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Federal Income Taxation - Travel Expense Deductions - Employees at Remote Nuclear Test Site May Deduct under I.R.C. 162(a)(2) the Cost of Extra Meals and Lodging Incurred When They are Required to Work Overtime and Find It Necessary to Remain at Test Site Overnight

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FEDERAL INCOME TAXATION—TRAVEL EXPENSE DEDUCTIONS—
EMPLOYEES AT REMOTE NUCLEAR TEST SITE MAY DEDUCT UNDER
I.R.C. § 162(a)(2) THE COST OF EXTRA MEALS AND LODGING INCURRED WHEN THEY ARE REQUIRED TO WORK OVERTIME AND FIND IT NECESSARY TO REMAIN AT TEST SITE OVERNIGHT.

Coombs v. Commissioner (9th Cir. 1979)

Appellants are taxpayers who were employed by private contractors or by the United States government1 at a government nuclear testing facility in Nevada (Test Site)2 during at least some portion of the period 1970 to 1973.3 The taxpayers resided in the Las Vegas area and commuted distances ranging from 65 to 200 miles each way to the Test Site on a daily basis.4 On those occasions when appellants were required to work overtime,5 they would purchase an additional meal and stay overnight at the Test Site.6 Pursuant to section 162(a)(2) of the Internal Revenue Code (Code),7

1. Coombs v. Commissioner, 608 F.2d 1269, 1271 (9th Cir. 1979). Coombs is a consolidation of appeals by two groups of taxpayers whose cases arose out of virtually identical circumstances and were consolidated for trial in the Tax Court and in the District Court for the District of Nevada, respectively. Id. The cases of one group of 52 taxpayers, hereinafter referred to as the Coombs taxpayers, were initially consolidated for trial in the Tax Court. See Coombs v. Commissioner, 67 T.C. 425, 428-30 (1976), aff'd in part and rev'd and remanded in part, 608 F.2d 1269, 1271 (9th Cir. 1979). The cases of a second group of 15 taxpayers, hereinafter referred to as the Cox taxpayers, were initially consolidated and tried in the United States District Court for the District of Nevada. See Cox v. United States, 78-2 U.S. Tax Cas. 84,832, 84,832 (D. Nev. 1978), aff'd sub nom. Coombs v. Commissioner, 608 F.2d 1269, 1271 (9th Cir. 1979).

2. 608 F.2d at 1271. The Nevada Test Site, a 1350 square-mile tract, is part of the United States Air Force's Las Vegas Bombing and Gunnery Range and is used primarily as a nuclear testing facility. Cox v. United States, 78-2 U.S. Tax Cas. at 84,832-33. See also note 4 infra.

3. 608 F.2d at 1271.

4. Coombs v. Commissioner, 67 T.C. at 475; Cox v. United States, 78-2 U.S. Tax Cas. at 84,834. The Test Site lies approximately 65 miles north of Las Vegas at its southernmost point, while its northernmost boundary lies approximately 130 miles north of that community. 608 F.2d at 1271. Las Vegas is the nearest habitable community to the Test Site. Id. The site's location was specifically selected because of its remoteness from populous areas. Id.

During the taxable years in question, all of the appellants received, in addition to their regular wages and regardless of the actual costs incurred for transportation, meals, or lodging, a per diem allowance for each day they reported to work. Id. at 1272. Employees who were members of various craft unions received an additional allowance pursuant to their collective bargaining agreements. Cox v. United States, 78-2 U.S. Tax Cas. at 84,833.

5. Coombs v. Commissioner, 67 T.C. at 434; Cox v. United States, 78-2 U.S. Tax Cas. at 84,834.

6. Cox v. United States, 78-2 U.S. Tax Cas. at 84,834. Trailers with bunks were available for those workers who chose not to drive back to Las Vegas at rates of $1 to $2 per night. Id. Subsidized cafeterias were provided by various employers at the Test Site. Id.

7. See I.R.C. § 162(a)(2). Section 162(a)(2) provides as follows:

(a) IN GENERAL—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 amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business.

Id.
the taxpayers claimed deductions for the “traveling expenses” incurred for transportation in going between their homes and their work areas at the Test Site as well as for meals and lodging on overnight stays. The Internal Revenue Service (IRS) disallowed the deductions, and suits were filed in the Tax Court and in the United States District Court for the District of Nevada. Both courts determined that the taxpayers’ transportation expenses were not deductible. They also found that since the “tax home” of the taxpayers was the Test Site, overtime-related expenses for food and lodging were not deductible under section 162(a)(2) because the taxpayers were not “away from home” within the meaning of that provision.

8. Coombs v. Commissioner, 67 T.C. at 473, 479; Cox v. United States, 78-2 U.S. Tax Cas. at 84,834. Appellants also asserted that the subsistence payments and travel allowances received from their employers were excludable from gross income under § 119 of the Code. Coombs v. Commissioner, 67 T.C. at 469; Cox v. United States, 78-2 U.S. Tax Cas. at 84,834. See I.R.C. § 119. Section 119 provides that an employee may exclude from his gross income the value of meals and lodging furnished by his employer for the employer’s convenience if “(1) in the case of meals, the meals are furnished on the business premises of the employer, or (2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.” Id.

9. Coombs v. Commissioner, 67 T.C. at 434-69 (by implication); Cox v. United States, 78-2 U.S. Tax Cas. at 84,594. The IRS determined deficiencies in the federal income taxes of the Coombs taxpayers. See Coombs v. Commissioner, 67 T.C. at 428-29. The Coombs taxpayers paid their federal income taxes for the taxable years in question—after the deductions sought had been denied by IRS offices responsible for auditing the returns of workers at the Test Site—and then filed claims for refunds. See Cox v. United States, 78-2 U.S. Tax Cas. at 84,834. The claims for refunds were disallowed. Id.


11. Coombs v. Commissioner, 67 T.C. at 477; Cox v. United States, 78-2 U.S. Tax Cas. at 84,835. Both of the lower courts found that the transportation expenses were commuting expenses which constituted personal expenditures under § 262 of the Code and, hence, were not deductible under § 62(2)(C) or § 162(a). Coombs v. Commissioner, 67 T.C. at 473-77; Cox v. United States, 78-2 U.S. Tax Cas. at 84,835. See I.R.C. §§ 62(2)(C), 162(a). For the text of § 262, see text accompanying note 15 infra; for text of § 162(a), see note 7 supra. See also Treas. Reg. § 1.162-2(e) (1959), quoted at note 16 infra. Section 62(2)(C) provides that deductions for transportation expenses incurred by a taxpayer in connection with services rendered for an employer which are allowed under Part VI of the Code (§§ 161-92) shall be used in calculating the taxpayer’s “adjusted gross income.” I.R.C. § 62(2)(C).

12. For an explanation of the “tax home” concept, see notes 21-28 and accompanying text infra.

13. Coombs v. Commissioner, 67 T.C. at 479-80; Cox v. United States, 78-2 U.S. Tax Cas. at 84,837. See I.R.C. § 162(a)(2). In addition, both courts upheld the determination by the IRS that the various cash allowances received by taxpayers were not excludable from gross income. Coombs v. Commissioner, 67 T.C. at 472; Cox v. United States, 78-2 U.S. Tax Cas. at 84,835. On appeal, appellants abandoned their claim that the allowances were excludable from gross income in view of the Supreme Court’s decision in Commissioner v. Kowalski, 434 U.S. 77 (1977) (holding excludable the value of meals furnished in kind by an employer and on his business premises but not the value of any cash reimbursement for meals). See 608 F.2d at 1272.

Appellants had also contended in the lower courts that, with regard to the tax treatment of the various allowances received from their respective employers, the IRS had discriminated against the employees of the private contractors in favor of the federal employees permanently assigned to the Test Site. Coombs v. Commissioner, 67 T.C. at 480; Cox v. United States, 78-2 Tax Cas. at 84,834. Both courts rejected appellants’ claim of discriminatory tax treatment, finding it unsupported by the evidence on the record. Coombs v. Commissioner, 67 T.C. at 480; Cox v. United States, 78-2 U.S. Tax Cas. at 84,837.
On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the ruling of the district court and affirmed in part and reversed and remanded in part the judgments of the Tax Court, holding, inter alia, that appellants were "away from home" within the meaning of section 162(a)(2) of the Code when they were required to work overtime and found it necessary to sleep overnight at the Test Site and were, therefore, entitled to deduct the cost of lodging and extra meals thereby incurred. Coombs v. Commissioner, 608 F.2d 1269 (9th Cir. 1979).

Section 262 of the Code provides that "no deductions shall be allowed for personal, living, or family expenses." Commuting expenses have long been held "personal" expenses under section 262 and, thus, nondeductible. Similarly, meals purchased by a taxpayer at or near his place of business are held nondeductible under section 262.

14. 608 F.2d at 1279. The district court's judgment against the taxpayers in Cox was affirmed because the Court taxpayers failed to provide substantiation for claimed meal and lodging expenses. Id. at 1279. See Cox v. United States, 78-2 U.S. Tax Cas. at 84,837.

15. I.R.C. § 262.


Several exceptions to the general rule of nondeductibility of commuting expenses, however, have been recognized. A taxpayer who must use a more expensive mode of transportation in order to transport the tools of his trade has been allowed to deduct a portion of his commuting expenses. See Tyne v. Commissioner, 385 F.2d 40, 41-42 (7th Cir. 1967); Sullivan v. Commissioner, 368 F.2d 1007, 1008-09 (2d Cir. 1966); Crowther v. Commissioner, 29 T.C. 1293, 1299-300 (1957), rev'd on another ground, 269 F.2d 292 (9th Cir. 1959); Rev. Rul. 75-380, 1975-2 C.B. 59. In addition, a taxpayer who has two places of employment or who must travel from one job site to another during the day has been permitted a deduction for transportation expenses incurred in travel between job sites. See Smith v. Warren, 388 F.2d 671, 672 (9th Cir. 1968) (per curiam); Steinholt v. Commissioner, 335 F.2d 496, 504 (5th Cir. 1964); Stewart v. Commissioner, 35 T.C.M. (CCH) 1762, 1764-65 (1976); Winslow v. Commissioner, 23 T.C.M. (CCH) 1978, 1979-1980; Rev. Rul. 55-109, 1955-1 C.B. 261.

The courts and the IRS have consistently recognized an exception for taxpayers commuting to a temporary place of employment. See Norwood v. Commissioner, 66 T.C. 467, 469-70 (1976); Schurer v. Commissioner, 3 T.C. 544, 546-47 (1944); Rev. Rul. 75-432, 1975-2 C.B. 60. Although neither the IRS nor the courts have established a specific length of time after which employment will no longer be deemed temporary, employment of anticipated or actual duration of more than a year is generally viewed as indicative of "indefinite" or "indeterminable," rather than "temporary," employment. Rev. Rul. 60-189, 1960-1 C.B. 60.

Finally, prior to United States v. Correll, 389 U.S. 299 (1967), exceptions were recognized for 1) the taxpayer who is unable to live near his job, 2) the taxpayer who resides centrally to several distant places of employment, and 3) the taxpayer who is employed in two widely separated localities. See Matthews v. Commissioner, 310 F.2d 98, 98 (9th Cir. 1962) (per curiam), rev'd 36 T.C. 483 (1961); Wright v. Hartsell, 305 F.2d 221, 225-26 (9th Cir. 1962) (discussed at note 65 infra); Chandler v. Commissioner, 226 F.2d 467, 470 (1st Cir. 1955); Carlson v. Wright, 181 F. Supp. 568, 574 (E.D. Idaho 1960). The Supreme Court's decision in Correll, however, has undermined the validity of the exceptions for taxpayers commuting to temporary jobs and for those commuting long distances by necessity. See note 54 infra. For a discussion of Correll, see notes 49-54 and accompanying text infra.

For further discussion of the deductibility of commuting expenses, see generally Klein, Income Taxation and Commuting Expenses: Tax Policy and the Need for Nonsimplistic Analysis
Section 162(a)(2) of the Code, on the other hand, allows taxpayers a deduction for traveling expenses incurred while "away from home in the pursuit of a trade or business."\(^{18}\) The purpose of this provision is to allow a deduction for those travel expenses which, but for the taxpayer's pursuit of his trade or business, would not have been incurred—\(i.e.,\) expenses which are, in effect, a duplication of living expenses.\(^{19}\) It is clear that Congress, in enacting section 162(a)(2), did not intend to allow a deduction for those expenditures caused not by the exigencies of the taxpayer's business but by the taxpayer's personal choice to locate his home away from his place of business.\(^{20}\) Nevertheless, the deductibility of traveling expenses\(^{21}\) is an area of


17. See Commissioner v. Bagley, 374 F.2d 204, 206 (1st Cir. 1967); Amoroso v. Commissioner, 193 F.2d 583, 585 (1st Cir.), cert. denied, 343 U.S. 925 (1952); Armstrong v. Commissioner, 43 T.C. 733, 734-35 (1965); Osteen v. Commissioner, 14 T.C. 1261, 1262-63 (1950); Drill v. Commissioner, 14 T.C. 902, 903-04 (1947). The principle here involved was stated by the First Circuit in Bagley as follows:

[Both travel and meals away from home are not deductible if they are personal, as distinguished from business, expenses. If a taxpayer chooses to live in one locality and work in another, normally his travel from one to the other is regarded as being for his personal convenience. It is equally clear that a commuter cannot deduct his lunch. . . . Nor do we suppose, if a commuter were required to work late at his place of business, that any court would distinguish between his lunch and supper.]

374 F.2d at 206 (citations omitted).

18. I.R.C. \(\S\) 162(a)(2). For the text of this provision, see note 7 supra.

19. See United States v. Correll, 389 U.S. 299, 304-06 & 305 n.18 (1967); Brandl v. Commissioner, 513 F.2d 697, 699 (6th Cir. 1975); James v. United States, 308 F.2d 204, 206-07 (9th Cir. 1962); Kroll v. Commissioner, 49 T.C. 557, 562 (1968). The duplication rationale is reflected in the first administrative rulings regarding the deductibility of traveling expenses which were issued under the Revenue Act of 1918. See T.D. 3101, 3 C.B. 191 (1920). The 1920 regulation provided that a deduction will be allowed only for those expenses incurred in the pursuit of business which are in excess of ordinary living expenses, since "wherever a person may be, at home or abroad, he necessarily must have personal and living expenses which in any event are not deductible." Mim. 2688, 4 C.B. 209, 209 (1921). If the taxpayer did not, in fact, incur duplicate living expenses, no deduction was available. See O.D. 905, 4 C.B. 212, 212 (1921).

20. See Barnhill v. Commissioner, 148 F.2d 913, 916-17 (4th Cir. 1945). The Barnhill court stated:

It is clear in the first place that Congress, in prescribing the rules for the computation of net income, intended to confine the deductions for business expenses to those which are ordinary and necessary, and to prohibit the deduction of personal living or family expenses. It was recognized that the taxpayer must maintain a home for his family at his own expense even when he is absent on business, and that his personal expenses during his absence on business may fairly be regarded as expenses of the business. But it is not reasonable to suppose that Congress intended to allow as a business expense those outlays which are not caused by the exigencies of the business but by the action of the taxpayer in having his home, for his own convenience, at a distance from his business. Such expenditures are not essential to the prosecution of the business and were not within the contemplation of Congress which proceeded on the assumption that a business man would live within reasonable proximity to his business.

Id. at 917. See also James v. United States, 308 F.2d 204, 206-07 (9th Cir. 1952); Wallace v. Commissioner, 144 F.2d 407, 411 (9th Cir. 1944); Rev. Rul. 75-432, 1975-2 C.B. 60. Cf. Rosenspan v. United States, 438 F.2d 905, 911 n.6 (2d Cir.), cert. denied, 404 U.S. 864 (1971) (questioning the heavy emphasis which courts have placed on the assumption that the location of a taxpayer's residence is a matter of personal choice).

21. Traveling expenses are defined to include "travel fares, meals and lodging, and expenses incident to travel such as expenses for sample rooms, telephone and telegraph, public stenog-
the tax law which has been fraught with confusion—with the difficulty centering around the statutory requirement that expenses be incurred “away from home.”

Notwithstanding the apparent legislative purpose of Congress in enacting the Revenue Act of 1921, the IRS and the Tax Court have consistently interpreted “home” to mean the taxpayer’s primary place of business, not his personal residence. The first case to so hold was Bixler v. Commis-


Finding administration of the “excess provision” of the 1920 regulation extremely difficult, the Treasury Department sought and obtained congressional relief in the Internal Revenue Act of 1921. See Internal Rev. Act of 1921, ch. 136, § 214(a)(1), 42 Stat. 230 (now I.R.C. § 162(a)(2)). The 1921 predecessor of the current § 162(a)(2) allowed deductions for “traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business.” Id. The House Committee Report described the amendment as designed to replace “the more limited deduction for such expenses allowed under present law.” H.R. REP. NO. 350, 67th Cong., 1st Sess. 11 (1921). As the Second Circuit has stated:

There is . . . nothing to indicate that the Treasury sought, or that Congress meant to require, any change in the ruling that disallowed deductions for living expenses in such a case. The objective was to eliminate the need for computing the expenses “ordinarily required” at home . . . . and the words used were appropriate to that end.


The remarks of Senator Walsh of Massachusetts and Senator Williams of Mississippi during the Senate debates on the 1921 amendment reflected their assumption that the word “home” referred to the residence or domicile of a taxpayer. Id. But see Note, supra note 22, at 126-28 (commentator finds no definitely ascertainable legislative intent concerning the interpretation of the word “home” and points out that arguments for either interpretation have some support). See generally Haddleton, supra note 22, at 261-63; Traveling Taxpayer, supra note 22, at 120-25.

24. See Commissioner v. Flowers, 326 U.S. 465, 471 (1946); Coerver v. Commissioner, 36 T.C. 252, 253 (1961), aff’d, 297 F.2d 837 (3d Cir. 1962) (per curiam). The position taken by the Commissioner of Internal Revenue and by the Tax Court is apparently founded upon the assumption that the interpretation of home as the taxpayer’s place of business is necessary to prevent the deductibility of commuting expenses under § 162(a)(2) of the Code. See Commissioner v. Stidger, 386 U.S. 287, 290 (1967); Barnhill v. Commissioner, 148 F.2d 913, 917 (4th Cir. 1945); Note, supra note 22, at 133-34; Note, 48 TUL. L. REV. 445, 447 (1974).
sioner, wherein the taxpayer maintained a permanent residence in Alabama while employed part of the taxable year in Louisiana and part in Texas. The taxpayer claimed deductions for living expenses at both places of employment and for transportation costs between the two locations. In disallowing the deduction, the Board of Tax Appeals held that travel expenses may be deducted only when incurred "while the taxpayer is away from his place of business, employment, or the post or station at which he is employed, in the prosecution, conduct, and carrying on of a trade or business." The Board's position in Bixler, equating the statutory term "home" with the taxpayer's principal place of business, was subsequently adopted by the IRS.

The so-called "tax home" doctrine was expressly rejected, however, by the Ninth Circuit in Wallace v. Commissioner. In that case, the taxpayer's personal residence was in San Francisco but her place of employment for six months of the taxable year was in Hollywood. The Tax Court applied the tax home doctrine and disallowed her claimed deductions for living expenses while in Hollywood. The Ninth Circuit reversed on the basis that the plain meaning of the statute required "home" to be construed in its ordinary sense.

25. 5 B.T.A. 1181 (1927).
26. Id. at 1182. The taxpayer was a professional manager of state and municipal fairs and expositions. Id. During the taxable year in question, 1922, the petitioner was employed by the Florida Parishes Fair at Hammond, Louisiana, from January 1 through April 15, and by the Houston Fair and Exposition at Houston, Texas, from April 15 through December 15. Id. The taxpayer was employed in Mobile, Alabama, during the entire year of 1923. Id. at 1183.
27. Id. at 1183. Bixler claimed a $1068 deduction under section 214(a)(1) of the Internal Revenue Act of 1921 for lodging, meals, and laundry at Hammond, Louisiana, and Houston, Texas, as well as for travel between Hammond and Houston, in connection with obtaining the Houston employment, and between Houston and his home in Mobile, Alabama. Id. For the text of § 214(a)(1) of the Internal Revenue Act of 1921, see note 23 supra.
28. 5 B.T.A. at 1184 (emphasis added). The Board further stated that "[a] taxpayer may not keep his place of residence at a point where he is not engaged in carrying on a trade or business, . . . and take a deduction from gross income for his living expenses while away from home." Id. It then noted that Bixler "was not required to travel in connection with his position as manager" and that he was not carrying on a trade or business when traveling in an effort to secure employment and when going to and from his residence in Mobile. Id. But cf. Primuth v. Commissioner, 54 T.C. 374, 377-78 (1970) (employee may be engaged in the trade or business of performing services apart from the performance of services for a particular employer, and may deduct expenses incurred in seeking new employment within that trade or business); Rev. Rul. 75-120, 1975-1 C.B. 55, 56 (same).
30. 144 F.2d 407 (9th Cir. 1944).
31. Id. at 409. Ina Claire Wallace, an actress, maintained a permanent residence with her husband. Id. During the year 1939, she spent six months in Hollywood fulfilling her obligations under the terms of a contract for her personal services as an actress. Id.
32. Id. at 408-09. The Tax Court concluded that "home" as used in the statute means the taxpayer's place of business or employment. Id. at 408. Because Hollywood was Mrs. Wallace's place of employment, the court held that she was not "away from home in the pursuit of a trade or business" during the period in which the claimed expenses were incurred. Id.
33. Id. at 410. Finding that the Tax Court's interpretation of the word "home" as the taxpayer's place of business or employment "invaded the domain of Congress," the appellate court stated:
The *Wallace* decision did not, however, deal a death blow to the "tax home" doctrine, for one year later, in *Barnhill v. Commissioner*, the Fourth Circuit implicitly rejected *Wallace* by affirming the Tax Court's application of the doctrine. Justice Barnhill of the North Carolina Supreme Court maintained a residence sixty miles from Raleigh, where court was held, claiming deductions for the cost of travel to and from Raleigh and for food and lodging expenses there incurred. In affirming the Tax Court's disallowance of the deductions, the Fourth Circuit concluded that, in order to prevent the deductibility of commuting expenses, the statutory language should be read as implying "that the home and the place of business must be in the same general locality."  

To resolve the conflict among the courts of appeals created by the *Barnhill* decision, the Supreme Court granted certiorari in *Commissioner v. Flowers*. *Flowers*, a lawyer whose primary place of business was in Mobile, Alabama, and who maintained a residence in Jackson, Mississippi, sought to deduct as a travel expense the costs of transportation to and from Mobile and the costs of meals and lodging there incurred. The Tax Court's decision that Flowers' tax home was Mobile, and that therefore the expenses sought to be deducted were personal and nondeductible, was reversed by the Fifth Circuit which held that "the word home as used in the statute means that place where one in fact resides." Reversing the Fifth Circuit and upholding the Tax Court's disallowance of the claimed deduc-

The plain, obvious and rational meaning of a tax statute is always to be preferred to any narrow or hidden sense ... and while the meaning to be given to terms used will be determined from the character of their use by the legislature in the statute under consideration, words in common use should not be distorted by administrative or judicial interpretation.

Id. The Ninth Circuit considered the ordinary meaning of "home" to be "a dwelling place of a person, distinguished from other dwelling places of that person by the intimacy of the relation between the person and the place." Id. With regard to Mrs. Wallace's residence in Hollywood, the court found that "[n]one of her private and intimate attitudes and relationships which go to make up home, as that place is ordinarily designated, found lodgment there." Id. at 410-11. Consequently, the Ninth Circuit determined that, as between her Hollywood and San Francisco abodes, the latter was her home in the ordinary sense and therefore her tax home. *Id*.

34. 148 F.2d 913 (4th Cir. 1945).
35. *Id.* at 915. See *Barnhill v. Commissioner*, 3 T.C.M. (CCH) 514 (1944), aff'd, 148 F.2d 913 (4th Cir. 1945).
36. 148 F.2d at 914.
37. *Id.* at 914-15.
38. *Id.* at 917. See note 20 supra. The Fourth Circuit distinguished *Wallace* as having been decided on the basis of the temporary nature of the employment. 148 F.2d at 916. Cf. note 48 infra. The court nevertheless determined that the statute may be read as requiring that the taxpayer's tax home be in the vicinity of his place of business "without arbitrarily construing the word 'home' as synonymous with the term 'place of business.'" 148 F.2d at 917.
41. *Id.* at 164. Adopting the reasoning of the Ninth Circuit in *Wallace*, the Fifth Circuit explained: "There is no indication in the statute of a legislative intention to give the word an unusual or extraordinary meaning. For the court to do so would be an invasion of the legislative domain." *Id*.
tion, the Supreme Court established a three-part test for determining the deductibility of travel expenses. In order to be deductible, a travel expense must be 1) reasonable and necessary, 2) incurred while "away from home," and 3) incurred in the pursuit of a trade or business. While recognizing that the interpretation of the word "home" had engendered much difficulty, the Court, however, found it unnecessary to address the issue because it found that Flowers had not met the third condition of the test.

Although the Supreme Court has been confronted with the tax home question in subsequent cases, it has similarly avoided resolution of the issue. The Court did, however, in United States v. Correll, add a fourth

43. See 326 U.S. at 470-74.
44. Id. at 470.
45. Id. The Court's oft-quoted language provided:
   Three conditions must thus be satisfied before a traveling expense deduction may be made under § 23(a)(1)(A) [now I.R.C. § 162(a)(2)]:
   (1) The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling.
   (2) The expense must be incurred "while away from home."
   (3) The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade.

Whether particular expenditures fulfill these three conditions so as to entitle a taxpayer to a deduction is purely a question of fact in most instances.

326 U.S. at 470.

46. 326 U.S. at 471. The Flowers Court noted that "[t]he meaning of the word 'home' . . . with reference to a taxpayer residing in one city and working in another has engendered much difficulty and litigation," that the Tax Court and administrative officials have "consistently defined it as the equivalent of the taxpayer's place of business," and that two courts of appeals have rejected that construction and "confined the term to the taxpayer's actual residence." Id. at 471-72.

47. Id. at 472-73. Justice Rutledge dissented, arguing that there was no indication of congressional intent to use the word "home" to mean "business headquarters." Id. at 474 (Rutledge, J., dissenting).

48. See Commissioner v. Stidger, 386 U.S. 287 (1967); Peurifoy v. Commissioner, 358 U.S. 59 (1958) (per curiam). Peurifoy involved three construction workers who were employed in Kinston, North Carolina, for periods of 20%, 12% and 8% months, respectively, while maintaining residences elsewhere in the state. 358 U.S. at 59. The Tax Court had allowed each taxpayer deductions for amounts expended for board and lodging while at Kinston and for transportation to his permanent residence upon leaving Kinston. Peurifoy v. Commissioner, 27 T.C. 149, 156-57 (1956), rev'd, 254 F.2d 483, 485-87 (4th Cir. 1957), aff'd, 358 U.S. 59 (1958) (per curiam). In affirming the Fourth Circuit's reversal of the Tax Court, the Supreme Court relied upon its holding in Flowers and found that the third condition enunciated in that case had not been met because the expenses involved were not required by the exigencies of the employer's business. 358 U.S. at 60. While the Peurifoy Court acknowledged as an exception to the Flowers rule a deduction for travel expenses where the taxpayer's employment is "temporary" rather than "indefinite" or "indeterminate," the Court declined to overturn the court of appeals' decision that the Tax Court's finding of temporary employment was "clearly erroneous." Id. at 60-61. For a discussion of Flowers, see notes 39-47 and accompanying text supra.

Although the majority declined to address the tax home issue, see 358 U.S. at 59-60, Justices Douglas, Black, and Whittaker dissented and "disagree[d] with the Commissioner's contention that 'home' is synonymous with the situs of the employer's business." Id. at 62 (Douglas, J., dissenting). Like Justice Rutledge, who dissented in Flowers, Justice Douglas doubted that Congress intended the statutory construction embodied in the tax home concept. Id. See also note 47 supra. In addition, the dissent criticized the majority's reliance on the "temporary-
requirement to the *Flowers* test for determining the deductibility of travel expenses by upholding the so-called "overnight rule." The taxpayer in *Correll*, a traveling salesman for a wholesale grocery company, claimed deductions for the costs of meals purchased on the road at his customers' establishments. The IRS disallowed the deductions because Correll's daily trips

indefinite" rule as "improperly emphasizing duration of the absence [from the taxpayer's residence] as the determinative factor in deciding where the taxpayer's 'home' actually is." 358 U.S. at 62 n.4.

The Supreme Court similarly skirted resolution of the tax home question in *Stidger*. In that case, the taxpayer served a tour of duty in the Far East of 14 months' duration, 10 months of which were spent at a base in Iwakuni, Japan. 386 U.S. at 288. His wife and children were prohibited from accompanying him to that duty station. *Id.* The taxpayer claimed a deduction for the cost of his meals for the 10-month period spent at the Iwakuni base. *Id.* at 288-89. The Commissioner disallowed the deduction on the ground that the expenditures for meals were personal living expenses under § 262 of the Code. *Id.* This determination was upheld by the Tax Court. *Stidger* v. Commissioner, 40 T.C. 986, 999-900 (1963), rev'd 355 F.2d 294 (9th Cir. 1965), rev'd, 386 U.S. 287 (1967). In reversing, the Ninth Circuit ruled that the word "home" in § 162(a)(2) of the Code should be construed as the taxpayer's place of residence and that, since it was not reasonable for the taxpayer to move his residence nearer to his place of business, the requirements for deductibility had been met. 355 F.2d at 299-300.

The Supreme Court, while alluding to the congressional acceptance of the IRS' interpretation of "home" which would appear to be implied by the enactment of the Internal Revenue Code of 1954, found that it was unnecessary to decide whether that action by Congress in fact constituted approval of the tax home doctrine since

in the context of the military taxpayer, the Commissioner's position has a firmer foundation. The Commissioner has long held that a military taxpayer's permanent duty station is also his home for purposes of determining deductibility of travel expenses. This position builds on the terminology employed by the military services to categorize various assignments and tours of duty, and also in the language and policy of the statutory provisions prescribing travel and transportation allowances for military personnel . . . . [E]ligibility for . . . travel allowances turns upon whether an assignment constitutes a "change of permanent station" or whether the serviceman is "away from his designated post of duty." Thus, the Commissioner's position recognizes, as do the relevant statutes and the military services themselves, that the "permanence" of location in civilian life cannot find a complete parallel in military life which necessarily contemplates relatively frequent changes of location.

386 U.S. at 292-93, quoting 37 U.S.C. § 404(a)(1) (emphasis supplied by the Court).


50. *Id.* at 307. See *Williams* v. Patterson, 286 F.2d 333, 340 (5th Cir. 1961). The overnight rule was explained in *Williams* as follows:

If the nature of the taxpayer's employment is such that when away from home, during released time, it is reasonable for him to need and to obtain sleep or rest in order to meet the exigencies of his employment or the business demands of his employment, his expenditures (including incidental expenses, such as tips) for the purpose of obtaining sleep or rest are deductible traveling expenses under section 162(a)(2) of the 1954 Code.

*Id.* The IRS has long adhered to the "sleep or rest" requirement although Treasury Regulations made no reference to it prior to 1958. *Correll* v. United States, 369 F.2d 87, 89 (6th Cir. 1966), rev'd, 389 U.S. 299 (1967). See Treas. Reg. §§ 1-162-17(b)(3)(ii), -17(b)(4), -17(c)(2) (1958) (requiring a taxpayer who seeks a deduction for business expenses in excess of reimbursement received from his employer, or for expenses for which he did not account to his employer, to provide specified information on his tax return, including "the total amount of ordinary and necessary business expenses paid or incurred by him . . . broken down into such broad categories as transportation, meals and lodging while away from home overnight, entertainment expenses, and other business expenses").

51. 389 U.S. at 300. The taxpayer traveled from 150 to 175 miles daily, although he usually traveled no farther than 55 miles from home. *Id.* at 303 n.12. The taxpayer was required to eat these meals at customers' restaurants by his employer so that he could be reached by telephone. *Correll* v. United States, 369 F.2d 87, 89 (6th Cir. 1966), rev'd, 389 U.S. 299 (1967).
required neither sleep nor rest.\textsuperscript{52} Reversing the district court's and court of appeals' allowance of the deductions,\textsuperscript{53} the Supreme Court held that travel "away from home" under section 162(a)(2) must be travel which necessarily requires "sleep or rest."\textsuperscript{54}

As a result of the Supreme Court's failure to resolve the tax home question, the conflict among the courts of appeals remains. The United States Courts of Appeals for the Third,\textsuperscript{55} Fourth,\textsuperscript{56} Seventh,\textsuperscript{57} Eighth,\textsuperscript{58} and District of Columbia\textsuperscript{59} Circuits have agreed with the IRS' interpretation, adopting the tax home doctrine. On the other hand, the Second,\textsuperscript{60} Fifth,\textsuperscript{61} and

\textsuperscript{52} 389 U.S. at 300.
\textsuperscript{53} Id. at 300-01, 307.
\textsuperscript{54} Id. at 302-07. Although the petitioner in Correll sought to deduct only meal expenses, the Court's decision sustaining the validity of the IRS' rule suggests that the "sleep or rest" requirement applies to all expenses deductible under § 162(a)(2). See id. at 301-02, 304-07 & n.20. This view has been adopted by the Ninth Circuit. See Sanders v. Commissioner, 439 F.2d 296, 298 (9th Cir.), cert. denied, 404 U.S. 864 (1971). In Sanders, the court held that transportation expenses incurred in travel to and from work by taxpayers employed at an Air Force facility but not permitted to live there were nondeductible commuting expenses. 439 F.2d at 297-99. The Sanders taxpayers contended that they were entitled to a deduction on the basis of Wright v. Hartsell, 305 F.2d 221 (9th Cir. 1962), in which a taxpayer, unable to live near the Atomic Energy Commission site at which he was employed, was permitted a deduction for commuting expenses. 439 F.2d at 298. The Ninth Circuit, however, found Hartsell "undermined by subsequent authority." Id. at 298-99. Relying on Correll, the court concluded that "expenses incurred on the daily trips in the case before us can no longer be deductible under § 162(a)(2) ...." Id. at 298. In addition, the court noted that Smith v. Warren, 388 F.2d 671 (9th Cir. 1969), had "impliedly rejected necessity as a principled basis of an exception to the general rule that commuting expenses are nondeductible personal expenses." 439 F.2d at 299. Consequently, it appears that the exceptions to the rule of nondeductibility of commuting expenses recognized prior to Correll for taxpayers commuting to temporary jobs and for those having to commute long distances (see note 16 supra) are no longer valid, at least for taxpayers residing in the Ninth Circuit. See also Edmerson v. United States, 72-2 Tax Cas. 85,744, 85,744 (9th Cir. 1972); United States v. Taunton, 407 F.2d 243, 244-47 (10th Cir.), cert. denied, 396 U.S. 812 (1969). But see Comment, supra note 16, at 442 (contending that to apply Correll to one-day trip transportation expenses as well as to meals is contrary to previous authority under § 162(a)(2) and improper reliance on dicta). See generally Note, 35 ALB. L. REV. 843 (1971). For a discussion of Hartsell, see note 65 infra. For a discussion of Smith, see note 72 infra.
\textsuperscript{55} See Coever v. Commissioner, 297 F.2d 837 (3d Cir. 1962) (per curiam).
\textsuperscript{56} See Bercaw v. Commissioner, 165 F.2d 521, 523-24 (4th Cir. 1948); Barnhill v. Commissioner, 148 F.2d 913, 917 (4th Cir. 1945). For a discussion of Barnhill, see notes 34-38 and accompanying text supra.
\textsuperscript{57} See England v. United States, 345 F.2d 414, 417 (7th Cir. 1965).
\textsuperscript{58} See Cockrell v. Commissioner, 321 F.2d 504, 506-07 (8th Cir. 1963); Ney v. United States, 171 F.2d 449, 453-54 (8th Cir. 1948), cert. denied, 336 U.S. 967 (1949).
\textsuperscript{60} See Rosenspan v. United States, 438 F.2d 905 (2d Cir.), cert. denied, 404 U.S. 864 (1971). In affirming the disallowance of a deduction for travel expenses sought by a traveling salesman who maintained no permanent personal residence, the Second Circuit held that "home" means personal residence. 438 F.2d at 910-12. The court found that the third Flowers condition, requiring that the expenses be compelled by the "exigencies of business," will, in most cases, produce the same result as the tax home doctrine and protect the revenue sought. Id. at 911. The Rosenspan court stated:
\[E]xamination of ... cases ... endorsing the "business headquarters" test has revealed almost none, aside from the unique situations involving military personnel ... , which cannot be explained on the basis that the taxpayer had no permanent residence, or was not away from it, or maintained it in a locale apart from where he regularly worked as a matter of personal choice rather than business necessity. This principle likewise affords a satisfactory rationale for the "temporary" employment cases ... .
Sixth, the Ninth Circuit's 1969 decision

Notwithstanding its early rejection of the tax home doctrine in Wallace, which was followed in later cases, the Ninth Circuit's 1969 decision

_id. at 911-12 (footnote omitted), citing Note, supra note 22, at 162-63. In addition, the Rosenspan court found the Flowers approach preferable in that it "better effectuates the congressional intent in establishing the deduction and thus provides a sounder conceptual framework for analysis . . . ." 438 F.2d at 912. See also Coburn v. Commissioner, 138 F.2d 763, 764-65 (2d Cir. 1943).

The Second Circuit in Rosenspan also clarified its decision in O'Toole v. Commissioner, 243 F.2d 302 (2d Cir. 1957), which had been interpreted by the Supreme Court as upholding the tax home doctrine. See Commissioner v. Stidger, 386 U.S. at 292 n.11. The Rosenspan court explained that, in O'Toole, the tax home concept merely provided "an alternate ground of decision," 438 F.2d at 910 n.3, 911.

61. See Steinhort v. Commissioner, 335 F.2d 496, 504-05 (5th Cir. 1964). See also United States v. Le Blanc, 278 F.2d 571, 571-77 (5th Cir. 1960); Flowers v. Commissioner, 148 F.2d 163, 163-64 (5th Cir. 1945). For a discussion of Flowers, see notes 39-47 and accompanying text supra.

But see Curtis v. Commissioner, 449 F.2d 225, 226-27 (5th Cir. 1971); Jones v. Commissioner, 444 F.2d 508, 509-10 (5th Cir. 1971). In Jones, the Fifth Circuit disallowed a deduction for expenses for meals and lodging incurred by a taxpayer who moved his family from Texas to Ohio in order to attend school on a fellowship provided by his employer. 444 F.2d at 509. The court found that "[f]or purposes of section 162(a), a taxpayer's home is his abode at his principal place of business or employment." _id., citing Wills v. Commissioner, 411 F.2d 537, 540-41 (9th Cir. 1969) (discussed at notes 66-73 and accompanying text infra); Ney v. United States, 171 F.2d 449, 451-55 (8th Cir. 1948), _cert. denied, 336 U.S. 967 (1949). The Fifth Circuit, in Curtis, similarly denied a deduction for living expenses incurred by a taxpayer in Illinois where he worked during a three-year period as a pipefitter on 26 different jobs while maintaining a residence for his wife in Kerrville, Texas. 449 F.2d at 226. Relying on Jones, the court reiterated that the taxpayer's "home" is "his abode at his principal place of business or employment." _id. at 227, citing Jones v. Commissioner, 444 F.2d at 509, and cases cited therein. While the Fifth Circuit has been generally viewed by other courts as one of those jurisdictions which have rejected the tax home doctrine, see Commissioner v. Stidger, 387 U.S. 287, 291 & n.8 (1967); Steinhort v. Commissioner, 335 F.2d 496, 504 n.24 & 505 (5th Cir. 1964), these more recent decisions appear to indicate that it has abandoned its original position in favor of one similar to that adopted by the Ninth Circuit in the instant case.

62. See Commissioner v. Mooneyhan, 404 F.2d 522, 527-28 (6th Cir. 1968), _cert. denied, 404 U.S. 864 (1971); Burns v. Gray, 287 F.2d 698, 699-701 (6th Cir. 1961). In Burns, the Sixth Circuit allowed a deduction to a racetrack official for travel expenses incurred while away from his residence in carrying out the duties of his employment. _id. at 699, 701. The court held that "'[h]ome is not synonymous with 'business situs.' . . . Burns' home, within the intention of the statute, is the place where he has lived for twenty-five years . . . ." _id. at 700. The generally authorities cited note 22 supra. This view has received widespread support by the commentators, most of whom have proposed abolishing the tax home concept. See, e.g., Haddon, supra note 22, at 272-73; Traveling Taxpayer, supra note 22, at 141-44; Note, supra note 22, at 162-63.

63. See notes 30-38 and accompanying text supra.

65. See, e.g., Stidger v. Commissioner, 355 F.2d 294, 299-300 (9th Cir. 1965), rev'd, 386 U.S. 287 (1967) (discussed at note 48 supra); Wright v. Hartt, 305 F.2d 221 (9th Cir. 1962); Crowther v. Commissioner, 269 F.2d 292, 298-99 (9th Cir. 1959). Hartt involved a skilled laborer who resided in Pocatello, Idaho. _id. at 222. During a two-year period, the taxpayer had four jobs with various contractors engaged in construction work at the Atomic Energy Commission (AEC) site located 70 miles from his home. _id. The AEC site covered 1.500 square miles of a desert area in southeastern Idaho and was remote from any habitable community. _id. The taxpayer commuted daily to the site from his home and received a travel allowance from his employer. _id. at 223. On his 1955 income tax return, he deducted from gross income as a travel expense the amount of the allowance received. _id. The Commissioner disallowed the deduction on the basis that no expenses were not incurred "while away from home" when traveling to the AEC site. _id. Relying on Wallace, which the court stated had "unequivocally declared that

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in *Wills v. Commissioner* 68 casts doubt upon the status of the rule within that circuit.67 Wills, a professional baseball player for the Los Angeles Dodgers, maintained a personal residence near Spokane, Washington,68 and claimed a deduction for the costs of travel, meals, and lodging incurred while in Los Angeles.69 The IRS disallowed the deduction and the Tax Court upheld that determination.70 Relying on the third *Flowers* condition 71 and on case law which it interpreted as equating tax home for purposes of Code section 162(a)(2) with the taxpayer’s principal place of business,72 the Ninth Circuit affirmed and held that Wills’ tax home was Los Angeles.73

"home" as it is used in [the] statute should be given its ordinary and usual meaning," the Ninth Circuit rejected the Commissioner’s position. Id. at 223-24. While the Commissioner argued that “a literal application of the Wallace doctrine would permit the use of commuting and other non-deductible personal expense to reduce taxable income,” the Ninth Circuit found that the statutory requirement that a travel expense be incurred in pursuit of a trade or business “clearly serves to prevent such a wrong result.” Id. Analogizing Hartsell’s situation to that of the taxpayer with two jobs who “obviously cannot live simultaneously in both localities,” and who is generally entitled to deduct the cost of commuting to job sites, the Hartsell court concluded that “a taxpayer’s inability to live near his job site is a valid ground for deduction as travel expense of the resulting cost of his transportation, food and lodging.” Id. at 225. See note 16 supra. The court cautioned, however, that a taxpayer in these circumstances would be expected to “mitigate his expense by moving as near to the job site as is reasonable,” and that the amount of his deduction would be “gauged in that light.” 305 F.2d at 225. But see Sanders v. Commissioner, 439 F.2d 296, 298-99 (9th Cir.), cert. denied, 404 U.S. 864 (1971) (maintaining that the holding of Hartsell has been undermined by Correll). For a discussion of Correll, see notes 49-54 and accompanying text supra.

See also Crowther v. Commissioner, 269 F.2d at 298-99 (where there were no living accommodations available at distant log sites and taxpayer, engaged in occupation of felling trees, lived in centrally located city and commuted to log sites daily, transportation expenses were held deductible; court rejected government’s contention that taxpayer’s tax home was at various log sites). 66. 411 F.2d 537 (9th Cir. 1969).
67. See Rosenspan v. United States, 438 F.2d 905, 911 (2d Cir.), cert. denied, 404 U.S. 864 (1971) (citing *Wills as upholding the tax home doctrine*).
68. 411 F.2d at 538-39.
69. Id. at 539.
70. See 48 T.C. 308, 310-14 (1967).
71. 411 F.2d at 539. The *Wills* court explained:

*Flowers stated* that travel expenses in pursuit of business can arise only when the employer’s business forces the taxpayer to travel and live temporarily in some place other than the principal place of business, thereby advancing the interests of the employer. And ... *Flowers* also stated that business trips are to be identified in relation to business demands and the traveler’s business headquarters, and that exigencies of business rather than the personal conveniences of the traveler must be the motivating factors.

Id. at 540 (emphasis in original).
72. Id. at 540, citing Commissioner v. Stidger, 386 U.S. 287, 296 (1967); Smith v. Warren, 388 F.2d 671, 672-73 (9th Cir. 1968); Steinhort v. Commissioner, 335 F.2d 496, 503-05 (5th Cir. 1964); Wright v. Hartsell, 305 F.2d 221, 223-24 (9th Cir. 1962).

The Court’s interpretation of prior case law here is puzzling. *Stidger* presented a distinguishable fact situation (see note 48 supra), while the cited portion of the *Hartsell* opinion clearly reaffirms the *Wallace* court’s rejection of the tax home doctrine (see note 65 supra). Furthermore, *Smith* and *Steinhort* appear to have been based upon the rule of nondeductibility of commuting expenses, rather than upon the tax home doctrine. In *Smith*, the Ninth Circuit had held that a ship pilot who received his work assignments through an office in Seattle, Washington, was not entitled to deduct transportation expenses incurred in traveling between his home and the port in Seattle from which he undertook approximately half of his pilotage
Against this background, the Ninth Circuit in *Coombs* began its analysis by summarily rejecting the taxpayers' claims that commuting expenses incurred in travel between their homes and the entrance to the Test Site were deductible. Turning to the taxpayers' claim that they were entitled to deduct the cost of meals and lodging incurred as a result of their having to

assignments. 388 F.2d at 672-73. The IRS had allowed the taxpayer a deduction for transportation expenses incurred in travel between job sites and between his home and ports located within an area ranging from 100 miles north of to 60 miles south of Seattle, from which he also undertook assignments. *Id.* at 672. The taxpayer argued that his residence was his principal place of business and that his transportation expenses should therefore not be considered commuting expenses. *Id.* The Ninth Circuit, however, affirmed the district court's disallowance of the claimed deduction, finding that "the trial court could properly conclude, on this record, that appellant's principal place of business was in Seattle, rather than his home, and the costs of his transportation between those two points were therefore non-deductible commuting expenses." *Id.* at 673. The court explained that the taxpayer's situation "was not essentially different from that of other taxpayers . . . who . . . prefer to live in the suburbs and maintain limited personal office or shop facilities in their residence, but who commute daily to their principal place of employment in the city." *Id.* The factual situation and holding in *Steinhort* were virtually identical to those of *Smith*. See 335 F.2d at 503-05.

73. 411 F.2d at 540. Also serving to create confusion as to the tax home rule within the Ninth Circuit is the decision of *Frank v. United States*, 577 F.2d 93 (9th Cir. 1978). The taxpayer in *Frank*, an administrative assistant to a United States Senator, maintained a residence in Oregon and incurred substantial expenses while performing duties in Washington, D.C., and traveling around the world in order "to report to the senator on various problem areas." *Id.* at 94. The district court allowed the taxpayer deductions for these expenses. *Id.* On appeal by the government, the Ninth Circuit upheld the allowance of the deductions and agreed with the trial court that "Oregon was the taxpayer's home for tax purposes." *Id.* at 96. The court did not, however, base this determination on the fact that the taxpayer maintained a residence in Oregon. See *id.* at 97 & n.3. Rather, it stated:

While the general rule may be that a person's home should be his place of business for tax purposes, the Supreme Court has not so held. We do not believe the rule should be indiscriminately applied, and instead follow the statement of the Fifth Circuit that where one's "home" is for tax purposes is essentially a question of fact . . . . Here in view of the fact that the taxpayer's net income in Oregon for the four years in question was [more than 98% of his total income], we cannot say that the trial court was clearly in error in its decision.

*Id.* at 97 (citations and footnotes omitted).

74. 608 F.2d at 1272, citing *Sanders v. Commissioner*, 439 F.2d 296, 299 (9th Cir.), cert. denied, 404 U.S. 864 (1971). See Commissioner v. *Flowers*, 326 U.S. at 473; notes 16 & 19-20 and accompanying text [*supra*]. The *Coombs Court* also rejected the appellants' claim that they were entitled to deductions for their transportation expenses incurred in travel between the entrance to the Test Site and their individual work stations. 608 F.2d at 1277-78. Observing that employees who must travel from one job site to another are generally entitled to deduct transportation costs other than for travel to the initial job site and from the final job site, *id.*, the Ninth Circuit found that the taxpayers here would be entitled to a deduction only if the entrance to the Test Site could be considered a work site. *Id.* at 1278. It then determined that the conclusion of the district court and the Tax Court that the entrance is an "arbitrary middle point of the taxpayers' commute to work" was not clearly erroneous. *Id.* While recognizing the added hardship on those taxpayers who commuted to the forward areas of the Test Site, the court explained that "the taxpayers [did not report] to the forward work areas 'for the convenience' of their employers, any more than any employee who reports to his place of work does so for the convenience of his employer." *Id.* For a discussion of the rule which allows an employee to deduct expenses incurred in travel between job sites, [*see note 16 supra*].

In addition, the court rejected appellants' claim that the IRS had discriminated against the employees of private contractors at the Test Site in favor of federal employees. 608 F.2d at 1278. See [*note 13 supra*]. Noting that the claim was based solely on a "private letter ruling" which . . . simply set forth the rules for withholding . . . and including [per diem] allowances in income," the Ninth Circuit concluded that the lower courts did not err in finding this claim to be without merit. 608 F.2d at 1278.
work overtime and remain at the Test Site overnight, the court concluded that these expenses would be deductible only if within the scope of section 162(a)(2).

In order to determine the applicability of section 162(a)(2) and whether the taxpayers were "away from home" within the meaning of that provision, the Ninth Circuit found it necessary to address the tax home question. Noting an apparent conflict among its prior decisions as to whether a taxpayer's tax home is his residence or principal place of business, the Coombs court reviewed the case law. By distinguishing several earlier decisions, the Ninth Circuit determined that it had "never held that the

75. 608 F.2d at 1273. For the text of § 162(a)(2), see note 7 supra. The court noted that the fact that an employee may find it necessary to eat a meal away from his personal residence does not, in itself, entitle him to a deduction for the cost of the meal. Id. at 1272-73, citing United States v. Correll, 389 U.S. at 302 n.7; Commissioner v. Bagley, 374 F.2d 204, 206 (1st Cir. 1967); Drill v. Commissioner, 8 T.C. 902, 903-04 (1947). See note 17 supra. For a discussion of Correll, see notes 49-54 and accompanying text supra. The Coombs court stated that "we [do not] suppose, if a commuter were required to work late at his place of business, that any court would distinguish between his lunch or his supper." 608 F.2d at 1273, quoting Commissioner v. Bagley, 374 F.2d at 206.

As a corollary to this rule, the Coombs court rejected the taxpayers' contention that overtime-related expenses were deductible as "ordinary and necessary business expenses" pursuant to the general provisions of § 162(a) of the Code. 608 F.2d at 1273. The Cox taxpayers asserted that they were entitled to a deduction for expenses under § 162(a) on the basis of Sibla v. Commissioner, 65 T.C. 422 (1977), appeal docketed, No. 78-1295 (9th Cir. Feb. 8, 1978) and Cooper v. Commissioner, 67 T.C. 870 (1977), appeal docketed, No. 77-3815 (9th Cir. Dec. 6, 1977). 608 F.2d at 1273. Those cases held that where regulations required firemen to pay for their meals and eat them in the firemen's mess while in the station house, the firemen could deduct the payments as a business expense under § 162(a). Sibla v. Commissioner, 68 T.C. at 431-32; Cooper v. Commissioner, 67 T.C. at 872-74. The Ninth Circuit concluded that even if it were to affirm those cases, they would be inapposite because the Cox taxpayers were not required to purchase meals or to rent lodging from a particular source as a condition of employment. 608 F.2d at 1273.

76. 608 F.2d at 1274-76.

77. Id. at 1274, citing Frank v. United States, 577 F.2d 93, 97 n.3 (9th Cir. 1978). See also notes 64-73 and accompanying text supra.

78. 608 F.2d at 1274-76. For the court's analysis of prior Ninth Circuit rulings, see note 79 infra. The court also rejected the IRS' reliance on Commissioner v. Stidger, 386 U.S. 257 (1967). 608 F.2d at 1275. For a discussion of Stidger, see note 48 supra. The Coombs court explained that "Stidger only held that, insofar as military personnel are concerned, their permanent duty stations are also their homes for the purpose of determining the deductibility of travel expenses." 608 F.2d at 1275, citing 386 U.S. at 296.

79. 608 F.2d at 1274-76, distinguishing Frank v. United States, 577 F.2d 93 (9th Cir. 1978) (distinguished on the ground that it dealt only with the question of fact as to which residence of a taxpayer having more than one residence is his principal place of business); Wills v. Commissioner, 411 F.2d 537 (9th Cir. 1969) (explained as having held that "Wills' tax home was [his residence in] Los Angeles, not that his home was the Dodger ballpark"); Smith v. Warren, 388 F.2d 671 (9th Cir. 1968) (per curiam) (distinguished on the ground that it considered the concept of tax home in connection with the nondeductibility of commuting expenses but not for purposes of travel expense deductions under § 162(a)(2)); Wright v. Hartsell, 305 F.2d 221 (9th Cir. 1962) (distinguished on the basis that the Correll "sleep or rest" rule now precluded the deduction which the taxpayer was allowed in Hartsell); Wallace v. Commissioner, 144 F.2d 407 (9th Cir. 1944) (distinguished on the ground that the taxpayer's employment was of a temporary nature). Frank is discussed at note 73 supra; Wills at notes 64-73 and accompanying text supra; Smith at note 72 infra; Hartsell at note 65 supra; Wallace at notes 30-33 and accompanying text supra.
the vicinity

Recognizing next incurred overnight taxpayers homes Ninth result finds supra.

608 F.2d at 1274, quoting Curtis v. Commissioner, 449 F.2d 225, 227 (5th Cir. 1971). For a discussion of Curtis, see note 61 supra. See also note 99 infra.

While holding that a taxpayer's tax home is his personal residence at his principal place of business, and not the place of business, the Ninth Circuit nevertheless acknowledged:

[When a taxpayer accepts employment either permanently or for an indefinite time away from the place of his usual abode, the taxpayer's tax home will shift to the new location—the vicinity of the taxpayer's new principal place of business. . . . In such circumstances, the decision to retain a former residence is a personal choice, and the expenses of traveling to and from that residence are nondeductible personal expenses.]

608 F.2d at 1275-76 (citations omitted).

80. 608 F.2d at 1274, quoting Curtis v. Commissioner, 449 F.2d 225, 227 (5th Cir. 1971). For a discussion of Curtis, see note 61 supra. See also note 99 infra.

81. 608 F.2d at 1275, citing Barnhill v. Commissioner, 148 F.2d 913, 917 (4th Cir. 1945). For a discussion of Barnhill, see notes 34-38 and accompanying text supra. See also note 98 infra.

82. 608 F.2d at 1276.

83. Id.

84. See 608 F.2d at 1276. It is clear that, under the requirements of the statute and the third prong of the Flowers test, a particular overnight stay must be deemed "necessary" in order for expenses thereby incurred to fall within the scope of § 162(a)(2). See notes 7 & 45 supra. Whether a particular overnight stay is necessary is a question of fact to be determined by the trial court. 608 F.2d at 1276.

85. 608 F.2d at 1276. While affirming the rationale of Correll that "only the taxpayer who finds it necessary to stop for sleep or rest incurs significantly higher living expenses as a direct result of his business travel," id., quoting United States v. Correll, 389 U.S. at 304-05, the Ninth Circuit in Coombs found that "the combination of the unavoidable distance between their homes and places of work and the employer's requirement of the performance of overtime work" constituted a circumstance which fell within the scope of § 162(a)(2) and entitled the taxpayers to deduct the expenses of food and lodging incurred in overnight stays. 608 F.2d at 1276. With regard to transportation expenses, however, the court did not believe "that the stay overnight miraculously transform[ed] the costs of commuting which the taxpayer [had] already incurred on the most recent trip to the Test Site or those which he [would] incur later, on the next trip home, into deductible travel expenses, within the meaning of section 162(a)(2)." Id. Recognizing that, in many instances, a taxpayer who travels and stays overnight away from the vicinity of his home and employer may deduct the cost of all meals and transportation, the court acknowledged that it had made a somewhat arbitrary distinction. Id. at 1277. Nevertheless, it believed the distinction to be justified in light of "the competing concerns of equity between the taxpayers here and the average daily commuter, and the policy of section 162(a)(2) to take
By interpreting the word "home" for purposes of section 162(a)(2) to mean the taxpayer's personal residence nearest his place of business, it is suggested that the Ninth Circuit in Coombs has taken a sensible approach to the tax home question. Such an interpretation of "home" has long been advocated as effectuating the intent of Congress in enacting the statutory provision and as providing greater conceptual consistency. Moreover, the court's requirement that the taxpayer's home and place of business be in the same general vicinity aids in preventing the deduction of commuting and living expenses by a taxpayer who locates his home far away from his place of business as a matter of personal choice and, thus, preserves the revenue which the IRS has sought to protect through the tax home doctrine. Although this objective is largely achieved by the third prong of the Flowers test and by the Correll "sleep or rest" rule, the rule stated by the Ninth Circuit in Coombs has the advantages of 1) providing more explicit protection for the revenue desired, and 2) clarifying the situations in which a deduction will be permitted when the Flowers test is difficult to apply. Thus, the rule enunciated in Coombs preserves revenue in cases like Wills, where the taxpayer chooses to maintain a personal residence at a distance from his place of business, while it also provides a measure of relief for taxpayers who, like the appellants in Coombs, are unable to live near their jobs.

account of the extraordinary, often duplicative costs, especially for lodging, incurred while traveling away from home." Id. (citations omitted).

The Ninth Circuit's resolution of the "competing concerns" here involved clearly reflects the "duplication of expenses" rationale behind the statutory provision---i.e., while finding that the taxpayers could deduct the cost of "extra meals and lodging" incurred during overnight stays, the court expressly stated that the cost of commuting incurred on the trips immediately preceding and following the overnight stay, and the expense of lunch on the following day, were not deductible since they were expenses which the taxpayers "ordinarily incur at their place of work." Id. at 1276-77 (emphasis added).

86. See notes 60 & 63 supra.
87. See note 20 and accompanying text supra.
88. See Rosenspan v. United States, 438 F.2d 905, 911 (2d Cir.), cert. denied, 404 U.S. 864 (1971); Traveling Taxpayer, supra note 22, at 141; Note, supra note 22, at 163; notes 60 & 63 supra. Regarding the third prong of the Flowers test, see note 45 and accompanying text supra. For a discussion of the Correll "sleep or rest" rule, see note 54 and accompanying text supra.
89. See notes 55-63 and accompanying text supra. The continuing controversy over the tax home issue is indicative of the difficulty inherent in the application of the Flowers test. See 608 F.2d at 1275 n.2. The Coombs court noted the difficulty of determining the deductibility of travel expenses incurred by a taxpayer who "earns a substantial portion of his income and resides in each of two or more locales." Id.
90. See notes 19-20 and accompanying text supra. For a discussion of Wills, see notes 64-73 and accompanying text supra.
91. See text accompanying notes 83-85 supra. It can hardly be denied that the tax treatment of commuting expenses impacts more harshly on taxpayers unable to live near their job sites due to the nature of the work area than on ordinary commuters. As stated by the Ninth Circuit in Wright v. Hartsell, 305 F.2d 221, 225 (9th Cir. 1962),

[It is difficult to conceive of a situation which makes it more necessary for a taxpayer to incur travel expenses than the unfitness of the work area for civilized habitation. Such a taxpayer has less choice with respect to his place of abode than the taxpayer who prefers not to live in his work area simply because of the temporary nature of his employment there; his situation is similar to that of the public official who must maintain his home elsewhere, or of the taxpayer with two widely separated jobs, who obviously cannot live simultaneously in both localities.]

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It is submitted, however, that although the Ninth Circuit's definition of tax home appears to resolve equitably the competing concerns of the taxpayer and the government, the court's reasoning in Coombs is deficient in several respects. Most significantly, the Ninth Circuit's analysis of prior cases appears to be strained. In construing prior decisions to justify its conclusion that the definition of tax home which it stated in Coombs has always been the rule within the Ninth Circuit,92 the Coombs court, it is suggested, has failed to acknowledge what appears to be an obvious difference between the view originally expressed in Wallace and followed in subsequent cases93 and the position taken by the court in Wills and Coombs. The Wallace court's rejection of the tax home doctrine was clearly based on its belief that the word "home" as used in the statute must be construed in its ordinary sense.94 In defining a taxpayer's tax home as his actual "home," the Wallace court went so far as to distinguish a taxpayer's home from a mere "place of abode" on the basis of the "private and intimate attitudes and relationships" associated with a home.95 It would appear that, regardless of the factual distinction between Wallace and Coombs,96 the Ninth Circuit has clearly rejected the "home-is-where-the-heart-is" type of interpretation espoused in Wallace and has replaced it with a more dispassionate definition—the taxpayer's "abode at his principal place of business or employment."97

While not articulated as such by the court, the rule stated in Coombs would appear to represent a compromise between the IRS' view and the Ninth Circuit's position in Wallace. Insofar as a taxpayer with more than one place of residence is concerned, his tax home under the Coombs rule will be his residence nearest his principal place of business. Similarly, the tax home of a taxpayer having one residence located in the general area of his place of business or employment will be that residence. For these taxpayers, the Coombs rule will have the same effect with regard to the deductibility of travel expenses as does the tax home doctrine.98 But for taxpayers who, like the appellants in Coombs, are unable to live near their jobs, the Coombs

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92. See notes 77-80 and accompanying text supra.
93. See notes 30-33 and accompanying text supra; note 65 supra.
94. See note 33 and accompanying text supra.
95. See 144 F.2d at 410-11; note 33 and accompanying text supra.
96. See note 79 and accompanying text supra.
97. See notes 64-73 and accompanying text supra; text accompanying notes 80-81 supra. See also Frank v. United States, 377 F.2d 93, 96-97 (9th Cir. 1967), discussed at notes 73 & 79 supra.
98. See notes 23-29 and accompanying text supra. For most taxpayers, the Coombs rule will operate in the same manner as that set forth by the Fourth Circuit in Barnhill. See notes 34-38 and accompanying text supra.
rule operates to allow them a deduction for otherwise qualifying travel expenses incurred at their place of business.\textsuperscript{99}

While the unique factual situation presented in Coombs\textsuperscript{100} may enable courts to distinguish subsequent cases, the significance of the opinion lies in its treatment of the tax home issue. By reaffirming that a taxpayer's tax home is his personal residence but finding a statutory requirement that the taxpayer's residence be in the general area of his employment, the Ninth Circuit has provided a measure of fairness to taxpayers in the circumstances presented here and has eliminated an unnecessary, artificial construction from the law while preserving the strong policy considerations behind it.\textsuperscript{101}

In light of the widespread dissatisfaction with the tax home concept\textsuperscript{102} and the Supreme Court's disinclination to address the issue,\textsuperscript{103} the Coombs approach to determining the tax home of taxpayers unable to live near their jobs may well serve as a model for other courts of appeals.

\textbf{Beth A. Ungerman}

\textsuperscript{99} See notes 80-81 and accompanying text supra. See also note 61 supra. While the Fifth Circuit has articulated the same rule for determining “tax home” as that set forth in Coombs, see Curtis v. Commissioner, 449 F.2d 225, 227 (5th Cir. 1971), the Ninth Circuit is the first court to apply the rule to a taxpayer having only one place of abode located at a distance from his place of employment. See 608 F.2d at 1274-75.

\textsuperscript{100} See notes 1-6 and accompanying text supra.

\textsuperscript{101} See notes 87-91 and accompanying text supra.

\textsuperscript{102} See notes 60-63 and accompanying text supra.

\textsuperscript{103} See notes 46-48 and accompanying text supra.
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