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**Income Tax—The Deductibility of Meals as Traveling Expenses**

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The significance of the principal case in regard to West Virginia property law is not one of minor potentialities. Interpretations by the lawyers and courts of our state concerning the ramifications of this case could have a profound effect upon the nature of future interests, and particularly contingent remainders. Upon a consideration of such interpretative possibilities, one tends to search for a concurring or dissenting opinion which is conspicuously absent.

F. Richard Hall

Income Tax—The Deductibility of Meals as Traveling Expenses

The United States Supreme Court in the recent case of United States v. Correll\(^1\) ostensibly settled the long standing confusion as to the permissible scope of section 162 of the Internal Revenue Code. That section provides that a taxpayer may deduct the ordinary and necessary traveling expenses he incurred during the taxable year in carrying on his trade or business. Included in this deduction is the entire amount spent for meals and lodging while away from home.\(^2\)

The Court elected to examine, in the light of the existing conflicts among the United States Courts of Appeals,\(^3\) the Commissioner’s interpretation of section 162. Specifically, the question presented was whether the Commissioner’s position on that part of section 162 which provides for the deductibility of meals “while away from home” was justified. Originally the Commissioner ruled that a taxpayer could not deduct expenses for meals under section 162 unless such expenses were incident to travel away from home “overnight.”\(^4\) Subsequently this overnight requirement was modified by the Commissioner’s acquiescence\(^5\) to the decision of the Fifth Circuit in Williams v. Patterson.\(^6\) In that case the taxpayer did not stay away from home overnight but rather rented a hotel room where he simply rested prior to returning to work. As a result of the Williams decision

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2 INT. REV. CODE of 1954, § 162 (a)2.
3 The First Circuit in Comm’r v. Bagley, 374 F.2d 204 (1st Cir. 1967), upheld the Commissioner’s interpretation that the taxpayer’s meals were not deductible under section 162 unless his business travel was such that he was required to stop for rest or sleep. Contra, Hanson v. Comm’r, 298 F.2d 391 (8th Cir. 1962).
4 Kenneth Waters, 12 T.C. 414 (1949); Allan L. Hanson, 35 T.C. 413, rev’d, Hanson v. Comm’r, 298 F.2d 391 (8th Cir. 1962).
6 286 F.2d 333 (5th Cir. 1961).
and the Commissioner's subsequent acquiescence, the overnight rule became known as the "necessary sleep or rest" rule. Even though *Williams v. Patterson* was not considered a repudiation of the Commissioner's original overnight rule, it nonetheless marked the beginning of a considerably broader attack on the rule. But, the Commissioner stood firm and it was this interpretation of section 162 that was the issue before the Court in the *Correll* case.

Correll, the taxpayer, was a traveling salesman for a wholesale grocery with headquarters in Morristown, Tennessee. He lived in Fountain City, Tennessee, some 50 miles from Morristown. Daily he left his home at 5 a.m. and stopped to eat his breakfast at the first point on his route as required by his employer. After the first stop, Correll continued his route until about 2 p.m. when he again had a meal at a customer's restaurant. He generally finished his daily schedule by 4 p.m. Since Correll's daily route required neither sleep nor rest, the Commissioner disallowed the deduction Correll had claimed for the cost of his morning and noon meals as traveling expenses resulting from the pursuit of his business while away from home under section 162. Rather, the Commissioner considered such expenses as coming within the provisions of section 262 relating to the non-deductibility of personal living expenses. After having paid the taxes, Correll sued for a refund in the District Court and received a favorable jury verdict. The Sixth Circuit Court of Appeals affirmed, holding that the Commissioner's sleep or rest rule is not "a valid regulation under the present statute." *Held*, reversed. The Commissioner's sleep or rest rule is at least a reasonable interpreta-

7 Comm'r v. Bagley, 374 F.2d 204 (1st Cir. 1967).
8 Id. at 205.
9 For a more detailed discussion of those cases resulting from the problems surrounding the applicability of the Commissioner's required sleep or rest rule see 69 W. VA. L. REV. 365 (1967).
9 "Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses." INT. REV. CODE of 1954, § 262.
10 INT. REV. CODE of 1954, § 162(a)2, otherwise expressly provides that, "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 . . .

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business. . . ."

It is the interaction of sections 162 and 262 that becomes the focal point of cases dealing with the deductibility of meal expenses. Unless these expenses come within the purview of section 162, section 262 disallows such expenses as being purely personal in nature.
10 369 F.2d 87, 90 (6th Cir. 1966).
tion of section 162, considering the administrative ease of such a rule and its equalizing effect in application.

The Court found that the pertinent language of section 162 is sufficiently broad to encompass the Commissioner’s interpretation that “away from home” means away from home “requiring sleep or rest.” The basis for this finding by the Court was its examination of the relationship of expenses deductible for meals and those deductible for lodging. More particularly, since meals and lodging are used in the conjunctive in section 162, the Court stated that, at least arguably, “Congress contemplated a deduction for the cost of meals only when the travel in question involved lodging as well.” There exists however just as strong an argument to support the proposition that the mere addition of a conjunction between the words, meals and lodging, does not indicate that Congress intended that meals and lodging be construed as a unit. Section 62 which defines adjusted gross income in general terms describes the deductions under section 162 as consisting of “expenses of travel, meals, and lodging. . . .” Therefore, section 62 clearly shows that Congress intended that meals be considered a separate entity. Nonetheless, it has been pointed out that the phraseology of section 62 was not intended to alter the previous meaning of section 162. The Court in the Correll case further pointed out that the word “traveling” as employed in section 162 imparts the meaning that the taxpayer could only deduct the enumerated expenses when separated from his home. Accordingly, the majority opinion argued that this phrase “away from home” is not meant to apply in its literal sense; a literal construction would render this phrase redundant since the word “traveling” already implies geographical separation from the taxpayer’s home.

Even though the Commissioner’s interpretation could thus be considered a reasonable construction of section 162, the Court proceeded also to examine whether such construction served to provide a degree of certainty in administration. Therefore, implicit in the Court’s decision is the desire for achieving an unambiguous test for determining when a taxpayer is away from home, as required in section 162. The Court adopted the Commissioner’s interpretation

\[\text{Comm'r v. Bagley, 374 F.2d 204 N. 10 (1st Cir. 1967).}\]
that a taxpayer is away from home only "if his trip requires him to stop for sleep or rest." The majority reasoned that this limited test achieves the necessary concreteness by adequately limiting the statutory phrase "away from home." But, by accepting this test the Court created a new, albeit less obvious, ambiguity. That is, since a taxpayer's meals are only deductible in those situations where his travel requires him to stop for sleep or rest, one must of necessity ascertain when sleep or rest is required. Whether or not one will in fact require sleep or rest is clearly dependent on a variety of factors. Should the taxpayer, under this test, consider the length of the trip in determining whether sleep or rest is required, or is simply the time factor sufficient? Additionally, does the taxpayer consider his particular physical and emotional need for rest or sleep? The Court would seem to say not. The majority pointed out that the Commissioner has consistently excluded such factors as time and distance.

The taxpayer might also ask if he must in fact stop for rest or sleep, or is the fact that such sleep is required sufficient to bring him within the meaning of the required sleep or rest rule? It appears the majority has adopted a test which may be as ambiguous as the statutory language it was seeking to define. Certainly the taxpayer must still take "pot luck" in the courts in order to determine whether or not his sleep or rest was required.

As originally conceived, meal expenses incident to business travel were deductible only when such expenses were in excess of normal living expenses. Yet, having tried such a plan and having experienced the related administrative difficulties, the Treasury itself asked Congress to allow the entire amount expended for meals to be deductible. It is incontestable then that the traveler who brings himself within the purview of section 162 receives somewhat of a windfall in that at least some personal expenses are deductible. Admittedly, the traveling taxpayer may incur greater expense in obtaining meals away from home, but such expense is only that amount in excess of his normal personal costs for food. Nonetheless, since the administration of the original excess expense plan proved totally impractical, the Commissioner was faced with a difficult situation for he had to achieve some fairness in applying section 162 so that most taxpayers were on an equal tax footing. Perhaps then

\[15\] Id. at 5846 (emphasis added).
\[16\] Id. at 5847.
\[17\] Treas. Reg. art. 292 (1920).
\[18\] Comm'r v. Bagley, 374 F.2d 204, 206 (1st Cir. 1967).
it was this attempt to treat the commuter and the one day traveler equally that lead to his adoption of the "overnight" or "sleep or rest" rule. Thus, the Court in the principal case was called upon not only to examine the administrative ease and certainty of the "sleep or rest" rule, but also to consider whether the Commissioner's interpretation of section 162 achieved the desired fairness in application. The Court concluded that it did.

Admittedly, the Commissioner's "sleep or rest" rule is successful in reducing the inequities among one day travelers. Under this rule the commuter and the person whose business takes him from New York to Washington and back the same day are placed upon an equal tax footing; both are denied the benefit of section 162. But this rule cannot put the commuter on an equal tax footing with the traveler who is required to stop for sleep or rest. That is, since administrative exigencies have shown it necessary to allow the entire amount spent for meals to be deductible, the moment the taxpayer comes within the Commissioner's interpretation of section 162 he receives a partial windfall in that he can deduct some expenses of a purely personal nature. This is especially true since the Commissioner's rule allows the taxpayer to deduct not only expenses for meals after lodging but also expenses incurred before such rest or sleep.

The question now is whether the Commissioner's rule as adopted by the Court has gone as far as is pragmatically possible to meet the objective of fairness. Seemingly, a refinement of the Commissioner's rule could have gone further to diminish the inevitable inequalities between one day travelers and those who are required to stop for rest or sleep. More specifically, the Court held a person is not away from home within the meaning of section 162 until he requires rest or sleep. Therefore, one might argue that only the expenses for meals occurring after the taxpayer has stopped for rest or sleep should be deductible under section 162. For, it is not until the taxpayer has stopped that he is considered away from home; and, the language of section 162 is not applicable until the taxpayer is away from home. This interpretation would reduce the overnight travelers' windfall by one day's expenses for meals and thereby more closely approximate the desired equality for all taxpayers. This particular question was not presented to the Court for determination. Considering however

19 Id. at 207.
the Court's total acceptance of the Commissioner's interpretation, this question might well arise in the future. If this problem is resolved and the word "requiring" is deleted from the Commissioner's interpretation, the meaning of the phrase "away from home" would become more equitable in application and more definite in meaning.

_Thomas Ryan Goodwin_

Labor Law—Public Employee's Right to Strike

_P_, a municipal board of education, obtained a temporary injunction restraining _Ds_, a public school teachers union and its president, from engaging in a strike. By statute, all public employees and employee organizations were prohibited from striking. _Ds_ ignored the injunction which was made final shortly afterward. Criminal contempt charges were then brought against _Ds_ for violation of the injunction. _Ds_ urged that its members were not striking, but that they had instead "resigned." _Held_, guilty of contempt. It has long been a fundamental principle that a government employee may not strike. This common law prohibition is now reflected in statutory form. _Ds_ in asserting that a strike is not the same as the so-called "resignations" are urging a distinction without a difference; the argument is specious and sham. By engaging in a strike, _Ds_ deliberately violated the statute and defied the lawful mandate of the court. _Board of Education v. Shanker, 283 N.Y.S.2d 548 (1967)._  

The principal case is simply one more addition to the long line of authority which denies public employees the right to strike. As stated in the case, "From time immemorial, it has been a fundamental principle that a government employee may not strike." ¹ This broad prohibition has been applied with equal vigor to federal, state, and municipal employees. By statute, federal employees are not only denied the right to strike, but they are also prohibited from knowingly becoming members of an organization that asserts the right to strike against the government.² Likewise, several states have codified the proscription against strikes by public employees³ and the states

¹ _Bd. of Educ. v. Shanker, 283 N.Y.S. 2d 548 (1967)._  
³ Currently, statutory provisions against strikes by public employees are found in Fla., Hawai‘i, Mich., Minn., Neb., N.Y., Ohio, Pa., Tex., and Va. _Anderson, Labor Relations in the Public Service, 12 Lab. L.J. 1069, 1071 (1961)._