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Income Tax—"Overnight Rule"

Taxpayer, a grocery salesman, was required to eat breakfast and lunch at customers' restaurants where his employer could reach him by telephone. Taxpayer left home around 4:30 every morning and returned home about 5:30 p.m. after traveling from 150 to 175 miles each day. The United States District Court for the Eastern District of Tennessee ruled that taxpayer could deduct the meal expense. *Held*, affirmed. Taxpayer could deduct for income tax purposes, the cost of his meals, for which he was reimbursed by employer, as expenses incurred in pursuit of a trade or business "while away from home" under the Internal Revenue Code of 1954. Internal Revenue Code of 1954, §§162(a)2, 262. *Correll v. United States*, 369 F.2d 87 (6th Cir. 1966).

The Commissioner has long sought to make the taxpayer include in gross income the cost of meals incurred while traveling if the taxpayer does not stay overnight.¹ This rule has been termed the "overnight rule" and has been the subject of extensive litigation.² The Commissioner has received some support from the Tax Court;³ but he has been relatively unsuccessful in the Circuit Courts.⁴ In recent years the chief theory advanced by the Commissioner in favor of his position is that it provides a convenient rule of thumb, *i.e.*, it provides a standard which is unambiguous for the determination of whether meals are deductible from gross income.⁵

The origin of the "overnight rule" can be attributed solely to the Commissioner. Both the 1939 Code and the 1954 Code allowed a deduction for necessary expenditures made by an employee while away from home;⁶ the Commissioner has added a judicial gloss to the words "away from home" so that they read "away from home

¹ Kenneth Waters, 12 T.C. 414 (1949).

² Treas. Reg. §§ 1.162-17(b)(3)(ii); 1.162-17(b)(4); 1.162-17(c)(2) (1960). This was the first time the "overnight rule" was mentioned by the Commissioner.

³ Jerome Mortrud, 44 T.C. 208 (1965); Fred M. Osteen, 14 T.C. 1261 (1950).

⁴ *Hanson v. Commissioner*, 298 F.2d 391 (8th Cir. 1962), *rev'd* 35 T.C. 413 (1960); *Chandler v. Commissioner*, 226 F.2d 467 (1st Cir. 1955). The first Circuit now says that *Chandler* was wrongly decided. See, *Bagley v. Commissioner*, 19 Am. Fed. Tax R.2d Para. 67455 (1st Cir. 1967).

⁵ Allan L. Hanson, 35 T.C. 413 (1960).

⁶ INT. REV. CODE of 1954, § 62(2)(B).

overnight".⁷ The Tax Court agreed with the Commissioner, in an early case, where a railway clerk had his regular third meal at 11:00 p.m. at the end of his run which took 6 hours and 15 minutes. The court said that the expense of the meal was not incurred while "away from home" within the meaning of the 1939 statute.⁸ Then in 1954 when Congress re-enacted the provision dealing with traveling expense without any substantial change, the Commissioner contended that this was a sub silentio manifestation that Congress accepted the "overnight rule."⁹ But the First Circuit in referring to the "overnight rule" said that it was "more in the nature of legislation than interpretation and accordingly goes beyond the rule-making power of the Internal Revenue Service."¹⁰ After the Commissioner finally put the "overnight rule" into the regulations, it did not fare much better.

The taxpayer has usually argued that although the "overnight rule" is administratively functional, its application does not always yield an equitable result.¹¹ The trend has been away from a rigid application of the rule to all cases.¹² Instead a number of equally undesirable rules have been advanced;¹³ or the courts have taken the case by case approach by stating that there is no universal rule that can be adequately applied to all situations.¹⁴ This prompts the question that if there is no workable standard, how will the taxpayer know when to deduct the cost of meals. Apparently as the law now stands he will have to litigate, and this is indeed an undesirable situation.

The Fifth Circuit rejected the rule in *Williams v. Patterson*, saying that it was arbitrary and had no basis in the statute.¹⁵ However, the Commissioner agreed to the decision, saying that on its facts the case did not reject the rule.¹⁶ In *Williams* the taxpayer was a rail-

⁷ *Williams v. Patterson*, 286 F.2d 333 (5th Cir. 1961).

⁸ Fred M. Osteen, 14 T.C. 1261 (1950).

⁹ Rev. Rul. 239, 1963-2 CUM. BULL. 87.

¹⁰ *Chandler v. Commissioner*, 226 F.2d 467, 470 (1st Cir. 1955).

¹¹ E.g., *Kenneth Waters*, 12 T.C. 414 (1949).

¹² *Chandler v. Commissioner*, 226 F.2d 467 (1st Cir. 1955). *William A. Bagley*, 46 T.C. 176 (1966), *rev'd*, 19 Am. Fed. Tax R.2d Para. 67455 (1st Cir. 1967).

¹³ *William A. Bagley*, 46 T.C. 176 (1966); *Jerome Mortrud*, 44 T.C. 208 (1965).

¹⁴ *Hanson v. Commissioner*, 298 F.2d 391 (8th Cir. 1962).

¹⁵ 286 F.2d 333 (5th Cir. 1961).

¹⁶ Rev. Rul. 221, 1961-2 CUM. BULL. 34.

road conductor who boarded a train at his Alabama home about 6:45 a.m. every morning. He arrived in Atlanta at 12:15 p.m. and was off duty until he boarded the return trip at 6:15 p.m. He arrived home about midnight. While in Atlanta the taxpayer rented a hotel room where he rested and refreshed; he also ate lunch and dinner there. The court ruled that a deduction is permissible where it is reasonable for the employee to seek rest during his hours off even though not required to do so by the employer.¹⁷ When the Commissioner accepted this ruling, the "overnight rule" became known as the "necessary sleep or rest" rule.¹⁸ If the *Williams* case was unclear and thus subject to diverse interpretations, the Commissioner could have hoped that his rule would still be followed. But the Eighth Circuit left no doubt when it held that a contracting executive could deduct the cost of meals expended while visiting job sites regardless of whether he stayed overnight.¹⁹ The Commissioner argued that this decision would either discriminate against other taxpayers who eat meals away from their residence but cannot deduct them; or in the alternative it would cause a trend where all taxpayers would be allowed to deduct to the extent of seriously diminishing the revenues. The court replied that if that were the case it was a legislative mandate and that each case must be decided on its facts. The Commissioner did not acquiesce and warned that taxpayers could expect more litigation in the future.²⁰

There has been more litigation and as a result the problems surrounding the "overnight rule" have become more pronounced. In *Hanson v. Commissioner*,²¹ the court had suggested a "substantial time and distance" test saying that it would be more equitable than the "overnight rule." But, again, each case would have to be decided on its facts with the added shortcoming that there is no standard established to serve as a guideline. The Tax Court propounded a "daily routine" test which denied the taxpayer a deduc-

¹⁷ When this case was decided Rev. Rul. 497, 1954-2 CUM. BULL. 64, provided that business expenses had to be required by the employer to be deductible.

¹⁸ *Commissioner v. Bagley*, 19 Am. Fed. Tax R.2d Para. 67455 (1st Cir. 1967).

¹⁹ *Hanson v. Commissioner*, 298 F.2d 391 (8th Cir. 1962).

²⁰ Rev. Rul. 231, 1963-2 CUM. BULL. 87.

²¹ 298 F.2d 391 (8th Cir. 1962).

tion if expenses were incurred while engaged in routine duties.²² But, the question arises, what is considered routine. The taxpayer would most likely have to engage in a lawsuit to find out. The problem is to find a test which offers some degree of certainty in administration without vitiating equitable treatment of the taxpayer.

The problem is graphically illustrated by a recent Tax Court decision.²³ The majority of the court held that a consulting engineer who travelled about 70 miles per day, who did not eat at home because he did not like to cook, and who did not stay overnight because of alleged business reasons could deduct the cost of meals. The court said a strict application of the "overnight rule" in every situation is not feasible and that Congress has not given its approval to an inflexible rule disallowing expense incurred for meals on non-overnight trips. The court said that this case came within the *Hanson* decision. However, there were three concurring opinions and one judge dissented without comment. One opinion said that *Hanson* did not apply, but the meals were deductible because the taxpayer was in "travel status." Another opinion stated that *Commissioner v. Bagley* was indistinguishable from *Hanson*; and even though *Hanson* rejected the application of the "overnight rule" to all cases, the judge still contended that either the "overnight rule" is justified or no other rule is valid. A final opinion admonished that it was clear that the court was no longer applying the "overnight rule," but it was not clear what was being substituted for it. It was then argued that the "substantial time and distance" test should be adopted—the advantage of certainty it offers outweighs its slight imperfections. According to one concurring opinion in *Bagley*, "there are many taxpayers who will be affected by this decision, and if we do not make clear whether the *Herrin*, *Hanson* and *Mortrud* opinions are still in effect and what is the rule, then we are compelling people to engage in further litigation to learn the answer."²⁴

But, the Tax Court was overruled in *Bagley* when the Commission appealed. The First Circuit approved the "overnight rule" arguing that those courts rejecting the rule had not substituted

²² Jerome Mortrud, 44 T.C. 208 (1965).

²³ William A. Bagley, 46 T.C. 176 (1966).

²⁴ See *Id.* at 189., concurring opinion.

anything better.²⁵ This produced a clear conflict between the First Circuit and the Sixth Circuit. If either the Commissioner appeals *Correll* or the taxpayer appeals *Bagley* it is likely that the Supreme Court would review in order to reconcile the conflict between the circuits.

If the Supreme Court declines to take action or is not given the opportunity to do so, then the problem will have to be remedied by Congress. A suggested draft for Code revision has been advanced by the American Law Institute.²⁶ It advocates the elimination of the words "away" and "home" so as to adhere to the essential principle that an expense of travel in order to be deductible, must have been incurred in pursuit of business. There is no emphasis on the overnight aspect; probably, because the overnight requirement was introduced by the Commissioner and is not to be found in the legislative history of the statute.²⁷

Regardless of whether the "overnight rule" is deemed desirable or not, it is imperative that the problem which exists in this area be recognized. Definitive action must be taken so that the rule will be unequivocally accepted or rejected. If it is rejected, additional consideration should be given to the formulation of some test by which the taxpayer will be able to determine whether the cost of his meals in pursuit of business is deductible. Otherwise the taxpayer will be required to litigate in order to ascertain whether the cost of meals on a business trip on which he did not stay overnight is deductible.

Jacob Michael Robinson

Labor Law—Choice of An Appropriate Bargaining Unit— Craft Severance

The National Labor Relations Board recently announced a policy change concerning union petitions for recognition of a bargaining unit which would be separated from other plant workers.

²⁵ *Commissioner v. Bagley*, 19 Am. Fed. Tax R.2d Para. 67455 (1st Cir. 1967). In deciding this case the court said that its previous decision in *Chandler v. Commissioner*, 226 F.2d 467 (1st Cir. 1955), was an instance of a hard case making bad law and that it was wrongly decided.

²⁶ ALI. FED. INCOME TAX STAT. § X 151(b)(5) (Feb. 1954 Draft).

²⁷ H.R. REP. No. 1337, 83rd Cong., 2d Sess. 9 (1954).