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Income Tax--Travel Expense Deductions--New Approach to Implement the "Temporary and Indefinite" Test

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Before the appearance of the principal case, one view concerning the same question was noted. Note 69 HARV. L. REV. 737, 745 (1956). The test given as the determining factor was whether there was a reversion in the transferor after the disposition, an answer in the negative resulting in capital gain treatment. The author admits that the application of this test would be harder than the rule that the possessory interest be transferred for a minimum time in order to qualify for preferential treatment. From an examination of the principal case it is not clear whether "reversion or not" accurately describes the differences in result, though it would also be satisfied under the fact situation presented in this case.

The Commissioner has acquiesced in the holding of the principal case. See 1959-2 CUM. BULL. 6.

Robert Glenn Lilly, Jr.

**Income Tax — Travel Expense Deductions —
New Approach to Implement the
"Temporary and Indefinite" Test**

The taxpayer was transferred by his employer to a work site located one-hundred and seventeen miles from his place of residence. The taxpayer was employed in this area for approximately one year, and he deducted his travel expenses, including food and lodging, incurred during that year. The Tax Court held that since the taxpayer's tenure was of an indefinite duration, then he cannot be considered as being "away from home" so as to allow a deduction. *Held*, in reversing the Tax Court, that the "indefinite" test is no longer a feasible guide in absolutely determining that a person is not "away from home." A more functional approach to the problem is to establish whether the taxpayer should reasonably know that he is to be employed for a long period of time so as to warrant a removal of the taxpayer's domicile to the new area of work. *Harvey v. Commissioner*, 283 F.2d 491 (9th Cir. 1960).

The dilemma created by the determination of what constitutes "away from home" has provided the courts with a prolonged flow of litigation. The Tax Court and a few circuit courts have consistently equated "home" with "taxpayer's place of business." *Com-*

missioner v. Flowers 326 U.S. 465 (1946); *Barnhill v. Commissioner* 148 F.2d 913 (4th Cir. 1945). This view is also maintained by the Commissioner. 4 MERTENS, FEDERAL INCOME TAXATION § 25.93 (1960 rev.). Some circuits, however, have flatly rejected this view. *Commissioner v. Janss*, 260 F.2d 99 (8th Cir. 1958); *Wallace v. Commissioner*, 144 F.2d 407 (9th Cir. 1944); *Coburn v. Commissioner*, 138 F.2d 763 (2nd Cir. 1943). As a direct result of the latter position, the Tax Court developed an exception to its general rule, and has devised the formula of "temporary and indefinite" duration to provide another avenue for determining "away from home."

The origin of the "temporary, indefinite" test may be traced to the Tax Court decision in *Harry Schurer*, 3 T.C. 544 (1944). The taxpayer was a journeyman plumber who resided in Pittsburgh, Pennsylvania. His job was of such a nature that required him to work at various locations. The court recognized that the taxpayer's home was the area in which he usually worked, which was Pittsburgh. The court consequently allowed a deduction for those expenses incurred during employment at his various job sites. The court then stated that the employment away from his usual employment area was of a "temporary duration." By this case, a taxpayer may therefore be at his place of employment and still be considered being "away from home." By this exception, if the employment is temporary then it is considered to be "away from the usual business home," and a deduction is allowed. *E. G. Leach*, 12 T.C. 20 (1949). If the employment is of an indefinite duration then it will not be considered as being "away from the usual business home", and a deduction will not be allowed. *Claunch v. Commissioner*, 264 F.2d 309 (5th Cir. 1959); *Ney v. United States*, 171 F.2d 449 (8th Cir. 1948); *Beatrice Albert*, 13 T.C. 129 (1949); *Henry Warren*, 13 T.C. 205 (1949).

The first major vote of confidence conferred upon this test was in *Commissioner v. Flowers*. 326 U.S. 465 (1946). The Supreme Court recognized that travel expenses in pursuit of business could only arise when the employment forced the taxpayer to travel and live temporarily at some place other than his place of employment. The most recent Supreme Court discussion of this problem is found in *Peurifoy v. Commissioner* 358 U.S. 59 (1958). Here the court recognized the existence of such a test. The court found as its pivotal point of determination—Was the employment "temporary or indefinite"?

The basic mechanics of the test are quite limiting. If the employment is of the sort which may readily be foreseen as terminable within a short period of time, then such employment is considered to be "temporary." *John Harvey*, 32 T.C. 1368 (1959). An arbitrary period of less than one year seems to be the accepted tenure by the courts. *Kermüt Claunch*, 29 T.C. 1047 (1958); *James Whitaker*, 24 T.C. 750 (1955); *Arnold Bark*, 6 T.C. 851 (1946). If no such termination point can be fixed then the employment is of an "indefinite" duration. *John Harvey*, *supra*. The application of such a mechanical test quite often produces a distasteful result. The principal case is the first to adopt a fresh device by which the prescribed intent of the Congress can be consummated.

The greatest appeal that such a standard provides is that it fills in the gaps in those situations which are in the fringe area. The situation may often arise whereby the taxpayer could not foresee that his employment would terminate within a short fixed period, but it could be said that his employment was relatively short which would not warrant a complete upheaval of his residence to his place of work.

The principal case does not manifest a complete divergence from the test which seems to be approved in the *Flowers* case, *supra*, and the *Peurifoy* case, *supra*. It may be concluded that this case provides a new guide post in which to facilitate a more equitable application of the "temporary and indefinite" test. If the employment requires the taxpayer to move his residence as a question of fact, then the employment is of an "indefinite" duration. If no such requirement is necessary, the employment is "temporary." This is a realistic and functional approach to a problem which has plagued the courts and taxpayers for many years.

Arthur Mark Recht