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The Persistent "Tax Home" Concept: Is It on the Wane?

Nathan Kaminski Jr.

COMMENTS

THE PERSISTENT "TAX HOME" CONCEPT: IS IT ON THE WANE?

I. INTRODUCTION

It is well known in lay circles and law schools that federal tax law is best taken with a grain of salt, and properly regarded as a land shadowed with cryptic words and enigmatic phrases. A formidable representative of the linguistic turnabout of which the Internal Revenue Code is capable is §162(a)(2) which delineates the allowable deductions for travelling expenses incurred by the taxpayer in his trade or business.[1]

On first glance, this section seems devoid of obfuscating terminology and designed for even the layman's comprehension.

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

However, even one with only a passing familiarity with the tax laws could quickly forewarn that this section, particularly its "while away from home" provision, has proven to be most litigious. Its simple words have devolved into complex terms of art, and the United States Supreme Court has said, "More than a dictionary is . . . required to understand the provision here involved, and no appeal to the 'plain language' of this section can obviate the need for further statutory construction."[3]

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1. INT. REV. CODE of 1954, §162(a)(2).
2. *Id.* (emphasis added).
3. United States v. Correll, 389 U.S. 299, 304 n.16 (1967).

This analysis will serve as a precis of the conflicting interpretations of the "away from home" phraseology given by the Internal Revenue Service, the Tax Court, and the federal circuit courts. In considering the difficulties that have attended these various interpretations, a recent case decided by the Tax Court will serve as an example of a more rational approach that points to the attenuation of the old "tax home" doctrines.[4] An historical look backward is a necessary preface to this consideration.

II. THE "TAX HOME" CONCEPT

A. Its Statutory Origins and Early Development

The phrase "away from home" which is part of the present-day language of §162(a)(2) was brought into the tax structure by §214(a)(1) of the Revenue Act of 1921.[5] Congressional records reveal that the deduction for traveling expenses was created because of concern for the traveling salesman.[5a] It was felt that he should be allowed a deduction for expenses incurred for meals, lodging and transportation while on the road, since the nature of the job forced duplication of living expenses.[6] The new legislation was to provide for the commercial traveler "a measure of justice."[7]

However, the records evince little, if any, evidence that Congress intended special interpretations to attach to any of the wording of this particular section. A good supposition would be that the word "home" as used in this statute meant to the members of Congress exactly what it meant to their constituents—a "residence" or "domicile."[8]

4. The scope of this comment does not include discussion of the problems surrounding the "overnight rule" or the "two businesses" rule. For a discussion of these concepts, see 4A Mertens, *Law of Federal Income Taxation* §25.93 nn.79-1, 84 (1966) and the accompanying text; *see also* Note, *A House Is Not A Tax Home,* 49 VA. L. REV. 125 (1963), and Haddleton, *Traveling Expenses Away From Home,* 17 TAX L. REV. 261 (1962).

5. REVENUE ACT of 1921, ch. 136, §214(a)(1), 42 Stat. 239.

5a. *See* 61 CONG. REC. 6673 (1921).

6. *See* Note, *A House Is Not A Tax Home,* 49 VA. L. REV. 125, 127 n.20 (1963). *See also* Schreiner v. McCray, 186 F. Supp. 819 (D. Neb. 1960).

7. *See* 61 CONG. REC. 5201 (1921) (Remarks of Representative Hawley, a member of the Committee on Ways and Means of the House of Representatives).

8. *See* 61 CONG. REC. 6673 (1921). *See also* Note, *A House Is Not A Tax Home, supra* note 6, at 127-8.

On the other hand, the Internal Revenue Service, even before passage of the 1921 Act, apparently perceived a possible "loophole" in the wording of the legislation.[9] Undoubtedly, it was felt that application of the commonly understood meaning of "home" would allow many taxpayers to take unwarranted deductions for traveling expenses (particularly of commuting expenses) which up until 1921, clearly had been barred because they fell into the category of "personal, living, or family expenses."[10] The Commissioner, to prevent such abuse, devised the artificial "tax home" which he designated to be the taxpayer's principal place of business or "post of duty." In 1927, in the case of *Mort L. Bixler*,[11] the Tax Court endorsed this definition. From that point, the Commissioner's position that the taxpayer's home is his place of business has become an established part of the tax structure and has been consistently maintained.[12]

B. The "Temporary Duration" Exception

Nevertheless, it was soon apparent that the "tax home" in application had a certain rigidity which treated unfairly those in certain occupations. Construction workers, for in-

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9. While debating the 1921 Act in the Senate, the question was raised whether a Congressman could deduct his expenditures for meals and lodging incurred in Washington. One Senator responded that the Treasury Department had informed him that such deductions would be impossible because Washington would be considered a Congressman's "home" for tax purposes. *See* 61 CONG. REC. 6672-74 (1921).

10. REVENUE ACT of 1921, ch. 136, §215(a)(1), 42 Stat. 239. The fear that taxpayers would take advantage of the wording of the statute was unfounded. The further requirement that the expense be incurred "in the pursuit of business" was enough to obviate any attempt to deduct commuting expenses. *See* Flowers v. Commissioner, 326 U.S. 465 (1926); Barnhill v. Commissioner, 148 F.2d 913 (4th Cir. 1945).

11. 5 B.T.A. 1181 (1927). The taxpayer, an itinerant manager of state and municipal fairs, attempted to deduct amounts expended on rail fares between his home in Mobile and various other towns where he worked, and also the cost of food and lodging while working. In denying the deduction, the court thought §214(a)(1) was only intended to allow deductions of traveling expenses to taxpayer "while away from his post of duty or place of employment on duties connected with his employment." 5 B.T.A. at 1184.

12. Rev. Rul. 60-189, 1960-1 CUM. BULL. 60; Rev. Rul. 56-49, 1956-1 CUM. BULL. 152; Rev. Rul. 55-604, 1955-2 CUM. BULL. 49; Rev. Rul. 54-497, 1954-2 CUM. BULL. 75; G.C.M. 23672, 1943 CUM. BULL. 66; I.T. 3314, 1939-2 CUM. BULL. 152.

stance, who worked for various employers for short periods of time at different job locations, and yet also maintained a family at a permanent residence, found that their "tax home" in the eyes of the Commissioner moved with them like a turtle shell. Traveling salesmen, on the other hand, generally had only one employer and could designate one location as a principal place of business, and thus could deduct their living expenses while traveling.

The inequities were such that they served as a catalyst in a line of cases that created the "temporary duration" exception to mitigate the harshness of the "tax home."[13] As the exception has developed, it has come to mean that one's "tax home" does not move to the new job location of the taxpayer when the employment is only of temporary duration.[14] However, it must be foreseeable when the job is commenced that the work will terminate within a short period of time, and that it will not be "indeterminate in fact as it develops."[15] If the job will not end within a foreseeably fixed or short period of time, it is considered to be for an indefinite period, and one's "tax home" shifts to the general locality in which the work is being performed.[16] Whether the employment is temporary or indefinite is a question of fact to be decided on a case by case basis,[17] although any duration of employment exceeding one year is likely to be considered "indefinite."[18]

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13. *See, e.g.*, E. G. Leach, 12 T.C. 20 (1949); Harry F. Schurer, 3 T.C. 544 (1944); Coburn v. Commissioner, 138 F.2d 763 (2d Cir. 1943); Walter E. Brown, 13 B.T.A. 832 (1928); Chester D. Griesemer, 10 B.T.A. 386 (1928).

14. The Commissioner has accepted the "temporary duration" exception in I.R.S. Pub. No. 300, CCH 1956 STAND. FED. TAX REP. ¶6347.

15. Commissioner v. Peurifoy, 254 F.2d 483, 486 (4th Cir. 1957). See *Floyd Garlock*, 34 T.C. 611 (1960), as an example of employment, temporary in nature when begun, but which "ripened" into substantial or indefinite duration during the tax years in question.

16. *See, e.g.*, Ronald D. Kroll, 49 T.C. 557 (1968) (child actor living in New York for two year period); Rendell Owens, 50 T.C. 577 (1968), (employee on freeway project 60 miles from home for 5 year period); Floyd Garlock, 34 T.C. 611 (1906) (mechanic repairing heavy equipment at construction site for four year period); Beatrice H. Albert, 13 T.C. 129 (1949) (U.S. government inspector at duty station for two years 47 miles from home).

17. Peurifoy v. Commissioner, 358 U.S. 59 (1958).

18. Rev. Rul. 60-189, 1960-1 CUM. BULL. 60 states that if the anticipated or actual duration of the shift is less than one year, the Commissioner will normally treat the shift as a temporary one.

The "temporary duration" exception has served primarily as an expedient means to cure a defect in the application of the "tax home" concept allowing taxpayers who by necessity must shift from job to job to deduct their living expenses. The viability of the approach has been questioned in various cases because the rule and the exception tend to be syllogistic in form without sound analytical underpinnings. In application to the sometimes difficult question of the deductibility of travel expenses, the "tax home" concept and the "temporary duration" exception have led to decisions which do not seem to effectuate the policies underlying the statute.[19] Correlatively, uneven administration of these rules because of faulty decisions produces inequitable results where it hurts the most. Some of the federal circuit courts have argued that these shortcomings are overcome and the government's revenues are as well protected if the words in the statute are taken at their face value. Although these courts have tried their hand at development of a more penetrating and fairer approach to the "away from home" provision, for the most part, they have left the waters muddier than before.

III. DEVELOPMENT IN THE FEDERAL COURTS

A. The Flowers Decision

The awkwardness of the "tax home" doctrine was intensified when several of the federal circuit courts chose to align themselves with a literal interpretation of the word "home." The Ninth Circuit in 1944 was the first to unequivocally declare that "home" should be given its ordinary and usual meaning, and the Second, Fifth, and Sixth Circuits have followed suit.[20] With the exception of the First and Tenth Circuits, which have yet to take a position on the matter, the

19. In *Harvey v. Commissioner,* 283 F.2d 491, 495 (9th Cir. 1960), the court branded the "temporary-indefinite" test as mechanical and ineffective.

20. Rosenspan v. United States, 438 F.2d 905 (2d Cir. 1971); Burns v. Gray, 287 F.2d 698 (6th Cir. 1961); Flowers v. Commissioner, 148 F.2d 163 (5th Cir. 1945), *rev'd on other grounds,* 326 U.S. 465 (1946); Wallace v. Commissioner, 144 F.2d 407 (9th Cir. 1944).

remaining circuit courts have upheld the Commissioner's view that "home" is the taxpayer's principal place of business.[21]

The proper course of settlement of such a rift in the federal judiciary should end with a decision by the Supreme Court. Thus, in 1946 when the Supreme Court granted certiorari in the case of *Flowers v. Commissioner*[22] for the express purpose of erasing this interpretive conflict that had developed between the Fourth[23] and Fifth[24] Circuits, it seemed certain that the *ratio decidendi* of the case would establish the propriety of one of the interpretations of the word "home."

The taxpayer in *Flowers* was a lawyer who maintained his residence in Jackson, Mississippi, but who worked during the week as general counsel for a railroad in Mobile, Alabama. When he attempted to deduct his traveling and living expenses incurred while working in Mobile, the Commissioner ruled that these were non-deductible personal expenses. The Tax Court upheld this decision with the analysis that his "home" was his "post, station or place of business" where he was employed and for this reason his expenses were not incurred "while away from home." The Fifth Circuit reversed, maintaining that "home," as used in the statute, meant "residence," and the taxpayer was therefore away from home and his deductions were allowable.

Although the stage seemed set, the majority opinion of the Supreme Court adroitly ducked the issue of which interpretation of "home" would be proper under the circumstances. Instead it set out three conditions which had to be satisfied before a deduction of traveling expenses could be made, essentially restating the language of the statute.

(1) The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling.

(2) The expense must be incurred "while away from home."

(3) The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditure

21. *See, e.g.*, England v. United States, 345 F.2d 414 (7th Cir. 1965); Cockrell v. Commissioner, 321 F.2d 504 (8th Cir. 1963); Coerver v. Commissioner, 297 F.2d 837 (3rd Cir. 1962); York v. Commissioner, 160 F.2d 385 (D.C. Cir. 1947); Barnhill v. Commissioner, 148 F.2d 913 (4th Cir. 1945).

22. 326 U.S. 465, *rehearing denied*, 326 U.S. 812 (1946).

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

24. Flowers v. Commissioner, 148 F.2d 163 (5th Cir. 1945).

> and the carrying on of the trade or business of the taxpayer or his employer.[25]

The Court then decided that Flowers' expenses lacked the necessary direct relation to the prosecution of his employer's business that was required in the third condition of the test which the Court had espoused. Since the failure to meet any one of the three criteria meant that the expense was not deductible, the Court felt there was no need to consider the further question of whether he was "away from home" within the meaning of the statute.

The difficulties spawned by the *Flowers* decision were, first, that it failed to deal definitively with the "away from home" provision, and secondly, that it did not carefully analyze the possibility that a taxpayer might be in the pursuit of his own trade or business while carrying out the orders of his employer.

Using as an example the case of the construction worker who holds intermittent jobs for temporary periods and for different employers, and yet maintains a permanent residence, it can be seen that usually his traveling expenses do not arise out of the exigencies of his employer's business, but are related directly to the carrying on of his trade of being a construction worker. Although the point might have been argued in *Flowers* that the taxpayer was pursuing his own business of being a lawyer while employed by the railroad and therefore his expenses were deductible, there is an important distinction to be drawn between the nature of Mr. Flowers' work and that of the construction worker. In *Flowers,* the employment was of a permanent nature under one employer, while the construction worker only *becomes* an employee for short periods of time on specific jobs. It follows from this that the Court was correct in holding that if Mr. Flowers' expenses were to be deductible, they had to be incurred in pursuit of his employer's business. On the other hand, the traveling expenses of a construction worker, if they are reasonable and necessary and incurred while away from home, would be considered deductible because they occurred while the taxpayer was in

25. 326 U.S. 465, 470 (1946). In what has now become an aphorism of tax law, the Court in further explanation of the third criterion said "[t]he exigencies of business rather than the personal conveniences and necessities of (the taxpayer) must be the motivating factors." *Id.* at 474.

pursuit of his own trade or business.[26] This distinguishing factor was not pointed out by the Supreme Court, and apparently its failure to do so caused some of the lower courts to go astray in subsequent decisions.[27]

B. The Peurifoy Decision

Certainly, the Fourth Circuit Court of Appeals in deciding *Commissioner v. Peurifoy* disregarded the fact that a taxpayer might be a temporary employee and yet, at the same time, incur traveling expenses in pursuit of his own trade or business.[28] The taxpayers in question were construction workers who had taken employment for continuous periods of 20½, 12½, and 8½ months respectively on a large construction job some distance from their permanent residences. The Commissioner disallowed each taxpayer his deductions for food, lodging, and traveling expenses, but the Tax Court, concluding that the employment in each case was of temporary duration, ruled that the deductions should be allowed. On appeal, the Fourth Circuit concluded that the *Flowers* decision had established that a deduction for traveling expenses could be taken only if the expenses arose from the exigencies of the employer's business or were incurred by a self-employed taxpayer in the pursuit of his business.[29] In so doing, the court failed to consider the importance of the distinction between the permanent employee, as in *Flowers*, vis-a-vis the temporary employee involved in *Peurifoy*.

However, the court, at least implicitly, recognized that such a narrow reading of the Flower's holding would eliminate any deductions for traveling expenses when the employee happened to be a quasi-independent contractor, such as the construction worker here in question. Clearly, such a result would

26. *See* Note, *A House Is Not A Tax Home*, *supra* note 6, at 138-45. It is worth noting that the Internal Revenue Service has consistently maintained that employees may be in the pursuit of their own trade or business, and it did not read the *Flowers* opinion as holding contra.

27. *See, e.g., Willard S. Jones,* 13 T.C. 880 (1949), where the taxpayer was employed at Oak Ridge on construction work for more than two years. Since housing was scarce, his family could not move there. In denying the deduction for the taxpayer's living expenses, the Tax Court said that the expenditures were not necessary to the employer's business or trade, and, perforce, failed under the *Flowers* requisites.

28. 254 F.2d 483 (4th Cir. 1957).

29. *Id.* at 486.

be inequitable in many cases. The court noted there were some cases coming after the *Flowers* decision which had allowed construction workers their deductions solely upon the basis that their work was of a "temporary duration," without mention of the "exigencies of business" requirement.[30] This led the court in *Peurifoy* to assume without deciding that the "temporary duration" exception to the "away from home" provision had been grafted to the third criterion of *Flowers* and had created an exception to it.[31] This led to the somewhat desultory reasoning that when an *employee* had work of "temporary duration" away from his established residence, (1) his "tax home" did not shift to the new job location, and (2) his living expenses did not have to be directly related to the carrying on of his employer's business, the net result being that the expenses were deductible under §162(a)(2). Nonetheless, the court reversed in favor of the Commissioner because it did not think the taxpayers had met the burden of proof of showing that their employment was temporary.

Again, the intention of the Supreme Court in granting certiorari in *Peurifoy* was to settle the dispute over the "tax home," and again it failed to do so.[32] Instead, in a per curiam decision, the Court stated that the issue, as it was presented, was the factual question of whether the employment of the taxpayers was for a temporary period. The Court made a brief restatement of the lower court's reasoning and assumptions and refused to disturb its assessment that the work was not of temporary duration.[33] In a narrow sense, this decision was correct in so far as the "tax home" issue was not presented properly to the Court for settlement. But the fact that the sophistic reasoning of the circuit court was penned in a Supreme Court decision—although the Court did not endorse it—tended to perpetuate that reasoning; and even today, it

30. *See, e.g.*, E. G. Leach, 12 T.C. 20 (1949); Harry F. Schurer, 3 T.C. 544 (1944).

31. 254 F.2d 483, 486 (4th Cir. 1957).

32. Peurifoy v. Commissioner, 358 U.S. 59, *rehearing denied*, 358 U.S. 913 (1958).

33. The dissent of Mr. Justice Douglas, joined by Justices Black and Whittaker, maintained that home was not synonymous with the situs of the employer's business. Furthtrmore, the expenses incurred were "ordinary and necessary" to the carrying on of the taxpayers' chosen trades. Since they met the three requirements of *Flowers*, the dissent contended the deductions should have been allowed. 358 U.S. at 61-63.

makes more difficult a viable application of fair and consistent tax policy.

C. The Precedents of the Ninth Circuit

With the Supreme Court standing aside on the issue, the Ninth Circuit took an activist role in the 1960's in the search for a more practical and evenhanded approach to the "home" concept.[34] However, it often found itself semantically shackled by the *Flowers* and *Peurifoy* decisions and the general state of myopia concerning the "tax home" doctrine which these cases seemed to reinforce.

This was apparent in the case of *Harvey v. Commissioner*[35] where the Ninth Circuit attempted to reorient the "temporary duration" exception to a position more favorable for the taxpayer.[36] The petitioner in this case was an employee of Douglas Aircraft Company who was transferred to a new job location approximately one hundred miles from his permanent residence for a period of time that was expected to last from a few months to two years. The Tax Court upheld the Commisioner's disallowance of any deductions for travel expenses based on the reasoning that the taxpayer could not foresee termination of his job within a reasonably short period of time; therefore he was employed for an "indefinite" period, and his tax home shifted to the new job location.[37] Underlying this decision was the Supreme Court's acquiescence to the "temporary duration" exception which the Tax Court read as an endorsement of its position that any post of "indefinite" employment will always be the "tax home."

The Ninth Circuit, in a finely drawn argument that culminated in reversal of the Tax Court, carefully distinguished the *Peurifoy* decision on the grounds that the Supreme Court was discussing there the application of the "temporary duration" exception as bearing only on the question of whether the taxpayer could qualify for a deduction despite the fact that he did not meet the *Flowers* requirement that the expense

34. Years earlier, in Wallace v. Commissioner, 144 F.2d 407 (9th Cir. 1944), the court had rejected the concept that the "tax home" equated with the taxpayer's business headquarters.

35. 283 F.2d 491 (9th Cir. 1960).

36. The "temporary duration" exception is discussed *supra* notes 13-18 and the accompanying text.

37. John J. Harvey, 32 T.C. 1368 (1959).

be incurred because of the exigencies of the employer's business.[38] Because in *Harvey* the concern was focused on the "away from home" criterion rather than the "exigencies of business" condition discussed in *Peurifoy*, it could not be said that *Peurifoy* controlled or established a rule that "the place where a taxpayer is employed for an 'indefinite' period is *necessarily* his tax home."[39]

The *Harvey* court went on to consider the Tax Court's contention that any employment is "indefinite" if it cannot be foreseen that it will terminate within a fixed or reasonably short period of time. Considering such a test "mechanical" and harsh, the Court devised its own test to better effectuate the purpose of the statute:

> An employee might be said to change his tax home if there is a reasonable probability *known to him* that he might be employed for a long period of time at his new station. What constitutes "a long period of time" varies with circumstances surrounding each case.[40]

The importance of the *Harvey* decision was its attempt to de-emphasize the distinction between long and short periods of employment as the controlling factor in determining the deductibility of traveling expenses. The question, as the Ninth Circuit viewed it, was whether it was reasonable to expect the taxpayer to move his residence to his place of employment. If the taxpayer was to be stationed at his new job location for an indeterminate period of time, but there was a good probability that it would only be for a short time, the Court thought it unfair to tell the taxpayer he must move his residence to the vicinity of his work or suffer a duplicate and nondeductible set of living expenses.

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38. 283 F.2d 491, 494 (9th Cir. 1960).

39. *Id.* at 495.

40. *Id.* It is interesting to note that in Doyle v. Commissioner, 354 F.2d 480 (9th Cir. 1966), by way of dicta, the Ninth Circuit said that the 1964 amendment to §217 of the Internal Revenue Code of 1954 (which provided that a taxpayer should be allowed a deduction for expenses of moving his family to a new area if he is employed at least 39 weeks during the twelve month period immediately following his arrival) afforded a Congressional opinion of the maximum length of time one could be regarded as maintaining his "travel" status. If this 9 month period is applied as a reasonable measurement of what actually constitutes a "long period of time," then the Ninth Circuit test becomes more restrictive than that employed by the Internal Revenue Service.

This approach was again used and more fully developed in *Wright v. Hartsell*,[41] where the court held that the inability of a taxpayer to maintain a residence near his place of employment because of the crudity of living conditions was a valid reason for allowing the deduction. Said the court:

> The fundamental question in determining if an expense claimed as a travel expense is dictated by the exigencies of business is whether it would be reasonable to expect the particular taxpayer to move his home nearer to the place where he is working.[42]

The most synoptic of the Ninth Circuit's opinion is found in *Stidger v. Commissioner*.[43] Holding as specious the Commissioner's argument that the rejection of the "tax home" doctrine would open the floodgates to the deductibility of formally non-deductible personal expenses, the circuit court pointed out that no deductions could be taken unless it met the statutory requirement that expenses be "ordinary and necessary" business expenses. The *Flowers* test that the expense arise from the "exigencies of business" was another way of saying "ordinary and necessary" in its statutory context. To determine if the expense meets this test, the court thought the consideration must be whether it is reasonable to expect the taxpayer to move his home under the circumstances.

It is unfortunate that the Ninth Circuit chose *Stidger* to present in full measure its iconoclastic, but more rational, viewpoint. The fact that the taxpayer seeking the deduction for traveling expenses was a member of the armed services who was stationed overseas added an extra dimension to the question of whether the deduction was proper. Because the Fourth Circuit Court of Appeals had previously denied a taxpayer a deduction in similar circumstances,[44] the Supreme Court granted certiorari to resolve the conflict produced when the Ninth Circuit ruled that the deduction should be allowed.[45]

Noting that Congress traditionally had recognized the unusual financial problems of military life and had reacted by providing a system of tax-free allowances, the Supreme Court felt that under these unusual circumstances the Commission-

41. 305 F.2d 221 (9th Cir. 1962).
42. *Id.* at 225.
43. 355 F.2d 294 (9th Cir. 1965).
44. Bercaw v. Commissioner, 165 F.2d 521 (4th Cir. 1948).
45. Commissioner v. Stidger, 386 U.S. 290 (1967).

er's argument that "home" was the military taxpayer's permanent duty station carried particular weight. In finally taking this circumscribed position on the "tax home," the Supreme Court's decision again can be regarded as the proper one under the circumstances. However, by avoiding in the majority opinion any discussion of the possible beneficial applications of the lower court's new tack on the interpretation of "away from home" and "the exigencies of business," the Court relegated the ideas to a position of less prominence than they deserved.[46]

IV. THE NEW APPROACH: A CASE STUDY

Shortly after the *Harvey* decision was handed down, the Internal Revenue Service announced that it would not follow the rationale of the case.[47] Then followed the reversal by the Supreme Court of the Ninth Circuit's holding in *Stidger*, which seemed to stymie any general acceptance by other jurisdictions of approaching the question of the deductibility of the traveling expenses with the query whether it is reasonable to require of the taxpayer that he move his established residnce. Yet credit is due the Ninth Circuit in its attempt to make more rational the "tax home" concept. Undoubtedly, it has influenced some judges and administrators to more fully consider the unfairness that may result in blind adherence to the "tax home" doctrine and its "temporary duration" exception.[48] It is clear that adoption of the Ninth Circuit's reasoning does not result in dramatic changes in the results of the decision, nor does it even require explicit rejection of the old "tax home" concepts. All that is required is that the court first look to the plain language of the statute and make a determination whether the expense constitutes an ordinary and necessary business expense. The question framed by such an approach then becomes whether the expense could be avoided; or, is it reasonable to expect the taxpayer to move his resi-

46. Mr. Justice Douglas, joined by Justices Black and Fortas dissented, setting forth essentially the same view espoused by the Ninth Circuit. 386 U.S. at 1071-2.

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

48. *See, e.g.*, Leo C. Cockrell, 38 T.C. 470 (1962). The Second Circuit has recently opted to follow an analysis that focuses on questioning the business necessity for incurring the expense away from the permanent residence. Rosenspan v. United States, 438 F.2d 905 (2d Cir. 1971).

dence to his job locality? An example of this approach is the case of *Truman C. Tucker*[49] and although it points up the decline of the "tax home," it indicates that other problems remain.

Truman Tucker and his family resided on a small farm in the vicinity of Knoxville, Tennessee. In 1966, Tucker graduated from Tennessee Wesleyan College in Athens, Tennessee, and began searching for a teaching job in the Knoxville area, but to no avail. The job market apparently was flooded due to the number of graduates from the University of Tennessee. Eventually he found a teaching position in Trenton, Georgia where he worked from August, 1966, until June, 1967. During the time that Tucker lived in Trenton, his family remained in Knoxville where his wife was employed and his child attended school. Although the school board in Trenton offered to rehire Tucker for the next school term, he chose not to accept the position for another year and returned to Knoxville for the summer. In August of 1967, Mr. Tucker found another teaching position in Murphy, North Carolina, but left the job in February of 1968 because the burden of duplicate living expenses was proving onerous. He remained unemployed until September 1969 when he found a teaching position in Knoxville. While in Georgia and North Carolina, Tucker incurred living expenses of $1,330 which he listed as a deduction under §162(a)(2), but which was disallowed by the Commissioner. Tucker then appealed this ruling, and the Tax Court, with six judges concurring and three dissenting, upheld the Commissioner's decision.

The plurality opinion of the Tax Court noted that *Flowers* rested upon a finding that the expenses incurred resulted from personal necessity rather than from the exigencies of the taxpayer's employment. In subsequent cases, it had proven difficult to develop proper guidelines to establish when a taxpayer was traveling out of the exigencies of business. The facts of this case, said the court, necessitated a re-examination of the criteria for determining when a taxpayer should be treated away from home for the purposes of deducting his living expenses.

Then, with a stroke of the pen, the Tax Court seemed to align itself with the position of the Ninth Circuit. The Tax

49. 55 T.C. 783 (1971).

Court noted that the general purpose of §162(a)(2) was to eliminate duplicate living expenses, and "when a taxpayer with a principal place of employment goes elsewhere to take work which is merely temporary, he may deduct the living expenses incurred at the temporary post of duty, because *it would not be reasonable to expect him to move his residence under the circumstances.*"[50]

When the taxpayer takes indefinite employment away from his residence, the additional living expenses are incurred because of personal reasons, rather than in the course of business.

> Thus, the deductibility of traveling expenses and duplicate living expenses depends upon the ultimate question of whether the taxpayer, under all the circumstances, could reasonably have been expected to move his residence to the vicinity of his employment.[50a]

To determine the reasonableness of the petitioner's actions, the court looked at Tucker's business ties in Knoxville and found that he had none to speak of. It then looked at his prospect of finding employment in the Knoxville area during the 1966-67 years and, by the petitioner's own admission, found that it must have looked bleak. In the opinion of the majority "(t)he petitioner chose to keep his family residence there (in Knoxville) for reasons of personal choice that were *despite*, rather than because of, the exigencies of his trade or business."[51]

Finally Tucker argued that the "temporary duration" exception was applicable. Disposition of that argument, said the court, was made when it was decided that the taxpayer reasonably could be expected to move his family to his new job location.

The language of the plurality opinion seems to point to a pragmatic resolution of the "away from home" terminology. The concurring opinion suggests that the Court was interested in developing an analytical approach that could subsume more palatably the taxpayer "class" of which Tucker was a representative.[52] In general, these would be the persons work-

50. *Id.* at 786 (emphasis added).

50a. *Id.*

51. *Id.* at 787.

52. "If we were to allow the deduction sought here, I would view it as an open invitation to any school teacher, retired legal stenographer (cite omitted), or other person who wants to live one place and work at 'temporary' jobs away from his residence, to claim as deductions the personal living expenses he incurs while attending his out of town employment." 55 T.C. at 791.

ing in a "profession" who have a permanent residence but who, *for personal reasons,* choose to work for temporary periods away from their home. Their work is "temporary," of course, because the taxpayer, for subjective reasons, doesn't renew the short term contract under which he is employed, or, in some cases, the employer may choose not to renew it.

Application of the "temporary duration" exception in its shibboleth format, creates a dilemma. The contract of employment usually delineates relatively short periods of work (approximately nine months in Tucker's case) and the termination of employment usually is foreseeable. Since the expenses are incurred while the taxpayer is in pursuit of his profession, then according to the criteria of the "temporary duration" exception, the traveling expenses are allowable deductions. But clearly this should not be, since, in many cases, the expenses have resulted because of the personal requirements of the taxpayer rather than because of business reasons.

Faced with this situation, the Tax Court naturally flees to higher ground. Certainly it is easier to arrive at the conclusion that the deduction should be denied when the "ultimate" question is framed in terms of whether it is reasonable to expect the taxpayer to move his residence to the vicinity of his work. Since the Court will choose the criteria most helpful in justifying its decision on the issue of reasonableness, it may make the question of whether or not the taxpayer is "away from home" a rhetorical one.

Nonetheless, the Tax Court in *Tucker* commendably seems to have put aside the "tax home" methodology which only has reference to home as a single physical situs, the place of the taxpayer's business. In the plurality opinion is the implicit view that "away from home" in its statutory context is expressive of a relationship between the taxpayer and a given locality.[53] This relationship is expressed in terms of a query whether it is reasonable for the taxpayer to pull up stakes and move his established residence. This approach undoubtedly is more sophisticated and, *if properly applied,* most consistently effectuates the policies of the tax laws in these cases. But the question remains whether the court is placing the

53. For a general discussion of the undesirability of regarding "home" as either the business headquarters or the permanent residence, since both are equally inflexible, see Venuti, *A Taxpayer's Home—A Matter of Choice,* 17 DE PAUL L. REV. 278 (1968).

results it seeks ahead of sound analysis. A closer look at *Tucker* reveals certain flaws.

Assuming that the expenses incurred are reasonable and necessary, the question of whether traveling expenses are deductible can be decided by following an analysis suggested by the *Flowers* case, which here involves two, distinct, steps.[54]

First it must be asked whether the expense is directly connected to the pursuit of the business of the taxpayer or that of his employer. This gives rise to the subsidiary question of whether the taxpayer's employment is only temporary. The answer to this may be decisive in determining if the expense is deductible.

The teacher, like anyone working in a trade or business, may incur in some situations deductible traveling expenses while pursuing the business of being a teacher.[55] But, as has been previously noted, the distinction must be drawn between the permanent employee, on the one hand, and the temporary employee who maintains his separate professional identity. In the former case the traveling expenses of the employee are deductible only if incurred in direct connection with the pursuit of the employer's business, and while away from home. In the latter situation of the temporary employee, the expenses are deductible when the taxpayer, away from home, incurs his expenses as a result of carrying on his trade or business.

In the case of Mr. Flowers, the lawyer, the factual situation left no doubt that he was a permanent employee of the railroad. His traveling expenses were not deductible because they were not directly related to the carrying on of his employer's business. If Mr. Tucker is to be regarded as a permanent employee of the school district, then his traveling expenses, as in the case of Mr. Flowers, cannot be considered deductible items. Conversely, if Tucker is only a temporary employee, like the construction worker, then his expenses can be attributed directly to the pursuit of his profession of being a teacher.

54. The *Flowers* decision is discussed *supra,* notes 20-26, and the accompanying text.

55. In the case of *David J. Primuth,* 54 T.C. 374 (1970), the taxpayer was held to be in the trade or business of being a corporate executive, and fees expended by him to secure employment were deductible as an ordinary and necessary expense under §162.

But still, assuming that Tucker is a temporary employee, traveling expenses are not deductible unless a further question, the second step of the analysis, can be answered affirmatively. Is the taxpayer "away from home" for purposes of §162(a)(2)? This, of course, is answered by determining if it is reasonable to expect this particular taxpayer to move his residence nearer his job location.

Although this method of analysis can be regarded as a simple extrapolation of the basic conditions set forth in *Flowers* by using the subsequent developments going to the interpretation of "away from home," the court in *Tucker* disregards its more subtle distinctions.

The court would have the Tucker case turn on the question of whether the taxpayer reasonably could move his home to the vicinity of his employment, but the determinative issue in Tucker is whether the employment of the taxpayer should be regarded as permanent or temporary.

Thus, when the court decides that Tucker had no business connections with the Knoxville area; that he had little immediate hope of obtaining a teaching job in the vicinity of his home; and finally that the occupation of teaching was one that normally required no travel, the court maintained that these were criteria for determining whether the taxpayer reasonably should have moved. But was not the court in reality stating factors by which it objectively might determine that Tucker's job should be considered permanent in nature?

Certainly the criteria espoused in Tucker have not been employed in prior federal court decisions to determine the reasonableness of the actions of the taxpayer in the context of the "away from home provision."[56] Instead more subjective indices have been used. The difficulties that usually attend the moving from one established residence to another are weighed against the probabilities known to the taxpayer of how long his employment will last. In some cases, consideration would be given to adverse living conditions in the vicinity of the taxpayer's work.[57]

This approach maximizes practical considerations and seems to give full recognition to the fact that the purpose of

56. *See e.g.*, Rosenspan v. United States, 438 F.2d 905 (2nd Cir. 1971); Harvey v. Commissioner, 283 F.2d 491 (9th Cir. 1960).

57. *See* Wright v. Hartsell, 305 F.2d 221 (9th Cir. 1962).

§162(a)(2) is to mitigate the burden of duplicate living expense when it arises from the exigencies of the business of the taxpayer or his employer.

From a realistic point of view, then, Mr. Tucker had an established home in an area where members of his family were working and going to school. He took work away from his home for periods of 9 and 5 months knowing all the while that he would remain employed only for the duration of the contract. In this light, it would seem that the taxpayer took the most reasonable course in *not* moving his residence. In this light, Mr. Tucker was "away from home" for the purposes of §162(a)(2).

Nonetheless, the deduction in Mr. Tucker's case properly was disallowed because of the impersonal standard that deductible travel expenses must always arise out of the exigencies of business. This provision focuses the question of the deductibility of the expense through a narrow apperture whose dimensions preclude consideration of the personal motivations of the taxpayer.

The language of §162(a)(2), "in the pursuit of a trade or business," is drawn to recognize only impersonal factors deriving from the nature of the taxpayer's work. The statute at this point eliminates consideration of those personal factors, however valid, that might weigh against moving the taxpayer's residence. Nor should any consideration be given the narrow social phenomena that work was not available in the area of Tucker's residence because of an overcrowded job market. Removing these elements from consideration, there are no valid business reasons by which Mr. Tucker could be distinguished from other employees of the school district who maintained their permanent residences nearby. (A proper decision, then, would find that Mr. Tucker was a permanent employee for purposes of §162(a)(2) and his traveling expenses were not incurred directly in pursuit of his employer's business.)

In light of this reasoning, the case of *Douglas A. Mazzotta*[58] presents an interesting contrast to *Tucker*. Mr. Mazzotta, who had been a teacher in the Detroit Public School system for 10 years, took sabbatical leave from September

58. T.C. Memo. 1971-227.

1966 to June 1967. When he returned to the Detroit area to resume teaching, he was offered a job which he felt was inferior to others to which his seniority rightfully entitled him. While working out his differences with the Detroit school system, Mazzotta took a position as an instructor at a community college in Cleveland, Ohio, for 3 months and incurred expenses of $908 for travel, meals, lodging, electricity, and telephone. The I.R.S. disallowed the deduction, apparently relying on *Tucker*, but, when the ruling was appealed, the Tax Court reversed.

It easily distinguished *Tucker*, citing the fact that Mazzotta had a permanent "tax" home in Detroit and that his securing of another job in Cleveland was for the purpose of earning enough to care for his family while preserving his tenure in the Detroit school system. It would not have been reasonable, thought the court for the petitioner to uproot his family and move to Ohio under these circumstances.

The result cannot be faulted, but again the court looks to the "away from home" provision of §162(a)(2)—which clearly is satisfied in this case—when analytically it should have been concerned with whether the taxpayer was a temporary employee so that his expenses became deductible when directly incurred in the pursuit of his trade or business. Simply on the basis of the fact that Mr. Mazzotta, while undertaking employment in Ohio, was negotiating for a work position in the Detroit school system in which he had considerable tenure is enough to regard him as a temporary employee for the purposes of our analysis.

Perhaps the optimistic view would be that in *Tucker* there is recognition by some members of the Tax Court that §162(a)(2) is part of a complex statement of taxation policies whose practical effectuation over a broad range of factual situations requires more than the syllogistic formulae of past years.

A more negative comment is made by the dissenting judge in *Tucker*:

> The majority opinion does real violence to the doctrine of stare decisis and will create doubt, confusion and uncertainty as to the position of the Tax Court on this issue, thus inviting increased litigation.[59]

59. 55 T.C. at 796.

Undoubtedly more and more use will be made of §162 (a) (2) as our society inevitably becomes more mobile. In the face of a growing workload, the challenge facing the Tax Court will be perceptive interpolation of the separate elements that demand consideration within the language ". . . away from home in the pursuit of a trade or business." Caution prompts one to say that an insensitive approach may result, as the dissenting judge suggests, in something more troublesome than the old rules left behind.

NATHAN KAMINSKI, JR.