Legal Memo

COPY

Subject: Whether an Army officer, stationed in Washington, who maintains a home elsewhere, may deduct living expenses incurred in Washington.

1. The question presented is whether an Army officer, stationed in Washington, who maintains a home elsewhere, may deduct living expenses incurred in Washington.

2. At the outset, it is obvious that to the extent that the officer is reimbursed through rental and subsistence allowances (which are excluded from gross income, Section 29.22(a)-3, Regulations 111, Jones v. United States, 60 Ct. Cl. 552) such expenses are not paid by the officer and he may not deduct them. I.T. 3474, C.B. 1941-1, p. 207. The question, therefore, is whether he may deduct the amount by which his expenses exceed the allowances.

3. Section 24(a) of the Internal Revenue Code provides in part as follows:

> "In computing net income no deduction shall in any case be allowed in respect of--
>
> (1) Personal, living, or family expenses,***."

4. Section 23 of the code in part provides:

> "In computing net income there shall be allowed as deductions:
>
> (a) Expenses.---
>
> (1) Trade or business expenses.---
>
> (A) In General.---All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including***traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business;***"

5. There is no question that the profession of an Army officer is a trade or business within the meaning of the statute. I.T. 1497, I-2 C.B. 89. Normally, however, living expenses are non-deductible under Section 24(a), unless they constitute "traveling expenses" under Section 23(a)(1)(A). It will be observed that to fall within that category, they must be incurred "while away from home in the pursuit of a trade of business."

6. The Bureau of Internal Revenue has long adhered to the view, in which the Board of Tax appeals (now Tax Court) has uniformly concurred, that a taxpayer's "home" within the meaning of the statute is the "place of business, employment, or the post or station at which he is employed" and 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 for his additional living expenses. Bixler v Commissioner, 5 B.T.A. 1181; Lindsay v Commissioner, 34 B.T.A. 840; Priddy v Commissioner, 43 B.T.A. 18, appeal dismissed (C.C.A. 5) 23 July 1941; Winborne v Commissioner, T.C. Memo, Docket No. 58, 8 June 1944; Barnhill v Commissioner, T.C. Memo, Docket Nos. 37, 38, 31 May 1944. In I.T. 1404, I-2 C.B. 146, it was expressly ruled that a naval officer who is stationed in one locality for an indefinite period of time is not engaged in traveling in pursuit of a trade or business and cannot deduct his living expenses at his station.

7. The Circuit Courts of Appeals for the Second and Ninth Circuits have, however, rejected the Board's view. In Coburn v. Commissioner, (C.C.A. 2) 138 F. (2d) 763, the taxpayer was an actor and manager in legitimate stage production in New York. He maintained there a house which he also used as his office. In 1938 he spent an aggregate of 263 days in California performing several short-term contracts to appear in motion pictures, and claimed as a deduction his living expenses in California. The Board of Tax Appeals held that during that year the taxpayer's principal occupation was that of a movie actor in California, and that, consequently, his "home" for statutory purposes was in California. The Circuit Court pointed out that the taxpayer always intended to return to New York, and his California residence was never intended to be anything but temporary. In holding, therefore, that the expense was incurred away from "home" the Court said:

> "In the ordinary meaning of the word Mr. Coburn's 'home' was in New York, not in California. The Commissioner urges that the statute uses the word in a special 'tax sense' which compels the opposite conclusion. But nothing in the statute bears evidence of any unusual meaning. Ordinarily, it is true, a man maintains his 'home' in the city or locality where he carries on his trade or business; and, if he chooses to live in the suburbs, it may well be that the expenses of daily travel

between 'home' and place of business are personal expenses rather than 'traveling expenses' within the meaning of the revenue acts. Appeal of Sullivan, 1 B.T.A. 93. But granting this and assuming that the words of the statute may be given a special 'tax sense', we are convinced that a taxpayer's home, even in such sense, ought to be limited to the place where he is regularly employed or customarily carries on business during the taxable year."

6. In Wallace v. Commissioner, (C.C.A. 9) ___F. (2d) ___, the taxpayer lived in San Francisco, but for the purpose of appearing in a motion picture, maintained a temporary residence in Hollywood. As in the Coburn case, the court cited the taxpayer's undeniable intention to return to San Francisco, and said:

"Our first inquiry is to ascertain whether there is any indication of an intention by Congress to employ the expression 'away from home in the pursuit of a trade or business' in the legislation under consideration other than according to the ordinary and usual meaning of the words used * * *.

"We have found nothing in section 23 (a)(1) of the Internal Revenue Code or in the earlier legislation from which this code provision is derived which denotes any intent by Congress to attribute to the word 'home' as therein used any unusual or novel meaning.

"Therefore the Tax Court in its effort to differentiate between the conceded 'domicile' and 'legal residence' of both petitioners after their marriage and their 'home' at such times, has, we think, invaded the domain of Congress in construing the term 'home' as used in the statute under consideration as meaning 'the taxpayer's place of business, employment or the post or station at which he is employed.' Had Congress intended that the word 'home' should not be understood and applied in its ordinary sense but rather as meaning the locale of employment of the taxpayer, it would have used a more appropriate term to express such an intent.

"A home in relation to the place of abode is 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.

* * *

"Petitioner Ina Claire Wallace's relations with Hollywood and its vicinity were casual, professional and temporary. None of her private and intimate attitudes and relationships which go to make up home, as that place is ordinarily designated, found lodgment there. Her physical presence and her place of abode in the vicinity of Hollywood were business necessities, and at no time did she manifest any intention or desire to remain there after completion of her work. All of her expenditures for which the deductions are claimed were allowable business expenses as distinguished from personal expenses and were incurred in the pursuit of and directly connected with a temporary contract of employment while she was away from her usual place of abode.

> "The clearly expressed purpose of Congress in enacting income tax laws is to impose tax burdens upon the net income of individuals, and in ascertaining such income when Congress has used only literal terms in specifying the allowable deductions from gross income such meaning of deductions must be accepted by the courts unless such course would lead to absurd results. We can conceive of no such results by giving to the word 'home' in the application of Section 23 (a)(1) of the Internal Revenue Code its normal and customary meaning. On the other hand, to judicially innovate a meaning of 'home' as the taxpayer's 'place of business, employment, or the post or station at which he is employed,' as the Tax Court has done, would, we think, operate to thwart the obvious purpose of Congress to tax net income and would in many cases tax the gross instead of the net income of individuals."

9. On the basis of these authorities there appears to be a strong argument for allowance of a deduction of unreimbursed living expenses by temporary officers; the rights of officers of the Regular Army, however, are not so clear. For the citizen-soldier who has maintained his peace-time home, it is clear that his additional quarters and subsistence expenses are temporary, and that he intends to return to his "home" as soon as he is released from active duty. His expenses would, therefore, be incurred away from "home" as the appellate courts have defined it. Most of such officers likewise have another "principal" business which they will resume. (See Powell v. Commissioner, 34 B.T.A. 655; Schurer v. Commissioner, 3 T.C. No. 68). It would seem, however, that those who have rented or sold their homes, and who, therefore, are incurring living expenses in only one place, could not successfully claim the deduction. If his expenses exceed his allowances by reason of his maintaining his family with him, however, the deduction is extremely doubtful. Likewise, for the professional soldier, the deduction is doubtful. The Army, of course, is the permanent business of the Regular Army officer and he cannot have a home apart from his station in the sense of a place to which he will return between temporary excursions. With the exception, perhaps, of actual combat stations, each station is really

his home. Accordingly, it is doubtful if his living expenses are "away from home."

10. For either officer, however, it is wholly unlikely that the Bureau will approve the deductions. Litigation, therefore, would almost inevitably follow a claim for the allowance of a deduction of living expenses.