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Food for Thought and Thoughts About Food: Can  
Meals and Lodging Provided to Domestic Servants  
be for the Convenience of the Employer?

*Erik M. Jensen*



# Food for Thought and Thoughts About Food: Can Meals and Lodging Provided to Domestic Servants be for the Convenience of the Employer?†

ERIK M. JENSEN\*

The legal world is filled with issues crying to be ignored. Authors of law review articles search long and hard for subjects in which no reasonable human being should be interested; most succeed in their quest. With this Commentary, the first study devoted solely to the tax effects of meals and lodging provided to domestic servants, I renew my membership in that group.

Most law students who take the basic federal income tax course are introduced, often very early, to section 119 of the Internal Revenue Code.<sup>1</sup> That section, the codification of the "convenience of the employer" doctrine, sets out the guidelines under which an employee may exclude from gross income the value of meals and lodging provided by his employer.<sup>2</sup> Although the subject may seem trivial, it has significance. For example, real lawyers (very well paid lawyers) worry about whether executives of Multinational, Inc., may exclude the value of the lavish spread provided at no charge each day in the executive dining room.<sup>3</sup> Moreover, section 119

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\* Professor of Law, Case Western Reserve University Law School. J.D., 1979, Cornell University; M.A., 1972, University of Chicago; S.B., 1967, Massachusetts Institute of Technology. During a luncheon discussion, my colleague, Karen Nelson Moore, unwittingly sparked my interest in writing on this subject. If she were given the chance—she hasn't been and won't be—I have little doubt she would want to absolve herself from the blame she so richly deserves.

1. Section 119 was added to the Internal Revenue Code [hereinafter "Code"] as part of a recodification culminating in the Internal Revenue Code of 1954. Many casebooks include § 119 in early chapters. See, e.g., W. ANDREWS, BASIC FEDERAL INCOME TAXATION 43-61 (3d ed. 1985); W. KLEIN, B. BITTKER & L. STONE, FEDERAL INCOME TAXATION 91-101 (7th ed. 1987).

2. The statutory rule derived from cases such as *Benaglia v. Commissioner*, 36 B.T.A. 838 (1937), *acq.*, 1940-1 C.B. 1. In *Benaglia*, a hotel manager was permitted to exclude the value of a posh hotel suite and equally extravagant meals on the ground that his presence was necessary to attend to the "numerous, various, and unpredictable" demands of the filthy rich patronizing the establishment—i.e., for the convenience of the employer. 36 B.T.A. at 840. Any benefit to the manager was "merely an incident of the performance of his duty." *Id.* The favorable tax treatment, some commentators have noted, "apparently runs with the land." The manager of the same hotel, forty years after *Benaglia*, continued the tax-free receipt of meals and lodging, "although he admitted to an enterprising tax professor that he had never handled a nighttime emergency." Byrnes & McIntyre, *Famous Events in Tax History*, 1 TAX NOTES INT'L 260 (1989).

3. In many cases, the lawyers' answer will be "no," unless, for example, there are no alternative eating facilities in the vicinity. See *infra* notes 25-27 and accompanying text (discussing "substantial noncompensatory business reason" requirement).

has pedagogical import. It is a meaty statute, something students can sink their teeth into<sup>4</sup> while developing expertise in deciphering the Code. And section 119 provides an opportunity for classroom discussion of the relationship between exclusions from gross income and deductions.<sup>5</sup>

All of these matters are important and are therefore beyond the scope of this essay. Here I intend only to examine the tax consequences of a simple scenario—domestic servants living, working, and eating in the home of their employers—about which, I shall argue, the income tax regulations are singularly misleading. Were this an ordinary law review article—and this is neither an ordinary law review nor an ordinary article<sup>6</sup>—I would be expected to insert a statement at this point about how critical this issue is. A clause or two claiming to have created a “general theory” would also be in order.<sup>7</sup> Having some integrity, I make no such claims.

This Commentary begins<sup>8</sup> by describing the hypothetical fact situation to be analyzed. Part II examines the structure of section 119 and the accompanying regulations. Part III considers the incongruity in a regulatory example that deals with meals and lodging provided to domestic servants. And that's it. At no point does the essay discuss the relationship between the convenience of the employer doctrine and the infield fly rule, although I wish it did.<sup>9</sup> There is no Part E, despite the general understanding that any excuse for a Part E is a good one.

## I. THE SERVANT PROBLEM

Consider a husband and wife who, burdened by excessive wealth, are unable to care for themselves. They therefore hire domestic servants<sup>10</sup>—

4. Without spoonfeeding, too. The literature on the relationship between law and morals is extensive and needs no citation here. The relationship between law and molars has received less study in the scholarly press. *But see* O. SCHROEDER, *DENTAL JURISPRUDENCE: A HANDBOOK OF PRACTICAL LAW* (1980) (a biting commentary on legal issues affecting dentistry).

5. *See infra* note 13 and accompanying text.

6. It might be an ordinary law. On the distinction between “ordinary” and whatever the antonym of “ordinary” is, see *Welch v. Helvering*, 290 U.S. 111, 115 (1933) (Cardozo, J.) (“Life in all its fullness must supply the answer to the riddle.”).

7. Perhaps the best known general theory is that of Douglas MacArthur: “Old soldiers never die; they just fade away.” W. MANCHESTER, *AMERICAN CAESAR: DOUGLAS MACARTHUR 1880-1964* at 681 (1978).

8. Actually it began several paragraphs ago, but you know what I mean.

9. Articles on the infield fly rule seem to be popping up everywhere these days. *See* Cochran, *The Infield Fly Rule and the Internal Revenue Code: An Even Further Aside*, 29 WM. & MARY L. REV. 567 (1988); Flynn, *Further Aside: A Comment on “The Common Law Origins of the Infield Fly Rule,”* 4 J. CONTEMP. L. 241 (1978); *Aside, The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474 (1975); *see also* Linder, *Strict Constructionism and the Strike Zone*, 56 UMKC L. REV. 117 (1987) (another baseball article); *Commentary, In re Brett: The Sticky Problem of Statutory Construction*, 52 FORDHAM L. REV. 430 (1983) (ditto).

10. For the purpose of this Commentary, “domestic” does not refer to the national origin

perhaps a butler, cook, and maid—to handle household chores at their isolated mansion. Suppose that because of their location and their desire for round-the-clock service—in taxation, as in comedy, timing is everything—the couple has the servants live in. The couple provides the servants with meals and lodging in addition to salaries. Suppose further that the husband and wife support themselves largely through coupon-clipping; they conduct no business at the mansion and, to the extent they engage in business at all, they travel to the larger world.<sup>11</sup>

The tax issue is clear. Of course each servant must include salary in gross income, and the couple may have withholding obligations involving the salaries. But must the servants also include the value of the meals and lodging in gross income?<sup>12</sup>

A decision in favor of exclusion has a clear economic benefit to the servants. For most of us, the purchase of meals and lodging generates no tax advantages. The expenditures are fundamentally personal in nature—except in special circumstances like business trips—and we buy meals and lodging with after-tax (that is, nondeductible) dollars. If the meals and lodging are not supplied by the wealthy couple, the servants will have to acquire those amenities with their own funds, and they will, in the ordinary course, be entitled to no deduction. In contrast, if the servants are permitted to exclude the value of meals and lodging from gross income, the economic effect will approximate that of a deduction. Indeed, an exclusion can be reconceptualized as an inclusion followed by an offsetting deduction. It is as if the servants were paid additional, taxable salary; they purchased meals and lodging with those funds; and they deducted an amount equal to the hypothetical additional salary.<sup>13</sup>

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of the servants. The servants must be U.S. taxpayers if this essay is to make any sense, but no part of the analysis depends on the servants' being American-born or American citizens. Cf. I.R.C. § 7701(a)(4) (1982) (defining "domestic" when used to modify "corporations" or "partnerships"). Nor does "domestic" refer to the level of domestication of the servants. Randy servants, tame servants—it doesn't matter.

11. This assumption is not a critical factor in the analysis. If you wish, you can make the couple daily commuters to lucrative jobs.

12. Even if includable in gross income, the value of the meals and lodging would not be subject to withholding. See I.R.C. § 3121(a)(7)(A) (1982) (excluding from the definition of wages "remuneration paid in any medium other than cash to an employee for . . . domestic service in a private home of the employer").

13. *Sibla v. Commissioner*, 611 F.2d 1260 (9th Cir. 1980), illustrates the relationship between exclusions and deductions. *Sibla* considered whether firemen required to participate in an organized mess at the station could either deduct the costs of the meals (averaging about \$3 per person per day) or, in the alternative, treat the portion of their salary from which they paid the expenses as excludable from gross income. The Ninth Circuit concluded that the amounts at issue could be viewed either as excludable from gross income under § 119, or as includable in gross income but subject to an offsetting deduction for ordinary and necessary business expense. *Id.* at 1265-66. Since the taxpayers wound up in the same position under either theory, the court saw no reason to favor one over the other. *Id.*

## II. THE CONVENIENCE OF THE EMPLOYER STATUTE

Section 119, by its terms, sets out a number of requirements for exclusion of the value of meals and lodging.<sup>14</sup> Any excludable foodstuffs<sup>15</sup> must be "meals" (within the meaning of the statute), provided to an employee for the "convenience of the employer" on the "business premises of the employer."<sup>16</sup> Since nearly identical requirements apply in order to exclude the value of lodging provided by an employer to an employee, the rest of this Commentary focuses on meals.<sup>17</sup>

Each of the statutory standards has been the subject of substantial interpretation in regulations, rulings, and judicial decisions. You don't want a full exposition of those materials, and your desires and mine coincide on that point. Nevertheless, while this Commentary is ultimately concerned with a regulation illustrating the meaning of "business premises of the employer," there are reasons for also looking at the meals and convenience of the employer requirements along the way.<sup>18</sup>

### A. Meals

If any term lends itself to a plain meaning theory of statutory interpretation, it ought to be "meals." A novice tax researcher might expect to find no cases whatsoever analyzing the term. Not so. For example, in *Commissioner v. Kowalski*,<sup>19</sup> a case of fundamental importance for section

14. The relevant portion of § 119 provides:

(a) Meals and lodging furnished to employee, his spouse, and his dependents, pursuant to employment.—There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him, his spouse, or any of his dependents by or on behalf of his employer for the convenience of the employer, but only if—

(1) in the case of meals, the meals are furnished on the 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.

I.R.C. § 119 (1988).

15. A tasteless term, I know, but I am trying to avoid an excessive diet of "meals" in these sentences.

16. I.R.C. § 119(a)(1) (1988) (relevant portion reprinted at *supra* note 14).

17. For the value of lodging to be excludable, the statute contains an additional formal prerequisite that the lodging be provided as a condition of employment. I.R.C. § 119(a)(2) (1988). However, it is hard to see how that standard adds much, if anything, to the convenience of the employer requirement. See B. BITTKER & L. LOKKEN, *FEDERAL TAXATION OF INCOME, ESTATES, AND GIFTS* ¶ 14.5.2 (2d ed. 1989).

18. I shall take for granted that an employer-employee relationship exists in the servant scenario.

19. 434 U.S. 77 (1977).

119 jurisprudence,<sup>20</sup> the Supreme Court devoted some of its precious time in 1977 to considering whether meal allowances, provided to New Jersey state troopers, constituted "meals" for purposes of the statute.

As rough and ready as New Jersey troopers may have been, no claim was made that the troopers in fact devoured the cash or that the allowances were paid in a form easily digestible, such as paper money or checks.<sup>21</sup> The allowances replaced a system in which the troopers were expected to travel to a central location for their meals. When that system proved impracticable—either too much time was spent getting to and from lunch or the troopers were missing the meals completely—the cash allowance scheme was instituted.

Although the cash was denominated a meal allowance, the state placed no restrictions on how it was to be used. For practical purposes, the cash was, from any trooper's standpoint, indistinguishable from additional salary. Under those circumstances, the Court concluded that the cash allowances were taxable. The troopers may have had some difficulty in stomaching that result, but it was the right one conceptually. As part of its rationale for the decision, the Court stated a broader principle: that the term "meals" refers to in-kind allowances only.<sup>22</sup>

### B. Convenience of the Employer

In ruling on the meals question, the *Kowalski* Court also considered what "convenience of the employer" means under section 119. As the Court put it, the older pre-1954 Code rulings "emphasize[d] the necessity of the benefits to the functioning of the employer's business"<sup>23</sup>—the "business

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20. Section 119 jurisprudence should not be confused with "digestive jurisprudence," an appetizing extrapolation of the views of some legal realists. See Hutchins, *The Autobiography of an Ex-Law Student*, 7 AM. L. SCH. REV. 1051, 1054 (1934) (ridiculing the idea, the author observes: "The law may thus depend on what the judge has had for breakfast. The conclusion is that legal scholars, adopting the slogan of Shredded Wheat, 'Tell me what you eat and I'll tell you what you are,' should devote themselves to studying the domestic larders of judicial wives.").

21. On the digestion process, see any of the West Decennial Digests; see also the title of this Commentary, as well as the titles of just about every other law review essay ever written (importance of colon).

22. That was a plausible inference from the legislative history. See S. REP. NO. 1622, 83d Cong., 2d Sess. 190 (1954). Nevertheless, in *Sibla v. Commissioner*, 611 F.2d 1260 (9th Cir. 1980), the Ninth Circuit read *Kowalski* very narrowly and concluded that certain meal allowance schemes could meet § 119's dictates. See *supra* note 13. Factually *Sibla* was a very different case from *Kowalski* in that the *Sibla* firemen had no choice about where their "allowances" could be spent, and a rational statute might well treat the two cases differently. In evaluating *Sibla*, however, the critical question is whether § 119 was intended to incorporate the distinction made by the Ninth Circuit.

23. *Kowalski*, 434 U.S. at 86.

necessity" test—and Congress had enacted section 119 with that rationale in its collective mind.<sup>24</sup>

The Treasury Regulations use somewhat different language to define convenience of the employer. Meals are provided for the convenience of the employer only if there is a "substantial noncompensatory business reason" for the arrangement.<sup>25</sup> The regulations list several qualifying reasons, including the employer's need to have employees available for emergencies<sup>26</sup> and the employer's need to have meal periods so short that suitable alternative eating facilities cannot be found.<sup>27</sup>

For present purposes, we need not consider whether the Supreme Court's statement of the rule fully coincides with the regulatory provision—that is, whether "business necessity" and "substantial noncompensatory business reason" have precisely the same meaning. It is enough to note that both attempts to define "convenience of the employer" require a *business* justification for the meals, with the emphasis on the employer's business. The relevant distinction is between convenience of the employer and convenience of the employee.

### C. *Business Premises of the Employer*

For meals to be excludable, the benefits must be provided on the "business premises of the employer," and here the domestic servant scenario approaches its conceptual summit.<sup>28</sup> Ask yourself, Professor Andrews tells his casebook readers, whether meals and lodging provided to domestic servants meet that requirement.<sup>29</sup> Aha! you quickly realize, while the servants may be engaging in *their* businesses at the couple's home, the premises are not the *employers'* business premises. Read literally, section 119 would not apply, and that statute appears to provide the only possibility for exclusion.

The Treasury Regulations come to the rescue, as they so often do, by suggesting that the appropriate focus in defining "business premises of the employer" is "the place of employment of the employee," not that of the employer.<sup>30</sup> Indeed, the regulations give two examples satisfying the "business premises" requirement, and one is precisely our situation: "[M]eals and lodging furnished in the employer's home to a domestic servant would constitute meals and lodging furnished on the business premises of the

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24. *Id.* at 92-93.

25. Treas. Reg. § 1.119-1(a)(2)(i) (as amended in 1985).

26. Treas. Reg. § 1.119-1(a)(2)(ii)(a) (as amended in 1985).

27. Treas. Reg. § 1.119-1(a)(2)(ii)(b) (as amended in 1985).

28. It's not much, but there are those who love it.

29. See W. ANDREWS, *supra* note 1, at 43.

30. Treas. Reg. § 1.119-1(c)(1) (as amended in 1985).



employer."<sup>31</sup> Relying on the regulations, Professor Andrews concludes in his teacher's manual that the domestic servant case "is within [section] 119, even though it is a strain on the statutory language to call the employer's home his 'business premises.'"<sup>32</sup>

Even if it turns out to have a simple resolution, the Andrews conundrum is pedagogically valuable—which, of course, is why the good professor raised the issue to begin with. It forces examination of the statutory language, and it illustrates how critical the regulations are in tax analysis. However, once we have found the regulatory example, there seem to be no leftover issues. So comforted, we presumably then go on to consider other matters, like accelerated depreciation or percentage depletion.

### III. THE SERVANT PROBLEM PROBLEM

It can't be so easy. The domestic servant example in the regulations appears to conclude, albeit implicitly, that the value of meals and lodging provided to domestic servants may be excludable under the authority of section 119. But, assuming the example is correct on its "business premises" point, how does that conclusion fit under the rest of section 119 and the regulations?

One answer may be that it doesn't matter whether there is a fit. The example tells us something about the business premises issue, and it does not purport to evaluate the rest of section 119's requirements. We should not read too much into an example that has a limited purpose.

I suspect, however, that a casual reader of the regulations would find it impossible to read the example so narrowly. I find it impossible, and apparently Professor Andrews feels the same way.<sup>33</sup> If the regulatory draftsman saw potential problems with other aspects of section 119, surely he would have dropped a hint to that effect—or used a different example to illustrate the business premises point. With no hint to the contrary, the example bears the draftsman's imprimatur. The example stands as favorable authority for domestic servants' excluding the value of meals and lodging provided at their employers' home.

I have no reason to assume that the draftsman was trying to be tricky or that his motives were impure.<sup>34</sup> Nevertheless, even if he intended no harm, did the draftsman not mislead us?

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31. *Id.* Infinitely more helpful, in terms of broad application, is the regulation's second example which confronts the common problem of "meals furnished to cowhands while herding their employer's cattle on leased land." *Id.* (also considered to be on the business premises of the employer).

32. W. ANDREWS, *TEACHER'S MANUAL: BASIC FEDERAL INCOME TAXATION 2B* (3d ed. 1985).

33. See *supra* text accompanying notes 29-30.

34. These regulations were issued in 1956. T.D. 6220, 1957-1 C.B. 34. I would not assume

Prepared food provided to the servants should unquestionably be "meals" for purposes of section 119. But what "business necessity" or "substantial noncompensatory business reason" can the wealthy couple show for having live-in and eat-in servants—that is, under what theory is the convenience of the employer test met? The servants' work has no direct connection with the operation of the couple's trades or businesses, if they even have any. Perhaps the servants facilitate the couple's ability to engage in gainful trades—the less time spent in house-cleaning, the more time available for business<sup>35</sup>—but expenses of that sort have always been considered fundamentally personal, lacking a sufficient business connection. For example, commuting expenses might not be incurred but for a taxpayer's employment, but the expenses are not deductible ordinary and necessary business expenses.<sup>36</sup> Similarly, child care expenses may be incurred only because of employment obligations, but the expenses remain personal in nature.<sup>37</sup> The expenses of maintaining live-in servants are no different conceptually from commuting or child care expenses.

The business premises regulation thus has a faulty premise. As long as the home in which the services are performed is only a home, the convenience of the employer requirement cannot be met.<sup>38</sup> As a result, there should be *no* circumstances under which meals and lodging provided to domestic servants are excludable from gross income.

#### IV. CONCLUSION<sup>39</sup>

The issue of meals and lodging for domestic servants has been deservedly neglected for years. It is time, however, to bring the issue temporarily out of the broom closet. Because of the example in the Treasury Regulations, generations of law students have graduated with exaggerated views about the possibility of exclusion. Should a client approach a new law graduate

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good intentions today. It has now become disgustingly common for young lawyers to spend several years at Treasury working on complex regulations projects—creating obscurity for its own sake—in order to be able later to market their skills at interpreting their own work. The worse the Treasury product, the more valuable the draftsman becomes to private firms and others. Publishers now advertise that a treatise author was, for example, the "Draftsman of § 469 and the first regulations."

35. A sweeping statement, but true nonetheless.

36. See *Commissioner v. Flowers*, 326 U.S. 465 (1946).

37. See *Smith v. Commissioner*, 40 B.T.A. 1038 (1939), *aff'd per curiam*, 113 F.2d 114 (2d Cir. 1940). Congress has permitted limited tax benefits for child care expenses while preserving the principle of *Smith*. See, e.g., I.R.C. § 21 (1982) (credit for household and dependent care services necessary for gainful employment).

38. The analysis would be more complicated if the employers used part of the home as a business office.

39. Not quite. See *infra* note 41 and accompanying text.

with a domestic servant question,<sup>40</sup> that client would receive plausible, but flawed, advice.

No one is well served by a misleading example in the regulations, but this is a mess easily cleaned up. The portion of the regulations dealing with "business premises of the employer" should soon meet a fate particularly appropriate in the domestic servant context: dust to dust, ashes to ashes.<sup>41</sup>

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40. Well, it *could* happen.

41. This is the real conclusion.