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Taxation - Federal Income Tax - Deductibility of Transportation Expenses Between Two Places of Current Employment

George E. Ewing S.Ed.
University of Michigan Law School

TAXATION—FEDERAL INCOME TAX—DEDUCTIBILITY OF TRANSPORTATION EXPENSES BETWEEN TWO PLACES OF CURRENT EMPLOYMENT—Petitioner was employed as a high school principal by the city of Attleboro, Massachusetts, where he lived. He was also employed as an accounting instructor by Boston University, thirty-seven miles distant, two evenings a week for thirty-two weeks during the taxable year. He used his personal automobile to travel between the two cities and did not remain overnight in Boston. Neither employer expressly required him to incur any transportation expenses in connection with his teaching duties and there was no arrangement for reimbursement of transportation costs. The Tax Court affirmed the Commissioner's disallowance of a deduction for the automobile expenses incurred in traveling between the two cities which petitioner had taken to arrive at his adjusted gross income before employing the standard deduction.[1] On appeal, *held*, reversed. The Tax Court erred in its holding that the expenses were not incurred in connection with the performance of services by petitioner as an employee. Further, the taxpayer was "away from home" within the statutory meaning when he traveled to his evening teaching job. *Chandler v. Commissioner*, (1st Cir. 1955) 226 F. (2d) 467.

Certain expenses incurred while traveling in connection with a taxpayer's trade or business have long been deductible under our income tax laws.[2] However, commuter's fares between home and business have been held not deductible because they are considered personal rather than business expenses.[3] The problem of categorizing expenses with characteristics placing them between these two extremes was solved under the Internal Revenue Code of 1939 by the application of the criteria established in *Com-*

[1] Douglas A. Chandler, 23 T.C. 653 (1955). I.R.C. (1939), §22(n)(2) provided for "deductions allowed by §23 which consist of expenses of travel, meals and lodging while away from home, paid or incurred by the taxpayer in connection with performance by him of services as an employee" in arriving at adjusted gross income. If the claimed transportation deduction had been allowed in arriving at adjusted gross income, the taxpayer could then have utilized the standard deduction in determining his net income.

[2] Section 23(a) of the Internal Revenue Codes of 1939, 1938, 1936, 1934, 1932 and 1928; section 214(a) of the Internal Revenue Codes of 1926, 1924, 1921. Earlier acts did not provide specifically for travel expense deductions.

[3] Charles H. Sachs, 6 B.T.A. 68 (1927); John C. Bruton, 9 T.C. 882 (1947); Beatrice H. Albert, 15 T.C. 350 (1950). See 31 BOST. UNIV. L. REV. 520 (1951).

missioner v. Flowers.[4] The expense had to be (1) a reasonable and necessary traveling expense (this could include transportation fares, food, and lodging expenses), (2) incurred while away from home, and (3) incurred in the pursuit of the trade or business of the taxpayer or his employer. The Court indicated that the travel must be actually required by the employer to satisfy this last requirement.[5] If a traveling expense did not meet all three criteria, it was a commuter expense and not deductible under section 23 (a) (1) (A) of the 1939 code.[6] The "away from home" test involved[7] three interpretative problems. They are: (1) Must the taxpayer remain away from home overnight? (2) How far away from home must the taxpayer travel? (3) What is meant by the word "home"? The principal case properly recognizes that the taxpayer need not remain away from home overnight[8] but that it is essential that the taxpayer leave the general metropolitan area of his home city.[9] The word "home" has been equated to the taxpayer's actual residence by some courts[10] and to his principal post of duty by others.[11] Because both the taxpayer's residence and his principal post of duty were clearly in the same city, the court in the principal case was not forced to choose between the two interpretations.[12] The principal case indicates that the Tax Court must have based its decision upon an application of the third criterion, the "required by the employer" test of the *Flowers* case. The court of appeals agreed that if this test were applicable, the claimed deduction would fail since the travel was not specifically required by either of the employers in the principal case. To avoid the ap-

4 326 U.S. 465, 66 S.Ct. 250 (1945).

5 Id. at 470-473.

6 Ibid. Of course if the expense were not deductible under §23 it was not deductible under §22 (n) (2), which incorporated §23 by reference. See note 1 supra.

7 Under the 1954 code it is no longer necessary that transportation expenses (as distinct from meals and lodging) be incurred while away from home in order to be deductible in computing adjusted gross income before utilizing the standard deduction. I.R.C. (1954), §62 (2) (c).

8 Principal case at 470; Kenneth Waters, 12 T.C. 414 (1949); Scott v. Kelm, (D.C. Minn. 1953) 110 F. Supp. 819; Caroll B. Mershon, 17 T.C. 861 (1951); Rev. Rul. 190, 1953-2 Cum. Bul. 303. The Tax Court in the principal case avoided the problems of the "away from home" criterion by resting its decision entirely on other grounds. 23 T.C. 653 at 655.

9 Compare the principal case, at 470, with Amoroso v. Commissioner, (1st Cir. 1952) 193 F. (2d) 583. See also Raymond E. Kershner, 14 T.C. 168 (1950); Summerour v. Allen, (D.C. Ga. 1951) 99 F. Supp. 318; Frank N. Smith, 21 T.C. 991 (1954).

10 Wallace v. Commissioner, (9th Cir. 1944) 144 F. (2d) 407; Coburn v. Commissioner, (2d Cir. 1943) 138 F. (2d) 763. See 19 UNIV. CHI. L. REV. 534 (1952).

11 Barnhill v. Commissioner, (4th Cir. 1945) 148 F. (2d) 913; Ney v. United States, (8th Cir. 1948). 171 F. (2d) 449. The Supreme Court refused to resolve this conflict in Commissioner v. Flowers, note 4 supra, preferring to rest its decision on its third criterion.

12 However the court's position is unclear because it quotes dicta from Joseph H. Sherman, Jr., 16 T.C. 332 (1951), which refers to the taxpayer's "residence" as the crucial point. Principal case at 469. In the Sherman case the tax "home" was held to be at the business location where the taxpayer spent the most time and had his residence rather than the business location where he earned the most money. Rev. Rul. 55-604, Int. Rev. Bul. No. 40, p. 8 (1955), was quoted in the principal case to indicate that the Internal Revenue Service's interpretation of the Sherman holding was another vote for the "principal duty location" definition. However, this revenue ruling is concerned with meals and lodging under §162 (a) (2) of the 1954 code and also contains a vehement disavowal of the Sherman dicta.

plication of this test, the court of appeals observed that the *Flowers* case involved only one business location rather than two widely separated places of employment.[13] However, the Commissioner had conceded throughout that the taxpayer's deduction would have been proper under section 23 (a) (1) (A) alone.[14] The question which should then have been clearly answered is whether the words of section 22 (n) (2) place a different and more stringent limitation upon the deductibility of travel expenses than the words of section 23 (a) (1) (A).[15] It is possible that the *Flowers* "required by the employer" test is the same as the "in connection with the performance . . . of services as an employee" test of section 22 (n) (2). If they are the same, the court should have so stated and then supported its decision on the basis of the Commissioner's concession.[16] If they are not the same, the interpretative problem has not been satisfactorily resolved by the principal case because there was no discussion of any cases or rulings which deal with the "as an employee" test of section 22 (n) (2)[17] but only those which deal with section 23 (a) (1) (A). Since the words of section 22 (n) (2) are present in the 1954 code as section 62 (2) (B) the problem of what the section actually means is still moot.

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[13] Principal case at 469. The court's reasoning was that it is impossible for the taxpayer to be in two locations simultaneously and since he is required to travel by exigencies he is within the statutory provision just as if he were specifically required to travel by an employer.

[14] Principal case at 468.

[15] On the function of §22 (n) (2) and its relation to §23 (a) (1) (A), see note 1 supra.

[16] Another approach to the taxpayer's problem in the principal case might have been to argue that a teacher is a professional person whose transportation would be deductible under §22 (n) (1), as a trade or business expense, in arriving at adjusted gross income. But see Chester C. Hand, Sr., 16 T.C. 1410 (1951) (teacher held to be an employee and not a professional man).

[17] The only case cited by the court which deals with §22 (n) (2) was Kenneth Waters, note 8 supra, which the court quoted to substantiate its observations on the "overnight" test. (See note 8 supra and adjacent text.) There was no attempt to compare it with the principal case on the "as-an-employee" test.