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Deduction of Living Expenses from Gross Income

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1. Reference is made to your memorandum to Mr. , dated 29 January 1945, containing inquiries concerning the allowances, as deductions, from gross income for Federal Income Tax purposes, of living expenses of persons working for the Federal Government in Washington, D. C. but maintaining a permanent residence elsewhere.

2. It would seem that the expenses are allowable, if at all, under Section 23 (a) of the Current Revenue Act. This section provides in part that, in computing net income there shall be allowed as deductions all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business and travelling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business. Regulation 111, concerning this Section, provides that, "If a trip is solely on business, the reasonable and necessary travelling expenses, including railroad fares, meals, and lodging, are business expenses and deductible from gross income."

3. The Board of Tax Appeals has held that expenses are deductible under Section 23(a) only while the taxpayer is away from his place of business, employment, or the post or station at which he is employed, in the prosecution and carrying on of a trade or business. 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. Mort L. Sixler, 5 B.T.A. 1161; also Charles E. Duncan, 17 B.T.A. 1032, affirmed without opinion, 47 Fed. (2d) 1002.

4. In George W. Lindsay, 34 B.T.A. 940, it is concluded that "home" as used in Section 23(a) means business location, post, or station, citing the Mort L. Sixler and Charles E. Duncan cases, supra. In the instant case a

Congressman from New York was not permitted to deduct living expenses while in Washington since it was held that his station or "home" by reason of his official position was Washington and not New York. Similarly, in W. L. Tracy, 39 B.T.A. 578, it was held that, a movie star maintaining a legal residence and home in Pennsylvania, but pursuing a career in Hollywood, cannot deduct his living expenses in Hollywood, for that is his home."

5. In Walter F. Brown, 15 B.T.A. 832, Dec. 4424, it was held that travelling expenses to and from Washington, including meals and lodging while there, paid by one holding a Government position requiring his presence there about half the time, and who retained his home and professional connections in another city, were deductible. The following opinion was written in 1943 and apparently is still being followed. So-called dollar-a-year men and others rendering part-time service to the Government on a per diem basis are taxable on the full amounts received, including expense allowances, and may deduct their actual expenses. These include lodging and meals if the taxpayer continues in private employment at his original place of business and renders only intermittent services to the Government, S.C.M. 23672, 1943 C.B. 66.

6. The case of Coburn v. Commissioner of Internal Revenue, Circuit Court of Appeals, 2d Cir., 29 November 1943, 138 Fed. (2d) 763, should be considered. Here an actor who had lived in New York City since 1900 and was an actor and manager there, received five short-term contracts during 1938 which took him to Hollywood for a total of 265 days. The Court upheld taxpayer's contention that each contract was a mere temporary diversion from a lifelong career on the stage in New York. Thus, the time spent in Hollywood did not wrest him from New York permanently and his "home" remained there, whether the word be construed in its usual domiciliary sense or in the special "tax sense." The living expenses in California were held to be deductible under Section 23 (a).

7a. In answer to question 1 in your memorandum, it appears that a person working in Washington with a War Agency in a classified Civil Service position, thus maintaining a residence here, but continuing his former permanent residence in Chicago, may not deduct any of his living expenses in Washington for income tax purposes.

b. As to Question 2, if the same taxpayer is placed in a WOC or WAE status and maintains his home and private employment at another city, merely performing intermittent services for the Government, his living expenses in Washington would be deductible. A taxpayer in such case should

include in gross income all amounts received, including per diem and expense allowances and is entitled to deduct therefrom his actual expenses, including lodging and meals. Where the status of the taxpayer remains the same in all respects, the mere fact that he has served 180 days on a WOC basis, would not seem to change the general rule applicable in this type of case.

8. The facts of each particular case will have to be considered carefully in determining whether or not the rules given in Paragraph 7 are to be applied. In considering the facts in any given case, it should be borne in mind that a taxpayer claiming a deduction must bring himself squarely within the terms of a statute expressly authorizing it. Hales-Mullaly, Inc. v. Commissioner of Internal Revenue, CCA 1942, 131 Fed. (2d) 509.

9. These problems were discussed by the undersigned with Mr. W. B. Hill of Internal Revenue (Ext. 2244). He confirmed the conclusions set out in Par. 7 above. The opinion in C.C.M. 23672, 1943 C.B. 66, cited in Par. 5 above, is apparently still the guiding standard in that type of case. However, there seems to be no clear rule on what constitutes intermittent employment. It is clear that where a person spends half his time in a Government position and half at his previous employment, there are only intermittent services being rendered to the Government. It may not be so clear where, over a period of months or a year, he spends five days a week with the Government and only one day a week at his previous employment. A question of degree is involved and reference must be had to all the facts to determine the answer.

10. There is a recent decision which may affect the whole situation concerning the deductability of living expenses while away from home. This is the case of Wallace v. Commissioner of Internal Revenue, 17 July 1944, Circuit Court of Appeals, Ninth Circuit, 144 F. 2d 407. This decision reversed the Tax Court and construed "home" as used in Sec. 23 (a) (1) Internal Revenue Code, in its ordinary sense and not as meaning the taxpayer's place of business, employment, or the post or state in which he is employed.

In this case it was clearly established that the taxpayer had her residence in San Francisco and lived there with her husband. In order to fulfill a movie contract she spent a total of six months in Hollywood. The Court said her "relations with Hollywood and its vicinity were casual, professional,

and temporary. None of her private and intimate attitudes and relationship which go to make up home, as that place is ordinarily designated, found lodgment there."

The Court stated that the meaning given to "home" by the Tax Court operates to thwart the obvious purpose of Congress to tax net income and not gross income.

11. This decision, if followed by the Tax Court, is very significant. Upon discussing this case with Mr. Goddard (Ext. 2631) of the Bureau of Internal Revenue, he stated that the Bureau was not following the ruling in that case and is awaiting an opportunity to take the issue involved to the United States Supreme Court. It would appear that a taxpayer engaging in business while away from his home and claiming living expenses while so engaged, and not maintaining his business connections and employment at the same place as his home, would have such deductions disallowed by the Commissioner. To press such a claim would involve litigation which would probably result in the case being carried to the appellate courts if not the U. S. Supreme Court. This appears to be the attitude of the Bureau of Internal Revenue.

12. It is questionable how the U. S. Supreme Court would rule on the issue. Although an interpretation of "home" as meaning the taxpayer's place of business, employment, or the post or state in which he is employed, appears to be unwarranted, the Supreme Court has handed down many unique decisions unfavorable to the taxpayer.

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