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# TAX: EMPLOYEE'S MOVING EXPENSE IN EXCESS OF REIMBURSEMENT BY EMPLOYER AS DEDUCTIBLE BUSINESS EXPENSE

It is well settled that the cost of moving to accept or begin employment is not a deductible expense;<sup>1</sup> and any reimbursement, received from the employer, is includable in the employee's gross income.<sup>2</sup> But a particular area of difficulty centers around the expenses incurred by an employee in moving from one permanent post of duty to another, and the effect which these expenses have upon his gross income.

The Tax Court has recently held, in *Walter H. Mendel*, 41 T. C. No. 4, (Oct. 10, 1963), that the entire amount expended by an employee in moving from one permanent duty station to another is deductible to the extent that the amount expended is ordinary and necessary to accomplish the move. An employee may exclude the reimbursed amount from income or include the reimbursed amount in income and deduct the total amount expended. In arriving at this decision, the court referred to Revenue Ruling 54-429,<sup>3</sup> as interpreted by the Tax Court in *John E. Cavanaugh*.<sup>4</sup> It would appear that the result reached in *Mendel* goes beyond other cases arising under the ruling,<sup>5</sup> and is inconsistent with the commissioner's interpretation.

Under Revenue Ruling 54-429, non-reimbursed moving expenses have been considered personal in character and not de-

<sup>1</sup> *United States v. Woodall*, 255 F.2d 370 (10th Cir. 1958).

<sup>2</sup> INT. REV. CODE OF 1954, § 61(a) provides, with enumerated exceptions, that all income derived from any source is gross income.

<sup>3</sup> Rev. Rul. 54-429, 1954-2 CUM. BULL. 53, states, insofar as is pertinent here that "(1) amounts received by an employee, from his employer representing allowances or reimbursements for moving himself, his immediate family, household goods and personal effects, in case of a transfer in the interest of his employer, from one official station to another for permanent duty, do not represent compensation within the meaning of section 22(a) of the (1939) Code, and are not includible in the gross income of the employee if the total amount of the reimbursement or allowance is expended for such purposes; (2) any excess of the allowances or reimbursements over the actual expenses incurred is includible in the employee's gross income; and (3) any moving expenses paid or incurred by the employee in excess of the allowance or reimbursements are not deductible for Federal income tax purposes, since they represent personal, living or family expenses within the meaning of section 24(a) of the Code."

<sup>4</sup> *John E. Cavanaugh*, 36 T.C. 300 (1961), wherein the court held that an employee can exclude reimbursed extraordinary living expenses incurred while his household effects were in transit.

<sup>5</sup> *United States v. Woodall*, 255 F.2d 370 (10th Cir. 1958); *H. Willis Nichols, Jr.*, 13 T.C. 916 (1949), where an Army officer moved his household effects and automobiles from one duty station to another at his own expense. There it was held that the cost thereof is not an ordinary and necessary business expense within the meaning of section 23(a) (1) of the (1939) Internal Revenue Code.

ductible as a business expense of the employee.<sup>6</sup> The probable reason for this conclusion is that if there is no reimbursement, the employer does not consider the expense to be connected with its business and, hence it is merely a personal expense of the employee.<sup>7</sup> Prior to *Mendel*, the Tax Court appears to have been in agreement with the proposition that non-reimbursed moving expenses are merely personal and not business expenses since the expense only benefited the employee and not the employer.<sup>8</sup>

It has been suggested that it would be inequitable to disallow a deduction for moving expense if the original understanding between employer and employee was that the salary had been established in contemplation that the employee would pay all moving costs, or if the move were for the employer's benefit but no reimbursement were made because the employer was either penurious or niggardly.<sup>9</sup> While such might be inequitable, it has, nevertheless, been long recognized that deductions are matters of legislative grace, allowable only when there is a clear provision for them, and do not turn upon equitable considerations.<sup>10</sup>

In *Mendel*, the court inferred from Revenue Ruling 54-429 that reasonable amounts expended by a transferred employee in moving his family and personal effects from one permanent post of duty to another are not personal expenses. If such amounts are not personal expenses, they are for the purpose of the taxpayer's business as an employee. The court then went on to point out that ordinary and necessary business expenses are deductible by an employee who itemizes his deductions on his income tax return. It has also been pointed out that there is little logic for not allowing such a deduction if under similar circumstances, reimbursement to him would not be taxable.<sup>11</sup>

Viewed in this light, the ruling would appear to make the allowance of a deduction depend upon whether there had been a reimbursement by the employer. What the court is apparently saying in *Mendel* is that whether moving expenses may be deducted by the employee should not depend upon the relation between expenses and reimbursement, but rather upon whether the amount claimed is a business or personal expense. The view taken by the court is that an expenditure by an employee is no less a business expense simply because it is not reimbursed by the employer. In short, if the whole of the ordinary and necessary cost of moving can be legitimately viewed as an expense incurred for the benefit of the employer, and so treated in computing the

<sup>6</sup> H. Willis Nichols, Jr., *supra* note 5.

<sup>7</sup> See, Bailey, *Moving and Housing Expense*, N.Y.U. 14th INST. ON FED. TAX. 1479 (1956).

<sup>8</sup> H. Willis Nichols, Jr., 13 T.C. 916 (1949).

<sup>9</sup> See, Bailey, *Compensation With the Fringe on Top*, N.Y.U. 16th INST. ON FED. TAX. 75 (1958).

<sup>10</sup> *United States v. Woodall*, 255 F.2d 370 (10th Cir. 1958).

<sup>11</sup> Bailey, *supra* note 7, at 1483.