convenience of the employer doctrine. The division between the Bureau and the courts over the various positive and negative factors to be considered in the application of the doctrine caused Congress to attempt to clarify the controversial question of when to exclude from income the value of meals or lodging furnished to an employee. Congressman Reed, Chairman of the House Ways and Means Committee [hereinafter referred to as the “House Committee”], explained the purpose of the House version of section 119 in the following words:

Under present law, if an employer furnishes an employee meals or lodging, the employee may have to include their value in his income even though they are furnished for the convenience of the employer if there is any evidence that they are taken into account in computing the amount of the employee's wages. The new code will remove this inequity.¹⁰⁷

There were two proposed versions of section 119: one adopted by the Senate, which was the version ultimately enacted by Congress, and the other adopted by the House. The House version, as introduced by its Committee, specified that:

There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer (whether or not furnished as compensation) but only if—

(1) such meals or lodging are furnished at the place of employment, and

(2) the employee is required to accept such meals or lodging at the place of employment as a condition of his employment.¹⁰⁸

¹⁰⁴ 152 F. Supp. 427 (D.N.J. 1957).

¹⁰⁵ *Id.* at 429.

¹⁰⁶ *Id.*

¹⁰⁷ 100 CONG. REC. 3423 (1954). This thought is reiterated in the Report accompanying the House Bill: “Your committee has adopted a provision designed to end the confusion as to the tax status of meals and lodging furnished an employee by his employer.” H.R. REP. NO. 1337, 83d Cong., 2d Sess. 18 (1954). The same language appears in the Senate Report. See S. REP. NO. 1622, 83d Cong., 2d Sess. 19 (1954).

¹⁰⁸ H.R. 8300, 83d Cong., 2d Sess. § 119 (1954).

It is to be noted that this version does not even speak in terms of a convenience of the employer requirement, nor does the House Committee's Report display any intent to have such a requirement.¹⁰⁹ The thought behind this omission of the phrase "for the convenience of the employer" would seem to be that when meals or lodging are furnished to a person at the place of employment and required as a condition of his employment, such items are, in fact, being furnished for the convenience of the employer. It also must be noted that the House version clearly rejects the theory behind Mim. 6472 by specifically eliminating the compensation factor as a reason for denying application of the convenience of the employer doctrine. This rejection is expressed in the House Committee's Report as well.¹¹⁰

The Senate Finance Committee [hereinafter referred to as the "Senate Committee"] evidently felt that a specific convenience of the employer requirement was necessary and that the phrase "whether or not furnished as compensation" was confusing. In its version of the statute, which was finally enacted into law, the latter phrase was deleted and replaced with the words "for the convenience of the employer."¹¹¹ This change was explained in the Senate Committee's Report:

Your committee believes that the House provision is ambiguous in providing that meals or lodging . . . are excludable from income whether or not furnished as compensation. Your committee has provided that the basic test of exclusion is to be whether the meals or lodging are furnished primarily for the convenience of the employer (and thus excludable) or whether they were primarily for the convenience of the employee (and therefore taxable).¹¹²

The Report continues:

Under section 119 as amended by your committee, there is excluded from the gross income of an employee the value of meals or lodging furnished to him for the convenience of his employer whether or not such meals or lodging are furnished as compensation.¹¹³

Administrative reaction to section 119 came in 1956 with the promulgation of the first Regulations expressing the Service's interpretation of the new provision.¹¹⁴ These Regulations stated that section 119 required as one of its tests

109 Under your committee's provision these meals and lodging [furnished an employee by his employer] are to be excluded from the employee's income if they are furnished at the place of employment and the employee is required to accept them at the place of employment as a condition of his employment. H.R. REP. No. 1337, 83d Cong., 2d Sess. 18 (1954).

See also *id.* at A39.

110 Under section 119, if meals or lodging (1) are furnished at the place of employment, and (2) are required to be accepted by the employee at the place of employment as a condition of his employment, the value thereof shall be excluded from gross income, notwithstanding the fact that such meals or lodging represent additional compensation to the employee. *Id.* at A39.

See also *id.* at 18.

111 See Amendment No. 38, 100 CONG. REC. 9002 (1954).

112 S. REP. No. 1622, 83d Cong., 2d Sess. 19 (1954).

113 *Id.* at 190.

114 Treas. Reg. § 1.119-1 (1956).

that the meals or lodging furnished to an employee be for the convenience of the employer.¹¹⁵ The Service gave an indication of the approach it would use to determine whether this test had been met: "The question of whether meals are furnished for the convenience of the employer is one of fact to be determined by analysis of all the facts and circumstances in each case."¹¹⁶

This pronouncement met with approval in the courts, beginning with a 1959 Tax Court decision — *William P. Olkjer*.¹¹⁷ The taxpayer was an engineer employed by a construction company working in Greenland. He was supplied with meals and lodging at the jobsite by his employer, and the employer deducted from the taxpayer's paycheck an estimated amount to cover the cost of such items. The taxpayer, relying on section 119, reduced his income, as reported on his tax return, in the amount deducted by his employer for meals and lodging. One of the issues involved in the case was concerned with the convenience of the employer requirement of section 119. The court stated that this issue was "primarily one of fact to be resolved by a consideration of all of the circumstances before [the court]."¹¹⁸ It then proceeded to review the circumstances in the case — no other facilities for meals and lodging were available at the jobsite, the employment agreement showed that the employer was interested in keeping employees in proper condition to work, and the employer agreed to furnish facilities to counteract the unusual working conditions. The court ultimately held that the food and lodging were necessary in order to have the taxpayer on the job, and thus were furnished for the convenience of the employer.¹¹⁹ Significantly, the opinion noted that section 119 does not require that the employee be available for service twenty-four hours a day nor does it mean that the employee cannot himself be inconvenienced by the receipt of such meals and lodging.¹²⁰

In 1960 the Service explicitly recognized what it had implied in the Regulations and what had become evident from *Olkjer* — the fact that no general rule could be given for determining whether the convenience of the employer requirement had been fulfilled. Rev. Proc. 60-6 enumerated several areas in which the Service would not issue rulings "because of the inherently factual nature of the problems involved."¹²¹ One of the areas listed referred to the convenience of the employer requirement: "Whether meals and lodging furnished to an employee are for the convenience of the employer."¹²²

A variety of factual patterns have appeared in the case law dealing with this requirement. The following is a partial listing of the situations in which meals or lodging have been determined to be furnished for the convenience of the

115 *Id.* § 1.119-1(a)(1), (b).

116 *Id.* § 1.119-1(a)(2).

117 32 T.C. 464 (1959); *accord*, Manuel G. Setal, 30 P-H Tax Ct. Mem. 853 (1961).

118 32 T.C. at 468.

119 *Id.* at 468-69.

120 *Id.*

121 Rev. Proc. 60-6, 1960-1 CUM. BULL. 880, *superseded*, Rev. Proc. 62-32, 1962-2 CUM. BULL. 527. The latter announcement made no change with reference to section 119.

122 Rev. Proc. 60-6, 1960-1 CUM. BULL. 881. *But see* Rev. Rul. 68-354, MERTENS, CURRENT RULINGS MATERIALS, Revenue Rulings at 1090-91, a Service ruling that, where personnel at a mental hospital are needed on a twenty-four hour emergency call basis, meals and lodging furnished such personnel are furnished for the convenience of the employer.

employer: state troopers were given allowances for meals in order that they could eat along their highway patrol areas and still be subject to call at a moment's notice, so as to prevent the highways from being unguarded;¹²³ a doctor's receptionist was furnished lodging at the office in order that she could be accessible to answer business calls after hours from patients, pharmacists, and her employer;¹²⁴ the president of the United States Junior Chamber of Commerce was furnished a house for one year at the organization's headquarters to provide a place for conducting various meetings and social functions of the organization at which the president would have to preside;¹²⁵ a caretaker at a city park was furnished lodging at the park to enable him to watch over the area at all times;¹²⁶ managers of a cattle ranch were given meals and lodging in order that they could be near the cattle and available in case of emergencies arising on the ranch;¹²⁷ and executives of a brewery were furnished homes in order to be close to the daily operations of the brewery and available for emergency call.¹²⁸ The convenience of the employer requirement was found not to have been met in other situations: a \$200 per month housing allowance was given to a resident engineer at a dam site but the engineer was unable to show to the satisfaction of the court that the allowance was provided for the employer's benefit;¹²⁹ a majority stockholder in a realty corporation who performed managerial duties for two apartment buildings owned by the corporation was furnished lodging by the corporation, but failed to prove that the lodging was for the employer's convenience;¹³⁰ and two employees of an undertaker were furnished houses adjacent to the funeral home, but their duties were not found to be substantial enough to overcome the inference that the lodging was furnished primarily for their own benefit.¹³¹

The legislative history accompanying section 119 made clear that the convenience of the employer requirement could be met regardless of the fact that meals or lodging might be furnished as compensation.¹³² This intent was not articulated as lucidly in the statute itself:

In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation.¹³³

However, the case law has interpreted the statute, with the legislative history as

123 *Keeton v. United States*, 256 F. Supp. 576 (D. Colo. 1966), *aff'd per curiam*, 383 F.2d 429 (10th Cir. 1967); *United States v. Morelan*, 356 F.2d 199 (8th Cir. 1966); *United States v. Barrett*, 321 F.2d 911 (5th Cir. 1963).

124 *John L. Nolen*, 33 P.H. Tax Ct. Mem. 654 (1964).

125 *United States Junior Chamber of Commerce v. United States*, 334 F.2d 660 (Ct. Cl. 1964).

126 *Coyner v. Bingler*, 344 F.2d 736 (3d Cir. 1965).

127 *Wilhelm v. United States*, 257 F. Supp. 16 (D. Wyo. 1966).

128 *Adolph Coors Co.*, 37 P-H Tax Ct. Mem. 1477 (1968).

129 *Henry M. Lees*, 34 P-H Tax Ct. Mem. 1993 (1965).

130 *Nicath Realty Co.*, 35 P-H Tax Ct. Mem. 1411 (1966).

131 *Leonard J. Ruck, Inc.*, P-H 1969 TAX CT. REP. & MEM. DEC. (38 P-H Tax Ct. Mem.) 73.

132 See text accompanying note 113 *supra*.

133 INT. REV. CODE OF 1954, § 119.

a guideline, to effectively eliminate the compensatory element as a factor in the convenience of the employer doctrine.¹³⁴

The Regulations give the same treatment as section 119 to the effect of lodging furnished to an employee as compensation: "If the tests [specified in section 1.119-1(b)] are met, the exclusion shall apply irrespective of whether . . . under an employment contract or statute fixing the terms of employment, such lodging is furnished as compensation."¹³⁵ The Regulations are less than clear on the effect of meals furnished as compensation in the application of the convenience of the employer doctrine. Section 1.119-1(a)(2) specifies that:

If an employer furnishes meals as a means of providing additional compensation to his employee (and not for a substantial noncompensatory business reason of the employer), the meals so furnished will not be regarded as furnished for the convenience of the employer. Conversely, if the employer furnishes meals to his employee for a substantial noncompensatory business reason, the meals so furnished will be regarded as furnished for the convenience of the employer, even though such meals are also furnished for a compensatory reason. In determining the reason of an employer for furnishing meals . . . such determination will be based upon an examination of all the surrounding facts and circumstances.¹³⁶

The proper interpretation of this language would seem to be that the phrase "substantial noncompensatory business reason of the employer" has the same meaning as "primarily for the convenience of the employer." In other words, if meals are furnished to provide additional compensation and not for a substantial noncompensatory business reason, they will be considered to be furnished primarily for the convenience of the employee and, therefore, taxable as income. Such an interpretation would directly conform to the intentions stated in the legislative history.¹³⁷ The examples given in the Regulations, illustrating substantial noncompensatory business reasons, also provide evidence for this inference: when meals are furnished during an employee's working hours in order to have the employee available for emergency call during his eating period;¹³⁸ when meals are furnished to the employee during working hours because of a limited meal period (thirty or forty-five minutes), where the employee could not be expected to eat elsewhere in such a short period of time;¹³⁹ and where meals are furnished to a restaurant or other food service employee during meal periods in which the employee works.¹⁴⁰ Examples of factual patterns which would be viewed as meals furnished for compensatory business reasons are: generally, when meals are furnished before or after the employee's working hours;¹⁴¹ when they are furnished on nonworking days;¹⁴² and when meals are

134 *Coyner v. Bingler*, 344 F.2d 736, 738-39 (3rd Cir. 1965); *United States Junior Chamber of Commerce v. United States*, 334 F.2d 660, 663 (Ct. Cl. 1964); *Boykin v. Commissioner*, 260 F.2d 249, 254 (8th Cir. 1958).

135 *Treas. Reg. § 1.119-1(b)* (1964).

136 *Id. § 1.119-1(a)(2)(i)*.

137 See text accompanying note 112 *supra*.

138 *Treas. Reg. § 1.119(a)(2)(ii)(a)* (1964).

139 *Id. § 1.119(a)(2)(ii)(b)*. See also *id. § 1.119-1(a)(2)(ii)(c), (f)*.

140 *Id. § 1.119(a)(2)(ii)(d)*.

141 *Id. § 1.119-1(a)(2)(i)*. The exceptions to this general rule noted by the Regulations are contained in section 1.119-1(a)(2)(ii)(d), (f) and deal with situations where the em-

furnished to the employee to promote his morale, foster goodwill towards the employer, or attract prospective employees.¹⁴³

In addition, further evidence of this interpretation has been provided by a recent Tax Court decision and Revenue Ruling. In *Carlton R. Mabley, Jr.*,¹⁴⁴ it was held that meals furnished a corporate vice-president at daily luncheon conferences conducted by the corporation were for substantial noncompensatory business reasons.¹⁴⁵ These meals were furnished for the purpose of providing necessary daily contact with the corporate staff, thereby conserving normal working hours which would otherwise be consumed by many daily conferences among the various corporate executives.¹⁴⁶ In Revenue Ruling 68-354,¹⁴⁷ personnel of a mental hospital who were needed on twenty-four-hour emergency call were furnished meals and lodging by their employer. The Service ruled that in light of past emergencies and the anticipation of similar future situations, the meals and lodging were furnished for substantial noncompensatory business reasons.¹⁴⁸ Thus, even under the Regulations an exclusion under section 119 would seem to be available, regardless of the fact that the meals or lodging are furnished as compensation, if such items are furnished *primarily* for the convenience of the employer.

C. Lodging Furnished an Employee as a Condition of His Employment

Section 119(2) and the Regulations specifically require that in order for the value of lodging to be excluded from gross income, the employee must be required to accept such lodging "as a condition of his employment."¹⁴⁹ This is not a new element for the convenience of the employer rule; indeed, it has long been recognized by case law¹⁵⁰ and by administrative rulings¹⁵¹ appearing prior to section 119 as an essential element of the doctrine. In fact, the test for determining the existence of "convenience of the employer," as given by the Bureau in 1940, was that "if living quarters or meals are furnished to an employee who is required to accept such quarters and meals in order to perform properly his duties," such items would be excluded from gross income.¹⁵² Prior to the enactment of section 119, there was an implicit requirement in the con-

ployee would have been furnished a meal by his employer during working hours had the employee's duties not prevented him from eating during working hours.

142 *Id.* § 1.119-1(a)(2)(i).

143 *Id.* § 1.119-1(a)(2)(iii).

144 34 P-H Tax Ct. Mem. 1963 (1965).

145 *Id.* at 1965.

146 *Id.* at 1965-66.

147 MERTENS, CURRENT REVENUE RULINGS, Revenue Rulings at 1090-91.

148 *Id.* at 1091.

149 Treas. Reg. § 1.119-1(b)(3) (1964).

150 *See, e.g.*, *Diamond v. Sturr*, 221 F.2d 264 (2d Cir. 1955); *Saunders v. Commissioner*, 215 F.2d 768 (3d Cir. 1954); *Moulder v. United States*, 51 Am. Fed. Tax R. 1226 (W.D. Mo. 1955); *McCarty v. Cripe*, 44 Am. Fed. Tax R. 978 (S.D. Ind. 1952); *Greene v. Kanne*, 23 Am. Fed. Tax R. 1141 (D. Hawaii 1938); *Jones v. United States*, 60 Ct. Cl. 552 (1925); (George I. Stone, 32 T.G. 1021 (1959)); *Powell v. White*, 58-2 U.S. Tax Cas. 68,527 (S.D. Ill. 1958); *Hazel W. Carmichael*, 17 P-H Tax Ct. Mem. 239 (1948); *R. Shad Bennett*, 11 P-H Tax Ct. Mem. 1481 (1942); and *Arthur Benaglia*, 36 B.T.A. 838 (1937).

151 *See, e.g.*, G.C.M. 14710, XIV-1 CUM. BULL. 44 (1935); I.T. 2253, V-1 CUM. BULL. 32 (1926); O.D. 915, 4 CUM. BULL. 85 (1921).

152 Mim. 5023, 1940-1 CUM. BULL. 14, 15.

venience of the employer doctrine that for meals or lodging received to be exempt from federal taxation, they had to be furnished so that the employee could properly perform his work for the employer. Section 119 embodies this as an explicit requirement, yet makes it only applicable to lodging received.

It has already been noted¹⁵³ that the House version of section 119 expressed two specific requirements for qualifying for the exemption: (a) that the meals or lodging be furnished on the business premises of the employer, and (b) that the employee be required to accept them as a condition of his employment. The Senate Committee amended this version and expressly required (a) that such meals be furnished for the convenience of the employer, and (b) that they be furnished on the business premises of the employer; it also specifically required that (a) such lodging be furnished for the convenience of the employer, (b) it be furnished on the business premises of the employer, and (c) it be accepted by the employee as a condition of his employment.¹⁵⁴ The prime reason for the specific convenience of the employer requirement incorporated in the Senate version was to emphasize that the keystone of the convenience of the employer doctrine is that meals or lodging be given to an employee primarily for the benefit and convenience of his employer.¹⁵⁵ No rationale for including a specific condition of employment requirement was given in the legislative history accompanying the Senate's version, nor was there a reason expressed for having the requirement apply only to lodging.

The Senate Committee Report¹⁵⁶ and the Regulations¹⁵⁷ explain the phrase "required as a condition of employment" as meaning required to enable the employee to perform properly the duties of his employment. It has already been noted that Mim. 5023 considered this latter requirement to be the test for making a determination of "convenience of the employer."¹⁵⁸ This determination entails a consideration of all the facts and circumstances in a particular situation and speaks to the ultimate issue of whether the meals or lodgings were furnished primarily for the employer's benefit and convenience. Thus, since the "condition of employment" concept is at the very essence of the convenience of the employer requirement, stating it as a separate requirement of section 119 is redundant, and unnecessary to the proper application of the statute.

Several criteria have been utilized to indicate a situation in which lodging is furnished to an employee as a condition of his employment. The example situation given in the Regulations is when "lodging is furnished because the employee is required to be available for duty at all times or because the employee could not perform the services required of him unless he is furnished such lodging."¹⁵⁹ The other common criteria applied by the judiciary are evident in one of the first tax court cases to have discussed this section 119 requirement — *Mary B. Heyward*.¹⁶⁰ The court cited several instances in which an employee

153 See text accompanying note 108 *supra*.

154 See Amendment No. 38, 100 CONG. REG. 9002 (1954).

155 See text accompanying note 112 *supra*.

156 S. REP. No. 1622, 83d Cong., 2d Sess. 19, 190 (1954).

157 Treas. Reg. § 1.119-1(b) (1964).

158 See text accompanying note 152 *supra*.

159 Treas. Reg. § 1.119-1(b) (1964).

160 36 T.C. 739 (1961), *aff'd per curiam*, 301 F.2d 307 (4th Cir. 1962).

would have to accept lodging from his employer in order to properly perform his duties — the remoteness of the jobsite and the unavailability of other facilities in the area, the inherent necessity of the employee's presence at the jobsite, or demands made by the employer for his own reasons.¹⁶¹ Thus, the exigencies of the particular situation may as a practical matter require the employee to accept the lodging furnished by his employer; there is no need for an express requirement by the employer.¹⁶²

More recent case law might well have eliminated one of the criteria — “at the demand of the employer” — listed in *Heyward*. *Gordon S. Dole*¹⁶³ involved employees of a clothing mill who were *required* by their employer to live in company-owned houses approximately one mile from the mill. Relying on the legislative history and the Regulations, the court stated that the condition of employment standard “prescribed by Congress is not subjective. It is objective. The employer's state of mind is not controlling.”¹⁶⁴ Then, using the objective test of whether the lodging was “required in order for the employee to properly perform the duties of his employment,” the court denied the section 119 exemption.¹⁶⁵

As a practical matter, the method and ultimate test utilized in making a determination of whether the condition of employment requirement has been met is identical to that used for establishing the convenience of the employer requirement. It calls for an analysis of all the facts and circumstances in each case.¹⁶⁶ In the *Olkjer* case it was the decision of the court that meals and lodging had been furnished employees for the convenience of the employer because such an arrangement was necessary in order to have the employees working at the jobsite.¹⁶⁷ The factual situations in other cases found to meet the convenience of the employer requirement also give the indication that one of the requisites is that the meals or lodging to be furnished to the employee because his duties require that he eat or live at the situs of his employment.¹⁶⁸ Thus, one is hard pressed to find a true distinction between the two requirements. *United States Junior Chamber of Commerce v. United States*¹⁶⁹ is in accord with this position. The court was presented with a section 119 situation and stated that “[t]here does not appear to be any substantial difference between the first two conditions of § 119: The ‘convenience of the employer’ test and the ‘required as a condition of his employment’ test.”¹⁷⁰ The two requirements were discussed together in *Nicath Realty Company*¹⁷¹ as well. There the court expressly used the condition of employment requirement (that lodging is required in order to enable the employee to perform properly the duties of his employment) to determine whether

161 *Id.* at 744.

162 See Manuel G. Setal, 30 P-H Tax Ct. Mem. 853, 856 (1961). See also Coyner v. Binger, 344 F.2d 736, 738 (3d Cir. 1965).

163 43 T.C. 697, *aff'd per curiam*, 351 F.2d 308, (1st Cir. 1965).

164 *Id.* at 706.

165 *Id.*

166 See text accompanying notes 116-18 *supra*.

167 See text accompanying note 119 *supra*.

168 See, e.g., John L. Nolen, 33 P-H Tax Ct. Mem. 654, 656 (1964).

169 334 F.2d 660 (Ct. Cl. 1964).

170 *Id.* at 663.

171 35 P-H Tax Ct. Mem. 1411 (1966).

the lodging provided had met the requirement of being furnished for the convenience of the employer.¹⁷² While the other cases dealing with section 119(2) are more subtle, the result has been the same. The courts have attempted to distinguish the two requirements but have, in effect, treated them identically.

The practical conclusion to this discussion is that the condition of employment requirement of section 119 is an anomaly, both because of its inconsistent application to lodging, and not meals, and because it is actually a factor to be considered in satisfying the convenience of the employer requirement.

D. Furnished Without Charge

The first Regulations promulgated after the enactment of section 119 specified:

The exclusion provided by section 119 applies only to meals and lodging furnished in kind, without charge or cost to the employee. If the employee has an option to receive additional compensation in lieu of meals or lodging in kind, or is required to reimburse the employer for meals or lodging furnished in kind, the value of such meals and lodging is not excluded from gross income.¹⁷³

This statement expresses the "free of charge" requirement. In more concrete terms, this requirement means that if an employee is furnished meals and lodging by his employer, but is required to pay for such items, he is not allowed to reduce his reported gross income by the amount paid for the meals or lodging, or by the reasonable value thereof.

The legislative history of section 119 is silent on this particular requirement, but there is evidence of its existence in case law prior to the passage of section 119.¹⁷⁴ It would appear from the cases that the free of charge requirement is founded on two principles: (a) when an employee receives any cash payment for services performed, he has received compensation that must be reported as gross income on his income tax return, regardless of the fact that the employee uses the money to pay his employer for meals or lodging which he is required to accept in order to perform his employment duties;¹⁷⁵ and (b) the word "furnished" in the statutory phrase "furnished for the convenience of the employer," implies that meals or lodging are to be given to the employee free of charge.¹⁷⁶

The first of these two principles is not new to the convenience of the employer doctrine. The idea that the doctrine did not apply when meals or lodging were furnished for compensatory reasons was dramatized by *Min.* 6472.¹⁷⁷ Yet this has been overcome by the enactment of section 119, which, in effect, elim-

172 *Id.* at 1416-17.

173 Treas. Reg. § 1.119-1(c)(2) (1956).

174 *E.g.*, Herman Martin, 44 B.T.A. 185 (1941); *accord*, Robert Douglas Bartilson, 23 P-H Tax Ct. Mem. 1023 (1954); Joseph L. Doran, 21 T.C. 374 (1953); Hazel W. Carmichael, 17 P-H Tax Ct. Mem. 239 (1948). *Contra*, Powell v. White, 58-2 U.S. Tax Cas. 68,527 (S.D. Ill. 1958) (*semble*). *But cf.* Lloyd N. Farnham, 16 P-H Tax Ct. Mem. 898 (1947).

175 *See* Herman Martin, 44 B.T.A. 185, 189 (1941).

176 *See* Boykin v. Commissioner, 260 F.2d 249, 251-52 (8th Cir. 1958).

177 *See* text accompanying notes 96-100 *supra*.

inates the compensatory element as a determining factor in the convenience of the employer doctrine. Thus, it can readily be seen that the convenience of the employer doctrine should apply regardless of the fact that the employee is required to pay for his meals or lodging. There is no substantial difference between paying an employee \$1300 per month and requiring him to reimburse the employer for meals and lodging in the amount of \$300 per month, and paying an employee \$1000 per month and furnishing him meals and lodging free of charge. An analysis of the applicability of the convenience of the employer doctrine should yield similar results in both situations. If section 119 recognizes an exclusion of \$300 for the value of meals or lodging furnished an employee, so also should the statute apply to the \$300 paid for meals or lodging where such items are not furnished free of charge. Neither the legislative history, the case law dealing with the free of charge requirement, nor the Regulations promulgating such requirement give any indication that, if an employee is charged for his meals or lodging, such items still cannot be furnished primarily for the convenience of the employer. The fact that the Regulations implied such a requirement from section 119 would seem to stem from the absence of clear language in the statute negating the compensatory element.¹⁷⁸

Wisely, the Court of Appeals for the Eighth Circuit rejected the free of charge requirement in 1958 in the case of *Boykin v. Commissioner*.¹⁷⁹ The factual situation involved an employee-physician who was required to live at a hospital in order to properly perform his duties. The employee was given a salary from which a set amount was deducted for the fair rental value of the lodging furnished to him by his employer. The court attacked the free of charge requirement by concentrating on the meaning of the word "furnished" as used in the context of the convenience of employer doctrine. It was held that "furnished" did not carry with it the implication of "free of charge"¹⁸⁰ and that nothing in section 119 itself or the legislative history indicated that the exclusion was limited to meals and lodgings furnished on a gratuitous basis.¹⁸¹ Finally, the opinion analyzed the requirement according to the basic test for the doctrine — primarily for the convenience of the employer.¹⁸² The immediate holding was in favor of the taxpayer, allowing him to exclude the fair rental value of the lodging from his gross income;¹⁸³ the implicit conclusion was that the Regulations had misinterpreted the statute.

In 1959 the Service issued Revenue Ruling 59-307 announcing that it would follow the *Boykin* decision.¹⁸⁴ Later in the same year, the Tax Court in *Olkjer*¹⁸⁵ and the Fourth Circuit in *Wolf v. Commissioner*¹⁸⁶ added their approval of the *Boykin* rationale. Yet it was not until 1964 that the Regulations were amended

178 See text accompanying note 133 *supra*.

179 260 F.2d 249 (8th Cir. 1958).

180 *Id.* at 251.

181 *Id.* at 252.

182 *Id.* at 254.

183 *Id.*

184 1959-2 CUM. BULL. 48.

185 William I. Olkjer, 32 T.C. 464, 468 (1959).

186 59-2 U.S. Tax Cas. 73,378 (4th Cir. 1959), *rev'g and remanding per stipulation*, 27 P-H Tax Ct. 580 (1958).

to reflect any change with regard to the free of charge requirement.¹⁸⁷ In the subsection pertaining to lodging, the present Regulations state that as long as the other requirements for section 119 are fulfilled,

[i]f the employer furnishes the employee lodging for which the employee is charged an unvarying amount irrespective of whether he accepts the lodging, the amount of the charge made by the employer for such lodging is not, as such, part of the compensation includible in the gross income of the employee. . . .¹⁸⁸

The Regulations continue to discuss "meals furnished without a charge" separately from "meals furnished with a charge";¹⁸⁹ however, the distinction made between the two would seem to be insignificant. Where meals are furnished to the employee for a charge the Regulations provide that the charges made for such meals are not to be included in gross income (presuming the other requirements for such an exclusion have been met) if: (a) the employee has no choice but to purchase his meals from the employer; and (b) the charge is an unvarying amount.¹⁹⁰ The effect of the language *denying* an exclusion for charged meals, where the employee is provided with the option of either accepting such meals and paying for them, or not paying for them and providing his own meals, is to reiterate the basic principle of section 119 and the convenience of the employer doctrine: such meals must be furnished primarily for the benefit and convenience of the employer. If the employee has the option of providing his own meals, the meals evidently need not be furnished by the employer in order for the employee to properly render service to the employer. In addition, there would seem to be no reason to limit the exclusion to meals and lodging for which an unvarying charge is made, *e.g.*, by subtraction from the employee's stated compensation. The fact that the charge may vary should not be a factor. Hopefully, the courts will disregard these ambiguous qualifications and consider both charged and uncharged meals and lodging according to the basic convenience of the employer requirement.

E. Meals or Lodging Must Be Furnished in Kind

Section 119 does not contain an explicit requirement that meals or lodging

187 T.D. 6745, 29 Fed. Reg. 9380 (1964).

188 Treas. Reg. § 1.119-1(b) (1964).

189 *Compare id.* § 1.119-1(a)(2) with *id.* § 1.119-1(a)(3).

190 The Regulation reads:

(3) *Meals furnished with a charge.*

(i) If an employer provides meals which an employee may or may not purchase, the meals will not be regarded as furnished for the convenience of the employer. Thus, meals for which a charge is made by the employer will not be regarded as furnished for the convenience of the employer if the employee has a choice of accepting the meals and paying for them or of not paying for them and providing his meals in another manner.

(ii) If an employer furnishes an employee meals for which the employee is charged an unvarying amount (for example, by subtraction from his stated compensation) irrespective of whether he accepts the meals, the amount of such flat charge made by the employer for such meals is not, as such, part of the compensation includible in the gross income of the employee In the absence of evidence to the contrary, the value of the meals may be deemed to be equal to the amount charged for them.

Treas. Reg. § 1.119-1(a)(3)(i), (ii). See generally Rev. Rul. 67-259, 1967-2 CUM. BULL. 76.

be furnished in kind; however, the "in kind" requirement is expressly stated in the Regulations:

The exclusion provided by section 119 applies only to meals and lodging furnished in kind by an employer to his employee. Cash allowances for meals or lodging received by an employee are includible in gross income to the extent that such allowances constitute compensation.¹⁹¹

Evidently, the Service has implied this requirement from the section 119 words "value of any meals or lodging furnished to [the employee]" The pre-Code cases in the area¹⁹² and the legislative history behind section 119¹⁹³ lend support to the Service's interpretation. The following statement taken from both the House Committee Report and the Senate Committee Report indicates congressional intention to make an in kind requirement implicit within the statutory language of section 119: "[this section] applies only to meals or lodging furnished in kind. Therefore, any cash allowances for meals or lodging received by an employee will continue to be includible in gross income . . . to the extent that such allowances represent compensation."¹⁹⁴

The case law¹⁹⁵ and administrative rulings issued¹⁹⁶ subsequent to the passage of the Code have, in general, recognized the in kind requirement as one of the essential elements for an exclusion under section 119. However, the requirement has not been accorded universal acceptance.¹⁹⁷ The case law dealing with state police subsistence allowances has been the maverick of the convenience of the employer doctrine, and particularly so with reference to the in kind requirement of the doctrine.

In its early years, the convenience of the employer doctrine was applied to a number of situations dealing with subsistence and/or quarters allowance. *Jones v. United States* is a notable example.¹⁹⁸ However, by and large, the employment situations where these allowances were provided and excluded as income involved military or foreign service personnel, who, through rulings and regulations, gradually came to be treated separately from the convenience of the employer doctrine. A distinction between military personnel and civilian

191 Treas. Reg. § 1.119-1(c)(2) (1964).

192 See, e.g., *Magness v. Commissioner*, 247 F.2d 740 (5th Cir. 1957), cert. denied, 355 U.S. 931 (1958); *Sweeney v. United States*, 285 F.2d 444 (Ct. Cl. 1961); *Charles H. Hyslope*, 21 T.C. 131 (1953); and *Gunnar Van Rosen*, 17 T.C. 834 (1951). But cf. *Saunders v. Commissioner*, 215 F.2d 768 (3rd Cir. 1954).

193 H.R. REP. NO. 1337, 83d Cong., 2d Sess. A39 (1954); S. REP. NO. 1622, 83d Cong., 2d Sess. 190-91 (1954).

194 *Id.*

195 See, e.g., *Wilson v. United States*, 292 F. Supp. 200 (D.N.H. 1968); *Michael A. Tougher, Jr.*, P-H 1969 TAX CT. REP. & MEM. DEC. (51 T.C. —) 519; *Charles N. Anderson*, 42 T.C. 410, rev'd on other grounds, 371 F.2d 59 (6th Cir. 1966); and *Henry M. Lees*, 34 P-H Tax Ct. Mem. 1993 (1965).

196 See T.I.R. 741, MERTENS, 1961-1965 RULINGS, Miscellaneous Announcements at 378-79 (1965); Rev. Rul. 60-66, 1960-1 CUM. BULL. 21.

197 See *United States v. Morelan*, 356 F.2d 199 (8th Cir. 1966); *United States v. Barrett*, 321 F.2d 911 (5th Cir. 1963); and *Keeton v. United States*, 256 F. Supp. 576 (D. Colo. 1966), aff'd per curiam, 383 F.2d 429 (10th Cir. 1967).

198 In *Jones*, the Court of Claims held that a military officer had not realized taxable income in the form of cash allowances provided for quarters. For further discussion of this case and other situations dealing with subsistence and quarters allowances, see text accompanying notes 19-43 supra.

employees for purposes of the exclusion was made in *Gunnar Van Rosen*.¹⁹⁹ A civilian employee of the Army Transportation Corps, as a result of the duties of his employment, was required to eat some of his meals away from home. The employee was given a cash allowance by his employer to pay for these meals. Although the allowance was given for the convenience of the employer, the Tax Court distinguished the situation in *Jones* from the facts in *Van Rosen* because the former involved "an army officer and . . . the terms and conditions of his service were much more rigid and his freedom of action much more restricted than in the case of a civilian employee" ²⁰⁰ The court decided that the convenience of the employer doctrine required that meals be furnished in kind and, the cash allowances granted to the civilian employee could therefore not be excluded from gross income.²⁰¹

The first case concerned with the tax consequences of state police subsistence allowances was *Charles H. Hyslope*.²⁰² An Indiana state trooper, while on duty, was required by his employer to purchase his meals near his highway assignment. To reimburse him for the cost of these meals and other incidental expenses, the state gave the trooper a \$70 per month subsistence allowance. Relying on *Van Rosen* as precedent, and distinguishing the state police subsistence allowance situation from *Jones*, the Tax Court held that these allowances were taxable income to those employees receiving them.²⁰³

The "Van Rosen-Hyslope approach" met with opposition in a court of appeals decision—*Saunders v. Commissioner*.²⁰⁴ Saunders was a state trooper who had enlisted in a two-year program with the New Jersey State Police. The program was structured along military lines whereby each trooper lived at the state police station, was on call for duty twenty-four hours a day, and could not leave his post without permission. Originally the program required each trooper to return to his station for all of his meals. However, in an effort to keep the troopers close to their highway assignments, a new system was initiated whereby they were given a cash allowance in lieu of meals. The Van Rosen-Hyslope approach was distinguished in that Saunders was in a program analagous to the usual military situation. The rigidity and discipline found in the New Jersey State Police program left no doubt that the allowance for meals was furnished primarily for the benefit and convenience of the employer. Relying on *Jones* as precedent, the court held that the convenience of the employer doctrine was applicable and that such cash allowances need not be included within gross income.²⁰⁵

The *Hyslope* rationale was followed in a court of appeals case coming after enactment of the Code but dealing with a tax year prior to the Code. *Magness v. Commissioner*²⁰⁶ involved a state trooper who was required to eat some of his meals near the highway while on duty, but was not subject to the strict working conditions present in *Saunders*. The troopers were also given a

199 17 T.C. 834 (1951).

200 *Id.* at 839.

201 *Id.* at 839-40.

202 21 T.C. 131 (1953).

203 *Id.* at 133-34.

204 215 F.2d 768 (3rd Cir. 1954).

205 *Id.* at 773-75.

206 247 F.2d 740 (5th Cir. 1957), *cert. denied*, 355 U.S. 931 (1958).

flat allowance of \$4.50 per day in lieu of meals, regardless of their actual expenses and whether they were on duty or on vacation. Refusing to rely on *Saunders*, the Fifth Circuit held that the meals were not furnished in kind and therefore could not be excluded under the convenience of the employer doctrine.²⁰⁷

The special treatment sometimes afforded state troopers over other non-military employees was given statutory recognition in section 120 of the Code:

(a) General Rule. — Gross income does not include any amount received as a statutory subsistence allowance by an individual who is employed as a police official by a State

(b) Limitations. —

(1) Amounts to which subsection (a) applies shall not exceed \$5 per day.²⁰⁸

The legislative history reflects the congressional intent to provide state police officers an exclusion not ordinarily allowed, because these officers were required to make frequent trips away from their command posts.²⁰⁹ It would also seem to be another example of a type of “per se” convenience of the employer doctrine, analogous to the exclusions granted for allowances provided to military and other special government personnel.²¹⁰ However, four years later, section 120 was repealed²¹¹ as a result of abuses by state authorities who utilized the exemption for compensatory purposes rather than for the state’s convenience.²¹² In addition, congressional sentiment for the state police and their peculiar situation declined: “this exclusion is inequitable since there are many other individual taxpayers whose duties also require them to incur subsistence expenditures regardless of the tax effect.”²¹³ It was the intent of Congress “[t]o bring the tax treatment of subsistence allowances for police officials in line with the treatment of such allowances in the case of other taxpayers”²¹⁴

Despite the repeal of section 120, the court of appeals cases which dealt with taxable years after the passage of the Code continued to cite *Saunders* as authority for granting exclusions for state police subsistence allowances. Two of these cases were *United States v. Barrett*²¹⁵ and *United States v. Morelan*.²¹⁶ They involved cash allowances granted to state troopers who were required to eat their meals at restaurants close to their highway assignments, to inform their superiors of when and where they would be eating their meals, and to remain on duty during their meal periods in the event that they were needed. At the end of each pay period, the trooper was required to submit an expense account and was allowed a subsistence reimbursement up to a maximum amount. The factual situation of these two cases was distinguished from the circumstances pres-

207 *Id.* at 744-45.

208 INT. REV. CODE of 1954, § 120, 68A Stat. 39 (repealed 1958).

209 H.R. REP. No. 1337, 83d Cong., 2d Sess. 18 (1954); S. REP. No. 1622, 83 Cong., 2d Sess. 20 (1954).

210 See text accompanying notes 41-43 *supra*.

211 Technical Amendments Act of 1958, § 3, 72 Stat. 1607.

212 See H.R. REP. No. 775, 85th Cong., 1st Sess. 7 (1957); S. REP. No. 1983, 85th Cong., 2d Sess. 14 (1958).

213 *Id.*

214 *Id.*

215 321 F.2d 911 (5th Cir. 1963).

216 356 F.2d 199 (8th Cir. 1966).

ent in *Hyslope* and *Magness* on two counts: (a) *Barrett* and *Morelan* dealt with situations where greater restrictions were imposed on the troopers' meal periods and greater concern shown for the benefit and convenience of the state in providing the allowances;²¹⁷ and (b) they illustrated a definite correlation between the amount of reimbursement and the sum actually expended for meals, whereas, there was no correlation found between the reimbursement and expenditures in *Hyslope* and *Magness*.²¹⁸

There was an additional argument posed in *Morelan*. The Commissioner argued that the Regulations and legislative history clearly indicated that section 119 contained an implied in kind requirement. Addressing itself to the language contained in the Regulations and legislative history the court held that:

The phrase [cash allowances for meals or lodging received by an employee are includible in gross income] "to the extent that such allowances represent compensation" could easily modify the words "cash allowances," meaning that only cash allowances which "compensate" — i.e., reward or benefit rather than reimburse — are includable in gross income. In the instant cases [*Saunders*, *Barrett* and *Morelan*] the evidence abundantly supports a conclusion that in fact the subsistence allowance was not compensation.²¹⁹

The most recent case to follow the *Saunders* line of cases was *Keeton v. United States*.²²⁰ The factual pattern was the same with one notable exception. Rather than require the troopers to list their actual expenses and receive reimbursements up to a maximum amount, the troopers in *Keeton* received a set \$50 per month allowance for meals and uniform maintenance. This arrangement was the same utilized in *Hyslope* and *Magness*, except that the amount provided the troopers was shown not to be sufficient to cover the actual cost of expenses. The court made a special effort to emphasize that the reason for this practice of providing cash allowances in lieu of meals was actually founded in sound business policy, i.e., to eliminate costly bookkeeping.²²¹ The fact that the allowance did not meet the actual expenses incurred by the troopers enabled the court to dismiss any argument that the allowance was granted for compensatory reasons, and decide that it was in fact given for the convenience of the state in providing better police service. Thus, the cash allowance was excluded from gross income.²²²

Unquestionably, the in kind requirement appears to be as artificial and formalistic as the free of charge requirement. There can be no substantial difference between having a state trooper return to his station to eat the meals provided there, where he will remain available for immediate call to service, and allowing him to eat at a restaurant near his highway assignment, where he will also remain on duty and be subject to call at any time. Ironically, the truth is that requiring the trooper to eat closer to his highway assignment

217 *United States v. Barrett*, 321 F.2d 911, 912-13 (5th Cir. 1963); *United States v. Morelan*, 356 F.2d 199, 207 (8th Cir. 1966).

218 *Id.*

219 *United States v. Morelan*, 356 F.2d 199, 204 (8th Cir. 1966).

220 256 F. Supp. 576 (D. Colo. 1966), *aff'd per curiam*, 383 F.2d 429 (10th Cir. 1967).

221 *Id.* at 580.

222 *Id.*

renders a greater benefit and convenience to the state. As *Saunders* indicated, the system of requiring the troopers to eat along the patrolled highways makes it possible for the state police to provide better protection to motorists. Thus, since the prime criterion of section 119 is convenience to the employer, there seems to be greater justification in allowing an exemption for subsistence allowances than for meals furnished directly to troopers by the state. It would seem that any possible abuse brought about by allowing exclusions for cash allowances could be controlled by a proper finding that the item is provided primarily for the convenience of the employer.²²³

While the in kind requirement would seem to have no practical place in the convenience of the employer doctrine, the fact remains that the requirement is indeed implicitly contained within section 119 and explicitly stated in the Regulations. A recent district court case, *Wilson v. United States*,²²⁴ bases its holding on this observation. Despite the fact that the case involved a situation which strongly resembled that appearing in the trooper cases allowing the exclusion, *Wilson* upheld the in kind requirement for section 119 in denying an exclusion of subsistence allowances given to New Hampshire state troopers.²²⁵ The opinion directs itself to the real problem in the judicial debate over the in kind requirement — the language contained in the Regulations and the statute.

The Regulations have interpreted section 119 as addressing itself only to meals and lodging furnished in kind, and unless this is an unreasonable and inconsistent interpretation, then it must be given judicial recognition.²²⁶ Considering the language of the statute and the legislative history, this interpretation would seem to be beyond reproach. Section 119 specifies that “*the value of any meals or lodging furnished*” will be excluded from gross income. The court in *Wilson* validly recognized that it would be a torture of words to interpret “value of” as equivalent to “cost of,”²²⁷ in addition, it would seem improper to interpret “furnished” as meaning “reimbursed in cash.” The strong implication of an in kind requirement in this language is supported by the specific statements in the legislative history that section 119 will apply only to meals or lodging furnished in kind.²²⁸ Had Congress really desired to include cash allowances within section 119, it would likely have specifically provided for the exclusion as it did with the exclusion granted to ministers in section 107.²²⁹

223 The real objection to treating subsistence allowances the same as meals and lodging furnished in kind seems to be that when an employer furnishes meals and lodging to an employee, the employer maintains control over such items and they are furnished in order to provide the employee with food and a place to live; when the employer gives an employee a subsistence allowance, to the extent that the money is the employee's own and without restrictions on its use or expenditure, the employer loses control of the allowance, and the money might be spent on items other than meals or lodging. See Gunnar Van Rosen, 17 T.G. at 836. However, even in situations where a flat cash allowance is given to the employee, it still must be shown that the allowance is given primarily for the convenience of the employer. If the allowance system is abused, *i.e.*, the allowance is given more for the employee's benefit and convenience, the convenience of the employer requirement will not be met and section 119 will not apply.

224 292 F. Supp. 195 (D.N.H. 1968).

225 *Id.* at 205-06.

226 See *id.* at 205.

227 *Id.*

228 See text accompanying note 194 *supra*.

229 See INT. REV. CODE of 1954, § 107.

Additionally, had Congress wanted to provide for an exemption to state troopers receiving subsistence allowances, section 120 would not have been repealed. Even the argument advanced in *Morelan* that the words "to the extent that such allowances constitute compensation," stated in the Regulations and legislative history, indicate that the in kind requirement applies only if the allowances are given as compensation, runs counter to a basic premise of section 119. This premise, also stated in the Regulations and legislative history, is that the statutory exclusion will apply regardless of any compensatory intent accompanying the meals or lodging, so long as the benefits are primarily given for the employer's convenience.²³⁰ On the basis of this premise, the fact that a subsistence allowance constitutes compensation is itself irrelevant to an appropriate consideration of section 119.²³¹ Thus, it appears the existence of the in kind requirement cannot be justifiably denied until an amendment to the statute and/or an amendment to the Regulation is made.

F. *Furnished on the Business Premises of the Employer*

Section 119 and the Regulations²³² specifically require that meals or lodging be furnished on the business premises of the employer in order for the statutory exclusion to apply. The problem here can be stated very simply: What does the phrase "on the business premises of the employer" mean? The legislative history²³³ and the Regulations²³⁴ define "business premises" as, in general, the place of employment of the employee. The problem with this definition is in determining the precise meaning of "the place of employment." The Regulations, in an attempt to express these abstract phrases in concrete terms, give two examples of situations which fulfill the business premises requirement:

[M]eals and lodging furnished in the employer's home to a domestic servant would constitute meals and lodging furnished on the business premises of the employer. Similarly, meals furnished to cowhands while herding their employer's cattle on leased land would be regarded as furnished on the business premises of the employer.²³⁵

These examples merely state the obvious and literal meaning of the phrase "on the business premises of the employer." The courts actually are left without a definite guideline to follow in this area.

The cases dealing with the business premises requirement reflect this lack of congressional and administrative direction. The opinions appear to be groping aimlessly for want of an established test by which a judgment on this require-

²³⁰ See text accompanying notes 132-37 *supra*.

²³¹ One explanation for this language might be that it is included within the Regulations and legislative history to point out that cash allowances will be included in gross income *unless* some other provision of the Code or Regulations provides that such allowances do not constitute compensation. *See, e.g.*, the exclusions from gross income specified in INT. REV. CODE of 1954, §§ 101-18; the statutory exclusion provided in *id.* § 912 for government foreign service personnel; and the exclusion for allowances given to other government personnel provided in Treas. Reg. § 1.61-2(b) (1957).

²³² Treas. Reg. §§ 1.119-1(a)(1)(i), (b)(1) (1964).

²³³ Conference Report, H.R. REP. No. 2543, 83d Cong., 2d Sess. 27 (1954).

²³⁴ Treas. Reg. § 1.119-1(c)(1) (1964).

²³⁵ *Id.*

ment can be made. In 1963 the first case which devoted discussion to the meaning of "on the business premises" appeared, it was one of the earlier discussed state trooper cases — *United States v. Barrett*.²³⁶ The court found that a private restaurant could be considered the business premises of the state police because the duties of a state trooper entailed protecting all the highways in the state and not merely the station headquarters.²³⁷ The idea that "the business premises of the employer" means the place where the employee performs his duties was explicitly stated in *United States Junior Chamber of Commerce v. United States*.²³⁸ The president of the National Junior Chamber of Commerce occupied a special house owned by the organization and furnished to each new president. Although it was used as a family residence, the house served as the place where the president performed many of his official duties, as the site of meetings and other events conducted by the organization. In finding that the business premises requirement had been met, the court stated the following test: "We think that the business premises of § 119 means premises of the employer on which the duties of the employee are to be performed."²³⁹

A somewhat stricter interpretation of business premises was given by the Tax Court in the 1965 case of *Gordon S. Dole*:²⁴⁰ "We think the phrase should be construed to mean either (1) living quarters that constitute an integral part of the business property or (2) premises on which the company carries on some of its business activities."²⁴¹ *Dole* involved an employee who was furnished housing one mile from the mill where he was employed, in order that he would be available for twenty-four hour call. The court's "doubt whether Congress ever intended section 119 to apply to situations . . . where the employee does his work in one location and resides at another location some distance away" led it to conclude that this requirement had not been fulfilled.²⁴² The First Circuit affirmed the decision in a per curiam opinion²⁴³ on the basis of the Tax Court's concurring opinion, which was even more restrictive:

The statute does not say "at some convenient or reasonably accessible" place; it does not say "in a nearby building" owned by the employer. It says "on the business premises" of the employer. These words mean what they say and should not be given any strained or eccentric interpretation so as to frustrate what the Legislature obviously tried to achieve.²⁴⁴

One year later, the Eighth Circuit, in *Morelan v. United States*,²⁴⁵ seemed to reach an opposite conclusion. *Morelan* held that a restaurant near or adjacent to a highway was "on the business premises of the employer" in situations in-

236 321 F.2d 911 (5th Cir. 1963).

237 *Id.* at 912.

238 334 F.2d 660 (Ct. Cl. 1964).

239 *Id.* at 664-65.

240 43 T.C. 697, *aff'd per curiam*, 351 F.2d 308 (1st Cir. 1965). See Henry M. Lees, 34 P-H Tax Ct. Mem. 1993, 1997 (1965); Carlton R. Mabley, Jr., 34 P-H Tax Ct. Mem. 1963, 1966 (1965).

241 43 T.C. at 707.

242 *Id.*

243 *Dole v. Commissioner*, 351 F.2d 308 (1st Cir. 1965).

244 *Dole v. Commissioner*, 43 T.C. 697, 708 (1965) (concurring opinion).

245 356 F.2d 199 (8th Cir. 1966). See *Keeton v. United States*, 256 F. Supp. 576 (D. Colo. 1966), *aff'd per curiam*, 383 F.2d 429 (10th Cir. 1967).

volving state troopers.²⁴⁶ The conclusion was a result of a two-pronged rationale: (a) Congress did not put geographical bounds on the business premises of an employer, and (b) all the land within the state could be said to be the business premises of the state police.²⁴⁷

These cases set the stage for *Commissioner v. Anderson*,²⁴⁸ a decision from the Sixth Circuit which gave exhaustive treatment to the business premises requirement in the hope of settling the judicial dispute over this element of the convenience of the employer doctrine. The taxpayer was a motel manager whose duties at the motel required him to be available for service at any time of the day or night. The employer initially required the manager and his family to occupy one of the units in the motel; however, the conditions became crowded and unsatisfactory and the employer built a house two blocks from the motel to serve as a residence for the manager. Initially, the Tax Court interpreted the Regulations as recognizing that under certain circumstances the place of employment might be separated from the living quarters.²⁴⁹ It stated that "to conclude that property owned by an employer within two short blocks of a facility being managed by an employee . . . is not on the business premises of the employer within the meaning of section 119 . . . is too restrictive an interpretation."²⁵⁰

The Sixth Circuit reversed and interpreted the phrase "on the business premises of the employer" to mean

that in order for the value of meals or lodging to be excluded from gross income, the meals must be furnished or the lodging be provided either at a place where the employee performs a significant portion of his duties or on the premises where the employer conducts a significant portion of his business.²⁵¹

The fact that the manager was on call for service twenty-four hours a day was found not of itself to form a basis for a finding of "on the business premises of the employer."²⁵² Additionally, the court rejected the contention that if meals or lodging were provided on premises owned by the employer for the purpose of being a benefit and convenience to the employer, the items need not be furnished where the employee performs his duties or where the employer conducts his business:

To make ownership by the employer from business motives the test of a "business premises" is to fail to provide for instances of meals furnished or lodging provided on non-owned premises, contrary to the expressed Congressional intent, while at the same time opening wide a tax loophole contrary to any expressed Congressional intent.²⁵³

246 356 F.2d at 203.

247 *Id.*

248 371 F.2d 59 (6th Cir. 1966).

249 Charles N. Anderson, 42 T.C. 410, 416 (1964). See generally George I. Stone, 32 T.C. 1021 (1959); William I. Olkjer, 32 T.C. 464 (1959).

250 42 T.C. at 417.

251 *Commissioner v. Anderson*, 371 F.2d 59, 67 (6th Cir. 1966).

252 *Id.*

253 *Id.*

Finally, the court refuted the idea that the business premises requirement could be fulfilled even though the employee was not receiving his meals or lodging directly *on* the business premises of the employer: "Had Congress so intended, it would appear that it could readily have used the words 'in the vicinity of' or 'nearby' or 'close to' or 'contiguous to' or similar language, rather than to say *on* the business premises."²⁵⁴

The decision was not without a vigorous dissenting opinion which relied primarily on *Barrett* and *Morelan* in coming to the conclusion that the majority's interpretation of "on the business premises of the employer" was "an obsession with words . . . narrow and extreme, and is unjustified by the purposes of the statute and contrary to the intention of Congress."²⁵⁵ This conclusion was also based on the legislative history behind section 119. According to the dissent, Congress indicated that the basic test of an exemption under the Code was whether the meals or lodging were furnished primarily for the convenience of the employer.²⁵⁶ The majority decision had the effect of obviating this basic test by not interpreting the phrase "on the business premises of the employer" in light of the meaning of the convenience of the employer requirement. In addition, the dissent stated that even on the basis of the restrictive test announced in the majority opinion, the motel manager had fulfilled the requirement. Since he was subject to call at all times and did receive guests' complaints, questions, and requests at the house, he was, in fact, performing some of his managerial duties at the house.²⁵⁷

The business premises requirement is another example of a test superfluous to the primary meaning behind section 119. The requirement is based upon geographical integration rather than "convenience of the employer." If an employee is furnished lodging on the same property where he works, then he fulfills the business premises requirement, regardless of how distant the lodging is from his jobsite. Yet if the employee is furnished lodging on certain property and works on certain other property, then he fails to fulfill the requirement, regardless of the proximity of his lodging to his jobsite. Thus, a motel manager who is furnished a house across the street from the motel, but who performs no duties there, is held not to meet the business premises requirement; yet, a manager who is furnished a unit in the motel two blocks from the motel office meets the requirement, even though he performs none of his duties in his lodging unit. The emphasis on geography rather than convenience of the employer clearly seems to be without logic.

IV. Conclusion

It is ironic that the Report accompanying the Senate's amended version of section 119 explained that provision as "designed to end the confusion as to the

²⁵⁴ *Id.* There is evidence that even the state trooper cases may be yielding to the stricter interpretation of "business premises." In *Wilson v. United States*, the *Dole* concurring opinion was cited again for the proposition that "on" indeed means "on." 262 F. Supp. 200, 206 (D.N.H. 1968).

²⁵⁵ 371 F.2d at 77.

²⁵⁶ *See id.* at 69-71.

²⁵⁷ *Id.* at 76-77.

tax status of meals and lodging furnished an employee by his employer.”²⁵⁸ It must be granted that Mim. 6472 precipitated the need for a statutory provision; however, it seems that section 119 has failed to calm the maelstrom that has characterized the convenience of the employer doctrine for many years. In addition, the Regulations interpreting the statute have tainted the doctrine with ambiguities and meaningless distinctions. This situation has brought about judicial and administrative inconsistency within the area of law governed by section 119 and has placed the taxpayer and practitioner, contemplating the possibility of an exemption under that section, in a state of bewilderment. Only an amendment to the statute and a complete revision of the Regulations governing section 119 will dissipate the ills that surround the doctrine.

Throughout the preceding examination of the convenience of the employer doctrine, the basic test for determining whether the doctrine would be applicable in a given situation has repeatedly been referred to as whether the meals or lodging, or cash allowances in lieu thereof, are furnished primarily for the benefit or convenience of the employer. If such is proven to be the case, the doctrine will be held to apply. Thus, for any requirement to be at all relevant to a determination of the application of the doctrine, it must indicate that the meals or lodging, or cash allowances in lieu thereof, are given more for the convenience of the employer than the employee.

The convenience of the employer doctrine by nature involves an employer-employee relationship. To hold otherwise would be a contradiction in terms. The “entity theory” of taxation, as applied to the partnership-partner or corporation-stockholder situation, recognizes the possibility of a partner or a stockholder being in an employer-employee relationship with his partnership or corporation. Thus, the requirement is reduced to a determination of whether the taxpayer is *in fact* an employee. This will involve a consideration of all the facts and circumstances in each particular case.

It has been noted that there is nothing inherent within the present free of charge and in kind requirements which precludes the conclusion that meals or lodging, or cash allowances in lieu thereof, are furnished primarily for the employer’s benefit. Rather, these two factors should be viewed only as circumstances to be considered in making the final determination for whose convenience such items are furnished. No strict requirement should be made whereby meals or lodging must be furnished free of charge or in kind because there are situations where one or both of these requirements are absent and the criterion “primarily for the benefit or convenience of the employer” can still be shown. This was recognized in the case of military and foreign service personnel long ago. There is no reason why these groups should be afforded special tax treatment over any other group of employees whose employment duties necessitate that they remain on duty during their eating or resting periods, and whose employers find it more convenient to charge for the meals or lodging or give cash allowances in lieu of such items.

The phrase “on the business premises” has been given various interpretations, with the most recent case, *Commissioner v. Anderson*, stating that it is

258 S. REP. No. 1622, 83d Cong., 2d Sess. 19 (1954).

“a place where the employee performs a significant portion of his duties or on the premises where the employer conducts a significant portion of his business.”²⁵⁹ The latter part of this definition places the emphasis of the requirement on geography rather than on whether the meals or lodging are furnished for the employer’s convenience. The other part of the *Anderson* definition corresponds directly to the condition of employment requirement: If the employee is furnished meals or lodging at a place where he performs a significant portion of his duties, it follows that he is given such items in order to enable him to perform properly the duties of his employment. But this latter element is inherent within the convenience of the employer requirement as well. The business premises, and condition of employment requirements are thereby reduced to one intermeshed convenience of the employer requirement, which must consider all the facts and circumstances in a particular case.

The conclusion to be drawn from this analysis would seem to be that there is only one actual requirement — the “convenience of the employer” test. The convenience of the employer doctrine cannot be delineated into separate requirements because all of these “requirements” apply as their ultimate test all the facts and circumstances which lead to a determination that the meals or lodging, or cash allowances in lieu thereof, are furnished primarily for the benefit or convenience of the employer. Even the compensatory nature of the items furnished an employee, while not being a requirement as specified by *Mim*, 6472, should be an element to consider. Congress, and the Service in its Regulations, in an attempt to clarify and standardize the convenience of the employer doctrine, established a set of inflexible requirements and rules to be followed in order to acquire an exemption under section 119. The statute and Regulations have failed to achieve their purpose because the convenience of the employer doctrine is one of those areas in the law which does not lend itself to hard and fast requirements and easy determinations.

It is suggested that the statute should be amended in such a way that the doctrine is set forth in language expressing its very essence, leaving the Regulations and case law to acknowledge the various elements or surrounding facts and circumstances which will be held to establish the essential requirement of the doctrine. The following is a suggested model of an amended version of section 119:

There shall be excluded from gross income of an employee the value of any meals or lodging, or cash allowances in lieu thereof, furnished to him by his employer. This exclusion shall apply only if it appears from all the facts and circumstances that such meals, lodging or cash allowances are furnished primarily for the benefit or convenience of the employer.

The Regulations to accompany this provision should be restructured in such a way that no distinction in the elements to be considered in any given factual situation is made between meals and lodging received. The word “employee” should be recognized as including any partner or shareholder who, after applying the test of section 707, is found to be in an employer-employee relationship with

his respective partnership or corporation. In order to eliminate development of non-statutory "requirements" and to avoid a reversion to the present, strict, "hard and fast" rules, the Regulations should clearly state that any of the facts or elements in a particular situation are to be relevant to a court or jury's determination only to the extent that they give an indication of whether or not the items furnished are primarily for the benefit or convenience of the employer. These facts or elements may include the present "requirements" discussed at length in this Note, but by no means are these to be requisite or exclusive to a proper resolution of the central issue in every section 119 case.

This Note has attempted to dissect the convenience of the employer doctrine in order to expose the cancers which thrive within its application. It has also indicated possible remedies to correct the malignancy. Hopefully Congress and the Service will recognize the dire need for legislative and administrative surgery in this important area of federal income taxation, and will provide for appropriate amendments to section 119 and the Regulations.

J. Patrick McDavitt