Income Taxation--Deductions for Travelling Expenses--1954 International Revenue Code Section 162(a)(2)

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an additional consideration in protecting the health, safety, morals, and general welfare of the public.\textsuperscript{21}

It is evident that until a judicially recognized purpose exists which will support the exercise of the police power to regulate erection of advertising signs along highways and streets, the result in \textit{Ghaster Properties, Inc. v. Preston}\textsuperscript{22} is inevitable. And most text authorities agree that this purpose may not be discovered until the judiciary includes aesthetic considerations as a necessary component of the general welfare.\textsuperscript{23}

\textbf{DAVID L. SIMIELE}

\textbf{INCOME TAXATION — DEDUCTIONS FOR TRAVELLING EXPENSES — 1954 INTERNAL REVENUE CODE SECTION 162(a) (2)}

\textit{Suzanne Waggener, CCH 1963 Tax Ct. Rep.}

(22 CCH Tax Ct. Mem.) Dec. 25902(M) (Jan. 3, 1963)

In \textit{Suzanne Waggener,}\textsuperscript{1} the petitioner maintained a permanent residence with her parents in Joplin, Missouri, and worked part-time as a clerk-typist while attending Joplin Junior College. During the summer of 1958, she moved to Dodge City, Kansas, and worked part-time as a clerk-typist while attending Dodge City Junior College. While in Dodge City, Kansas, the petitioner applied to the United States Department of the Interior for a summer job in Washington, D.C. She was accepted for employment, worked in Washington, D.C. for the summer of 1959, then voluntarily terminated her employment and returned to her parent's home in Joplin, Missouri.

The petitioner attempted to deduct her expenses for travel to and from Washington, D.C., in addition to the cost of her meals and lodging while working there. The tax court denied her deductions, holding that


\textsuperscript{22} 184 N.E.2d 552 (Ohio C.P. 1962).

\textsuperscript{23} See note 20 supra.
these expenses were purely personal and did not fall within the provisions
of section 162(a) (2) of the Internal Revenue Code.\(^2\)

In reaching this conclusion, the court in *Suzanne Waggener* followed
the decision of the United States Supreme Court in *Flowers v. Commis-
sioner*.\(^3\) There, the Court established three conditions essential to a valid
claim for travel and living expenses as a deduction from income under
the provisions of section 162(a) (2) of the Internal Revenue Code:

1. The expense must be a reasonable and necessary travelling
   expense as that term is generally understood. This includes such items
   as transportation fares and food and lodging expenses incurred while
   travelling.
2. The expense must be incurred while away from home.
3. The expense must be incurred in pursuit of business. This
   means that there must be a direct connection between the expenditure
   and the carrying on of the trade or business of the taxpayer or of his
   employer. Moreover, such an expenditure must be necessary or appro-
   priate to the development of the trade or business.\(^4\)

The tax court in *Suzanne Waggener* said that neither the second nor
third conditions of the rule in the *Flowers* decision were met. The court
held that the petitioner's duties as a clerk-typist did not make it necessary
for her to travel in connection with her employer's business. The ex-

![Image]

...ences incurred were not in pursuit of her trade or business since similar
clerk-typist positions were available in most localities in the United States.
The court further stated:

> We have construed "home" to mean the principal post of duty of a
taxpayer, especially where the taxpayer has his home for his own con-
venience at a place distant from his business.\(^5\)

Since the term "home," as employed in section 162 of the Internal Reve-

![Image]

...nue Code, was construed to mean "principal post of duty," it was felt
that the petitioner had moved her "home" to Washington, D. C. when
accepting the summer job there.

There is a conflict of authority among the federal circuit courts relat-
ing to the correct interpretation of the term "home" as employed in sec-

![Image]

...tion 162(a) (2) of the Internal Revenue Code. Courts in accord with
the tax court's decision in *Suzanne Waggener* define "home" to mean the

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2. "Sec. 162 TRADE OR BUSINESS EXPENSES
   (a) IN GENERAL — There shall be allowed as a deduction all the ordinary and necessary
   expenses paid or incurred during the taxable year in carrying on any trade or business, in-
   cluding —
   (2) Travelling expenses (including the entire amount expended for meals and lodg-
   ing) while away from home in the pursuit of a trade or business . . . ."
4. Ibid.
principal post of duty of the taxpayer. Other courts have held that the term "home" as employed in the Internal Revenue Code should not be so narrowly construed. Instead, "home" should be interpreted as it is ordinarily understood. Thus in Wallace v. Commissioner, the court stated in its opinion:

We have found nothing in section 23(a)(1) of the Internal Revenue Code, 26 U.S.C.A. Int.Rev.Code § 23(a)(1) or in the earlier legislation from which this Code provision is derived which denotes any interest by Congress to attribute to the word "home" as there 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 time, 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 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.

The United States Supreme Court has never adjudicated this precise issue. However, at least one Supreme Court Justice has expressed his opinion on how the term "home" should be construed. In Peurifoy v. Commissioner, Justice Douglas, in a dissenting opinion, felt that the court should have decided this question and that the term should be construed in its ordinary sense.

In the Peurifoy case, the Court recognized an exception to the threefold test of the Flowers case. The Court stated:

Generally, a taxpayer is entitled to deduct unreimbursed travel expenses under this subsection only when they are required by the "exigencies of business." Commissioner v. Flowers. Application of this general rule would require affirmance of the judgment of the Court of Appeals in the present case.

6. O'Toole v. Commissioner, 243 F.2d 302 (2d Cir. 1957); Amoroso v. Commissioner, 193 F.2d 583 (1st Cir.), cert. denied, 343 U.S. 926 (1952); Berlow v. Commissioner, 243 F.2d 302 (4th Cir. 1948).
7. Burns v. Gray, 287 F.2d 698 (6th Cir. 1961); Wallace v. Commissioner, 144 F.2d 407 (9th Cir. 1944); Coburn v. Commissioner, 138 F.2d 763 (2d Cir. 1943); Schreiner v. McCoy, 186 F. Supp. 819 (D. Neb. 1960).
8. 144 F.2d 407 (9th Cir. 1944).
11. Id. at 61. The dissent in Peurifoy was grounded on the Court's refusal to pass upon the correct interpretation of the statutory term "home." Justice Douglas stated: "The meaning of 'home' was expressly left undecided in Flowers but is squarely presented in the instant case. I disagree with the Commissioner's contention that 'home' is synonymous with the situs of the employer's business. Such a construction means that the taxpayer who is forced to travel from place to place to pursue his trade must carry his home on his back regardless of the fact that he maintains his family at an abode which meets all accepted definitions of 'home.'" Peurifoy v. Commissioner, supra note 10, at 62.
To this rule, however, the Tax Court has engrafted an exception which allows a deduction for expenditures of the type made in this case when the taxpayer's employment is temporary as contrasted with indefinite or indeterminate.\(^1\)

The courts have defined a "temporary" job as one in which termination is foreseeable within a fixed or reasonably short period of time.\(^1\) However, as the court stated in Benson v. Godwin:\(^2\)

> Although many decisions in this area have been based on the distinction between temporary and indefinite employment, no clear-cut rules have been established for application to a particular factual situation.\(^3\)

Conceding difficulty of defining the term "temporary" employment, as opposed to "indefinite" employment, most courts now seem to agree that if a business trip is for a temporary period of time, the taxpayer is entitled to a travelling expense deduction.\(^4\) The rule is based upon the theory that if the taxpayer's "away from home" employment is temporary, it would be unreasonable to expect him to shift his residence for such a temporary time.\(^5\)

In Suzanne Waggener,\(^6\) the tax court did not recognize the petitioner's claim as falling within the "temporary employment" exception as set forth by the Supreme Court in Peurifoy. In deciding Suzanne Waggener for the Commissioner, the court merely followed the three conditions described in the Flowers case.\(^7\)

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1. Peurifoy v. Commissioner, 358 U.S. 59, 60 (1958). (Emphasis added.) (Footnotes omitted.)
4. Id. at 71. (Footnotes omitted.)
5. Wright v. Hartsell, 305 F.2d 221 (9th Cir. 1962); Floyd Garlock, 34 T.C. 611 (1960); Alois J. Weidekamp, 29 T.C. 16 (1957); Henry C. Warren, 15 T.C. 205 (1949). Cf. Carragon v. Commissioner, 197 F.2d 246 (2d Cir. 1952). A problem is encountered when employment for a temporary period of time is accepted away from home, but is not prompted by exigencies of either the employer's or the employee's trade or business. The import of the Court's words in the Peurifoy case apparently indicates that once employment is accepted away from home for a temporary period of time, as opposed to an indefinite period of time, then the exigencies of the business of neither the employer nor the employee need have prompted the trip to permit a deduction under section 162(a) (2) of the Internal Revenue Code. However, Justice Douglas pointed out in his dissenting opinion in the Peurifoy case: "If the expenses are necessary and appropriate to neither the employer's business nor the employee's trade, they are personal expenses under § 24(a) (1) (§ 263 of the 1954 Internal Revenue Code)." Peurifoy v. Commissioner, 358 U.S. 59, 62-63 n.4 (1958). If Justice Douglas' dissent is valid, then it would seem that the Peurifoy exception to the tests of the Flowers case is really no exception at all. Under this interpretation, one would still have to meet the three tests of the Flowers case to fall under the provisions of section 162(a) (2) of the Internal Revenue Code. The court in Waggener was not called upon to decide this issue since it was determined that the petitioner had no set tax home when she accepted temporary employment in Washington.
8. Ibid.