

Tulsa Law Review

Volume 4 | Number 2

1967

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Recommended Citation

James C. Hall, *Tax: The Travel Expenses Overnight Gloss of the I.R.S.*, 4 Tulsa L. J. 238 (2013).

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TAX: THE TRAVEL EXPENSES "OVERNIGHT GLOSS" OF THE I.R.S.

The Internal Revenue Code of 1954, Section 162(a)(2) permits a deduction for "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." The Code does not now and never has specifically required that the trip be overnight in order for the travel expenses to be deductible. However, the Commissioner of Internal Revenue presently imposes an "overnight" rule as a test for the deductibility of a taxpayer's meal expenses on a business trip. This rule provides that the meal expenses for the entire trip are an allowable deduction only if the taxpayer was kept away from his home overnight; the rule disallows meal expenses if the taxpayer returned home the same day.

Prior to 1954, the Commissioner did not by official pronouncement require that travel must be overnight in order for the travel expenses to be deductible. The *Louis Drill*¹ case seems to be the birth of the "overnight" rule, when a taxpayer was denied a deduction for meals because he was not considered on a business trip when the trip was completed on one day. In 1954, the Commissioner issued his first official announcement that there would be an overnight requirement.² This was followed by numerous Tax Court cases agreeing with the "overnight" rule.³ The Tax Court seems to have been most reluctant to allow deductions for meals, apparently because of their basically personal nature.⁴ Several District Courts have agreed with the Commissioner and the Tax Court and upheld the "overnight" rule;⁵ however, the majority of the District Courts have rejected the overnight re-

¹ *Louis Drill*, 8 T.C. 902 (1947).

² Rev. Rul. 497, 1954-2 CUM. BULL. 75.

³ See, *E.g.*, Jerome Mortrud, 44 T.C. 208 (1965); Al J. Smith, 33 T.C. 861 (1961); Allan Hanson, 35 T.C. 413 (1960); Joseph M. Winn, 32 T.C. 220 (1959); Sam J. Herrin, 28 T.C. 1303 (1957); Fred Marion Osteen, 14 T.C. 1261 (1950).

⁴ INT. REV. CODE OF 1954, § 262 states that "no deduction shall be allowed for personal, living, or family expenses."

⁵ See, *E.g.*, *Summerour v. Allen*, 99 F. Supp. 318 (D.C. Ga. 1951).

quirement as having no statutory basis.⁶

A notable change occurred with regard to the original overnight requirement as a result of the Circuit Court case of *Williams v. Patterson*.⁷ In *Williams* the taxpayer, a railroad conductor, was assigned to regularly scheduled trains running between his home terminal in Montgomery, Alabama, and Atlanta, Georgia; these round trips usually required a 16-hour absence from Montgomery and included a six-hour layover in Atlanta, during which time the taxpayer ate two meals and rented a hotel room where he slept before starting his return trip. The Commissioner contended that the taxpayer was not away from home on such trips because they were not "overnight" trips. In Rev. Rul. 54-497⁸ the Commissioner had attempted to apply the overnight test to a situation similar to *Williams*. The Revenue Ruling held that meal expenses were deductible when the employee was away from home for a sufficiently long time so that it is reasonable for him to be "released from duty for a sufficient time to obtain necessary rest elsewhere."⁹ The Commissioner argued in *Williams* that this rest must be required by the employer. The *Williams* court reasoned, however, that the taxpayer had satisfied the dual test presented in Rev. Rul. 54-497 since his absences on such trips were substantially longer than an ordinary workday and it was reasonably necessary for him to sleep during his layover in order to carry out his assignment. In upholding the deduction, the Fifth Circuit noted that "there is no language in the statute limiting its application to 'expenses incurred while . . . away from home *overnight*.' The 'overnight' gloss was dreamed up by the Department."¹⁰ The "overnight" rule is not now and has never been a part of the Treasury Regulations. However, the Internal Revenue Service relies heavily on its application of the overnight test as an administrative matter. In answer to this, the *Williams* court stated:

We recognize the administrative advantages of a rule of thumb for defining the term "away from home." We concede it is reasonable to formulate a rule that will enable the Bureau

⁶ See, E.g., *Scott v. Kelm*, 110 F. Supp. 819 (D.C. Minn. 1953).

⁷ *Williams v. Patterson*, 286 F. 2d 333 (5th Cir. 1961).

⁸ Rev. Rul. 54-497; *supra* note 1.

⁹ *Id.*

¹⁰ *Supra* note 7, at 335.

to distinguish between an employee put to the expense of taking a bus or street car to work and a salesman with a territory to cover. Between these extremes, however, there are innumerable borderline situations . . . that cannot be measured by the length and breadth of a thumb.¹¹

As a result of the decision in the *Williams* case, which the Commissioner acquiesced to in Rev. Rul. 61-221,¹² the original "overnight" rule became a "necessary sleep or rest" rule — a trip long enough to require interruption for a rest during the day is equivalent to being away overnight. With this sole exception however, the IRS position demands strict compliance with the overnight requirement.

The overnight test has been rejected by the First, Fifth, Sixth, and Eighth Circuits¹³ as an unwarranted interpretation of the Internal Revenue Code. *Hanson v. Commissioner*¹⁴ was the first Circuit Court case under the 1954 Code to directly test the Commissioner's "overnight" rule with respect to deductibility of meals on a business trip. In *Hanson* a contractor supervised construction work at various job sites, most of which ranged from 6 to 80 miles from the town where the taxpayer maintained his residence and office. On many trips, the taxpayer returned home on the same day. The Eighth Circuit held that the expenses incurred for meals were deductible, even though the taxpayer was not away from home overnight. The Court in *Hanson* rejected the overnight test, and approved the reasoning of *Williams*. The *Hanson* Court also found support in the Tax Court case of *Kenneth Waters*¹⁵ which held the overnight requirement invalid as applied to transportation expenses¹⁶ stating, ". . . There is no connotation that the

¹¹ *Id.* at 336.

¹² Rev. Rul. 221, 1961-2 CUM. BULL. 34.

¹³ See *E.g.*, *Correll v. U.S.*, 369 F. 2d 87 (6th Cir. 1966); *U.S. v. Morelan*, 356 F. 2d 199 (8th Cir. 1966); *Hanson v. Commissioner*, 298 F. 2d 391 (8th Cir. 1962); *Williams v. Patterson*, *supra* note 7; *Chandler v. Commissioner*, 226 F. 2d 467 (1st Cir. 1955).

¹⁴ *Hanson v. Commissioner*, *supra* note 13.

¹⁵ *Kenneth Waters*, 12 T.C. 414 (1949).

¹⁶ "Transportation expenses" include costs of moving about, such as auto expenses plus the cost of food, lodging, and other incidental expenses of traveling. See, *Treas. Reg. 1.162-2(a)*.

Rev. Rul. 147, 1960-1 CUM. BULL. 682 concedes that "Transportation

trip must be an overnight one, nor do we think Congress intended such a connotation.”¹⁷ Again citing *Waters*, the Court in *Hanson* felt that the words of the Tax Court seemed fitting to the present situation:

“Travel . . . while away from home’ in its ‘plain, ordinary and popular’ sense means precisely what it says. It means travel while away from one’s home . . . Surely it would be absurd to say that an employee who flies from Boston to Washington on business and returns to Boston on the same day is not entitled to the deduction, but that if he takes two days for the whole trip, he is entitled to the deduction.”¹⁸

The Court in *Hanson* felt that the same reasoning was applicable to meals that the employee eats in Washington in the two hypothetical trips.

In Rev. Rul. 63-239¹⁹ the IRS stated that it disapproved of the *Hanson* decision and would not follow it. The Commissioner’s position was that *Hanson* was not in accord with the law as indicated by the legislative history of Section 162(a)(2) of the Internal Revenue Code of 1954. However, thus far, the Federal Appellate Courts usually hold that the plain meaning of a “simple and unambiguous phrase is transformed”²⁰ by the overnight test, and “such changes are more in the nature of legislation than interpretation and accordingly go beyond the rule-making power of the Internal Revenue Service.”²¹

Recently, the Tax Court reversed its prior position, and held invalid the Commissioner’s “overnight” rule. The Tax Court in *William A. Bagley*²² gave up its long-standing support of the overnight test in favor of deciding each case on its own facts. In

expenses (as distinguished from the cost of meals and lodging) incurred by an employee on business trips which take him outside his home area, but do not keep him away from home overnight, will be allowed as deductions . . .” Thus the deduction for transportation expenses on one-day trips are not disputed by the IRS.

¹⁷ *Supra* note 15, at 417.

¹⁸ *Id.*

¹⁹ Rev. Rul. 239, 1963-2 CUM. BULL. 87.

²⁰ See, E.g., *Chandler v. Commissioner*, *supra* note 13, at 470.

²¹ *Id.*

²² *William A. Bagley*, 46 T.C. 176 (1966).

Bagley the taxpayer was a self-employed consulting engineer. During 1960 and 1961 the taxpayer performed services in connection with projects which were located approximately 32 and 70 miles from his home. He spent 115 days in 1960 and 83 days in 1961 rendering services at these locations. As a general rule, the taxpayer would return home each night after he completed his work for that day at the particular location. He claimed deductions as a business expense of \$1,020 for 1960 and \$979 for 1961 as "living expenses away from home while on business trips." These deductions were disallowed by the Commissioner in his notices of deficiency because they were allegedly "non-deductible personal or living expenses." However, the Tax Court held in favor of the taxpayer and allowed the deductions, stating that they would "no longer follow the overnight rule as an absolute guide in every situation."²³ The Tax Court stated that the deductibility of meal expenses on one-day trips should be determined on an *ad hoc* basis, but also indicated that it considers the "hour-distance" test²⁴ and other tests²⁵ to have merit in deciding whether or not a deduction should be allowed.

On appeal, the First Circuit Court of Appeals reversed the Tax Court decision in *Bagley* and accepted the Commissioner's overnight test.²⁶ This reversal is the only IRS "overnight" rule victory in an Appellate Court. The First Circuit stated that the "hour-distance" test was not a workable rule and considered the Commissioner's "overnight" rule and "necessary sleep and rest" rule preferable in light of fairness, certainty, and administrative convenience. The Court felt that it was unfair to allow one taxpayer to deduct meals as a business expense when his business requires him to spend his eight hour day traveling, while other taxpayers

²³ *Id.* at —.

²⁴ See, *Chandler v. Commissioner*, *supra* note 13, at 469.

²⁵ See, *E.g.*, The "need for rest" test (*Williams v. Patterson*, *supra* note 13, at 340); the "clear words of the statute" test (*Kenneth Waters*, *supra* note 3, at 416); the "daily routine" test (*Charles Hyslope*, 21 T.C. 131 (1953)); and the "traveling in connection with the performance of his services as an employee and not solely in the performance of such services" test (*Joseph M. Winn*, *supra* note 3, at 224).

²⁶ *Commissioner v. Bagley*, 7 CCH 1967 STAND. FED. TAX REP. (67-1 U.S. Tax Cas.) § 9300 (1st Cir. 1967).

are denied the deduction because their business does not require them to travel. The First Circuit felt that the "overnight" rule has worked well for years and the tests that the other Appellate Courts have adopted are not sufficient guides for determining the deductibility of meals. In deciding the *Bagley* case, the First Circuit overruled its own decision in *Chandler v. Commissioner*,²⁷ however, the Court simply stated that its prior decision was erroneous.

The United States Supreme Court has not considered the "overnight" rule in defining "away from home." Therefore, the Commissioner is always at liberty to disallow a deduction for expenses incurred on a business trip that was not overnight. The Commissioner knows that it is not usually worth the taxpayer's time and money to litigate the matter in court even if the taxpayer knows that he can win. Nevertheless, until the First Circuit decision in the *Bagley* case, the Tax Court and the Circuit Courts of Appeal seemed to be abolishing the "overnight" rule. To be deductible, these Courts held that the expenditure must merely be non-extravagant, properly substantiated, incurred away from home, and incurred in the ordinary course of the taxpayer's trade or business. However, since there is now a conflict in the Appellate Courts, it is likely that the Supreme Court will be asked to decide the question.

The Supreme Court has rendered three decisions in which the issue was the meaning of "away from home" in Section 162(a)(2), but there continues to be much uncertainty as to its meaning.²⁸ Although the Supreme Court might rule on the "overnight" test, it is submitted that the appropriate remedy is Congressional action. To prevent the Courts from construing the words "meals and lodging" in the conjunctive and to abolish the overnight requirement, Congress should amend Section 162(a)(2) by inserting a parenthetical phrase stating that the travel expenses incurred on a business trip are deductible *whether or not the trip was overnight*.²⁹

²⁷ *Chandler v. Commissioner*, *supra* note 13.

²⁸ *See, Eg.*, *Commissioner v. Stidger*, 19 AFTR 2d 959 (1967); *Commissioner v. Peurifoy*, 358 U.S. 59 (1958); and *Commissioner v. Flowers*, 326 U.S. 465 (1946).

²⁹ Should Congress prefer to endorse the "overnight" rule, this could be

In earlier years, Congress has been quick to amend the Code to overcome an unreasonable Treasury Department interpretation of the travel expense section. In 1920, the Treasury issued a regulation purporting to limit the traveling expenses deduction for meals to that portion of the cost of meals "in an amount in excess of any expenditures ordinarily required for such purposes at home."³⁰ Congress quickly reversed the Regulation by passing Section 214(a)(1) of the Revenue Act of 1921, which contained the words "entire amount" of such expenditures for meals and lodging. The words "entire amount" were carried over into all succeeding revenue laws regarding travel expenses until 1962, when the "entire amount" language was changed to provide the present "lavish or extravagant" rule of Section 162(a)(2).

The Commissioner's "overnight" and "sleep or rest" rules bear no relation to the business necessity of the meal expense. "In an era of supersonic travel, the time factor is hardly relevant to the question of whether or not travel and meal expenses are related to the taxpayer's business and cannot be the basis of a valid regulation under the present statute."³¹

The present confused state of the law creates a perplexing dilemma for the taxpayers and tax advisors. There is perhaps no tax question which is so clearly defined, so simple of Congressional resolution, affects so many taxpayers, and is yet so small in terms of tax liability per taxpayer as the question involving the validity of the "overnight" rule. It is submitted in conclusion that continued hesitation on the part of Congress is unwarranted. As previously noted, it has been more than 20 years since the first of the three Supreme Court decisions involving the meaning of "away from home," and there is still no clear interpretation of that phrase. The Supreme Court does not seem to be the most appropriate source for an answer to questions such as the "overnight" rule. In addition, it does not seem proper for Congress to force such interpretation jobs upon the Supreme Court, because of the meager indications of the legislative purpose of this Code

affected by the addition of one word, "overnight," to the present Section 162(a)(2) language.

³⁰Treas. Reg. art. 292 (1920).

³¹Correll v. U.S., *supra* note 13, at 90.

language.

It is concluded that a relatively simple legislative addition would clarify a very troublesome question affecting many taxpayers, most of whom do not have enough tax liability at stake to make a dispute economically feasible. Congress owes taxpayers a measure of certainty on this issue.

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