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TAXATION-INCOME TAX-DEDUCTIONS FOR EXPENSES OF ARMY OFFICER

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TAXATION—INCOME TAX—DEDUCTIONS FOR EXPENSES OF ARMY OFFICER—Respondent, having had experience as an executive of a large machine tool distributing company, went to Washington, D.C. in 1942 at the request of the Ordnance Department of the United States Army to assist in the efficient distribution of machine tools, serving in a civilian capacity without compensation. During the year, he was commissioned in the army, attaining the rank of Lieutenant Colonel, and was assigned to the Army & Navy Munitions Board as Ordnance Officer, in which capacity he had to keep in contact with manufacturers of production equipment as well as with various government agencies. In his income tax returns for 1942 and 1943, respondent claimed deductions as an army officer for expenses in operating a private automobile used in the discharge of his duties, entertainment expenses, traveling expenses in excess of the per diem allowance and for the cost of a military dress uniform. Upon review following disallowance of the deductions by the Commissioner of Internal Revenue, the Tax Court reversed,[1] except as to the uniform,[2] on the ground they were ordinary and necessary trade or business expenses under the authority of I.R.C.

[1] Commissioner v. Motch, 11 T.C. 777 (1948). The Tax Court found that in view of the number and location of various offices requiring daily visits, and the meetings necessary to be attended on short notice, the taxpayer needed an automobile at his disposal to do his work more efficiently; that it was necessary to continue conferences with manufacturers and government representatives at a private club or home in order to avoid interruptions; and further that it was necessary to travel to other cities as a part of his duties.

[2] Treas. Reg. 111, §29.24-1.

§23(a)(1).[3] On appeal to the circuit court of appeals, *held,* the decision of the Tax Court reversed. An army officer, like any other government employee, is not carrying on a trade or business such as to qualify within the meaning of 23(a)(1), this being limited to persons engaged in private enterprise, and, therefore, such officer cannot deduct expenditures in excess of the amount allowed by the government. Furthermore, the expenses were not ordinary and necessary since it is not the normal practice to incur such expenses in conducting government business. *Commissioner v. Motch,* (6th Cir. 1950) 180 F. (2d) 859.

While the end result achieved in the principal case may be correct on the particular facts involved, the ground upon which the court based its decision is questionable. In considering the scope of the phrase "trade or business" as used in the code,[4] the court adopted a lay concept, whereas these words have long been considered to be far more inclusive, covering the arts and professions as well as ordinary commercial activities.[5] A trade or business has been defined by the courts, broadly enough to include the military, as that which occupies the time, attention and labor of men for the purpose of a livelihood or profit.[6] Congress has expressly said that any one holding public office is to be considered within such a category.[7] Almost directly in point, the Treasury Regulations declare that compensation earned by government employees, civilian or military, for services rendered in a possession of the United States is to be regarded as income derived from the active conduct of a trade or business within that possession.[8] Although the principal decision involved only a member of the armed forces, the language used was sweeping, expressly encompassing all government employees, without any real basis for not extending it to employees in private enterprise as well. The importance of this holding is somewhat lessened by virtue of the 1942 amendment to the code permitting deductions by individuals for certain non-trade and non-business expenses;[9] nonetheless, it is unfortunate that such a narrow interpretation was resorted to. Having disposed of the case completely, the court, apparently uneasy, went on to more solid ground by holding that regardless of the trade or business aspect the claimed deductions did not satisfy the additional statutory requirement of being "ordinary and necessary."[10] But instead of proceeding to apply this standard by an examination of the facts at hand,[11] the court seemed to use the unsatisfactory test of "usualness," by in

[3] I.R.C., §23(a)(1)(A) (1948).

[4] Note 3 supra.

[5] 4 MERTENS, FEDERAL INCOME TAXATION §25.05 (1942). To the effect that a member of the armed forces is in a profession, see Treas. Reg. 111, §29.24-1.

[6] Commissioner v. Field, (2d Cir. 1933) 67 F. (2d) 876; Northrop v. Commissioner, 17 B.T.A. 950 (1929).

[7] I.R.C. §48(d); on the basis of this section, a judgeship has been held to constitute a trade or business in McDonald v. Commissioner, 323 U.S. 57, 65 S.Ct. 96 (1944).

[8] Treas. Reg. 111, §29.251-1(2).

[9] I.R.C. §23(a)(2) (1948). However, the decision in McDonald v. Commissioner, supra note 7, indicates that there may be a tendency to construe this provision narrowly also.

[10] Note 3 supra.

[11] In a dissenting opinion in Deputy v. DuPont, 308 U.S. 488, 60 S.Ct. 363 (1939),

effect saying that, since the government maintains a system of motor pools and grants a per diem allowance for traveling, any expense incurred beyond this by an army officer is most unusual and must always be regarded as a personal expense.[12] Rather, the emphasis should not be on what is normal for military personnel in general but instead on what is ordinary and necessary for those individuals who are carrying on the particular type of job in question.[13] It is very significant and encouraging to note that the Treasury, recognizing that the court had gone too far in its favor, in effect nullified this decision by issuing a Tax Unit Ruling stating that the rule of the case is not to be followed insofar as it holds that travel expenses in excess of per diem allowance, incurred by government employees in carrying out their duties, are not deductible.[14] While pointing out that the appellate court apparently misunderstood the ground on which the government was seeking a reversal, the ruling went on to say that not only have government employees been previously regarded as engaged in a trade or business but also expenses have been allowed when they are shown to be ordinary and necessary, regardless of whether there has been reimbursement.[15]

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Justice Roberts said that since the determination of what is ordinary and necessary is a purely factual one, it is outside the purview of the court.

[12] The court in the principal case at 861 cited as authority for the meaning of "ordinary and necessary" the case of Deputy v. DuPont, supra note 11, where it was held that, "ordinary has the connotation of normal, usual, or customary." The next sentence of the principal decision said, "Certainly it is not the ordinary practice for army officers and other government officials to supply their own vehicles of transportation except on the basis of fixed mileage. . . ."

[13] "A controlling guide . . . is the kind of transaction out of which the obligation arose and its normalcy in the *particular* business involved." 4 MERTENS, FEDERAL INCOME TAXATION §25.07 (1942).

[14] I.T. 4012, XII-2 Cum. Bul. (1950).

[15] Howard Veit, 49,253 P-H TC Memo. (Oct. 11, 1949); Pollock v. Commissioner, 10 B.T.A. 1297 (1928).