Florida Law Review

Volume 29 | Issue 1 Article 4

December 1976

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# THE TRAVELING TAXPAYER: A RATIONAL FRAMEWORK FOR HIS DEDUCTIONS

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## INTRODUCTION

Section 162 of the Internal Revenue Code provides for a deduction of traveling expenses[1] that are ordinary and necessary to the pursuit of a trade or business and incurred "while away from home."[2] While seemingly plain in its import, this statutory provision has defied uniform interpretation for more than 50 years.[3] In particular, the Internal Revenue Service and the courts have been continually troubled with the meaning of the phrase "while away from home." Although the phrase seems to connote absence from one's primary place of residence, the phrase has been interpreted to mean absence from one's primary place of business by the Commissioner[4] and a majority of the courts.[5] This interpretation has been appropriately labeled the "tax home concept."[6] Its application has created much of the confusion that pervades the traveling expense deduction.

In an effort to clarify the area, this article reexamines the origins of the statutory language and the tax home concept.[7] The history of the statutory provision is first analyzed and a uniform interpretation of its terms is pro-

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1. Travel expenses have traditionally been defined to include costs of transportation, meals, and lodging, both in route and while away from home overnight. *See* Commissioner v. Flowers, 326 U.S. 465, 470, 1946-1 U.S.T.C. ¶9127 at 55. (1946); TREAS. REG. §1.162-2(a).

2. INT. REV. CODE OF 1954, §162.

3. *See* J. CHOMMIE, THE LAW OF FEDERAL INCOME TAXATION §46, at 101 (1968); Haddleton, *Traveling Expenses "Away from Home,"* 17 TAX L. REV. 261 (1962); Note, *A House is Not a Tax Home*, 49 VA. L. REV. 125 (1963).

4. *See, e.g.*, G.C.M. 23672, 1943 CUM. BULL. 66.

5. *Compare* Mort L. Bixler, 5 B.T.A. 1181 (1927) ("home" as place of business), *with* Burns v. Gray, 287 F.2d 698, 1961-1 U.S.T.C. ¶9127 (6th Cir. 1961) ("home" as place of residence). *See also* Commissioner v. Stidger, 386 U.S. 287, 290-91, 1967-1 U.S.T.C. ¶9309 (1967) (dicta).

6. Note, *supra* note 3.

7. Problems such as the combination business and pleasure trip and educational travel expenses will not be discussed in this article, but the general tests developed herein would apply to them. Similarly, the substantiation and burden of proof requirements to be met by a taxpayer claiming a travel, transportation, or commuting expense deduction are outside the scope of the article.

posed. After discussing administrative rulings and case law interpreting the statute and presenting various factual situations that illustrate the problems challenging any uniform rules of statutory interpretation, the article concludes with selected recommendations for administrative and statutory change.

## LEGISLATIVE HISTORY

The provisions of section 162 related to the deductibility of traveling expenses are the following:

> (a) . . . There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including . . .
> (b) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade business . . . .[8]

The language in the initial clauses of section 162(a) was derived from the Revenue Acts of 1913[9] and 1918.[10] The 1913 Act simply allowed as a deduction "the necessary expenses actually paid in carrying on any business . . . ."[11] In 1918 the requirements were modified to encompass only expenses that were both ordinary and necessary and to allow deduction of such expenses in the taxable year incurred by accrual method taxpayers without regard to the actual year of payment. The 1918 additions completed the legislative development of the current general deduction provision of section 162(a).[12]

The first administrative rulings regarding the deductibility of traveling expenses were issued by the Treasury under the 1918 Act. For example, Solicitor's Memorandum 1048[13] took the position that a salaried employee's commuter fares to and from work were not deductible because they were essentially personal expenses. Noting that commuting expenses were induced by both business and personal considerations, the ruling held that the test for deductibility as a business expense is "whether an expense is incurred primarily because of business as the immediate cause inducing the expenditure."[14]

This primary and immediate causation test did not prevent the deductibility of all transportation expenses. The first regulations promulgated under the

8. INT. REV. CODE OF 1954, §162.
9. Revenue Act of 1913, §II B, 38 Stat. 167.
10. Revenue Act of 1918, §214(a)(1), 40 Stat. 1066.
11. Revenue Act of 1913, §II B, 38 Stat. 167.
12. Revenue Act of 1918, §214(a)(1), 40 Stat. 1066. In full the section read: "That in computing net income there shall be allowed as deductions: (1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . ."
13. S. 1048, 1 CUM. BULL. 101 (1919).
14. *Id.* at 102.

1918 Act allowed a deduction for unreimbursed transportation expenses induced by the terms and conditions of a contract of employment.[15] Meal and lodging expenses incident to such required transportation were initially held to be nondeductible since they were viewed as primarily personal in nature.[16] As such, these expenses were encompassed by the predecessor of the present section 262, which provided that personal and family expenses were not deductible.[17] In 1920 the Treasury modified this position by declaring that meal and lodging expenses incidental to qualifying transportation expenses were deductible to the extent that they exceeded the normal costs of meals and lodging when the taxpayer was at home.[18] The rationale for the deduction was that the excess portion of the expenses was induced by business rather than personal considerations. However, the Treasury emphasized that only the excess could qualify for the deduction since "wherever a person may be, at home or abroad, he necessarily must have personal and living expenses which in any event are not deductible."[19]

No amount was deductible for meal and lodging expenses under the Treasury's approach unless the taxpayer actually incurred duplicate living expenses while away on business.[20] Furthermore, the amount of the deduction was not to be increased beyond the excess by the fact that his expenses at home continued while he was incurring these duplicate expenditures on the road.[21] The Treasury's approach meant that meal and lodging expenses would be deductible only to the extent that they were attributable solely to business considerations.

In 1921 Congress intervened to provide that "traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business"[22] were deductible in addition to those allowed under the general language of what is now section 162(a).[23] The

15. O.D. 451, 2 CUM. BULL. 157 (1920).

16. *Id.*; Mim. 2688, 4 CUM. BULL. 209 (1921).

17. Revenue Act of 1918, §215, 40 Stat. 1068.

18. T.D. 3101, 3 CUM. BULL. 191 (1920).

19. Mim. 2688, 4 CUM. BULL. 209 (1921).

20. O.D. 905, 4 CUM. BULL. 212 (1921) (meal and lodging expenses of a single taxpayer continuously on the road and without any permanent home completely disallowed).

21. Mim. 2688, 4 CUM. BULL. 209, 210 (1921). The ruling explained: "[T]he fact that expenses may continue at home *must be disregarded entirely, provision having been made for them in [section 215]*. Expenses at home become material only in arriving at the ordinary and necessary expenses required by the individual taxpayer for meals and lodging when at home, for this is the basis used in determining what expenses for meals and lodging may be attributed to the business."

22. Revenue Act of 1921, §214(a)(1), 42 Stat. 239. The wording of §214(a)(1) of the Revenue Act of 1921 has been carried over verbatim into §23(a)(1) of the 1939 Code and §162(a)(2) of the 1954 Code. In 1963, §162(a)(2) was amended by the deletion of "(Including the entire amount expended for meals and lodging)" and the substitution of "(including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances)." Act of October 16, 1962, PUB. L. No. 82-834, §4, 76 Stat. 976.

23. INT. REV. CODE OF 1954, §162(a). The new language in the 1921 Act was joined to the previous language of the 1918 Act by the term "including," which indicated an

House Committee Report described the amendment as one to "permit . . . the deduction of all traveling expenses incurred in the pursuit of a trade or business, instead of the more limited deduction for such expenses allowed under the present law."[24] References to the amendment in floor debates are generally consistent with the Committee Report's suggestion that it was intended only to remove the excess limitation and not to change existing requirements for the deduction.[25]

Despite this evidence of a limited legislative purpose, the Commissioner has subsequently regarded the amending language as the source of the controlling statutory requirements for the deductibility of traveling expenses.[26] Consequently, he has shifted from the previously controlling requirements of (1) primary and immediate causation plus (2) duplication of living expenses to one of "away from home in the pursuit of business."[27] The result has been that traveling expenses obviously induced by business needs are not considered deductible unless incurred away from home; "home" has in turn been given the tortured interpretation of primary place of business.[28]

### *A Proposed Alternative Interpretation*

A primary stimulus behind the 1921 amendment was the request of the Treasury that the scope of the meal and lodging expense deduction be broadened from its previous excess limitation to include all on-the-road meal and lodging expenses.[29] It seems logical, therefore, that Congress might borrow from prior administrative language in expressing its will regarding the amendment. The available evidence indicates that it did. For example,

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intent to extend the scope of the deduction without amending the requirements under prior law.

24. H. R. REP. No. 350, 67th Cong. 1st Sess. 11 (1921).

25. This conclusion is partially supported by the lack of any reference in the committee reports or congressional debates on the amendment to the infusion into the statute of new requirements for obtaining the deduction. *See* S. REP. No. 275, 67th Cong. 1st Sess. 13 (1921); H.R. REP. No. 350, 67 Cong. 1st Sess. 11 (1921). Senator Walsh noted in floor debate that the language of the amendment "was considered by the committee . . . from the standpoint of allowing the exemption to traveling salesmen. It was thought that their traveling expenses were a matter for proper deduction and that their meals and lodging should also be included in such deduction." 61 Cong. Rec. 6672 (1921). This comment certainly suggests no additional qualifications for the deduction, but corroborates the argument that there was no intent to change existing law.

26. *See, e.g., I.R.S. Publication No. 300,* 2 CCH 1973 STAND. FED. TAX REP. ¶1350.

27. *See, e.g.,* Mort L. Bixler, 5 B.T.A. 1181, 1184 (1927).

28. *See, e.g.,* Masline v. Commissioner, 462 F.2d 1328, 1972-2 U.S.T.C. ¶9524 (5th Cir. 1972); Curtis v. Commissioner, 449 F.2d 225, 1971-2 U.S.T.C. ¶9666 (5th Cir. 1971). One writer has asserted that "it would appear that Congress gave no consideration to the formulation of a definition of "home" other than that which was in common usage and, indeed, would have rejected, had it been proposed, the present concept of 'tax home' . . ." Haddleton, *Traveling Expenses Away From Home,* 17 TAX L. REV. 261, 263 (1962).

29. *See Hearing on H. R. 8245 Before the Senate Committee on Finance,* 67th Cong., 1st Sess. (1921). Section 215 (comparable to §262 of INT. REV. CODE OF 1954) was a barrier to a similar administrative solution since it specifically prohibited any deduction for personal and family expenses, and a certain portion of meal and lodging expenses on business trips was necessarily of such prohibited character. See note 21 *supra.*

the language employed by the Treasury in amending its regulations under the 1918 Act to include the excess portion of meal and lodging expenses within the deduction read "expenses incident to meals and lodging while absent from home on business during the taxable year."[30] The phrase "number of days away from home during the calendar year on account of business" also appeared in the regulations.[31] These phrases bear a remarkable resemblance to the language of the 1921 statutory amendment "(including the entire amount expended for meals and lodging) while away from home in the pursuit of business. . . ."[32] If in fact this statutory language was merely a paraphrase of the prior administrative language with the addition of "entire amount," the tenable conclusion is that Congress in 1921 did not intend to modify the qualifying requirements for the travel expense deduction, but intended only to increase the amount of a taxpayer's deduction once it qualified under the tests previously applied.

This conclusion is further supported by the fact that it allows the words of the 1921 amendment to be given their ordinary meanings. Under this approach, the troublesome phrase "away from home" can simply be read as a statutory enactment of the administrative rule under the 1918 Act that the taxpayer must incur duplicate living expenses to be allowed any deduction for meal and lodging expenses.[33] In short, the tests of deductibility under the post-1921 statutes could remain the same as the pre-1921 tests except that qualifying meal and lodging expenses would now be fully deductible rather than only to the extent of the excess over at home expenses.[34]

Such an interpretation of sections 162(a) and (a)(2) is preferable to the Commissioner's current position primarily because it accords with both the substance of the available legislative history and the common usage of the statutory language involved. Furthermore, as the remaining portions of the article make clear, this interpretation would produce substantially the same results in the majority of the myriad factual situations that have been litigated under this statutory language, without the necessity for the many exceptions now required by the application of the Commissioner's general rule.

### *Application of Proposed Interpretation*

The application of the interpretation urged here would first entail a breakdown of traveling expenses into the separate components of (1) transportation and (2) meals and lodging. The pre-1921 primary and immediate

30. T.D. 3101, 3 CUM. BULL. 191 (1920).

31. *Id.*

32. Revenue Act of 1921, §214(a)(1), 42 Stat. 239.

33. *See, e.g.*, O.D. 905, 4 CUM. BULL. 212 (1921); Mim. 2688, 4 CUM. BULL. 209 (1921); T.D. 3101, 3 CUM. BULL. 191 (1920).

34. In fact, some of the first Treasury rulings under the 1921 Act appeared to suggest this approach in that their concern over the definition of the "away from home" language was solely for purposes of maintaining the duplication requirement for meal and lodging expenses. *See* I.T. 1497, I-2 CUM. BULL. 89-90 (1922); I.T. 1490, I-2 CUM. BULL. 89 (1922). Only later did the Commissioner confuse this language with the requirements of the "primary and immediate" causation test. *See* Mort L. Bixler, 5 B.T.A. 1181, 1184 (1927).

causation test would then be applied to the transportation component to determine whether it was directly attributable to business needs. This test[35] is essentially the test announced by the Supreme Court in the landmark case of *Commissioner v. Flowers*[36] under the label "exigencies of the business." If the transportation expenses qualify under this test, they are deductible.

For the meals and lodging component, the applicable tests are more numerous. In the first place, meal and lodging expenses will be deductible only if incident to business related transportation, and in practice they must qualify as expenses generated by the exigencies of business.[37] Secondly, they must have been incurred while away from home. Under the interpretation suggested by this article, home is one's primary place of residence; consequently, the second hurdle is merely a codification of the pre-1921 administrative requirement that the taxpayer incur duplicate living expenses.[38] Its effect is simply to prevent deduction of personal living expenses if the traveler has no home or, when the traveler may be said to be carrying his home on his back.[39]

The third qualification for meal and lodging expenses is the requirement enacted by the 87th Congress that they not be "lavish or extravagant under the circumstances."[40] In effect, this requirement is only a reincarnation of the reasonable and necessary requirement applicable to all section 162 expenses. Its separate restatement was, however, required in section 162(a)(2) because the "entire amount" language of the 1921 amendment had suggested that it might have been waived as to meal and lodging expenses.[41]

The final hurdle for meal and lodging expenses is the requirement that they be incurred incident to travel involving necessary sleep or rest.[42] This last requirement is grounded on rather shaky statutory foundations, but its acceptance by the Supreme Court in 1967[43] makes any arguments for its re-

35. The factual considerations involved are virtually the same as those employed in determining what portion of the expenses of a combination business-pleasure trip is deductible. *See, e.g.*, Patterson v. Thomas, 289 F.2d 108, 1961-1 U.S.T.C. ¶9310 (5th Cir. 1961); Rev. Rul. 63-266, 1963-2 CUM. BULL. 88.

36. 326 U.S. 465, 474, 1946-1 U.S.T.C. ¶9127, at 56 (1946). See text accompanying note 62 *infra*.

37. Meal and lodging expenses will never be deductible under §162(a)(2) if the transportation component fails to qualify, since they would not there qualify as business-induced "traveling expenses." Similarly, when incident to deductible transportation, these expenses will often be directly attributable to business and therefore deductible. However, this latter result is not a necessary conclusion as the "exigencies of the business" test must be separately applied to these expenses as well. See note 35 *supra*, regarding the combination business-pleasure trip.

38. See notes 13-19 *supra*.

39. *See, e.g.*, Rosenspan v. United States, 438 F.2d 905, 1971-1 U.S.T.C. ¶9241 (2d Cir. 1971), *cert. denied*, 404 U.S. 864 (1972); I.T. 1490, I-2 CUM. BULL. 89 (1922); O.D. 905, 4 CUM. BULL. 212 (1921).

40. Revenue Act of 1962, PUB. L. No. 87-834, §4(b), 76 Stat. 976, *amending* INT. REV. CODE OF 1954, §162(a)(2).

41. H.R. REP. NO. 1447, 87th Cong., 2d Sess., 1962-3 CUM. BULL. 405, 430; S. REP. NO. 1881, 87th Cong., 2d Sess., 1962-3 CUM. BULL. 707, 744.

42. See text accompanying notes 44-63 *infra*.

43. United States v. Correll, 389 U.S. 299, 1968-1 U.S.T.C. ¶9101 (1967).

jection practically moot. It is therefore incorporated into the statutory interpretation proposed here and is used as a basis for dividing the discussion of the administrative and case law immediately to follow.

The transportation element of the traveling expenses having qualified under the exigencies of the business and reasonable and necessary tests, and the meals and lodging component having survived the requirements of (1) conjunction with business-motivated transportation, (2) away from home, (3) reasonableness, and (4) incidence to necessary sleep or rest, the traveling expenses can then be said to have qualified for deduction under sections 162(a) and (a)(2).

Having presented this background and the basic elements of the statutory interpretation proposed by this article, further discussion of the utility and application of this model is deferred until after subsequent analysis of presently controlling administrative and case law. This analysis consists of two major parts, the first dealing with travel situations involving necessary sleep or rest and the second treating their counterparts that consist solely of transportation expenses.

## ADMINISTRATIVE AND JUDICIAL INTERPRETATION OF SECTION 162

### *Travel Involving Sleep or Rest — Section 162(a)(2)*

The bulk of the voluminous litigation concerning deductions for expenses incurred on overnight trips and longer absences from a taxpayer's residence has centered around the inherent conflict between the allowance of the deduction for travel expenses[44] under section 162(a)(2) of the Code, and the disallowance of a deduction for "personal, living or family expenses" under section 262.[45] Faced with a seemingly infinite variety of fact situations, the Service and the courts have developed particularized concepts and doctrines in attempts at reconciliation. The theories of the travel deduction have developed unevenly and have not provided a logical and workable framework within which problem areas can be simplified.

### *The Tax Home Concept*

As indicated earlier, it is not clear whether Congress even considered the precise meaning of the phrase "away from home."[46] The Treasury and most courts, however, have interpreted "home" to mean something quite different from one's house or residence. This tax home concept was born in *Mort L. Bixler*[47] when the Board of Tax Appeals, interpreting section 214(a)(1) of the Revenue Act of 1921, explained:

> [T]raveling and living expenses are deductible . . . only while the taxpayer is away from his *place of business, employment, or the post*

44. See note 1 *supra*.
45. INT. REV. CODE OF 1954, §262.
46. See note 27 *supra*.
47. 5 B.T.A. 1181 (1927).

> *or station at which he is employed.* . . . We think section 214(a)(1) intended to allow a taxpayer a deduction of traveling expenses while away from his *post of duty or place of employment* on duties connected with his employment.[48]

One problem the Board attempted to avoid was the possibility of a taxpayer maintaining a residence at a distance from his primary place of employment and deducting his commuting expenses[49] or living expenses incurred at the primary place of employment. Unfortunately, the Board chose to avoid this admittedly undesirable result by shifting the taxpayer's tax home to his place of business. Commuting expenses had previously been held to be nondeductible because they were personal expenses that were the result of a personal choice as to location of the taxpayer's residence.[50] Thus, nondeductibility of commuting expenses had previously been predicated on the absence of business necessity for the expense, rather than a failure of the taxpayer to be away from a fictional tax home.

In any event, the tax home concept flourished thereafter.[51] The position of the Commissioner, the Board of Tax Appeals, and later the Tax Court, however, was soon eroded as the cases began to reach the Courts of Appeal. Several circuits questioned the tax home concept and at various times treated home as the place of residence.[52]

The first to reject the constraints of the fictional home definition was the Ninth Circuit in *Wallace v. Commissioner*.[53] Ina Clair Wallace, an actress, resided with her husband in San Francisco. During 1939, she spent seven months in Hollywood working on a motion picture while her husband remained in San Francisco. Reasoning that she was not away from home since her place of employment in Hollywood constituted her tax home, the Tax Court disallowed a deduction for her Hollywood living expenses. In rejecting the Tax Court's construction of the statutory term "home," the court

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48. 5 B.T.A. at 1184 (emphasis added).

49. See Barnhill v. Commissioner, 148 F.2d 913, 917, 1945-1 U.S.T.C. ¶9160, at 11,037 (4th Cir. 1945) for a subsequent expression of specific concern in this regard.

50. Frank H. Sullivan, 1 B.T.A. 93 (1924).

51. G.C.M. 4956, VII-2 CUM. BULL. 128, 129 (1928); G.C.M. 23672, 1943 CUM. BULL. 66, 67.

52. *Second Circuit*: Six v. Commissioner, 450 F.2d 66, 1971-2 U.S.T.C. ¶9694 (2d Cir. 1971). *Fifth Circuit*: Flowers v. Commissioner, 148 F.2d 163, 1945-1 U.S.T.C. ¶9227 (5th Cir. 1945), *rev'd on other grounds*, 326 U.S. 465 (1946); *but see* Curtis v. Commissioner, 449 F.2d 255, 1971-2 U.S.T.C. ¶9666 (5th Cir. 1971) (abode at place of business). *Sixth Circuit*: Brandl v. Commissioner, 513 F.2d 697, 1975-1 U.S.T.C. ¶9414 (6th Cir. 1975); *but see* Ham v. United States, 408 F.2d 671, 1969-1 U.S.T.C. ¶6292 (6th Cir. 1969). *Ninth Circuit*: Doyle v. Commissioner, 354 F.2d 480, 1966-1 U.S.T.C. ¶9162 (9th Cir. 1966); *but see* Wills v. Commissioner, 411 F.2d 537, 1969-1 U.S.T.C. ¶9401 (9th Cir. 1969). The split was solidified, however, by the acceptance of the "tax home" doctrine by the First, Third, Fourth, Seventh and Eighth Circuits. *First Circuit*: Amoroso v. Commissioner, 193 F.2d 583, 1952-1 U.S.T.C. ¶9135 (1st Cir. 1952), *cert. denied*, 343 U.S. 926 (1952). *Third Circuit*: Chimento v. Commissioner, 438 F.2d 643 (3d Cir. 1971). *Fourth Circuit*: Barnhill v. Commissioner, 148 F.2d 913, 1945-1 U.S.T.C. ¶9160 (4th Cir. 1945). *Seventh Circuit*: England v. United States, 345 F.2d 414 (7th Cir. 1965), *cert. denied*, 382 U.S. 986 (1966). *Eighth Circuit*: Jenkins v. Commissioner, 418 F.2d 1292, 1970-1 U.S.T.C. ¶9135 (8th Cir. 1969).

53. 144 F.2d 407, 1944-2 U.S.T.C. ¶9437 (9th Cir. 1944).

argued that if Congress had intended such an artificial meaning of the word, "it would have used a more appropriate term to express such an intent."[54] The deduction claimed was allowed.

One year later, the Fifth Circuit decided *Flowers v. Commissioner*.[55] Flowers was an attorney and a longtime resident of Jackson, Mississippi. Desiring to maintain his residence in Jackson, Flowers nonetheless accepted a position as general counsel for a railroad in Mobile, Alabama. Although required to be in Mobile occasionally, he had arranged with his employer to perform most of his duties in Jackson. The Tax Court denied his deduction for meals and lodging in Mobile and his transportation expenses between the two cities on the ground that the expenses were personal living expenses since they were not incurred away from his tax home, that is, his post of duty in Mobile.[56] In reversing, the Fifth Circuit joined the Ninth in interpreting the word "home" in the statute to mean one's place of residence.

Only fifteen days after the *Flowers* decision, the Fourth Circuit's contrary decision in *Barnhill v. Commissioner*[57] emphasized the need for a final determination of the controversy by the Supreme Court. Justice Barnhill had maintained his residence in Rocky Mount while serving a term as a North Carolina Supreme Court Justice. The Tax Court determined that his tax home was in Raleigh, the state capital, and that his meals and lodging expenses were not deductible as they were not incurred away from home.[58] In affirming the Tax Court's decision, the Fourth Circuit held that "home" could not mean residence since such a ruling would open the door for the deductibility of commuting expenses.[59] Because Congress assumed that a person would live in close proximity to his place of business, the court believed the necessary conclusion was that home was the general locale in which one resided and also maintained his place of employment.[60]

The conflict was ripe for resolution when the Supreme Court granted certiorari in *Flowers*. The Court, however, while acknowledging the conflict, found it unnecessary to decide the meaning of the statutory requirement

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54. *Id.* at 410, 1944-2 U.S.T.C. at 10,898.

55. 148 F.2d 163, 1945-1 U.S.T.C. ¶9227 (5th Cir. 1945), *rev'd*, 326 U.S. 465 (1946).

56. J.N. Flowers, 3 CCH Tax Ct. Mem. ¶14.082 (1944). This fact situation highlights the ineffectuality of attempting to determine the deductibility of otherwise normal living expenses solely on the basis of the location of "home." If home were considered the place of business, taxpayer's meals and lodging in Jackson would be deductible; if considered the place of residence, as done by the Fifth Circuit on appeal, his living expenses in Mobile would become deductible.

57. 148 F.2d 913, 1945-1 U.S.T.C. ¶9260 (4th Cir. 1945).

58. Maurice v. Barnhill, 3 CCH Tax Ct. Mem. ¶13,967 (1944).

59. 148 F.2d 913, 1945-1 U.S.T.C. ¶9260 (4th Cir. 1945). The court relied on the reenactment rule, reasoning that because Treasury regulations denying deductibility for commuting expenses had been maintained and enforced throughout successive reenactments of the statute, the definition of home must be consistent with that result. The court failed to realize that the regulation denied the deduction because commuting expenses were not "business" expenses. *See, e.g.*, TREAS. REG. §19.23(a)(2)(C) (1943). There was no implication that commuting expenses were denied because they were not incurred "away from home."

60. 148 F.2d at 917, 1945-1 U.S.T.C. at 11,037.

"away from home." Instead, it chose to affirm the disallowance of the deduction for the reason that the expenses were incurred because of personal choice rather than because of the exigencies of business.[61] The opinion identified the following as requirements for claiming a deduction for traveling expenses:

> (1) The expense must be a reasonable and necessary traveling expense, as that term is generally understood. . . .
> (2) The expense must be incurred "while away from home."
> (3) The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. . . .[62]

Because Flowers failed to satisfy the third requirement, the Court chose not to decide whether expenses had been incurred "while away from home."[63]

*Exigencies of the Business Requirement*

After *Flowers*, preoccupation with the location of the tax home began to subside in some instances with a shift to the more fundamental inquiry of the cause of the expenses. The notion that Congress expected taxpayers to live in the vicinity of their work, as expressed in *Barnhill v. Commissioner*[64]

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61. Commissioner v. Flowers, 326 U.S. 465, 1946-1 U.S.T.C. ¶9127 (1946).

62. *Id.* at 473, 1946-1 U.S.T.C. at 56. These requirements do nothing more than reiterate the specifications of §162(a)(2), which allows a deduction for all ordinary and necessary business expenses, including travel expenses away from home in the pursuit of business. For deduction of any business expenses, then, the ordinary-necessary requirement of the statute would encompass requirements (1) and (3) of *Flowers* in that they must be reasonable, necessary, and primarily and immediately caused by the demands of business. Thus it appears that a travel deduction is merely an ordinary and necessary business expense with the additional requirement that it be incurred away from home.

63. The Supreme Court also introduced a new source of confusion in its explication of the business exigencies requirement. In one of several statements of the requirement in the opinion, the Court explained that traveling expenses would be disallowed when "not incurred in the pursuit *of the business of the taxpayer's employer.*" 326 U.S. at 473, 1946-1 U.S.T.C. at 56 (emphasis added).

Decisions followed which seemed to interpret this statement to mean that deductible expenses must be incurred because of an employer's requirements. *See, e.g.*, Commissioner v. Peurifoy, 254 F.2d 483, 486, 1957-2 U.S.T.C. ¶10,045, at 58,633 (4th Cir. 1957), *aff'd per curiam*, 358 U.S. 59 (1958); Ford v. Commissioner, 227 F.2d 297, 299, 1955-2 U.S.T.C. ¶9767, at 56,144 (4th Cir. 1955); Bercaw v. Commissioner, 165 F.2d 521, 523 1948-1 U.S.T.C. ¶9153, at 133 (4th Cir. 1948). Other decisions indicated that construction workers employed by many firms and independent contractors could not deduct travel expenses incurred in pursuit of their trades. *See, e.g.*, Commissioner v. Janss, 260 F.2d 99, 1958-2 U.S.T.C. ¶9873 (8th Cir. 1958); Benson v. Godwin, 164 F. Supp. 70, 1958-2 U.S.T.C. ¶9751 (E.D. Ark. 1958); Grover Tyler, 13 T.C. 186 (1949). It appears settled today, however, that an employee may have a trade or business independent of that of his employer and that expenses incurred in pursuit of the trade or business of being an employee may be deductible. TREAS. REG. §§1.162-2(d); Thomas H. Kiah, 30 CCH Tax Ct. Mem. ¶31,043 (1971); REV. RUL. 60-189, 1960-1 CUM. BULL. 60; Rev. Rul. 190, 1953-2 CUM. BULL. 303, 305; I.T. 4012, CUM. BULL. 1950-1, 33.

64. 148 F.2d 913, 1945-1 U.S.T.C. ¶9160 (4th Cir. 1945).

in connection with the tax home concept, could be as easily expressed in terms of the reason for the expense. This approach seemed to make more sense in terms of the conflict between the deduction allowed by section 162(a)(2) and the disallowance of a deduction for personal living expenses by section 262. Thus, the inquiry began to focus on whether the taxpayer's employment (or trade or business) required the expenses of transportation, meals, and lodging, or whether they were the result of the personal choice of the taxpayer.[65]

This change in focus is most evident in a line of public servant cases decided after *Barnhill.* In these cases, state officials were allowed to deduct meal and lodging expenses incurred while performing duties away from their residences when local law required the continuance of residency in local districts away from their principal places of employment.[66] Significantly, these public servant cases gave little or no attention to the location of the taxpayers' homes.[67]

### *The Temporary versus Indefinite Exception*

Employees are often assigned temporarily by their employers to duty stations in areas away from their regular employment. Self-employed persons, such as construction workers, are often forced to leave their regular work areas for varying periods of time to find work. In these and similar situations, it is difficult to determine the location of a taxpayer's home for purposes of section 162(a)(2). The solution adopted by the Commissioner[68] and a majority of the courts[69] is that the location of a taxpayer's home is deemed to remain at the regular duty station unless the anticipated duration of the new assignment is "indefinite," as opposed to "temporary."

The first indication that a deduction might be allowed for a taxpayer working on a "temporary" assignment came in *Coburn v. Commissioner.*[70] Charles Coburn, a theatrical actor and manager, maintained an apartment

65. *See, e.g.,* United States v. Leblanc, 278 F.2d 571, 1960-1 U.S.T.C. ¶9472 (5th Cir. 1960); Ford v. Commissioner, 227 F.2d 297, 1955-2 U.S.T.C. ¶9767 (4th Cir. 1955); Emment v. United States, 146 F. Supp. 322, 1955-2 U.S.T.C. ¶9642 (S.D. Ind. 1957); Moss v. United States, 145 F. Supp. 10, 1956-2 U.S.T.C. ¶10,001 (W.D. S.C. 1956).

66. *See, e.g.,* United States v. Leblanc, 278 F.2d 571, 1960-1 U.S.T.C. ¶9472 (5th Cir. 1960) (state supreme court justice); Emment v. United States, 146 F. Supp. 322, 1955-2 U.S.T.C. ¶9672 (S.D. Ind. 1957) (state supreme court justice); Moss v. United States, 145 F. Supp. 10, 1956-2 U.S.T.C. ¶10,001 (W.D. S.C. 1956) (public service commissioner).

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

68. *See* Rev. Rul. 75-432, 1975-2 CUM. BULL. 60; Rev. Rul. 60-189, 1960-1 CUM. BULL. 60.

69. *See, e.g.,* Commissioner v. Mooneyhan, 404 F.2d 522, 1969-1 U.S.T.C. ¶9106 (6th Cir. 1968), *cert. denied,* 394 U.S. 1001 (1969).

70. 138 F.2d 763, 1943-2 U.S.T.C. ¶9652 (2d Cir. 1943).

residence in New York City which he used alternately as a business office. During the year in question, he spent 263 days making a movie in California under five short-term contracts. Conceding that a taxpayer's tax home is normally his place of business, the court nonetheless concluded that Coburn's home was in New York since the term home, even if construed to mean place of business, "ought to be limited to the place where he is regularly employed or customarily carries on business during the taxable year."[71]

The temporary versus indefinite rule was apparently first recognized by the Tax Court in *Harry F. Schurer.*[72] Schurer, a plumber who maintained a residence in Pittsburgh, received temporary job assignments through his local union at locations not within daily commuting distances of his residence. The court assumed that the taxpayer's home was Pittsburgh rather than the temporary job assignment locations and allowed a deduction for meals and lodging at the job sites and for transportation there and back. The *Schurer* case was subsequently relied on in *Leach v. Commissioner,*[73] in which the taxpayer had no regular station of employment but for 49 weeks out of the year was assigned to various construction sites at substantial distances away from his residence in Florence, Alabama. Concluding that the taxpayer had no tax home, the court, nevertheless, allowed the deduction since it found that he could not be expected to move his wife and child to those places for the short duration of each job.[74] Thus at this stage of its development,[75] the temporary versus indefinite rule was applied as an exception to the second *Flowers* requirement that the taxpayer must be "away from home."[76]

In *Commissioner v. Peurifoy,*[77] the Supreme Court assumed the temporary versus indefinite distinction to be valid but applied it as an embroidery on the third requirement of *Flowers* – the expenses must be due to the exigencies of the employer's business.[78] The appeal in *Peurifoy* was by three construction workers who maintained their residences approximately 100 miles from the construction site where they were employed for periods of 20, 12, and 8

71. *Id.* at 764, 1943-2 U.S.T.C. at 10,254.

72. 3 T.C. 544 (1944), *acquiesced in,* 1944 CUM. BULL. 24.

73. 12 T.C. 20 (1949), *acquiesced in,* 1949-1 CUM. BULL. 3.

74. The current approach to the *Leach* fact situation is found in Rev. Rul. 71-247, 1971-1 CUM. BULL. 54, which creates an exception to the tax home concept. The "home" of a taxpayer such as Leach is considered to be the location of his house.

75. The Treasury has expressed the temporary versus indefinite rule as a clarification of the tax home concept. I.R.S. Pub. No. 300, 5 CCH 1956 STAND. FED. TAX REP. ¶6347. Essentially, the tax home is deemed the taxpayer's regular post of duty. If the taxpayer's work takes him away from that post for an "indefinite" period of time, his tax home shifts with his new post of duty. However, if the assignment is only "temporary," the location of the taxpayer's home does not change.

76. Other decisions subsequent to *Flowers* but prior to the Fourth Circuit's opinion in *Peurifoy* applied the temporary versus indefinite exception without placing the distinction within the context of the *Flowers* requirements. *See, e.g.,* Robert K. Denning, 14 CCH Tax Ct. Mem. ¶21,156 (1955); T.G. Frazier, 12 CCH Tax Ct. Mem. ¶19,921 (1953); Lewis F. Cooper, 12 CCH Tax Ct. Mem. ¶19,634 (1953).

77. 358 U.S. 59 (1958) (per curiam).

78. The Commissioner's contention that *Peurifoy* stood for the proposition that a post of "indefinite" employment is the taxpayer's home was rejected in Harvey v. Commissioner, 283 F.2d 491 1960-2 U.S.T.C. ¶9771 (9th Cir. 1960).

months, respectively. Following the *Leach* rationale that taxpayers could not reasonably be expected to move their residences to the construction site, the Tax Court had allowed a deduction for meal and lodging expenses incurred at the construction site.[79] The Fourth Circuit reversed, however, reasoning that the temporary versus indefinite exception did not apply because the employment at its inception was uncertain and indefinite.[80] The Supreme Court affirmed the factual determination that the employments involved were indefinite rather than temporary.[81] The decision, however, only raised doubts as to which requirement of *Flowers* the temporary versus indefinite exception applied.

Although the Commissioner and most courts have continued to apply the temporary versus indefinite rule as an exception to the "away from home" requirement,[82] some courts have applied *Peurifoy* as an exception to the business exigencies requirement.[83] There should be no difference in the ultimate result under section 162(a)(2) no matter which of the two *Flowers* requirements is considered to be subject to the exception.[84] Under either approach the ultimate issue is whether the taxpayer's decision not to move permanently resulted from business considerations or personal choice. The important point is that the temporary-indefinite distinction is now an accepted part of the judicial gloss on section 162(a)(2).

The factual question of whether the duration of the taxpayer's stay is temporary or indefinite has proven to be extremely troublesome. The Commissioner's position is clear: if termination of the taxpayer's work away from his regular post of duty can be foreseen within a "fixed or reasonably short period of time," then the duty is temporary.[85] Although neither the Commissioner nor the courts have attempted to prescribe any specific length of time as being "reasonably short," the Commissioner presumes "indefinite" classification in cases of "anticipated or actual duration of a year or more at a

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79. James E. Peurifoy, 27 T.C. 149 (1956).

80. Commissioner v. Peurifoy, 254 F.2d 483, 1957-2 U.S.T.C. ¶10,045 (4th Cir. 1957). The court also held that the expenses were not due to the exigencies of the employer's business.

81. 358 U.S. 59 (1958) (per curiam).

82. *See* Rev. Rul. 75-432, 1975-2 CUM. BULL. 60; Rev. Rul. 60-189, 1960-1 CUM. BULL. 60. *See also* Jones v. Commissioner, 444 F.2d 508, 1971-1 U.S.T.C. ¶9461 (5th Cir. 1971); Commissioner v. Mooneyhan, 404 F.2d 522, 1969-1 U.S.T.C. ¶9106 (6th Cir. 1968), *cert. denied*, 394 U.S. 1001 (1969); Dyer v. Bookwalter, 230 F. Supp. 521 (W.D. Mo. 1964); Emil J. Michaels, 53 T.C. 269 (1969), *acquiesced in* 1973-2 CUM. BULL. 3; Frank M. Norris, 35 CCH Tax Ct. Mem. ¶33,667 (1976); Bruce A. Pappas, 34 CCH Tax Ct. Mem. ¶33,240 (1975).

83. *See, e.g.*, Six v. Commissioner, 450 F.2d 66, 1971-2 U.S.T.C. ¶9694 (2d Cir. 1971); United States v. Mathews, 332 F.2d 91, 1964-2 U.S.T.C. ¶9506 (9th Cir. 1964); Benson v. Godwin, 164 F. Supp. 70, 1958-2 U.S.T.C. ¶9751 (E.D. Ark. 1958); Richard W. Beebe, 30 CCH Tax Ct. Mem. ¶31,136 (1971).

84. See text accompanying notes 176-182 *infra* for a discussion of the possible application of the temporary versus indefinite distinction in determining the deductibility of transportation expenses under the general language of §162(a).

85. Rev. Rul. 75-432, 1975-2 CUM. BULL. 60. The corresponding test for "indefinite" is "if termination cannot be foreseen within a fixed or reasonably short period." I.R.S. Pub. No. 300, 5 CCH STAND. FED. TAX REP. ¶6347.

particular location."[86] Similarly, the Commissioner normally will not challenge a deduction on this ground when both the anticipated and actual duration are less than a year.

The emphasis should be placed on the taxpayer's expectations of the length of stay. It is possible, of course, that what originally was expected to be temporary employment may later become indefinite.[87] Actual duration is evidence of a taxpayer's initial expectations, but should not be regarded as conclusive. Many cases, however, do not credit the taxpayer with the initial anticipation of temporary employment and have therefore denied deductions for the periods before the taxpayers could reasonably expect the durations of their assignments to be more than temporary.[88]

Opposition to the Commissioner's tests of temporary and indefinite was expressed by the Ninth Circuit in *Harvey v. Commissioner*.[89] The taxpayer in *Harvey* was an employee of the Douglas Aircraft Company who maintained a residence for his family in El Segundo, California. He was subsequently transferred by his employer to Edwards Air Force Base, approximately 117 miles from his residence. The duration of the assignment at the time of commencement was unknown, and thus indefinite, but could have lasted from a few months to two years. The taxpayer actually remained at Edwards for about two years. The Ninth Circuit rejected the Tax Court's disallowance of a deduction for the taxpayer's living expenses while at Edwards. Arguing that the aim of Congress was apparently "to equalize the burden between the taxpayer whose employment requires business travel and the taxpayer whose employment does not,"[90] the court dispensed with the requirement of "definiteness" in the Commissioner's test and instituted a new, more subjective standard.

> An employee might be said to change his tax home if there is a reasonable probability *known to him* that he may be employed for a long period of time at his new station. What constitutes "a long period of time" varies with the curcumstances surrounding each case.[91]

Apparently substituting a temporary-permanent test for the temporary-indefinite standard,[92] the court deemed the critical consideration to be whether

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86. *See* Rev. Rul. 75-432, 1975-2 CUM. BULL. 60; Rev. Rul. 60-89 1960-1 CUM. BULL. 60; Rev. Rul. 60-314, 1960-2 CUM. BULL. 48.

87. *See* Robert J. Carr, 31 CCH Tax Ct. Mem. ¶31,487 (1972); Harold C. Pike, 30 CCH Tax Ct. Mem. ¶31,012 (1971); Beatrice H. Albert, 13 T.C. 129 (1949); Arnold P. Bark, 6 T.C. 851 (1946).

88. *See, e.g.*, Harold C. Pike, 30 CCH Tax Ct. Mem. ¶31,012 (1971); Beatrice H. Albert, 13 T.C. 129 (1949). *But see* Emil J. Michaels, 53 T.C. 269 (1969), *acquiesced in*, 1973-2 CUM. BULL. 3.

89. 283 F.2d 491, 1960-2 U.S.T.C. ¶9771 (9th Cir. 1960).

90. *Id.* at 495, 1960-2 U.S.T.C. at 78,159.

91. *Id.*

92. Rather than temporary versus indefinite, the logical dichotomy would appear to be either temporary versus permanent or definite versus indefinite. The Commissioner has attempted to require absolute certainty in the taxpayer's expectation of the temporary nature of the assignment in order for the exception to apply.

a taxpayer should reasonably be expected to move his residence to the new location. It concluded that when the length of an assignment is uncertain, in that it cannot be determined that it will end within a fixed period, but will probably end within a brief time period, the taxpayer should not be expected to move his residence to the new job site.

The *Harvey* test has merit in that it emphasizes the decision of the taxpayer whether or not to move his residence based upon his expectations as to the duration of the assignment. Nevertheless, the Treasury has specifically disapproved the *Harvey* approach,[93] probably because of the added problems of administration and determination of the taxpayer's time expectations.[94] The approach used by the Ninth Circuit in *Harvey* was not entirely original,[95] but few courts have followed its lead.[96]

### *Dual Business*

Another doctrine has evolved in cases in which the taxpayer maintains two businesses or employments at separate locations. Since a taxpayer may have two places of business, it would be possible under the Treasury's definition of home for him to have two tax homes. The dual business doctrine, however, provides that a taxpayer can have but one tax home, his primary place of business.

In *Walter F. Brown*,[97] the first case arising in this factual setting, the Board of Tax Appeals failed to recognize the need for a special doctrine. Mr. Brown was the senior partner of a law firm in Toledo, Ohio, when he received an appointment from President Harding to head a government committee. Although it was agreed that his Washington assignment was not to interfere with his Toledo law practice, Mr. Brown found it convenient to maintain a Washington apartment because his committee work required his presence every two weeks for varying periods of time from May through December. The Commissioner asserted that Brown's tax home was Washington, his place of business, and that none of his travel expenses were deductible. The Board noted that the taxpayer divided his time equally between the Toledo and Washington positions and that his expenses in one of the two cities would be deductible. Finding that there would be little, if any, difference in result regardless of which location was considered the taxpayer's

93. Rev. Rul. 61-95, 1961-1 CUM. BULL. 749.

94. Note, however, that under the Commissioner's test, this same determination of "expectations" of the taxpayer would have to be made.

95. *See, e.g.*, E.G. Leach, 12 T.C. 20 (1949), *acquiesced in*, 1949-1 CUM. BULL. 3; James E. Peurifoy, 27 T.C. 149 (1956), *rev'd*, 254 F.2d 483, 1957-2 U.S.T.C. ¶10,045 (4th Cir. 1957), *aff'd*, 358 U.S. 59 (1958).

96. *But see* Berhow v. United States, 279 F. Supp. 737, 1968-1 U.S.T.C. ¶9233 (D. Neb. 1968); Rosenspan v. United States, 438 F.2d 905, 1971-1 U.S.T.C. ¶9241 (2d Cir. 1971), *cert. denied*, 404 U.S. 864 (1971); Alois J. Weidekamp, 29 T.C. 16 (1958), *acquiesced in*, 1958-1 CUM. BULL. 6. In Six v. Commissioner, 450 F.2d 66, 1971-2 U.S.T.C. ¶9694 (2d Cir. 1971), the court emphasized the subjective nature of the test by listing the factors to be considered in making a determination whether it would be reasonable for taxpayer to move her residence. *Id.* at 70, 1971-2 U.S.T.C. at 87,703.

97. 13 B.T.A. 832 (1928), *acquiesced in*, VIII-I CUM. BULL. 6 (1929).

home, it granted Brown's deduction for the expenses incurred in Washington.[98]

In 1947, the Commissioner adopted a primary-secondary analysis of dual business or employment situations and analogized the temporary versus indefinite exception to that analysis. He stated that "[w]here a taxpayer has two or more business locations, a temporary shift of emphasis from the principal to a minor place of business should be regarded as similar in nature to the temporary departure of a taxpayer having only one business location from the place where he customarily carries on business during the taxable year."[99] The primary-secondary approach has become an established adjunct to the tax home rule in dual business location cases.[100]

The Tax Court in *Joseph H. Sherman, Jr.*[101] outlined the factors to be considered in determining a taxpayer's primary place of business. Sherman was a salaried employee of a manufacturing firm in Worchester, Massachusetts. In 1945 he established a sales business in New York City, retaining his employment in Worchester. During the year, taxpayer spent 216 days in Worchester, 102 days in New York City, and the balance in transit. Although not clearly specifying the controlling factor, the court stressed (1) that the taxpayer spent more time in Worchester, (2) that his permanent community ties were there, and (3) that the Worchester employment supplied a substantial portion of his income.[102] Worchester was held to be the taxpayer's primary place of business and expenses incurred for meals and lodging in New York were allowed as deductions.

The Service has adopted the factors identified by the Tax Court in *Sherman*,[103] but has added that when the taxpayer is an *employee* at two locations, income is the most important consideration.[104] Despite the Com-

98. *Id.* at 835.

99. I.T. 3842, 1947-1 CUM. BULL. 11, 12.

100. *See, e.g.*, Markey v. Commissioner, 490 F.2d 1249, 1974-1 U.S.T.C. ¶9192 (6th Cir. 1974); Rev. Rul. 75-432, 1975-2 CUM. BULL. 60, 62.

101. 16 T.C. 332 (1951), *acquiesced in*, 1951-2 CUM. BULL. 4.

102. The Tax Court in *Sherman* stated that a taxpayer, having two occupations or posts of duty which require him to spend substantial amounts of time in each of two cities, may deduct his traveling expenses "incurred in connection with attendance upon the one removed from his *residence*." 16 T.C. at 337 (emphasis added). The Commissioner rejected this part of the *Sherman* decision, Rev. Rul. 55-604, 1955-2 CUM. BULL. 49, although he acquiesced in the holding, 1951-2 CUM. BULL. 4.

103. "The more important factors to be considered in making a factual determination regarding the location of the taxpayer's principal place of business or 'tax home' are the total time ordinarily spent by the taxpayer at each of his business posts, the degree of business activity at each such post, and whether the financial return in respect of each post is significant or insignificant." Rev. Rul. 54-147, 1954-1 CUM. BULL. 51, 52. A curious result is reached when the taxpayer maintains his residence at his secondary post of employment. Such a taxpayer is away from "home" when he is at his residence and is allowed to deduct the cost of his meals and lodging at his residence "limited, of course, to that portion of the family expense for meals and lodging which is properly attributable to the taxpayer's presence there in the actual performance of his duties in connection with his secondary employment." Rev. Rul. 55-604, 1955-2 CUM. BULL. 49, 51. *See* Rev. Rul. 75-432, 1975-2 CUM. BULL. 60; Rev. Rul. 54-147, 1954-1 CUM. BULL. 51. *But see* Julio S. Mazzotta, 57 T.C. R.C. 427 (1971), *aff'd per curiam*, 465 F.2d 1399 (2d Cir. 1972).

104. Rev. Rul. 54-147, 1954-1 CUM. BULL. 51, 52.

missioner's contentions, however, the time factor has often seemed to be determinative.[105] When the taxpayer is self-employed, it is the Commissioner's position that the length of time spent at each location is the crucial factor.[106]

The tests utilized in ascertaining the primary place of business represent an objective rather than a subjective inquiry. In *Francis J. Markey*,[107] however, the Tax Court found that the determinative factor was the taxpayer's judgment as to which locale's business interests were more important to him. On appeal, the Sixth Circuit rejected this subjective test in favor of an objective inquiry based on the factors previously accepted by the Service and a majority of the courts.[108]

### *The Necessary Sleep or Rest Rule*

The Treasury has long insisted that meal expenses are deductible under section 162(a)(2) only when incurred incident to travel involving necessary sleep or rest. The rule, which ultimately received the approval of the Supreme Court, has produced an extra-statutory categorization of traveling expenses. The two categories are expenses which involve transportation, meals, and lodging, the deductibility of which is limited by the sleep or rest rule, and those which involve only transportation, which are not affected by the rule. The remainder of this section of the article first examines the "necessary sleep or rest" rule and then discusses the rules governing the deduction of transportation expenses incurred on trips not requiring sleep or rest.

The sleep or rest rule originated in a Treasury release dealing with railroad employees required to layover for several hours away from their home terminals.[109] The Treasury's position was that meal expenses incurred during such a layover would be deductible only if the layover was of sufficient duration to require "necessary" rest.[110] The limitation apparently derived

105. *See, e.g.*, Markey v. Commissioner, 490 F.2d 1249, 1974-1 U.S.T.C. ¶9192 (6th Cir. 1974); Wills v. Commissioner, 411 F.2d 537, 1969-1 U.S.T.C. ¶9401 (9th Cir. 1969); Dave Rubin, 26 T.C. 1076 (1956), *acquiesced in*, 1957-1 CUM. BULL. 5, *rev'd on other grounds*, 252 F.2d 243 (5th Cir. 1958). *But see* Arthur C. Puckett, 56 T.C. 1092 (1971), *acquiesced in*, 1971-2 CUM. BULL. 3.

106. *See* Rev. Rul. 63-82, 1963-1 CUM. BULL. 33; Rev. Rul. 61-67, 1961-1 CUM. BULL. 25.

107. 31 CCH Tax Ct. Mem. ¶31,467 (1972). Markey resided in Lewisburg, Ohio, where he was an officer in a bank and owned residential rental property, two farms, and a machine shop. Although retired, he took a position with General Motors in Warren, Michigan, 250 miles away. He stayed in Warren five days a week, returning to Lewisburg on weekends to attend to his business interests. The Tax Court determined that his primary place of employment was Lewisburg, despite the fact that he spent 70% of his time and earned the greater portion of his income in Warren. Markey was thus allowed a deduction for his meals and lodging while in Warren.

108. Markey v. Commissioner, 490 F.2d 1249, 1974-1 U.S.T.C. ¶9192, (6th Cir. 1974). The court held that in a dual business situation the taxpayer's designation of one location as his abode is not dispositive of the question of which location is his tax home for purposes of §162(a)(2). It reversed the Tax Court's decision and remanded for further proceedings.

109. I.T. 3395, 1940-2 CUM. BULL. 64, *superseded by* Rev. Rul. 75-170, 1975-1 CUM. BULL. 60.

110. *Id.* Rev. Rul. 75-170, 1975-1 CUM. BULL. 60, essentially restates this position. *See also* Rev. Rul. 75-168, 1975-1 CUM. BULL. 58 (truck drivers).

from a belief that meal expenses on one-day trips seldom duplicate normal living expenses.[111] If there is no duplication, the allowance of a deduction violates the ban against deductions for personal living expenses.[112] Determination of the existence of duplicate expenses on a case-by-case basis would have generated a disproportionate administrative and judicial burden. Furthermore, since many commuters incur daily meal expenses away from their residences without the benefit of any deduction, fairness seemed to dictate that the meal expenses of all "day trippers" be denied.[113]

Despite its logic and practicality, the rule was repeatedly and often successfully challenged, primarily on the ground that it was not supported by the statutory language.[114] Finally, the Supreme Court resolved the issue in favor of the Government in *United States v. Correll.*[115] The Court held that the statutory phrase "meals and lodging" was susceptible of the interpretation that meal expenses were deductible only in conjunction with lodging, that the Commissioner's rule-making power authorized his adoption of that construction, and that the sleep or rest rule was supportable on grounds of fairness and administrative practicality.[116]

The scope of the *Correll* rule is well illustrated by two Court of Appeals decisions. In *Williams v. Patterson,*[117] a railroad conductor working out of Montgomery, Alabama, was allowed a deduction for the expenses of his noon and evening meals as well as those for a motel room incurred during a six-hour layover in Atlanta. The elapsed time for the conductor's round trip from Montgomery to Atlanta, when added to that required for his preparatory and concluding duties, was approximately sixteen hours. The court stated its understanding of the correct rule as follows:

> If the nature of the taxpayer's employment is such that when away from home, during released time, it is reasonable for him to need and to obtain sleep or rest in order to meet the exigencies of his employment or the business demands of his employment his expenditures (including incidental expenses, such as tips) for the purpose of obtaining sleep or rest are deductible traveling expenses under §162(a) (2) of the 1954 Code.[118]

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111. *See* Commissioner v. Bagley, 374 F.2d 204, 206, 1967-1 U.S.T.C. ¶9300, at 83,739 (1st Cir. 1967).

112. INT. REV. CODE OF 1954, §262.

113. *See* United States v. Correll, 389 U.S. 299, 302, 1968-1 U.S.T.C. ¶9101, at 86,007 (1967); Commissioner v. Bagley, 374 F.2d 204, 207, 1967-1 U.S.T.C. ¶9300, at 83,739 (1st Cir. 1967).

114. *See, e.g.,* Hanson v. Commissioner, 298 F.2d 391, 1962-1 U.S.T.C. ¶9195 (8th Cir. 1962) (rule rejected); Ahrens v. United States, 264 F. Supp. 518, 1967-1 U.S.T.C. ¶9271. (S.D. Ill. 1967) (same result).

115. 389 U.S. 299, 1968-1 U.S.T.C. ¶9101, (1967).

116. 389 U.S. at 302-306, 1968-1 U.S.T.C. ¶9101, at 86,007-86,008.

117. 286 F.2d 333, 1961-1 U.S.T.C. ¶9183 (5th Cir. 1961). The Service announced in Rev. Rul. 61-221, 1961-2 CUM. BULL. 34, *superseded by* Rev. Rul. 75-170, 1975-1 CUM. BULL. 60 that it would follow *Williams.*

118. 286 F.2d at 340, 1961-1 U.S.T.C. at 79,393.

In contrast, the taxpayer in *Barry v. Commissioner*[119] was denied a deduction for meal expenses incurred on one-day trips which lasted as long as nineteen hours, despite the fact that it was occasionally necessary for him to take catnaps in his car before returning home. The court found that the necessary rest stops were not of sufficient duration to cause "a significant increase in expenses."[120] Thus, the practical effect of the *Correll* rule seems to be that meal expenses are not deductible unless incurred in conjunction with lodging or incidental to travel requiring substantial sleep or rest.[121]

The *Correll* decision has effectively confined the application of section 162(a)(2) to travel involving necessary sleep or rest.[122] Transportation expenses on one-day trips are thus deductible only under the general rule of section 162(a).[123] While this result was neither recognized in *Correll* nor suggested by its rationale,[124] it is consistent with the legislative history indicating that the predecessor of section 162(a)(2) was added primarily to establish the deductibility of meal and lodging expenses.[125]

## TRANSPORTATION EXPENSES

### *Nondeductibility of "Commuting" Expenses*

As previously noted, transportation expenses not involving necessary sleep or rest are deductible only if they qualify as ordinary and necessary business expenses under the general language of section 162(a).[126] Because that language

119. 435 F.2d 1290, 1971-1 U.S.T.C. ¶9126 (1st Cir. 1971).

120. *Id.* at 1291, 1971-1 U.S.T.C. at 85,612.

121. The *Correll* rule is not applicable to situations in which the taxpayer is required to stay at his normal work post for a period requiring necessary sleep and rest since the taxpayer is not away from home under either interpretation of that term. Home means something more than a particular building which serves as a place of business or residence. The general metropolitan area of a taxpayer's principal place of business or residence, depending on which interpretation of home is adopted, constitutes his home. *See* Rev. Rul. 55-109, 1955-1 CUM. BULL. 261; Rev. Rul. 190, 1953-2 CUM. BULL. 303.

122. *See, e.g.*, Sanders v. Commissioner, 439 F.2d 296, 1971-1 U.S.T.C. ¶9260 (9th Cir. 1971), *cert. denied*, 404 U.S. 864 (1971); United States v. Tauferner, 407 F.2d 243, 1969-1 U.S.T.C. ¶9241 (10th Cir.), *cert. denied*, 396 U.S. 812 (1969); William B. Turner, 56 T.C. 27 (1971).

123. Harold Gilberg, 55 T.C. 611, 614 (1971).

124. The *Correll* decision dealt only with the deductibility of meals. Its rationale was based largely on (1) the policy of administrative fairness and certainty and (2) a statutory interpretation of "meals and lodging" which allows a deduction for meal expenses only where incurred in conjunction with lodging. At no point did the court state that "traveling expenses" *per se* could only exist on overnight trips. *See* Comment, *Federal Income Taxation—A Survey of Commuting Deductions Under §162 of the Internal Revenue Code and the Ramifications of* United States v. Correll, 60 KY. L.J. 427, 436-39 (1972).

125. See text accompanying notes 22-25 *supra*.

126. *See, e.g.*, Sanders v. Commissioner, 439 F.2d 296, 1971-1 U.S.T.C. ¶9260 (9th Cir.), *cert. denied*, 404 U.S. 864 (1971); William B. Turner, 56 T.C. 27 (1971); Rev. Rul. 55-109, 1955-1 CUM. BULL. 261, 264.

It is possible, of course, for transportation expenses to be deductible as "travel" expenses under §162(a)(2). In several situations arising in the overnight travel context, transportation expenses are allowed as a deduction when otherwise they might be considered nondeductible commuting expenses.

does not require that expenses be incurred away from home, the tests developed in the application of the tax home concept do not control their deductibility.[127]

When single day travel occurs within the general area of a taxpayer's home, the deductibility of transportation expenses depends on whether they represent (1) travel between two business locations[128] or (2) travel between one's personal residence and a business location.[129] Transportation costs incurred in travel of the first type are termed "transportation expenses" by the Commissioner and are generally held to be deductible.[130] Transportation costs attributable to travel of the second type are termed "commuting expenses" and are generally deemed nondeductible.[131] A deduction for commuting expenses within the general area of a taxpayer's home is denied if the destination is the taxpayer's regular place of business or a place to which his business takes him only once. Travel from a taxpayer's residence to a temporary business location outside the general area of his primary place of business, however, has generally been held to generate deductible "transportation expenses."[132]

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In all temporary assignments away from home for which the taxpayer is allowed a deduction for meals and lodging, a deduction is allowed for transportation expenses incurred by the taxpayer on trips home for the weekends. Even though these expenses are personal expenses, they are deductible in lieu of and limited in amount to those expenses the taxpayer would have incurred for meals and lodging had he remained at the temporary employment site. Henry G. Lewia, 31 CCH Tax Ct. Mem. ¶31,489 (1972), *aff'd per curiam*, 506 F.2d 1321 (D.C. Cir. 1974); Rev. Rul. 75-432, 1975-2 CUM. BULL. 60. Additionally, when the taxpayer is temporarily away from home, his daily transportation expenses from his temporary lodging site to his business location are allowed as a travel deduction. Rev. Rul. 63-145, 1963-2 CUM. BULL. 86.

127. William B. Turner, 56 T.C. 27, 31 (1971); Unice C. White, 21 CCH Tax Ct. Mem. ¶25,415 (1962).

128. Rev. Rul. 55-109, 1955-1 CUM. BULL. 261; cf., TREAS. REG. §1.62-1(g).

129. *See, e.g.*, United States v. Tauferner, 407 F.2d 243, 1969-1 U.S.T.C. ¶9241 (10th Cir. 1969); TREAS. REG. §1.162-2(e).

130. *See, e.g.*, Arthur C. Puckett, Jr., 56 T.C. 1092 (1971); TREAS. REG. §1.62-1(g); Rev. Rul. 63-82, 1963-1 CUM. BULL. 33; Rev. Rul. 55-109, 1955-1 CUM. BULL. 261.

131. *See, e.g.*, J.M. O'Hare, 54 T.C. 874 (1970); Frank H. Sullivan, B.T.A. 93 (1924); TREAS. REG. §1.262-1(b)(5); Rev. Rul. 56-25, 1956-1 CUM. BULL. 152.

132. For a practical application of this distinction, *compare* Hulme v. United States, 1965-2 U.S.T.C. ¶9499 (W.D. Cal. 1965), with Steinhort v. Commissioner, 335 F.2d 496, 1964-2 U.S.T.C. ¶9701 (5th Cir. 1964). The Commissioner has always deemed such travel beyond one's general area of employment to generate deductible transportation expenses. *See* Rev. Rul. 55-109, 1955-1 CUM. BULL. 261; Rev. Rul. 54-497, 1954-2 CUM. BULL. 75; Rev. Rul. 190, 1953-2 CUM. BULL. 303. Confusion has developed with regard to these costs only after the decision in United States v. Correll, 389 U.S. 299, 1968-1 U.S.T.C. ¶9101 (1967). *See* Unice C. White, 31 CCH Tax Ct. Mem. ¶31,345 (1972); William B. Turner, 56 T.C. 27 (1971) (subsequently vacated and remanded on respondent's motion by an unpublished order). In both *White* and *Turner*, the Tax Court denied deductions for transportation expenses between residence and temporary employment site outside general area of employment. In Lawrence W. Norwood, 66 T.C. No. 45 (June 15, 1976), the Court allowed a deduction under §162(a) for transportation expenses between the taxpayer's home and temporary employment location outside the general area of his principal place of employment. The government had conceded that the expenses were deductible if the taxpayer's employment was temporary in nature.

Although some courts have maintained that the temporary versus indefinite rule

### *The "Bulky Tool" Exception*

The only situation in which the Commissioner has allowed a deduction for any portion of commuting expenses is one in which the mode of transportation serves some business purpose beyond getting the taxpayer from his home to a business destination or vice-versa.[133] In Revenue Ruling 63-100,[134] the Commissioner took the position that a taxpayer who found it necessary to use his auto in transporting work implements between his residence and place of work could deduct the entire amount of his transportation expenses if two conditions were met: (1) the tools must be too bulky to be carried otherwise; and (2) he would not have used his auto "except for" the need to carry the tools. The rationale for this position was that such expenses are incurred primarily due to business rather than personal reasons.[135]

The application of the "bulky tool" exception generated conflict among the courts in situations in which the taxpayer would have used the same means of transportation with or without the tools.[136] The Tax Court allowed no deduction unless the necessity of transporting equipment required the taxpayer to employ a more expensive mode of commuting to and from work.[137] The measure of the allowable deduction was the incremental cost allocable to the equipment.[138] The Second[139] and Seventh[140] Circuits, however, took the position that even where the taxpayer would have used the same mode of transportation notwithstanding the necessity of carrying the tools, a proportionate amount of the taxpayer's commuting expenses were deductible.

Confronting the issue in *Fausner v. Commissioner*,[141] the Fifth Circuit rejected the approach of the Second and Seventh Circuits and affirmed the Tax Court's disallowance of the taxpayer's deduction. The court reasoned that there was no rational basis for an allocation between the commuting and business components of the expense in the absence of some expense in

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does not apply to transportation expenses (see note 127 *supra*), Rev. Rul. 54-497, 1954-2 CUM. BULL. 75, 82, indicates that the temporary-indefinite test is clearly relevant in this area. *See also* Lawrence W. Norwood, 66 T.C. No. 45 (June 15, 1976). It was the failure of the court to recognize the applicability of this test that caused the denial of the deductions in *Turner* and *White*.

133. Rev. Rul. 75-380, 1975-2 CUM. BULL. 59. Perhaps an additional exception here is commuting expenses from one's temporary lodging to his temporary employment site when he is away from home overnight. However, such expenses are not commuting expenses in the true sense, since the taxpayer is considered to be in a continuous travel status. *See* Rev. Rul. 63-145, 1963-2 CUM. BULL. 86.

134. 1963-1 CUM. BULL. 34.

135. *Id.*

136. *See* Harold Gilberg, 55 T.C. 611 (1971).

137. Robert A. Hitt, 55 T.C. 628 (1971).

138. *Id.* at 633.

139. Sullivan v. Commissioner, 368 F.2d 1007, 1967-1 U.S.T.C. ¶9104 (2d Cir. 1967).

140. Tyne v. Commissioner, 409 F.2d 485, 1969-1 U.S.T.C. ¶9320 (7th Cir. 1969).

141. 472 F.2d 561, 1973-1 U.S.T.C. ¶9180 (5th Cir.), *aff'd*, 413 U.S. 838, 1973-2 U.S.T.C. ¶9515 (1973). Fausner was a commercial airline pilot who attempted to deduct his entire commuting expenses of driving from his home to the airport on the theory that they were incurred to carry his flight and overnight bags, even though he would have driven his auto in any event.

excess of the ordinary costs of commuting.[142] The Supreme Court settled the issue when it affirmed the decision of the Fifth Circuit, substantially adopting the reasoning of that court and reiterating that an allocation between deductible and nondeductible expenses may be possible where additional expenses are incurred for transporting job-required tools.[143]

The Service subsequently issued REV. RUL. 75-380[144] in an attempt to clarify its position in light of *Fausner*. The ruling held that transportation expenses incurred "in addition to ordinary nondeductible commuting expenses" are deductible if the additional costs are attributable solely to the necessity of transporting work implements and if they can be accurately determined.[145]

The ruling also held that when the taxpayer is required to make use of a more expensive mode of transportation to carry job-required materials, a deduction will be allowed for only that portion of the expense of carrying work implements "by the mode of transportation used which is in excess of cost of commuting by the same mode without the work implements."[146] In other words, contrary to his position in REV. RUL. 63-100,[147] the Commissioner will not allow a deduction for any portion of the basic cost of commuting even if the taxpayer's carrying of job-required tools necessitates the use of more expensive means of commuting. The apparent rationale for the Commissioner's current position is his belief that the entire cost of commuting, regardless of the fact that some portion of the expense was incurred for business reasons alone, constitutes a nondeductible personal expense.

Nothing in the opinions of the Supreme Court and the Fifth Circuit in *Fausner* suggests that the added expense of commuting caused by the taxpayer's required shift to a more costly mode of transportation is a nondeductible personal expense. *Fausner* supports the contrary implication that this increased cost is an ordinary and necessary business expense if the taxpayer can establish that the more expensive mode of transportation was used solely because of the necessity of carrying the tools.[148] In this situation, the taxpayer has incurred an expense in excess of his normal commuting expenses and should be allowed to deduct that excess.

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142. The court noted, citing Rev. Rul. 63-100, 1963-1 CUM. BULL. 34, that nothing in its opinion was intended to prevent the deduction of expenses in addition to ordinary commuting expenses which were incurred to carry necessary tools. 472 F.2d at 563 n.2, 1973-1 U.S.T.C. at 80,263 n.2.

143. Fausner v. Commissioner, 413 U.S. 838, 839, 1973-2 U.S.T.C. ¶9515, at 81,629 (1973), *citing* Rev. Rul. 63-100, 1963-1 CUM. BULL. 34.

144. 1975-2 CUM. BULL. 59.

145. It expressly invalidates the "but for" test of Rev. Rul. 63-100, 1963-1 CUM. BULL. 34, and provides that the deduction depends solely on whether the taxpayer incurred additional expenses in carrying the tools. Rev. Rul. 75-380, 1975-2 CUM. BULL. 59, 60.

146. Rev. Rul. 75-380, 1975-2 CUM. BULL. 59, 60.

147. 1963-1 CUM. BULL. 34. In this situation, the Commissioner had previously allowed the taxpayer to deduct the entire amount of his commuting expenses.

148. See notes 142 and 143 *supra*, which discuss both the Fifth Circuit's and Supreme Court's approving citation of Rev. Rul. 63-100, 1963-1 CUM. BULL. 34 in *Fausner*.

## A Recommended Approach

### *The Tax Home Concept*

The refusal of the Supreme Court to define the term "home" in *Flowers* and its ability to decide the case without making a commitment to either of the possible interpretations raises the question whether it would make any difference whether home is the place of residence or place of business in most litigated cases. Prior to *Flowers*, the courts frequently denied deductions to taxpayers who incurred travel expenses because they chose not to live in the vicinity of their principal place of employment by constructing the word "home" to mean place of business.[149]

By utilizing the approach of *Flowers*, however, all deductions denied by the artificial tax home concept could be rejected even if home were deemed the place of residence. When a taxpayer's residence is far away from his principal place of business, duplicate living expenses result from personal choice as to the location of the residence rather than from the exigencies of business and may be denied for that reason alone. For example, in *Barnhill v. Commissioner*,[150] which involved a judge who resided in a city different from that in which his court sat, the Commissioner could have conceded that the taxpayer was away from home and argued that it was the taxpayer's personal choice to incur duplicate living expenses.

Elimination of the artificial tax home concept would also simplify cases involving taxpayers who maintain no regular abode and therefore incur no duplicate expenses. The policy underlying the allowance of a deduction for living expenses while a taxpayer is "away from home" is "to mitigate the burden of the taxpayer who, because of the exigencies of his trade or business, must maintain two places of abode and thereby incur additional and duplicate living expenses."[151] This policy can be effectuated only if a requirement that the taxpayer incur duplicate expenses is incorporated into the "away from home" requirement.[152] Thus, if the place of residence were considered to be the taxpayer's home as is proposed here, a taxpayer with no regular place of abode would have no tax home, even though he may have a place of business to which he frequently returns. Such an interpretation of home would better serve the policy behind the deduction allowed by section 162(a)(2).

In *Rosenspan v. United States*,[153] the Second Circuit adopted this construction of home. The taxpayer, a traveling salesman, was employed by two New York City jewelry manufacturers. Rosenspan traveled through his sales territory in the Middle West for approximately 300 days a year, but returned to New York City five or six times during the year to work at his employers' offices. While in New York City, he occasionally stayed at his brother's house in Brooklyn where he stored some of his belongings.

149. *See, e.g.*, William L. Tracy, 39 B.T.A. 578, *acquiesced in*, 1939-2 Cum. Bull. 37.

150. 148 F.2d 913, 1945-1 U.S.T.C. ¶9260 (4th Cir. 1945). See discussion of the case at note 57 *supra* and accompanying text.

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

152. See the discussion of legislative history at text accompanying notes 8-28, *supra*.

153. 438 F.2d 905, 1971-1 U.S.T.C. ¶9241 (2d Cir. 1971), *cert. denied*, 404 U.S. 864 (1971).

Although Rosenspan did not contribute to its maintenance, he also used his brother's home as an address for purposes of voting and filing his tax returns. The Commissioner contended that home, although generally defined as principal place of business, should be construed as residence if the taxpayer is constantly traveling. The taxpayer argued that New York City was his principal place of business and therefore his tax home. Disallowing the deduction, the court held simply that home means residence in all situations; since Rosenspan maintained no residence, he had no home to be "away from." The Second Circuit surveyed the decisions of the Supreme Court in this area and concluded that the same results could have been reached in those cases if the residence interpretation of home had been followed and the business exigencies requirement of *Flowers* invoked. The court refused "to read the words 'away from home' out of the statute . . . and allow a deduction to a taxpayer who had no home in the ordinary sense."[154]

Although the courts have not always agreed on whether duplication of expenses is a necessary condition for the deduction of travel expenses,[155] its importance has been increasingly recognized in recent years.[156] Deductions have rarely been allowed to taxpayers who incurred no duplicate living expenses.[157] In *Steve L. Krase*,[158] for example, the taxpayer was hired by his employer on May 20, 1968, and assigned to Sioux Falls, South Dakota. He remained there until August 25, 1969, at which time he was transferred to Meridian, Mississippi, where he stayed through 1972. During this time, Krase's only ties to other areas were the maintenance of a bank account, registration with the Selective Service, payment of property taxes, and the storage of some personal belongings in Kansas. The Tax Court held that although the assignments were temporary, Krase was not away from home while in Sioux Falls and Meridian since he did not establish that he maintained two places of abode and had thereby incurred duplicate living expenses.[159]

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154. *Id.* at 912, 1971-1 U.S.T.C. at 85,971. The court identified one anomaly of the tax home rule under which a deduction for meal and lodging expenses incurred by a taxpayer while away from his residence on business would be denied solely because he had no principal business location. This anomaly no longer exists. In Rev. Rul. 71-247, 1971-1 CUM. BULL. 54, the Commissioner created still another exception to the tax home concept. The ruling held that when a taxpayer has multiple places of employment which are temporary and the locations of which he could not predict, his home will be deemed his actual residence. Rev. Rul. 73-529, 1973-2 CUM. BULL. 37, outlines the factors to be considered in determining whether a taxpayer has a "regular place of abode in a real and substantial sense," or whether he is an itinerant.

155. *See, e.g.*, Fisher v. Commissioner, 230 F.2d 79, 1956-1 U.S.T.C. ¶9258 (7th Cir. 1956); Whitman v. United States, 248 F. Supp. 845, 1966-1 U.S.T.C. ¶9150 (W.D. La. 1965); Emil J. Michaels, 53 T.C. 269 (1969), *acquiesced in*, 1973-2 CUM. BULL. 3.

156. *See, e.g.*, Brandl v. Commissioner, 513 F.2d 697, 1975-1 U.S.T.C. ¶9414 (6th Cir. 1975); Rosenspan v. U.S., 438 F.2d 905, 1971-1 U.S.T.C. ¶9241 (2d Cir. 1971), *cert. denied*, 404 U.S. 864 (1971); United States v. Matthews, 332 F.2d 91, 1964-2 U.S.T.C. ¶9506 (9th Cir. 1964); James v. United States, 308 F.2d 204, 1962-2 U.S.T.C. ¶9735 (9th Cir. 1962).

157. Charles G. Gustafson, 3 T.C. 998 (1944), *not acquiesced in*, 1973-2 CUM. BULL. 37.

158. 35 CCH Tax Ct. Mem. ¶33,694 (1976).

159. *Accord*, Delbert C. Files, 35 CCH Tax Ct. Mem. ¶33,671 (1976); Frank M. Norris, 35 CCH Tax Ct. Mem. ¶33,667 (1976).

If the residence of the taxpayer were deemed his tax home, the analytical problems would be less complex than those created by the artificial tax home concept since the deduction would hinge primarily on the exigencies of the business requirement. For instance, the taxpayer's home would no longer follow the taxpayer wherever he went, so long as he had a regular abode;[160] an exception holding that "home" is the taxpayer's residence when there is no *primary* place of business would no longer be required;[161] and courts could often avoid struggling with the temporary-indefinite exception, the exigencies of the business requirement, and the primary-secondary place of employment dichotomy if it were initially recognized that there is no justification for a deduction without duplicate expenses.

The only apparent stumbling block to the definition of home proposed here is the Supreme Court's decision in *Stidger v. United States.*[162] A Marine Captain attached to an aviation squadron received change of station orders to Iwakuni, Japan, for a 15-month tour. Because he could not take his family, the taxpayer continued to maintain a residence for his wife and family in California. The Tax Court denied deductions for taxpayer's meals while in Japan on the ground that his tax home was in Japan.[163] Holding that taxpayer's home was his actual residence in California,[164] the Ninth Circuit reversed. The Supreme Court reinstated the Tax Court's decision, ruling that a military taxpayer's home for tax purposes was his permanent duty station and that Stidger was not away from home.

Significantly, the Supreme Court narrowly confined its ruling in *Stidger* to the facts presented. It noted that the relevant statutes had been reenacted several times after the commissioner's tax home concept was first adopted, but stated:

> [I]t is not necessary for us to decide here whether this congressional action (or inaction) constitutes approval and adoption of the Commissioner's interpretation of "home" in all of its myriad applications since, *in the context of the military taxpayer,* the Commissioner's position has a firmer foundation.[165]

The unique situation of the military taxpayer stems from the relatively frequent changes in assignments, often involving remote locations. Furthermore, a serviceman receives subsistence[166] and quarters[167] allowances for meals and lodging which are tax exempt.[168] Accordingly, the Court chose to leave to Congress the task of remedying any inadequacies in the system of military compensation.

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160. *See, e.g.,* Charles Forsythe, 30 CCH Tax Ct. Mem. ¶31,033 (1971).
161. Rev. Rul. 71-247, 1971-1 CUM. BULL. 54.
162. 386 U.S. 287, 1967-1 U.S.T.C. ¶9309 (1967).
163. 40 T.C. 896 (1963).
164. Stidger v. Commissioner, 355 F.2d 294, 1965-1 U.S.T.C. ¶9161 (9th Cir. 1965).
165. 386 U.S. at 292, 1967-1 U.S.T.C. at 83,769 (emphasis added).
166 37 U.S.C. §402 (1972).
167. *Id.* §403 (1972).
168. *See* Rev. Rul. 63-64, 1963-1 CUM. BULL. 30.

The government's argument in *Stidger* that Congress had impliedly adopted the definition of home as place of business must be answered, however, before the definition proposed here can be accepted. The argument was based largely on the history of the treatment of Congressmen under section 162(a). The Tax Court in *George W. Lindsay*[169] had held that the meal and lodging expenses of a Congressman during his stay in Washington were nondeductible since his tax home was in that city. In 1951, Congress responded by amending section 162(a) to state that a Congressman's home is deemed to remain in his home electoral district.[170] The government urged in *Stidger* that by amending the statute without providing that home was generally synonomous with residence, Congress had accepted the tax home concept and merely carved out an exception to cover the special problems of Congressmen.[171] While this reasoning may be appealing, a review of the legislative history of this amendment clearly indicates that the purpose was not to carve out an exception. The debates clearly reflect the belief of the legislators that they were only providing for themselves what was available to all other individuals in a similar situation.[172] Therefore, instead of making an exception to the tax home concept for Congressmen, the meaning of the term home was not considered at all.

If home can as easily mean residence as place of business, it remains to be determined what should qualify as a residence. An obscure informational ruling by the Commissioner in 1922 established that a salesman would qualify for a deduction if he maintains a "house or other living quarters to which he may at any time return or which is at all times available for his use."[173] Such a definition of residence would appear to satisfy the duplicate expense requirement of the away from home provision. Accordingly, if a taxpayer maintains in his home town only a post office box, relations with a local stock broker and insurance agent, and family ties, he has no home and his travel expenses should not be deductible.[174] Similarly, if a taxpayer maintains a home for his aged parents, his returns are more like visits than returns to a personal headquarters and that place should not be deemed his home.[175]

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169. 34 B.T.A. 840 (1936).

170. Act of July 9, 1952, ch. 598, 66 Stat. 467. The amendment is now the second sentence of §162(a).

171. Without consulting the legislative history of that amendment, an equally persuasive argument could be made that Congress intended to affirm the meaning of home as residence and merely place a limit of $3000 on the amount of deductions.

172. 99 CONG. REC. 7003-4 (1953) (remarks of Congressman McCormack); 98 CONG. REC. 9672-3 (1952) (remarks of Congressman McGrath).

173. I.T. 1490, I-2 CUM. BULL. 89 (1922). *Cf.* Rev. Rul. 73-529, 1973-2 CUM. BULL. 37.

174. James v. United States, 308 F.2d 204, 1962-2 U.S.T.C. ¶9735 (9th Cir. 1962). In Fisher v. Commissioner, 230 F.2d 79, 1956-1 U.S.T.C. ¶9258 (7th Cir. 1956), the Seventh Circuit correctly held that even though (1) the taxpayer was an original native of milwaukee; (2) he was registered to vote there; (3) his automobile was registered there; (4) he normally gave Milwaukee as his address; (5) he filed income tax returns from that district; (6) he paid a $5 monthly phone bill there; and (7) he stored his off-season clothing there, the apartment of his mother-in-law was not his home since he paid no part of the rent.

175. Whitman v. United States, 248 F. Supp. 845, 1966-1 U.S.T.C. ¶9150 (W.D. La. 1965).

There is little case law on this issue, however, since a majority of the courts accept the Commissioner's tax home concept.

*The Temporary versus Indefinite Criteria*

The model proposed here retains the temporary versus indefinite dichotomy as an extension of the exigencies of business requirement of *Flowers*. When the duration of an employment at a new location is expected to be temporary at its commencement, it is unreasonable to expect a taxpayer to move his residence; the resulting duplication of expenses is therefore caused by the exigencies of business. Conversely, if a taxpayer undertakes employment permanently or for an indefinite period of time at a new location, he will decide to retain his old residence only as a matter of personal choice and not as a result of business exigencies.

An employment is considered "temporary" only if it is certain to be temporary and "indefinite" if it will be permanent or of uncertain duration. Every case involving the doctrine under current law involves an interplay of two variables, the length of time and the definiteness of the taxpayer's expectations. The doctrine can be improved by establishing a fixed period of time to distinguish temporary from permanent. The question "How long is too long?" is not suited to case-by-case resolution. Because judicial opinions will inevitably vary, similarly situated taxpayers will not be treated equally unless a fixed and uniformly applicable answer is given to the question. If a fixed time period were established, the only issue remaining in a litigated case would be whether the taxpayer reasonably expected that his assignment would last no longer than that period. In terms of the basic underlying consideration, the decision of the taxpayer not to move his residence would be conclusively presumed reasonable when he had a reasonable expectation that his assignment would last no longer than the fixed period.

Section 217, which allows a deduction for moving expenses associated with *permanent* moves, provides guidance in the selection of a fixed period to distinguish temporary from permanent.[176] A condition for the moving expense deduction is that an employee be employed for 39 out of the first 52 weeks at the new place of business.[177] A necessary implication supported by the legislative history[178] is that Congress believed that 12 months was a reasonable line of demarcation beyond which a move is clearly permanent and justifies a deduction for moving expenses. Thus, it is reasonable to conclude that Congress would expect a taxpayer to move his residence only if he anticipated that the new assignment would last at least 12 months.[179] The

176. INT. REV. CODE OF 1954, §217.

177. *Id.* §217(c)(2)(A). A self-employed person must work at a new place of business for 78 out of the first 104 weeks. *Id.* §217(c)(2)(B).

178. The legislative history of the section reveals that moving expenses were considered a cost of earning income and thus deductible, but only if associated with a permanent move. S. REP. No. 830, 88th Cong., 2d Sess. 805 (1964).

179. It does not necessarily follow, however, that the allowance *vel non* of the moving expense deduction should determine the deductibility of travel expenses. If the taxpayer expected a period of duty of 11 months away from home, for example, he should not

Commissioner has used 12 months as a rule of thumb to distinguish temporary from permanent[180] moves and the rule of thumb should be made a rule of law.

It is not possible, however, to avoid a factual inquiry into the definiteness of a taxpayer's expectations. Apparently the Commissioner requires that a taxpayer's expectation be certain or absolute.[181] The approach recommended here would be less demanding and require only a showing that the taxpayer could reasonably have expected to be temporarily away from home at the inception of the new assignment.

The burden is properly on the taxpayer to prove the reasonableness of his expectations. Practically, it would seem that the actual duration of the employment should temper the degree of the taxpayer's burden. If the length of stay is less than the period fixed as being temporary, the burden of the taxpayer to show that he did not initially expect to stay longer may be relatively slight. To avoid the tacking of a series of temporary periods at one location, the taxpayer should have a heavy burden of proof as to the reasonableness of his expectations if the employment lasts substantially longer than the fixed period. The longer the actual period of stay, the greater the burden should be.[182]

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be expected to move his residence and a travel deduction should be allowed, despite the fact that he could possibly have qualified for a moving expense deduction had he moved his home. Similarly, if the taxpayer reasonably expected the period of stay to be 15 months, he should be expected to move his home at the time and should not be eligible for a travel deduction even though a premature termination of his employment may make him ineligible for the moving expense deduction. For purposes of a travel deduction, the crucial consideration is the expectation of the taxpayer at the commencement of the assignment. See text accompanying note 87 *supra*. Under §217(d)(3), the determination of the deductibility of the expense is based on an after the fact consideration of the actual time spent in employment at the new place of business.

180. Revenue Ruling 60-189 states: "[A] stay of *anticipated* or *actual* duration of a year or more at a particular location must be viewed . . . as strongly tending to indicate presence there beyond a temporary period, and cases involving such an employment or stay will normally for that reason alone be subjected to close scrutiny." Rev. Rul. 60-189, 1960-1 CUM. BULL. 60, 63.

181. See notes 85-96 *supra* and accompanying text for a critical discussion of the Commissioner's definition of "temporary" and a more desirable approach to this problem.

182. The courts have yet to provide a lucid explanation of the considerations involved when a taxpayer initially expects a period of stay to be temporary, but decides to remain permanently at a later time. *See, e.g.*, Harvey v. Commissioner, 283 F.2d 491, 1960-2 U.S.T.C. ¶9771 (9th Cir. 1960); Lawrence W. Norwood, 66 T.C. No. 45 (June 15, 1976); Robert J. Carr, 31 CCH Tax Ct. Mem. ¶31,487 (1972); Richard W. Beebe, 30 CCH Tax Ct. Mem. ¶31,136 (1971). The taxpayer's expectation should control up to the time his expectations changed and a deduction for his expenses for this period should be allowed. *Norwood* and *Beebe* are rare cases which make this distinction. But if the ultimate consideration is to be whether the taxpayer should reasonably have been expected to move his residence, the distinction should be recognized.

Because the controlling consideration is the taxpayer's expectation as to the length of stay at the time the position was acquired (see text accompanying note 177 *supra*) an expectation of indefinite employment, either in the sense that the taxpayer has no idea how long it might last, or that he reasonably expects it to last beyond the fixed period of time, could never change to temporary. Even when the actual period of employment is

*Dual Business and Multiple Employments*

When a taxpayer conducts his business or performs his duties as employee in more than one place, he may deduct only those traveling expenses associated with the secondary place of business or employment.[183] Current law derives this rule from the conclusion that the primary place of a taxpayer's business or employment is his tax home.[184] The rule is retained in the model proposed here as an element of the business exigencies requirement. Expenses incurred by a taxpayer at his primary place of business are not incurred as a result of the exigencies of business, but rather as a result of his personal decision to maintain his home elsewhere.[185]

The principal factor relevant in determining a taxpayer's primary place of business or employment should be the amount of time spent by the taxpayer at each location. Ultimately, the issue turns on where a taxpayer could most reasonably be expected to maintain his residence, since expenses resulting from locating a residence elsewhere are deemed to be personal. Most persons faced with the question would choose to reside in the locale of the place where most of their working hours are spent. Many courts[186] and the Commissioner,[187] although recognizing that time is normally the most important factor, also look to the extent of the business interests in the two locations, community ties, and income earned at each location. When such

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less than the fixed period of time here suggested, the taxpayer could get no deduction since he should reasonably have moved his residence at the commencement of the employment. An alternate and more equitable solution to the dilemma of the taxpayer not moving because his expectations are indefinite may be a rule, promulgated either by statute or regulation, that the deduction would be allowed regardless of taxpayer's initial expectations if the actual period of the assignment is less than the fixed period of time. The results reached under such an approach would probably conform closely with those obtained under present law because of the Commissioner's reluctance to challenge a deduction for periods which in fact are temporary. *See* Rev. Rul. 60-189, 1960-1 CUM. BULL. 60, 63.

183. In most dual business or employment cases, the issue is not whether deductible expenses have been incurred, but rather is the problem of identifying which expenses are deductible. If a taxpayer works in city A and city B, for example, he may deduct expenses incurred in one of the places of employment. The difficulty is in determining whether it is the A expenses or the B expenses which are to be allowed. *See* text accompanying note 97 *supra*.

184. Rev. Rul. 75-432, 1975-2 CUM. BULL. 60; Rev. Rul. 55-604, 1955-2 CUM. BULL. 49; Rev. Rul. 54-147, 1954-1 CUM. BULL. 51.

185. For example, in Frank B. Matteson, 33 CCH Tax Ct. Mem. ¶32,547 (1974), *aff'd per curiam*, 514 F.2d 43 (8th Cir. 1975), the taxpayer was director of nursing at a hospital in one city, but in the evenings assisted her husband, a medical doctor, at their home in another city by relaying messages, dispensing medicine and treating minor injuries. The court, relying on the business exigencies requirement, held that the primary reason for the taxpayer's travel between the hospital and her home was personal rather than business and disallowed her deduction for travel expenses. *See also* Julio S. Mazzotta, 57 T.C. 427 (1971), *aff'd per curiam*, 465 F.2d 1399 (2d Cir. 1972); J. Paul Presault, 34 CCH Tax Ct. Mem. ¶33,203 (1975).

186. *See, e.g.*, Markey v. Commissioner, 490 F.2d 1249, 1974-1 U.S.T.C. ¶9192 (6th Cir. 1974); Vincent Treanor, 10 CCH Tax Ct. Mem. ¶18,242 (1951); Joseph H. Sherman, 16 T.C. 332 (1951), *acquiesced in*, 1951-2 CUM. BULL. 51.

187. Rev. Rul. 54-147, 1954-1 CUM. BULL. 51.

other factors lead to results different from those following from giving time spent controlling significance, the results will usually be wrong. Assume, for example, that a taxpayer obtains new employment in city B, but retains part-time employment, his residence, and his community ties in city A. His decision not to move to city B is very likely a personal choice; his retention of community ties in city A should not detract from the obvious fact that his primary place of employment has changed. Accordingly, the taxpayer's primary place of business for purposes of the recommended approach will depend on time spent alone.

## Conclusion

The Commissioner should abandon the tax home doctrine in favor of a rule which treats a taxpayer's residence as his home in all situations. Such an interpretation is consistent not only with the legislative history of the provision and the ordinary meaning of the statutory term home, but also with the policy underlying the provision. When home is defined as residence, application of the business exigencies requirement will usually produce results similar to those obtained under the tax home doctrine.

The temporary versus indefinite rule should be viewed as an aspect of the business exigencies requirement rather than as an exception to the tax home doctrine. This approach results in conceptual consistency since the temporary versus indefinite rule applies in some travel situations under section 162(a), as well as section 162(a)(2), and the business exigencies requirement applies to all section 162 expenses.

The Treasury should also modify its test for determining what constitutes a temporary stay by adopting a fixed period of one year for this purpose. If the taxpayer, at the commencement of a new assignment, reasonably expected that his assignment would last no longer than the fixed period, it should be considered temporary until such time as the facts change.

The congressional reluctance to amend section 162(a)(2) may be indicative of a satisfaction with the results reached under the present law. The changes in interpretation recommended here, however, suggest a more intelligible conceptual approach, which would lead to different results only in a few instances. Adoption of these changes would enable the courts to render more intelligible decisions, and the ensuing certainty would inure to the benefit of both the Treasury and the traveling taxpayer.