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# TRAVEL, TRANSPORTATION, AND COMMUTING EXPENSES: PROBLEMS INVOLVING DEDUCTIBILITY

## I. INTRODUCTION

Section 162(a)(2) of the Internal Revenue Code allows a deduction for traveling expenses while the taxpayer is away from home in the pursuit of a trade or business.<sup>1</sup> By providing this deduction, Congress sought to ease the burden of traveling workers who, because of the "exigencies" of their trade or business, must maintain two places of abode and thereby incur duplicate living expenses.<sup>2</sup> When the taxpayer travels away from home on business for short periods of time, it is unreasonable to expect him to take his home with him; therefore, he is permitted to deduct his traveling expenses from the business trip. However, Congress did not intend to allow a deductible business expense for those outlays which are not caused by the exigencies of the business, but instead are caused by the taxpayer's decision to locate his home, for his own convenience, at a distance from his place of business.<sup>3</sup> Such expenditures are not in pursuit of the taxpayer's business and were not within the contemplation of Congress, which proceeded on the assumption that a businessman would live within reasonable proximity to his business.<sup>4</sup>

In discussing the deductibility of expenses under section 162(a)(2), a distinction must be made among traveling expenses, transportation expenses, and commuting expenses. Traveling expenses generally include transportation expenses, meals and lodging, and expenses incident to travel.<sup>5</sup> The Internal Revenue Service has expanded the definition to include baggage claims, reasonable tips and other incidental expenses.<sup>6</sup> Transportation expenses are limited to transportation fares of all kinds, such as taxi and bus fares and the cost of operating and maintaining an automobile (to the extent that it is used for business purposes). The

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1. I.R.C. § 162(a)(2) specifically provides:

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— . . . 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 trade or business. . . .

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

3. *Barnhill v. Commissioner*, 148 F.2d 913, 917 (4th Cir. 1945).

4. *Id.*

5. Treas. Reg. § 1.162-2(a) (1954). Expenses incident to travel include sample rooms, telephone, stenographer services, etc.

6. I.R.S. Pub. No. 17, at 60 (1977), *in* [1978] 2 FED. TAXES (P-H) ¶ 11.362.

definition of transportation expenses does not include travel items such as meals and lodging.<sup>7</sup> Commuting expenses include only the local transportation expenses incurred by an individual in traveling to and from the location of his family residence and his place of business.<sup>8</sup>

The Internal Revenue Code provides general deduction rules for these expenses. Transportation expenses are deductible under the general language of section 162(a), whereas travel expenses are deductible only under the more specific provisions of section 162(a)(2).<sup>9</sup> Commuting expenses are personal expenses and, under the language of section 262,<sup>10</sup> generally are not deductible.

## II. TRAVEL EXPENSES

### A. *In General*

In *Commissioner v. Flowers*<sup>11</sup> the Supreme Court stated that there are three requirements which must be met in order to claim a deduction for travel expenses: (1) the expense must be reasonable and necessary;<sup>12</sup> (2) the expense must be incurred while "away from home"; and (3) the expense must be incurred while in pursuit of a trade or business.<sup>13</sup> Therefore, if a taxpayer chooses to locate his residence at an unnecessary and unreasonable distance from his job site, the expenses incurred in traveling to and from the residence, although arguably "away from home" and "in pursuit of a trade or business" would not be deductible because all three of the *Flowers* requirements would not be met.<sup>14</sup>

Few problems exist with the first and third requirements of the *Flowers* test. Typically, these two requirements come into play only if the expenses are deemed excessive or personal in nature, or if there is no direct connection between the expenses and the trade or business of the employee or employer. The first requirement simply prohibits the traveling taxpayer from deducting costs far in excess of those that he normally would incur. The final requirement restricts the deduction to

7. [1977] 2 FED. TAXES (P-H) ¶ 11,406.

8. *Id.* ¶ 11,407. There may be some overlap between commuting and transportation expenses but commuting refers only to those transportation expenses between one's residence and his place of employment.

9. See note 1 *supra*.

10. Treas. Reg. § 1.162-2(e) (1954).

11. 326 U.S. 465, 470 (1946).

12. This refers to an expense that is appropriate and helpful in carrying on a trade or business. It does not require that an expense be indispensable to the trade or business.

13. There must be a direct connection between the expenditure and the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade. *Commissioner v. Flowers*, 326 U.S. 465, 470 (1946).

14. In such a case, the expenses would be nondeductible personal expenses under § 262 of the Code.

those expenditures which are necessitated or motivated by the exigencies of the business of either the taxpayer or his employer.<sup>15</sup>

Some of the federal courts of appeal appear to have read the Supreme Court's opinion in *Flowers* as extending the allowable deduction only to travel expenses incurred by a taxpayer while pursuing his employer's business, and not to those expenses necessitated by the taxpayer's trade or business.<sup>16</sup> Most courts, however, have rejected such an interpretation and followed the general rule that the third *Flowers* requirement includes those travel expenses incurred in pursuit of either the employer's business or the taxpayer's own business.<sup>17</sup> The exigencies of the business, rather than the personal conveniences of the traveler, must be the motivating factors behind the travel to satisfy this third requirement.<sup>18</sup>

### B. *The Away from Home Requirement*

Most of the controversy concerning the travel expense deduction involves the definition of the second *Flowers* requirement, *i.e.*, determining what constitutes "away from home." The meaning of the phrase "tax home" is important because it serves as the starting point in computing deductible travel expenses. Despite several opportunities to resolve the conflict,<sup>19</sup> the Supreme Court has declined to do so. Consequently, two conflicting interpretations now are being applied by the courts.

The Tax Court<sup>20</sup> and most federal courts of appeals<sup>21</sup> have upheld

15. Commissioner v. *Flowers*, 326 U.S. 465, 470 (1946).

16. Commissioner v. *Janss*, 260 F.2d 99 (8th Cir. 1958); Commissioner v. *Peurifoy*, 254 F.2d 483 (4th Cir. 1957), *aff'd per curiam*, 358 U.S. 59 (1958).

17. *Wright v. Hartsell*, 305 F.2d 221, 224 (9th Cir. 1962); *Chandler v. Commissioner*, 226 F.2d 467 (1st Cir. 1955). *Accord*, Rev. Rul. 60-189, 1960- C.B. 60, 65.

18. Commissioner v. *Flowers*, 326 U.S. 465, 474 (1946).

19. The Supreme Court avoided the controversy in three decisions by deciding the cases on other grounds. In Commissioner v. *Flowers*, 326 U.S. 465 (1946), an interpretation of "home" was avoided and disallowance of the travel expense deductions was based instead on absence of proof that the expense was incurred in the pursuit of the taxpayers trade or business. In Commissioner v. *Peurifoy*, 254 F.2d 483 (4th Cir. 1957), *aff'd per curiam*, 358 U.S. 59 (1958), the Court again refused to resolve the "home" controversy and sustained disallowance on another ground. Finally, in Commissioner v. *Stidger*, 386 U.S. 287 (1967), the Court stated that "home" for a military officer was his permanent post of duty and not his place of residence. However, the Court said that this definition of "home" was limited to military personnel.

20. *George W. Lindsay*, 34 B.T.A. 840 (1936); *Mort L. Bixler*, 5 B.T.A. 1181 (1927). The "tax home" concept first originated in the *Bixler* case where the Board of Tax Appeals, in interpreting § 214(a)(1) of the 1921 Revenue Act, ch. 136, 42 Stat. 239 (1921), stated:

Traveling and living expenses are deductible . . . only while the taxpayer is away from his place of business, employment, or the post or station at which he is employed . . . . We think section 214(a)(1) in-

the Service's position<sup>22</sup> that "home" for purposes of section 162(a)(2) refers to the taxpayer's principal or regular place of business rather than his residence. The Service supports its interpretation by reasoning that Congress drafted the Code provision on the assumption that the taxpayer would live near his place of business. If the taxpayer locates his residence far from such place of business, this is a personal decision, and expenses incurred to and from work are nondeductible personal expenses under section 262.<sup>23</sup>

This definition of "home" has been rejected by other circuits<sup>24</sup> as contrary to the plain meaning of the statute. These courts have maintained that "home" is to be construed in its ordinary sense as "residence" and that the Service's distorted meaning is unnecessary to prevent the abuses of the travel expense deduction feared from a "residence home" interpretation.<sup>25</sup>

The first court to reject the Service's view was the Ninth Circuit in *Wallace v. Commissioner*.<sup>26</sup> In defining the taxpayer's "home" as his actual residence, the court stated:

The plain, obvious and rational meaning of a tax statute is always to be preferred to any narrow or hidden sense . . . and while the meaning to be given to terms used will be determined from the character of their use by the legislature in the statute under consideration, words in common use should not be distorted by administrative or judicial interpretation.<sup>27</sup>

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tended 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.

*Id.* at 1184. One problem that the Board attempted to avoid was the possibility of a taxpayer maintaining a residence at a distance from his primary place of business and then deducting his commuting expenses.

21. *Chimento v. Commissioner*, 438 F.2d 643 (3d Cir. 1971); *England v. United States*, 345 F.2d 414 (7th Cir. 1965), *cert. denied*, 382 U.S. 986 (1966); *Amoroso v. Commissioner*, 193 F.2d 583 (1st Cir.), *cert. denied*, 343 U.S. 926 (1952); *Barnhill v. Commissioner*, 148 F.2d 913 (4th Cir. 1945).

22. G.C.M. 23,672, 1943 C.B. 66, Rul. 1943-8-11407. In a subsequent special ruling (SPECIAL RULING, May 4, 1956, 565 CCH 9 6428) the definition of "home" was expanded by the I.R.S. and the Tax Court to include the taxpayer's "central business headquarters" in order to cover the situation where a worker reported and received jobs out of a central union hall or other central employment receiving place.

23. I.R.C. § 262.

24. *Six v. United States*, 450 F.2d 66 (2d Cir. 1971); *Wallace v. Commissioner*, 144 F.2d 407 (9th Cir. 1944).

25. Those circuits that disagree with the "residence home" interpretation fear that it would allow the deductibility of commuting expenses because travel to and from work would be "away from home." However, advocates of the "residence home" approach maintain that there is no basis for such a fear because even if the travel is "away from home," the other two conditions of the *Flowers* test still must be met in order to make the deduction.

26. 144 F.2d 407 (9th Cir. 1944).

27. *Id.* at 410.

The courts adopting this approach also have found that safeguards exist against the possible abuse of a "residence home" interpretation: (1) the Regulations<sup>28</sup> specifically state that commuting expenses are nondeductible, and (2) the two other conditions of the *Flowers* test must be met before an item is deductible. Although decisions in recent years have placed more emphasis on the presence or absence of business purpose with regard to claimed travel expense deduction,<sup>29</sup> a dispute still exists as to the interpretation to be given to "home" for purposes of determining deductibility under section 162(a)(2).

### C. *Necessary Sleep or Rest (Overnight) Rule*

There has been some controversy whether a section 162(a)(2) travel expense deduction requires an overnight stay by the taxpayer, or whether such a deduction is allowed on a one-day trip. More specifically at issue is whether the "away from home" requirement of section 162(a)(2) requires the taxpayer to be away overnight. If such an "overnight" requirement exists in section 162(a)(2), then daily transportation expenses are not deductible under that section; instead, they must be deducted under the general provisions of section 162(a). That section requires only that the expense be ordinary and necessary and incurred in carrying on any trade or business.<sup>30</sup> In these general provisions there is no requirement that the expense be incurred "away from home." However, because meals and lodging are deductible only under section 162(a)(2) and not under the general provisions of section 162(a),<sup>31</sup> the result of an overnight requirement in section 162(a)(2) would be to disallow any deductions for meals or lodging incident to non-overnight travel.

The Commissioner originally contended that a trip would not be "away from home" unless it required an overnight stay.<sup>32</sup> However, this position was later modified and the Service now maintains that travel expenses (which include meals and lodging) are deductible under section 162(a)(2) only if they are incurred incident to travel requiring "necessary sleep or rest";<sup>33</sup> an actual overnight stay is not required. This rule, sometime referred to either as the "overnight" or "necessary sleep or rest" rule, is stated 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

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28. Treas. Reg. § 1.162-2(e) (1954).

29. *Brandl v. Commissioner*, 513 F.2d 697, 699 (6th Cir. 1975).

30. I.R.C. § 162(a).

31. See note 1 *supra*.

32. See *Kenneth Waters*, 12 T.C. 414, 416 (1949). The Tax Court disagreed with the Commissioner and held that travel "away from home" did not require an overnight trip.

33. Rev. Rul. 61-221, 1961-2 C.B. 34, *superseded by* Rev. Rul. 75-170, 1975-1 C.B. 60. See also *Williams v. Patterson*, 286 F.2d 333 (5th Cir. 1961).

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 section 162(a)(2) of the 1954 Code.<sup>34</sup>

Application of the necessary sleep or rest rule poses few problems when the traveling taxpayer in fact does travel overnight on business. However, problems arise in deciding whether expenses incurred on one-day trips must involve necessary sleep or rest in order to be deductible under section 162(a)(2). Some courts have allowed a deduction for transportation expenses involved on a business trip requiring neither sleep nor rest by stating that the "away from home" requirement of section 162(a)(2) is satisfied if the taxpayer travels back and forth to a temporary job site,<sup>35</sup> or that because the "overnight" rule is merely an arbitrary line-drawing method, any travel on business away from the area of the general business headquarters is travel "away from home," regardless of whether such travel involved an overnight stay.<sup>36</sup>

The dispute finally was resolved in *United States v. Correll*<sup>37</sup> where the Supreme Court held that travel "away from home" under section 162(a)(2) excluded all trips requiring neither sleep nor rest.<sup>38</sup> The taxpayer, a traveling salesman, attempted to deduct his meal expenses incurred on a one-day trip as travel expenses under section 162(a)(2). Because such meal expenses did not satisfy the "overnight rule,"<sup>39</sup> the Court said they were not incurred "away from home" and therefore were not deductible under section 162(a)(2).

Several Tax Court cases<sup>40</sup> subsequently interpreted the *Correll* decision as precluding a section 162(a)(2) deduction for transportation expenses incurred on a one-day trip. Because the Court in *Correll* only dealt with application of the "overnight rule" to meal expenses, there may be some question whether the "overnight rule" is also applicable to transportation expenses.<sup>41</sup> In adopting the Commissioner's rule, the

34. *Williams v. Patterson*, 286 F.2d 333, 340 (5th Cir. 1961).

35. *David M. Hummel*, 36 T.C.M. (CCH) 573 (1977); *Roy D. Crouch*, 36 T.C.M. (CCH) 263 (1977); *L.W. Norwood*, 66 T.C. 467 (1976).

36. *Hanson v. Commissioner*, 298 F.2d 391, 397 (8th Cir. 1962).

37. 389 U.S. 299 (1967).

38. *Id.* at 304. The Court adopted the Commissioner's rule.

39. The "overnight rule" is now synonymous with the "necessary sleep or rest rule" because the I.R.S. no longer requires an actual overnight stay.

40. *Sanders v. Commissioner*, 439 F.2d 296 (9th Cir.), *cert. denied*, 404 U.S. 864 (1971); *United States v. Tauferner*, 407 F.2d 243 (10th Cir. 1969); *William B. Turner*, 56 T.C. 27 (1971).

41. 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 (1971/72).

Court stated in *Correll* that in order for the taxpayer to be considered "away from home" for purposes of deductibility under section 162(a)(2), his trip must require sleep or rest.<sup>42</sup> Therefore, because there is an "away from home" requirement as a condition precedent to deductibility under section 162(a)(2), and because "away from home" has been equated to "necessary sleep or rest," this apparently would indicate that for any expense (meals and lodging or transportation expenses) to be deductible under section 162(a)(2), it must satisfy the "overnight" or "sleep or rest" rule. As a result, it may be inferred that transportation expenses incurred on one-day trips will not be deductible under section 162(a)(2) because they are not incurred "away from home" as defined by the "overnight" rule. Instead, the expenses would have to be deductible under the general provisions of section 162(a) which require that they be ordinary and necessary and incurred in a trade or business. The *Correll* decision therefore has confined the application of section 162(a)(2) to travel involving necessary sleep or rest,<sup>43</sup> otherwise known as the "overnight" or "necessary sleep or rest" rule.

#### D. Temporary Job Site Exception

Because the strict interpretation of "home" as "place of business" resulted in few taxpayers qualifying for the deduction,<sup>44</sup> the Tax Court recognized an "exception" to the "away from home" requirement where the taxpayer works at a temporary place of employment or a temporary job site.<sup>45</sup> Employees often receive temporary assignments from their employers to job sites in distant areas away from their regular place of business so that an overnight stay is required. Because they are unable to return home each night, the employees have to maintain a temporary residence at the job site in addition to their regular residence at their normal place of employment. In these situations it is difficult to determine the location of the taxpayer's home for purposes of the deduction under section 162(a)(2).<sup>46</sup> Realizing the controversies that could arise,<sup>47</sup>

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42. 389 U.S. at 302.

43. See cases cited note 40 *supra*.

44. In such a case deductions would be restricted to situations in which an employee left his place of employment for a few days in order to carry out his trade or business and then returned to his general business at his place of employment.

45. Harry Shurer, 3 T.C. 544 (1944). This refers to the situation where the temporary job site is at such a distance from the employee's regular residence that he cannot return home each night.

46. Since the taxpayers place of business has temporarily changed to a new job site, there is some question whether he is "away from home." If "home" is defined as "principal place of business," under a strict interpretation the taxpayer would not be away from home for purposes of § 162(a)(2), and therefore no deduction would be allowed for travel expenses incurred at the new job site.

47. An employee who incurs living expenses (food and lodging) at a temporary job site essentially would be maintaining two residences without being al-



the Commissioner<sup>48</sup> and a majority of the courts recognized an "exception"<sup>49</sup> to the requirement that a taxpayer be "away from home" in order to qualify for the travel expense deduction. This exception provides that where a taxpayer is employed temporarily away from his principal or regular place of business, he will be considered away from home for purposes of section 162(a)(2) and a deduction will be allowed.<sup>50</sup> In such a case the taxpayer will be allowed a deduction for expenses incurred in initially traveling to the temporary job site, for meals and lodging while at the site, and for traveling expenses incurred in returning from the job site.<sup>51</sup> No deduction will be allowed for commuting expenses while at the temporary job site.<sup>52</sup> However, if the employment at the new job site is of indefinite duration, no deduction will be allowed.<sup>53</sup> Employment of indefinite duration has been distinguished from that which is merely temporary. This gave rise to a temporary-indefinite duration standard.<sup>54</sup>

The first indication that a deduction might be allowed for a taxpayer employed at a temporary job site came in *Coburn v. Commissioner*.<sup>55</sup> The taxpayer, an actor, normally maintained a residence and business in New York and attempted to deduct travel expenses incurred while filming a movie in California for 263 days out of the tax year. The court conceded that New York was his regular place of business and allowed the deduction as being "away from home."<sup>56</sup>

The temporary-indefinite duration standard was first adopted by the Tax Court in *Harry Shurer*.<sup>57</sup> The taxpayer, through his local union in Pittsburgh, was assigned temporarily to job sites which were not within commuting distance of his residence. The court recognized that it was unreasonable to expect the taxpayer to move his residence to each such temporary location and allowed a deduction for meals and lodging at the temporary job sites as well as for transportation costs to and from the temporary location.<sup>58</sup>

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lowed a deduction for the second residence. This would seem to defeat the purpose of the travel expense deduction.

48. See Rev. Rul. 75-432, 1975-2 C.B. 60; Rev. Rul. 60-189, 160-1 C.B. 60.

49. There may be a question whether this is actually an exception to the "away from home" requirement or whether this temporary job site rule is consistent with the notion that the taxpayer has no principal or regular place of business.

50. See authorities cited note 48 *supra*.

51. Rev. Rul. 75-432, 1975-2 C.B. 60.

52. Such expenses would be personal expenses under § 262. See text accompanying notes 85-116 *infra*.

53. See Rev. Rul. 75-432, 1975-2 C.B. 60; Rev. Rul. 60-189, 160-1 C.B. 60.

54. See text accompanying notes 57-73 *infra*.

55. 138 F.2d 763 (2d Cir. 1943).

56. *Id.* at 764.

57. 3 T.C. 544 (1944).

58. *Id.* at 547.

The determination whether a job is temporary or of indefinite duration depends on the facts and circumstances of the particular case, and the determination is generally not clear-cut. The Commissioner will consider that work at a job site is temporary if termination can be foreseen within a "fixed or reasonably short period of time."<sup>59</sup> If termination of the job cannot be thus foreseen, then such work is indefinite in duration, and the new location will be considered the taxpayer's "tax home."<sup>60</sup> Although neither the Service nor the courts have attempted to prescribe any specific length of time as the cut-off line between temporary and indefinite employment, an employment or stay of anticipated or actual duration of a year or more at a particular location is viewed by the Service as strongly indicative of presence beyond a temporary period. Any such case normally will be subject to close scrutiny.<sup>61</sup> Jobs of actual and anticipated duration of less than one year normally will not be questioned.<sup>62</sup> Despite the consideration of actual time spent at the location in determining whether the employment is temporary or indefinite, the main factor is the taxpayer's *expectation* as to the duration of such employment.<sup>63</sup> The temporary-indefinite duration standard will be applied according to the facts of each case.<sup>64</sup>

The Commissioner's temporary-indefinite duration test received opposition from the Ninth Circuit in *Harvey v. Commissioner*.<sup>65</sup> The taxpayer was sent to work at a job site approximately 117 miles from his home. The duration of the assignment was unknown—it could have lasted from a few months to two years.<sup>66</sup> The Tax Court applied the temporary-indefinite duration standard and held that the employment was indefinite because it could not be foreseen that termination would occur within a fixed or reasonably short period of time.<sup>67</sup> Therefore, no deduction was allowed for the taxpayer's traveling expenses. The Ninth Circuit rejected the temporary-indefinite duration standard and reversed the Tax Court.<sup>68</sup> The court stated that the aim of Congress was "to equalize the burden between the taxpayer whose employment requires business travel and the taxpayer whose employment does not." The court disposed of the definite duration requirement by stating that

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59. Rev. Rul. 75-432, 1975-2 C.B. 60, 61.

60. *Id.* In such a case the taxpayer is expected to move his residence to his new job site.

61. Rev. Rul. 60-189, 1960-1 C.B. 60, 63.

62. *Id.*

63. *Id.* Therefore, if the taxpayer reasonably believes his stay or employment will be less than one year, such will be considered temporary even if actual duration is greater than one year.

64. James M. Waldrop, 36 T.C.M. (CCH) 780 (1977).

65. 283 F.2d 491 (9th Cir. 1960).

66. The actual duration of the assignment was about two years.

67. John T. Harvey, 32 T.C. 1368, 1387 (1959).

68. *Harvey v. Commissioner*, 283 F.2d 491, 496 (9th Cir. 1960).

it was unreasonable to expect an employee on an assignment of indefinite duration to move his residence to his new post of duty.<sup>69</sup> The test imposed by the court was more subjective than the Commissioner's test:

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 circumstances surrounding each case.<sup>70</sup>

Although the assignment in *Harvey* was indefinite, this factor was not enough to cause denial of a deduction under section 162(a)(2). The determining factor was whether the taxpayer should have been reasonably expected to move his residence to the new job site.<sup>71</sup> Even if the duration is unknown, if the assignment is *expected by the taxpayer* to be of short duration, he will not be expected to move his residence, and he is allowed a deduction for living expenses at the job site. Despite the fairness to the taxpayer of the Ninth Circuit's approach, the Commissioner<sup>72</sup> and most courts<sup>73</sup> have specifically rejected it. The temporary-indefinite duration test is still followed by the majority of courts.

If a taxpayer is assigned temporarily to a job site away from his principal place of employment, a travel expense deduction will be allowed (assuming all three *Flowers* conditions are met) for the transportation costs incurred in initially going to the temporary job site, for any reasonable meal and lodging expenses incurred while there, and for the transportation expenses incurred in returning "home." No deduction will be allowed for the commuting expenses incurred at the temporary job site.<sup>74</sup>

### III. COMMUTING EXPENSES

#### A. In General

There seems to be little problem in allowing a deduction under section 162(a)(2) for travel expenses incurred by an employee who has been temporarily assigned to a job site at such a distance that he must remain overnight rather than travel back and forth each day to his residence.<sup>75</sup>

69. *Id.* at 495.

70. *Id.*

71. This "long period of time" requirement changes the test from a temporary-indefinite test to more of a "temporary-permanent" test.

72. Rev. Rul. 61-95, 1961-1 C.B. 749.

73. *E.g.*, Commissioner v. Peurifoy, 254 F.2d 483 (4th Cir. 1957), *aff'd per curiam*, 358 U.S. 59 (1958); *Claunch v. Commissioner*, 264 F.2d 309 (5th Cir. 1959).

74. Had the taxpayer been at his regular place of employment, such commuting expenses would have been nondeductible.

75. In such a case, all three *Flowers* requirements are easily satisfied.

Because the assignment is temporary rather than indefinite, the employee's "home" is deemed to remain at his regular place of business and therefore he is "away from home" for purposes of section 162(a)(2).<sup>76</sup>

However, controversy has developed over the application of this "temporary job site" exception so as to allow a deduction for the transportation expenses incurred by one who does not stay overnight at the temporary job site, but commutes every day from his residence. Generally, expenses incurred by an individual in traveling to and from the location of his family residence and his principal place of business or employment are nondeductible personal commuting expenses.<sup>77</sup> This is true regardless of the nature of the work, the distance traveled between the taxpayer's residence and his place of business, the mode of transportation, and the degree of necessity.<sup>78</sup> These factors are too uncertain to be satisfactory guidelines for determining deductibility. The Regulations<sup>79</sup> and administrative rulings consistently have denied deductions for personal commuting expenses. The Supreme Court<sup>80</sup> has refused to recognize that commuting expenses are to be treated as incurred in pursuit of a trade or business when they stem from an individual's action in maintaining his family residence at a distance from his business or employment. Commuting expenses are not "away from home" and therefore do not meet the deductibility requirements of the *Flowers* test.

Although commuting expenses are generally nondeductible, there are at least three possible exceptions to this rule: commuting expenses to and from a temporary business location,<sup>81</sup> the "carry-your-tools-to-work" exception,<sup>82</sup> and the two-job rule.<sup>83</sup>

#### B. *The Temporary Job Site Exception and the Impact of Revenue Ruling 76-453*

As an exception to the general rule that commuting expenses are personal, and therefore nondeductible, the costs of commuting from a residence to a *temporary job site* may be deductible as an expense incurred in pursuit of a trade or business under section 162(a)(2).<sup>84</sup> Because the

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76. Rev. Rul. 75-432, 1975-2 C.B. 60.

77. Treas. Reg. § 1.162-2(e) (1958); Frank H. Sullivan, 1 B.T.A. 93 (1924).

78. The fact that the taxpayer is prohibited from living any closer to his place of business will not make his commuting expenses deductible. *Sanders v. Commissioner*, 439 F.2d 296 (9th Cir. 1971); *United States v. Tauferner*, 407 F.2d 243 (10th Cir. 1969).

79. Treas. Reg. § 1.162-2(e) (1958).

80. *Commissioner v. Flowers*, 326 U.S. 465 (1946).

81. See text accompanying notes 84-110 *infra*.

82. See text accompanying notes 111-128 *infra*.

83. See text accompanying notes 129-138 *infra*.

84. Rev. Rul. 190, 1953-2 C.B. 303.

employee is not staying overnight at the site of the temporary job, he has not satisfied the "away from home" requirement of section 162(a)(2), and he is not entitled to a deduction for meals and other travel expenses. However, the absence of an overnight stay may not preclude the employee from deducting, under 162(a), his transportation expenses in going to and from the temporary place of employment. As to what constitutes a "temporary" place of employment for purposes of a commuting expense deduction, the temporary-indefinite duration test is determinative.<sup>85</sup>

The Service previously had allowed the cost of commuting to a temporary job site as a business expense deduction under section 162(a)(2). In Revenue Ruling 190<sup>86</sup> the Service stated that an employee who is required to work at a temporary location outside his "tax home" may deduct the transportation expenses for daily round trips to such temporary post of duty.<sup>87</sup> The Service allowed this exception to the non-deductibility of commuting expenses in order to provide tax relief to workers in the construction industry and others who, because they are temporarily employed outside their normal working area, incur a substantial increase in the cost of getting to and from work. This ruling specifically allowed a deduction for commuting expenses where construction workers who ordinarily worked within the metropolitan area were temporarily assigned to a distant construction site.<sup>88</sup> The Service provided for this temporary job site exception without specifying whether it applied to all temporary job sites or only to those outside the general area in which the employee worked.<sup>89</sup>

The Service<sup>90</sup> and Tax Court<sup>91</sup> later realized that employees who live in the suburban area surrounding cities often incur the same if not greater expense in commuting to work. Both the Service and the Tax Court reversed their previous positions and decided to deny a deduction for commuting expenses, even those incurred to and from a temporary job site.

In *William B. Turner*<sup>92</sup> the Tax Court stated that although the taxpayer was working at a temporary job site, transportation expenses be-

85. Roy D. Crouch, 36 T.C.M. (CCH) 263 (1977); L.W. Norwood, 66 T.C. 467 (1976).

86. 1953-2 C.B. 303.

87. *Id.* at 305.

88. *Id.*

89. If the temporary job site exception applies to work at all temporary job sites (regardless of position inside or outside the general area of employment), an employee who continuously moves from one temporary job site to another would be entitled to a deduction, even if all of the temporary job sites were located within the same general area.

90. Rev. Rul. 76-453, 1976-2 C.B. 86.

91. Unice C. White, 31 T.C.M. (CCH) 357 (1972); William B. Turner, 56 T.C. 27 (1971).

92. 56 T.C. 27 (1971).

tween his residence and "temporary" points of assignment were non-deductible commuting expenses. The taxpayer, a consulting engineer, worked out of a central job shop in New York City and was assigned to various temporary locations during the year. The taxpayer commuted daily from his residence to the temporary work sites and deducted his transportation expenses. He claimed that by maintaining his status as a temporary employee, he was "away from home" for purposes of section 162(a)(2) and therefore should be allowed a deduction for his transportation expenses to and from his temporary job site.<sup>93</sup> The Tax Court refused to apply the temporary job site exception to commuting expenses and stated that the temporary nature of the taxpayer's job would not convert commuting expenses into ordinary and necessary business expenses.<sup>94</sup>

The denial of a deduction for transportation expenses incurred in going to and from a temporary job site was based on the rationale set forth in the *Correll* case.<sup>95</sup> In *Correll* the Supreme Court distinguished between travel expenses deductible under section 162(a)(2) and transportation expenses deductible under the general provisions of section 162(a). The Court stated that section 162(a)(2) and the "away from home" requirement apply only to travel expenses incurred pursuant to an "overnight stay"<sup>96</sup> and that one-day trips, whether to a temporary job site or not, do not constitute travel away from home under section 162(a)(2).

In *Turner* the Tax Court followed the reasoning in *Correll* and stated that the temporary job site exception applies only to section 162(a)(2) and, because commuting expenses do not constitute travel away from home under section 162(a)(2), the temporary-indefinite duration standard is inapplicable to commuting expenses. In order for commuting expenses to be deductible as transportation expenses, they would have to qualify under the general provisions of section 162(a).<sup>97</sup> The court then decided that commuting expenses also are not deductible as transportation expenses under that section because they are not ordinary and necessary business expenses. The reasoning in *Turner* was followed by the Tax Court in later cases.<sup>98</sup>

After the *Turner* decision the Service published Revenue Ruling 76-453<sup>99</sup> which either revoked or modified all earlier rulings applying the

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93. *Id.* at 30.

94. *Id.* at 32.

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

96. This may refer to an overnight stay or one requiring necessary sleep or rest.

97. *William B. Turner*, 56 T.C. 27, 32 (1971).

98. *Unice C. White*, 31 T.C.M. (CCH) 357 (1972); *John W. Hill*, 31 T.C.M. (CCH) 14 (1972); *D.L. Crowson*, 30 T.C.M. (CCH) 953 (1971).

99. 1976-2 C.B. 86, *suspended indefinitely*, Ann. 77-147, I.R.B. 1977-42, 45; [1978] 7 FED. TAXES (CCH) ¶ 1352.144.

temporary job site exception to the general rule of nondeductibility of commuting expenses. In the new ruling the Service stated that transportation expenses incurred in trips between the taxpayer's residence and his place of employment (whether temporary or indefinite) are nondeductible commuting expenses.<sup>100</sup> In order to be deductible, the expenses must fall under section 162(a).<sup>101</sup> The Service concluded by saying that the "temporary" nature of the taxpayer's work does not convert commuting expenses into ordinary and necessary business expenses so as to make them deductible under that section.<sup>102</sup>

In *L.W. Norwood*<sup>103</sup> the Tax Court refused to follow either Revenue Ruling 76-453 or the earlier view set forth in *Turner*. The Tax Court returned to the temporary-indefinite duration test for determining the deductibility of commuting expenses to a job site. The taxpayer was a steamfitter employed in the Washington, D.C., area. He was assigned by his union to work at a construction site outside his general working area for an anticipated duration of six months. After finishing the job in five months, the taxpayer was asked to remain there as foreman for another job.<sup>104</sup> The taxpayer commuted daily to this job site outside of his general working area and deducted his transportation expenses. The Commissioner challenged the validity of this deduction and conceded that the transportation expenses incurred between the taxpayer's home and his temporary place of employment would be deductible if the Tax Court found the employment to be temporary rather than indefinite.<sup>105</sup> The Tax Court found that the taxpayer's first five-month job was temporary and therefore allowed a deduction under section 162(a) for his daily transportation expenses incurred to and from his temporary job site.<sup>106</sup>

The Tax Court thus recognized at least in the *Norwood* context, that a deduction for commuting expenses may be allowed under section 162(a) where the expenses are incurred in commuting to and from a temporary job site.<sup>107</sup> Although *Norwood* seems inconsistent with the Tax

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100. *Id.*

101. The Service applied the rationale of the *Correll* decision.

102. Rev. Rul. 76-453, 1976-2 C.B. 86.

103. 66 T.C. 467 (1976).

104. The taxpayer expected to remain at this second job for at least nine months. The court believed that he reasonably could expect to be rehired for further jobs which would have required him to remain at the job site for a substantial period.

105. *L.W. Norwood*, 66 T.C. 467, 469 (1976).

106. *Id.* at 471. The court denied a deduction for the taxpayer's transportation expenses incurred after the taxpayer became foreman and was asked to remain at the job site. The court held that the duration of the taxpayer's employment then was indefinite rather than temporary because he could have reasonably expected to remain at the location for a substantial amount of time.

107. See Roy D. Crouch, 36 T.C.M. (CCH) 263 (1977) (temporary-indefinite test recognized and deduction disallowed as arising from employment of indefinite duration). See also David M. Hummel, 36 T.C.M. (CCH) 573 (1977).

Court's decision in *Turner* and with Revenue Ruling 76-453, there is a possible explanation for this inconsistency. In *Turner*, the Tax Court flatly refused to apply the temporary-indefinite test to deductions under section 162(a). The court indicated that transportation expenses between a taxpayer's residence and place of work, even though temporary, were nondeductible commuting expenses. Furthermore, even if the court had accepted the temporary-indefinite test, it would have denied Turner a deduction under section 162(a) because Turner had no principal place of business from which he was temporarily assigned. Turner worked out of two job shops in the New York City area, but other than receiving his pay checks from these job shops, he had little contact with them. Turner was an employee of the job shops in form only; in substance, he was an employee of the client contractors. The court found that the locations of Turner's client contractors, and not the job shops in New York City, were his principal place of employment. Therefore, while working for the contractors at locations outside New York City, he was not on temporary assignment for purposes of a deduction under section 162(a).

The situation in *Norwood* was different. The Tax Court reinstated the temporary-indefinite test and, framing the issue within that test, found the commuting expenses to the temporary job site deductible under section 162(a). *Norwood* had been employed in the Washington, D.C. area for several years when a shortage of work caused him to accept employment outside of the area. Because he had a working history in the Washington, D.C., area, the Service conceded that that area was his principal place of business, and that any temporary assignment away from such area would be deductible under section 162(a). After conceding the principal place of business idea, the sole question in *Norwood* was whether his employment outside the area was temporary or indefinite; the court found it to be temporary.

The use of the temporary-indefinite test and the "principal place of business" concept seem to be the only distinctions between those two major decisions. If a taxpayer has a working history in one area, he may be able to take a deduction; a deduction may be denied if a working history is not established. Regardless of whether these distinctions were the justification for the inconsistent decisions, these two cases will continue to cause controversy until a specific ruling is made.

Revenue Ruling 76-453<sup>108</sup> was an attempt to end the dispute involving the deductibility of commuting expenses by disallowing *any* deduction for commuting expenses, regardless of whether such expenses were incurred in going to and from a temporary job site. However, due to the controversial nature of the subject, the ruling was suspended indefinitely.<sup>109</sup> *Norwood* thus seems to be the predominant view and the

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108. 1976-2 C.B. 86.

109. Ann. 77-147, I.R.B. 1977-42, 45; [1978] 7 FED. TAXES (CCH) ¶ 1352.144.



temporary-indefinite duration standard apparently has been reinstated for determination of the deductibility of commuting expenses to a temporary job site.<sup>110</sup> However, this deduction will be allowed under section 162(a) rather than section 162(a)(2) because the *Correll* overnight stay requirement for deductibility of travel expenses would not be met where the employee commutes each day from his residence to the job site. Only the expenses of commuting, not including travel expenses such as meals, would be permissible under section 162(a).

### C. *The Carry-Your-Tools-To-Work Exception*

A second exception to the rule that commuting expenses are nondeductible is the situation in which the mode of transportation serves some business purpose other than simply taking the taxpayer to and from work. This situation arises where the taxpayer, because of the nature of his work, must use an automobile or truck or trailer to transport the tools of his trade and is prevented from utilizing some other less expensive means of transportation.<sup>111</sup>

Originally, the Service took the view that the entire amount of the taxpayer's commuting expense was nondeductible under section 262 even though the automobile also was used to transport tools used by him in his work.<sup>112</sup> This ruling stated that the expenses incurred in going to and from work were not increased simply because the tools used by the taxpayer also were transported in his automobile.<sup>113</sup> Under this approach, no part of the commuting expense could be allocated to the cost of transporting the tools.

The Service later changed its position and ruled that this "dual purpose" expenditure was deductible where it would not have occurred "but for" the business purpose.<sup>114</sup> The Commissioner took the position that a taxpayer who found it necessary to use his automobile in transporting his tools to and from work could deduct the *entire amount* of his commuting expenses provided that two conditions were met: (a) if the tools were too bulky to be carried otherwise, and (2) if the taxpayer would not have used his automobile "but for" the need to carry his tools.<sup>115</sup> The rationale for this position was that such expenses were incurred primarily for business rather than for personal reasons, and that therefore the

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110. Roy D. Crouch, 36 T.C.M. (CCH) 263 (1977); L.W. Norwood, 66 T.C. 467, 469 (1976).

111. The taxpayer's contention is that if he did not have to carry his "bulky tools" to work, he could take public transportation or form a car pool. However, because he must take his tools with him, he is precluded from using these other means of transportation.

112. Rev. Rul. 56-25, 1956-1 C.B. 152.

113. *Id.*

114. Rev. Rul. 63-100, 1963-1 C.B. 34.

115. *Id.*

entire expense should be deductible. This ruling was a significant change from the earlier view under which no deduction was allowed.

The application of this "bulky tool" exception created disagreement among the courts in cases where the taxpayer would have used the same means of transportation regardless of whether he carried his tools to work.<sup>116</sup> The Second<sup>117</sup> and Seventh<sup>118</sup> Circuits took the position that the taxpayer was still entitled to a deduction for that portion of his commuting expenses allocable to the costs of carrying his tools to work, even if he would have taken the same transportation had it not been necessary to carry his tools.

The Tax Court took a strict position, stating that no deduction would be allowed unless the necessity of transporting the tools required the taxpayer to use a more expensive means of commuting to and from work.<sup>119</sup> The allowable deduction in such case would be only the incremental cost allocable to the tools rather than the entire commuting expense.<sup>120</sup> In *Robert A. Hitt* the Tax Court stated that "a deduction for transporting heavy, bulky, unwieldy and cumbersome tools and equipment should be allowed only to the extent that the transporting of such items cause a taxpayer to incur expenses above and beyond those he could otherwise incur in commuting."<sup>121</sup>

The Fifth Circuit in *Fausner v. Commissioner*<sup>122</sup> refused to follow the approach of the Second and Seventh Circuits, and instead adopted the stricter view of the Tax Court. The taxpayer had failed to prove that he had incurred expenses in excess of those he would have incurred in the absence of a necessity to transport his tools. The court denied the deduction because of the demonstrated impossibility of rationally distinguishing between personal and business expenses.<sup>123</sup> However, nothing in the opinion was intended to prevent a deduction of those expenses in excess of ordinary commuting expenses.<sup>124</sup> A taxpayer thus would be allowed to deduct any expenses in excess of ordinary commuting expenses incurred in transporting job-related tools to his place of work and back.

In an attempt to clarify the confusion regarding the "bulky tool" exception, the Service issued Revenue Ruling 75-380<sup>125</sup> which stated that transportation expenses beyond the cost of ordinary nondeductible

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

117. *Sullivan v. Commissioner*, 368 F.2d 1007 (2d Cir. 1967).

118. *Tyne v. Commissioner*, 409 F.2d 485 (7th Cir. 1969).

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

120. *Id.*

121. *Id.* at 633.

122. 472 F.2d 561 (5th Cir.), *aff'd*, 413 U.S. 838 (1973).

123. *Id.* at 562.

124. *Id.* at 563, n.2.

125. 1975-2 C.B. 59.

commuting expenses are deductible only if such additional costs are attributable *solely* to the necessity of carrying his tools or equipment to work, and only if such costs can be accurately determined. The Commissioner will not allow a deduction for any portion of the basic cost of commuting even if the taxpayer's carrying of job-related materials necessitates the use of a more expensive means of transportation. Thus, a deduction will be allowed only for that portion of the expense of carrying the tools by the chosen mode of transportation which is in excess of the cost of commuting by that same mode of transportation without the tools.<sup>126</sup> It is immaterial that a taxpayer might have used or would have used a less expensive mode of transportation if it had not been necessary to carry the tools.<sup>127</sup> The Service thus has invalidated the "but for" test and will allow the deduction only in limited situations.<sup>128</sup>

#### D. The Two-Job Rule

Another exception to the general rule that commuting expenses are nondeductible is recognized in the case of a taxpayer with two job sites within his general area of employment.<sup>129</sup> An employee who has two separate employers<sup>130</sup> and who works at two different locations *on the same day*<sup>131</sup> incurs additional commuting expenses because he must commute to both locations. The Commissioner will allow the employee to take a deduction for transportation costs incurred in going from one business location to the other.<sup>132</sup> No deduction is allowed for the costs of commuting either from his residence to the first location, or from the second location back to his residence.<sup>133</sup> These costs are not pure commuting expenses because the taxpayer is driving *between businesses* rather than between his residence and a place of business. However, the effect

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126. *Id.* at 60.

127. *Id.*

128. The following example illustrates the approach taken by the Service: A taxpayer commutes to and from work each day by public transportation at a cost of \$2.00 per day. If he decides to drive his car, at a cost of \$3.00 per day, so that he can carry his tools with him, he receives no deduction for such added cost of commuting. However, if the taxpayer must take his car, at a cost of \$3.00 per day, and must also rent a trailer for \$4.00 per day in order to carry his tools and equipment, then he is allowed a deduction for the cost of renting the trailer (\$4.00) because such cost is attributed solely to transporting his tools to and from work.

129. Rev. Rul. 55-109, 1955 C.B. 261.

130. An employee working for a single employer at two different business locations within the same general area incurs costs commuting between the two locations. These costs are not technically commuting expenses but instead are normal transportation expenses incurred in pursuit of a trade or business.

131. No deduction is allowed for the daily commuting expenses of a taxpayer who is employed at different locations on different days.

132. Rev. Rul. 55-109, 1955 C.B. 261.

133. Robert D. Steele, 19 T.C.M. (CCH) 966 (1960).

is similar because the taxpayer is allowed a deduction for transportation expenses incurred in traveling to his second location.<sup>134</sup>

This exception arose from a question whether a military reservist who attends drill within the city or general locality which constitutes his principal or regular post of duty is allowed a deduction for the costs of traveling to the drills.<sup>135</sup> The Commissioner ruled that as long as the taxpayer worked on both jobs on the same day he should be allowed to deduct his one-way transportation expenses in traveling from one such business location to the other.<sup>136</sup> However, if the taxpayer returns to his residence before going to his second place of employment, he can deduct his actual transportation expenses only to the extent that they do not exceed the transportation expenses he would have incurred had he gone directly from one such business location to the other.<sup>137</sup> If the taxpayers's second business location is very close to his residence, he probably will be able to deduct only the *lesser* of: (1) the transportation expenses incurred between business locations, and (2) the expenses incurred between the second location and his residence.<sup>138</sup>

#### IV. CONCLUSION

Although the Supreme Court has established three conditions for deductibility under section 162(a)(2),<sup>139</sup> various courts have interpreted each condition in different ways; contrary results occur depending on the jurisdiction in which the taxpayer is located. In order to provide a uniform deduction under this section, there must be improved definitions and guidelines so that the conditions precedent to deductibility will be clarified. The "away from home" requirement causes the most problems in interpretation. Controversy still exists on the issue whether "home" is to be defined as "residence" or as "principal place of employment." A standard definition of "home" for purposes of the second *Flowers* condition is needed so that deductions under this section will be granted uniformly. Although the "principal place of employment" definition is favored by most courts,<sup>140</sup> the residence-home definition may be the better view because exceptions to the rule probably would not be

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134. Rev. Rul. 55-109, 1955 C.B. 261.

135. *Id.*

136. *Id.*

137. *Id.* at 264.

138. A student taxpayer without a primary job probably would not be able to deduct commuting expenses to a military reserve meeting in the same town. His principal place of business would be the reserve meeting, and therefore transportation expense incurred in traveling to the meeting would be nondeductible commuting expenses.

139. *Commissioner v. Flowers*, 326 U.S. 465 (1946).

140. *See* cases cited note 21 *supra*.

needed.<sup>141</sup> The fear of unwarranted deductions (those of a personal nature) should be unnecessary because the first and third conditions of the *Flowers* test would prevent the deduction of personal expenses.

The temporary job site exception provides some relief from the harshness of the strict interpretation of "home" as "principal place of business."<sup>142</sup> However, the temporary-indefinite standard used with this exception may be unfair in application. A court may find an employment duration to be indefinite, and thus deny a deduction, in some cases in which it would be unreasonable to expect the taxpayer to move his residence to the job site. The test used by the Ninth Circuit, which analyzes the foreseeability and the facts surrounding each situation, may be more in line with Congress' aim to equalize the burden between the employee whose work involves travel and the employee whose work does not. The Supreme Court's decision in *Correll* put an end to the conflict on the question whether the "away from home" requirement of section 162(a)(2) requires an "overnight stay." It is clear that for purposes of a deduction under section 162(a)(2), the travel involved must require "necessary sleep or rest."<sup>143</sup> Therefore, transportation and/or commuting expenses which do not require "necessary sleep or rest," if deductible, will be deductible only under the general provisions of section 162(a) which has no "away from home" requirement. Under section 162(a), travel expenses, such as meals and lodging, would not be deductible.

Although there are exceptions to the general rule that commuting expenses are not deductible, it probably would simplify the tax law to deny deductions for *all* commuting expenses and prohibit any exceptions to the rule. However, simplification of the tax law is not always the overriding consideration. Exceptions may be warranted by public policy in certain situations.

It is unfair to allow a deduction to a taxpayer who commutes every day to a temporary job site and to refuse the same deduction to the suburban commuter who also must travel long distances each day. A deduction should not be allowed to a commuter simply because he is assigned temporarily to a job site other than his permanent job location. His expenses are no greater than those of the suburban commuter, and the traveling nature of his job should not entitle him to a deduction for his commuting expenses. If the assignment is for more than one day, and the taxpayer cannot return home the same day, then a deduction should be granted under section 162(a)(2). However, the deduction

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141. The temporary job site exception would not be needed because an assignment to a temporary job site would be away from the taxpayer's residence and the temporary nature of the assignment would be irrelevant.

142. This exception would not be needed if the residence-home definition were used.

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

should not be allowed when only daily trips are involved. Each individual chooses the nature of his work and to that extent it is personal. Perhaps the Service's view in Revenue Ruling 76-453<sup>144</sup> (a flat denial of a deduction for commuting expenses to a temporary job site) is the preferable alternative.

The situation is different in the "bulky tool" exception and the "two job" rule. The "bulky tool" exception allows a deduction only for those additional commuting expenses which are attributable *solely* to the necessity of carrying tools to work, and only if such costs can be accurately determined.<sup>145</sup> The "two job" rule allows a deduction only when an employee has two separate employers and works at two different locations on the *same* day.<sup>146</sup> Because these exceptions pose few practical problems, it is arguable that commuting expense deductions should be allowed in these limited situations where these exceptions are applicable.

However, there is a strong argument that because each individual chooses the nature of his work, the commuting implications that flow from such choice are personal and therefore a deduction should be denied under section 262. It would be easiest simply to deny a deduction for all commuting expenses. Permitting deductibility only if the requirements of section 162(a) are met would make the availability of a deduction more predictable and less dependent upon vague distinctions between similar factual patterns.

## V. APPENDIX

### A. Law Students' Summer Employment

The possibility of a travel expense deduction for a law student seeking summer employment poses a troublesome situation. Although there is little authority<sup>147</sup> in this area, if the three conditions set out in *Flowers* are met, a section 162(a)(2) travel expense deduction may be allowed. The deduction would include the cost of traveling to and from the summer job site and meals and lodging while at the that job site. Commuting expenses while working at the summer job probably would not be deductible.

The first condition, that the expense be a reasonable and necessary traveling expense, poses little problem when the law student attempts to deduct his transportation costs to and from his place of summer employment along with his food and lodging expenses incurred while

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144. 1976-2 C.B. 86. The temporary nature of the taxpayer's work will not convert commuting expenses into ordinary and necessary business expenses so as to make them deductible under § 162(a)(2).

145. Rev. Rul. 75-380, 1975-2 C.B. 59.

146. Rev. Rul. 55-109, 1955 C.B. 261.

147. *Commissioner v. Janss*, 260 F.2d 99 (8th Cir. 1958); *Suzanne Waggener*, 22 T.C.M. (CCH) 9 (1963).

there. Such expenses are clearly within the *Flowers* requirement if reasonable in amount.<sup>148</sup>

The second requirement, that the expense be incurred while away from home, will be met if the student can establish that he has a fixed home for tax purposes, and that his summer employment is away from such home.<sup>149</sup> The determination whether this requirement will be satisfied depends on whether home is defined as "residence"<sup>150</sup> or as "principal place of business."<sup>151</sup>

In those jurisdictions that follow the residence-home definition, a student who maintains a residence<sup>152</sup> in the city in which he attends school probably will satisfy the "away from home" requirement when he takes summer employment outside the city. Because the student's summer employment is temporary rather than indefinite, he would be "away from home" for purposes of section 162(a)(2).

However, the "away from home" requirement might *not* be met by the student who permanently resides in City A, attends school in City B, and takes a summer job in City A, his place of permanent residence. If the student has not established legal residence at his school location, his permanent residence would be his tax home, and summer employment at such a location would not be "away from home" for purposes of deductibility under section 162(a)(2).

The situation would be different in those jurisdictions that have adopted the "principal place of business" definition of "home." The student would have to establish that he had a "principal place of business" while he was in school so that when he took summer employment at another location, he would be "away from home" for purposes of section 162(a)(2). This seems to indicate that a law student who is not employed while going to school has no "home" for purposes of section 162(a)(2) and would not be entitled to a deduction for travel expenses incurred incident to his summer employment. If a law student can show that he is involved in a trade or business<sup>153</sup> while in school, travel expenses incurred as a result of summer employment outside of his school location probably will satisfy the "away from home" requirement of the *Flowers* test.

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148. *Commissioner v. Flowers*, 326 U.S. 465, 470 (1946).

149. *Suzanne Waggener*, 22 T.C.M. (CCH) 9, 10 (1963).

150. See text accompanying notes 24-28 *supra*.

151. See text accompanying notes 20-23 *supra*.

152. A student who lives with his parents or does not pay his own living expenses may not be allowed a deduction for traveling expenses because the major purpose of such a deduction is to enable the taxpayer to avoid having to pay duplicate living expenses. See *Suzanne Waggener*, 22 T.C.M. (CCH) 9 (1963) (indication that a taxpayer who pays no living expenses may not have a fixed home).

153. See text accompanying notes 157-159 *infra*.

The condition that poses the most difficult obstacle to the deduction of traveling expenses by a student is the requirement that expenses be incurred in pursuit of business, whether such business be that of the taxpayer or of his employer. It seems useless to argue that the traveling expenses incurred by a student incident to summer employment are motivated by the exigencies or interests of the employer rather than the personal interests of the student.<sup>154</sup> In most instances a student takes a summer job for his own personal convenience. Rarely does a student take a job pursuant to the interests of the employer. Factors which may tend to indicate that the traveling expenses are not necessitated by the exigencies of the employer's business include the employer's suggestion that the student will have to pay his own traveling expenses, and the availability of other labor in the vicinity of the employer's place of business.<sup>155</sup> Unless there is some strong indication that the employer's interests are of primary concern,<sup>156</sup> it will be difficult to prove that the travel expenses were dictated by the exigencies of the employer's business.

The third *Flowers* condition still may be satisfied if the law student can show that the traveling expenses incurred incident to his summer employment were motivated by the exigencies of *his own* business, the business of being a law clerk.<sup>157</sup> This proposition probably would be applicable only in those situations where the student is a law clerk while attending school and then takes a summer job as a law clerk in a different locality. In such a case summer employment with a law firm would definitely be pursuant to his interest as a law clerk, and it would be reasonable to argue that expenditures that are dictated or motivated by the exigencies of being a law clerk should be deductible under section 162(a)(2). The fact that employment as a law clerk is not readily available in the vicinity where the student resides<sup>158</sup> may add strength to the ar-

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154. *Commissioner v. Janss*, 260 F.2d 99, 104 (8th Cir. 1958); *Suzanne Waggener*, 22 T.C.M. (CCH) 9, 10 (1963).

155. *Id.*

156. The employer's willingness to reimburse the student for his traveling expenses may indicate that the travel is motivated by the exigencies of the employer's business.

157. Some courts follow the rule that travel expenses are deductible only if required by the exigencies of the employer's business without considering the business of the taxpayer himself. *E.g.*, *Commissioner v. Peurifoy*, 254 F.2d 483 (4th Cir. 1957), *aff'd per curiam*, 358 U.S. 59 (1958). In such a case, the student will have a difficult time satisfying this final requirement. However, the Service (Rev. Rul. 60-189, 1960-1 C.B. 60, 65) has long held that this final condition may be met where the employment was required by the exigencies of the taxpayer's own business.

158. In *Suzanne Waggener*, 22 T.C.M. (CCH) 9 (1963), the court pointed out that the expenditures by the student were not dictated by the exigencies of her own business because jobs in her area of interest (clerk-typist) were plentiful throughout the U.S.



gument that the law student should receive a travel expense deduction. Because the denial of such a deduction would result in duplicate living expenses contrary to congressional intent,<sup>159</sup> a deduction for the student taxpayer would appear to be proper.

A law student thus may validly contend that travel expenses incurred incident to his summer employment are motivated by his own business; a law student who satisfied the three *Flowers* requirements would be entitled to a deduction under section 162(a)(2) for such travel expenses. However, it should be noted that the deductions probably were designed to benefit full-time employees who are forced to change their place of employment. It is doubtful that Congress intended for the deductions to be available to students working a summer job and later returning to school. The requirements of the temporary job site exception therefore should be analyzed carefully before a deduction is taken.

EDWARD A. CHOD

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159. See text accompanying notes 2-4 *supra*.