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The "Overnight" Rule in Federal Income Taxation

SECTION 162(a)(2) of the *Internal Revenue Code of 1954*¹ specifically allows a deduction for travel expenses, including amounts spent for meals and lodging while the taxpayer is away from home for business reasons. There are few phrases in federal income tax law which have been the source of more litigation or controversy. The dispute with respect to the away from home requirement centers about two questions: Where is the taxpayer's home so that he may be considered to be away; and how long must the taxpayer be away from his home in order to come within the ambit of the deduction provision?

The first question is raised by the statutory language itself, for in order to determine whether one is away from home, his home must be located. The same cannot be said with respect to the second question because the statute merely states that in order to be deductible the expense must be incurred while the taxpayer is "away from home in the pursuit of a trade or business."² Although this language does not explicitly raise any question as to the duration of the taxpayer's absence, the Internal Revenue Service and the Supreme Court have imposed the requirement that the taxpayer must remain away from home overnight. It is the object of this Note to trace and analyze the judicial and administrative development of the so-called overnight rule.

I. WHEN IS THE TAXPAYER AWAY FROM HOME?

A. The Tax Home Concept

(1) *Where is the Tax Home?* —According to the proposed analysis, the first issue which arises under section 162(a)(2) is the location of the taxpayer's home. Because the word is nowhere defined in the statute except with respect to Congressmen,³ its definition has been left to the administrators and judiciary. Accordingly, both the Internal Revenue Service and the Tax Court have interpreted home to mean the taxpayer's principal place of business.⁴

¹ INT. REV. CODE OF 1954, § 162(a)(2) [hereinafter cited as CODE].

² *Id.*

³ *Id.* § 162(a).

⁴ George W. Lindsay, 34 B.T.A. 840 (1936); Mort L. Bixler, 5 B.T.A. 1181 (1927); Rev. Rul. 55-604, 1955-2 CUM. BULL. 49; G.C.M. 23,672, 1943 CUM. BULL. 66, 67.

This definition is based upon the policy that it is undesirable to allow a taxpayer to deduct traveling expenses which have resulted from his deliberate choice to maintain a residence at a distance from his place of business if such choice is not motivated by business reasons.⁵ Consistent with this policy, although contrary to the absolute business home rule of the Commissioner, the courts permit a deduction if the expenses were incurred with respect to distant employment of a temporary, rather than indefinite, nature,⁶ or where the distant employment was required by the nature of the taxpayer's business.⁷

(2) *The Duplication of Expenses Policy.* —The reason for allowing a deduction for traveling expenses incurred while away from home is to equalize the burden between the taxpayer whose employment requires business travel and the taxpayer whose employment does not.⁸ The taxpayer who is away from home for short periods of time has the burden both of maintaining his home abode and of meeting the living expenses of his place of employment. It is not reasonable to expect the employee to dispose of his home every time the requirements of his employer's business necessitate his being away for an indefinite period of a few weeks or a few months; hence a special deduction is allowed to mitigate the burden which this taxpayer carries.⁹

Although the duplication of expense rationale is applicable to lodging expenses, the same would not seem to be true with respect to meals. The taxpayer whose business requires travel has to eat whether he is at home or away. If he eats while traveling he obviously does not suffer a simultaneous and similar expense at home and it would thus appear that the meal expense deduction is actually a legislative gratuity. However, that gratuity can be justified on the basis that the in-transit diner must spend more for his meals.

⁵ Rev. Rul. 55-604, 1955-2 CUM. BULL. 49, 50; *cf.* Commissioner v. Flowers, 326 U.S. 465 (1946).

⁶ Wallace v. Commissioner, 144 F.2d 407 (9th Cir. 1944); Coburn v. Commissioner, 138 F.2d 763 (2d Cir. 1943); E.G. Leach, 12 T.C. 20 (1949); *cf.* Patricia A. Ruby Hall, 33 P-H Tax Ct. Mem. 157 (1964); Judy L. Gooderham, 33 P-H Tax Ct. Mem. 158 (1964).

⁷ Wright v. Hartsell, 305 F.2d 221 (9th Cir. 1962); United States v. LeBlanc, 278 F.2d 571 (5th Cir. 1960). *See also* Commissioner v. Stidger, 386 U.S. 287 (1967) (dissenting opinion).

⁸ John J. Harvey, 32 T.C. 1368, 1386 (1959), *rev'd on other grounds*, 283 F.2d 491 (9th Cir. 1960).

⁹ *See* James v. United States, 176 F. Supp. 270, 272 (D. Nev. 1959).

B. *The Overnight Rule*

(1) *Administrative Development.* —The Internal Revenue Service, recently supported by the United States Supreme Court,¹⁰ has long maintained that even conceding the fact that the taxpayer was outside his tax home, he was not away from home unless he stayed overnight.¹¹ The statute, however, makes no mention of such a requirement; section 162(a) of the *Code* merely provides:

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, including —

- (2) . . . traveling expenses (including amounts expended for meals and lodging . . .) while away from home in the pursuit of a trade or business . . .¹²

Furthermore, it was not until 1958 that the regulations made any mention of overnight.¹³ Even then, as now, the overnight requirement did not appear under the discussion in regard to the interpretation of the statute; rather, it appeared in the regulations concerned with the reporting and substantiation of travel expenses.¹⁴

Because since 1954, transportation expenses, other than for commuting, have been made expressly deductible regardless of whether incurred away from home,¹⁵ the relevance of the overnight test remains only with respect to the deductibility of meal and lodging expenses. Thus, the taxpayer is not allowed to deduct the traveling expense of meals or lodging — regardless of the distance traveled — unless he can show that he was away from his tax home overnight.¹⁶

C. *Judicial Development*

When the overnight rule came under judicial scrutiny under the 1939 Code, the courts rejected the overnight requirement with re-

¹⁰ *United States v. Correll*, 389 U.S. 299 (1967).

¹¹ Rev. Rul. 63-239, 1963-2 CUM. BULL. 87.

¹² CODB § 162(a).

¹³ Treas. Reg. §§ 1.162-17(b)(3)(ii), (b)(4), (c)(2) (1958).

¹⁴ *Id.*

¹⁵ CODE § 62(2)(C). The issue still remains, however, whether it represents deductible business transportation or the nondeductible cost of commuting. See Hufaker, "Away From Home" as a Tax Concept, N.Y.U. 22D INST. ON FED. TAX. 869, 886-92 (1964).

¹⁶ But see notes 19-23 *infra* & accompanying text (the "need for rest" qualification engrafted on the rule). The beginning of the rule seems to be I.T. 3395, 1940-2 CUM. BULL. 64.

spect to transportation expenses¹⁷ but upheld the Commissioner with respect to meals.¹⁸

(1) *The Need for Rest Qualification.*—It was not long before the courts found that a strict application of the overnight rule would result in injustice to certain classes of taxpayers. The case of *David G. Anderson*¹⁹ involved a railway express employee whose duties required him to make two consecutive 2-day round trips with a 45-hour layover between trips. On each trip, the taxpayer would be released for a period of several hours to eat and rest. During this released time, Anderson would eat a meal and sleep on a cot in the baggage car. In holding that the taxpayer was entitled to a deduction for the meals expense, the court stated:

We think it is too narrow a view of the facts not to regard both round trips as overnight trips. Furthermore, it was necessary for the petitioner to obtain rest at the end of the outbound trip before starting upon the return run. We believe too, that the determination of the question should not depend upon the length of the rest period. The round trips required 16 and 18 hours, during which a rest period was necessary.²⁰

The Commissioner accordingly relaxed the rigidity of his overnight test to accommodate the need-for-rest qualification which the *Anderson*²¹ court made applicable to carrier employees. A new rule was drafted which stated that in order to qualify for the deduction, the taxpayer must be away "for a period which is substantially longer than an ordinary day's work and of sufficient length to necessitate relief from duty to obtain sleep."²² To this ruling was added the impact of *Williams v. Patterson*²³ in which the court maintained that an elderly railroad conductor was entitled to a meals and lodging deduction for expenses incurred during a 6-hour midday layover period despite the fact that such expenses were incurred merely for the convenience of the taxpayer. Although the Commissioner acquiesced in the *Patterson* case, he cautioned that with respect to meals, the brief interval an employee was released for the purpose

¹⁷ *Chandler v. Commissioner*, 226 F.2d 467 (1st Cir. 1955); *Scott v. Kelm*, 110 F. Supp. 819 (D.C. Minn. 1953); *Joseph M. Winn*, 32 T.C. 220 (1959); *Podems*, 24 T.C. 21 (1955); *Kenneth Waters*, 12 T.C. 414 (1949).

¹⁸ *Al J. Smith*, 33 T.C. 861 (1960); *Sam J. Herrin*, 28 T.C. 1303 (1957); *Fred Marion Osteen*, 14 T.C. 1261 (1950).

¹⁹ 18 T.C. 649 (1952).

²⁰ *Id.* at 653.

²¹ The Commissioner acquiesced in the decision. 1952-2 CUM. BULL. 1.

²² Rev. Rul. 54-497, 1954-2 CUM. BULL. 75.

²³ 286 F.2d 333 (5th Cir. 1961).

of eating rather than sleeping did not constitute an adequate rest period.²⁴

(2) *Complete Rejection of the Overnight Requirement.* —Under the *Anderson* and *Patterson* cases except for taxpayers such as truckdrivers, railroad conductors, or other long-distance delivery men, the deductibility of meal expenses incurred while traveling still depended on whether the taxpayer procured lodging and stayed overnight. This last vestige of the overnight rule was rejected by the Eighth Circuit Court of Appeals in *Hanson v. Commissioner*²⁵ which involved a taxpayer who supervised work at various job sites 6 to 80 miles away from his place of business. On many of these trips he returned home the same day although at times he was away overnight. Reversing the Tax Court, the court of appeals permitted the deduction of meal expenses on the 1-day trips emphasizing the business necessity for the taxpayer's travel to areas away from his home city.²⁶

Despite the fact that the Commissioner did not acquiesce in the *Hanson* case,²⁷ the Tax Court decided to follow it and in *William A. Bagley*²⁸ permitted the deduction of meal expenses incurred on 1-day trips by a consulting engineer traveling from 30 to 75 miles from home. The court picked flexibility over rigidity and implied that each case was to be decided on its facts²⁹ but evidence of disagreement and confusion was demonstrated by the lack of unanimity as to the proper basis for the Tax Court decision.³⁰

When *Bagley* reached the First Circuit Court of Appeals, it was reversed.³¹ In a thoughtful analysis of the issues the court of appeals denied the deductibility of meal expenses incurred on 1-day trips. This result, the court felt, was necessary to prevent the discriminatory treatment of commuters.

(3) *The Issue Reaches the Supreme Court.* —While the *Bagley* case was in the courts, the Commissioner had without success continued to litigate the issue. In *Correll v. United States*,³² the

²⁴ Rev. Rul. 61-221, 1961-2 CUM. BULL. 34.

²⁵ 298 F.2d 391 (8th Cir. 1962), *nonacquiesced in*, Rev. Rul. 63-239, 1963-2 CUM. BULL. 87.

²⁶ *Id.* at 393.

²⁷ Rev. Rul. 63-239, 1963-2 CUM. BULL. 87.

²⁸ 46 T.C. 176 (1966), *rev'd*, 374 F.2d 204 (1st Cir. 1967).

²⁹ *Id.* at 183.

³⁰ There were concurring opinions by Judges Turner, Mulroney, and Simpson and a dissent without opinion by Judge Whitney.

³¹ 374 F.2d 204 (1st Cir. 1967).

³² 369 F.2d 87 (6th Cir. 1966), *rev'd*, 389 U.S. 299 (1967).

Sixth Circuit had rejected the overnight rule and allowed a meal expense deduction to a traveling salesman who always returned home at night. The First Circuit's decision in *Bagley* thus created a conflict in the circuits and the Supreme Court granted certiorari in *Correll*.³³

In a 5 to 3 decision the Court sustained the Commissioner's need-for-rest rule.³⁴ The Court's decision not only ended a long period of controversy on the question, but stopped a judicial trend which threatened the final demise of the long-standing administrative ruling.

II. ANALYSIS OF THE RULE

A. *The Legislative History*

The legislative materials in connection with the statutory development of travel expense deductions shed little light upon the congressional intent with respect to the overnight requirement.³⁵ The Supreme Court nevertheless felt in *Correll* that because the

³³ 388 U.S. 905 (1967).

³⁴ 389 U.S. 299 (1967) (Justice Marshall not participating).

³⁵ The life of the traveling expense deduction began in 1913 when the Revenue Act of that year provided for the deduction of "necessary expenses actually paid in carrying on any business, not including personal, living, or family expenses." Revenue Act of 1913, ch. 16, § 11B, 38 Stat. 167. This statute was followed by the Revenue Act of 1918 which allowed a deduction for "all ordinary and necessary expenses paid or incurred . . . in carrying on any trade or business . . .," Revenue Act of 1918, ch. 18, § 214(a), 40 Stat. 1066, without again making any specific mention of traveling expenses. Shortly, the first administrative pronouncement appeared on that specific subject. Treas. Reg. 45, art. 292 (1919). It is notable that the first regulation under the statute allowed no deduction for meals or lodging although it did provide that transportation expenses were deductible.

In 1920, T.D. 3101, 3 CUM. BULL. 191 (1920), expressed a different and more equitable administrative policy with respect to meals. One who has to travel for a living incurs meal expenses in excess of that of the taxpayer who eats at home. To allow the traveler a deduction for the total amount expended would not be fair to his "stay at home" counterpart who could deduct nothing. If the deduction were allowed only to the extent of the amounts in excess of what it would normally cost to sleep and eat at home, both taxpayers would be on relatively equal footing. That was the precise allowance permitted by the Treasury. *Id.*

The first statutory enactment with respect to travel expenses came with the Revenue Act of 1921 which amended section 214 of the 1918 Act by providing specifically for a deduction for "traveling expenses (including the *entire amount* expended for meals and lodging) while away from home in the pursuit of a trade or business." Revenue Act of 1921, ch. 136, § 214(a)(1), 42 Stat. 339 (emphasis added). It will be noticed that the statutory language, by allowing a deduction for the entire amount, specifically rejected the Treasury's previous pro rata approach. H.R. REP. NO. 350, 67th Cong., 1st Sess. 11 (1921). This language was then reproduced in section 23(a)(1) of the Internal Revenue Code of 1939 and remained intact in section 162 of the 1954 *Code*. Moreover, the concept of adjusted gross income was broadened in the 1954 *Code* to permit a deduction of unreimbursed transportation expenses.

statutory language had been carried forward unchanged from previous enactments, congressional consent to the existing rule was implied.³⁶

This conclusion, however, is not well supported. A statement in the Senate Finance Committee report with respect to the enactment of the 1954 adjusted gross income provision for transportation expenses stated: "At present, business transportation expenses can be deducted by an employee in arriving at adjusted gross income only if they are re-imbursed by the employer or if they are incurred while he was away from home *overnight*."³⁷ The Service contends that the 1954 enactment took place with "clear recognition of the 'overnight' rule" by Congress.³⁸ However, this conclusion is suspect in light of the fact that the same report at another point makes no reference to the overnight requirement while discussing expenses away from home.³⁹ Other sources are no more conclusive. A request to allow a meal expense deduction on 1-day trips was made during congressional hearings on the 1939 Code revision.⁴⁰ However, the Treasury itself suggested alternatives to the overnight rule.⁴¹

B. Possible Alternatives

The opinion of the Court in the *Correll* case, although forcibly written, nevertheless gave some indication that the result might have been otherwise had there been a reasonable alternative.⁴²

Many alternatives had been offered by the courts because judicial antagonism to the rule had been especially strong when, under the 1939 Code, the overnight requirement applied not only to the deductibility of meal expenses but transportation expenses as well.⁴³

(1) "*Clear Words of the Statute.*" —One alternative to the overnight rule is the plain meaning rule of statutory construction

³⁶ 389 U.S. 299 (1967).

³⁷ S. REP. NO. 1622, 83d Cong., 2d Sess. 191 (1954).

³⁸ Rev. Rul. 63-239, 1963-2 CUM. BULL. 87, 88.

³⁹ S. REP. NO. 1622, 83d Cong., 2d Sess. 169 (1954).

⁴⁰ *Hearings on General Revision of the Internal Revenue Code Before the House Comm. on Ways and Means*, 83d Cong., 1st Sess., pt. 1, at 216-19 (1953); *Hearings on H.R. 8300 Before the Senate Comm. on Finance*, 83d Cong., 2d Sess., pt. 4, at 2396 (1954).

⁴¹ *Hearings on the President's 1963 Tax Message Before the House Comm. on Ways and Means*, 88th Cong., 1st Sess., pt. 1, at 98 (1963).

⁴² 389 U.S. at 303 n.14, 306.

⁴³ See text accompanying note 17 *supra*.

which dictates that "away from home" can not mean "away from home overnight."⁴⁴ If that had been the congressional intent, the extra word would have been inserted in the statute. While it may not be disputed that the plain meaning rule is far from conclusive it nevertheless is a starting point and one which should govern unless there is evidence that a different meaning was intended by the legislature.⁴⁵ In *Correll*, the Supreme Court found such evidence because it felt the words of the statute were ambiguous. In its opinion, the phrase "traveling away from home" required statutory construction because "[t]he very concept of 'traveling' obviously requires physical separation from one's home. To read the phrase 'away from home . . .' literally, would render the phrase completely redundant."⁴⁶

(2) *Compromise Approaches*. —There have been additional approaches proposed which attempt to reach a compromise between the Commissioner's relatively narrow sleep or rest standard and the rather broad standard of the plain meaning rule. Some of these tests were formulated with regard to the deductibility of transportation expenses under the 1939 Code when the overnight requirement also applied to transportation expenses and, before *Correll*, could have been considered as applicable to meal expense deductions under the 1954 Code.

(a) *The Distance Test*. —One such compromise is the so-called distance test,⁴⁷ according to which the words "while away from home" are not to be taken in their literal sense. Whether the taxpayer will be allowed a deduction for meals consumed during his travel will depend on how far he is away from his home. What distance will suffice is to be a question of reasonableness. Thus, in *Amoroso v. Commissioner*,⁴⁸ the First Circuit Court of Appeals sustained the Tax Court's determination that expenditures made for meals consumed in the greater Boston area by a taxpayer who resided 10 miles away in Milton, were not deductible. The court concluded that the meals had been purchased within a reasonable

⁴⁴ See *Hanson v. Commissioner*, 298 F.2d 391, 397 (8th Cir. 1962); *Scott v. Kelm*, 110 F. Supp. 819, 821-22 (D. Minn. 1953); *Kenneth Waters*, 12 T.C. 414, 416-17 (1949).

⁴⁵ "[T]he words of statutes — including revenue acts — should be interpreted where possible in their ordinary, everyday sense." *Hanover Bank v. Commissioner*, 369 U.S. 672, 687 (1962); *Crane v. Commissioner*, 331 U.S. 1, 6 (1946).

⁴⁶ See *United States v. Correll*, 389 U.S. 299, 304 n.19 (1967).

⁴⁷ See *Amoroso v. Commissioner*, 193 F.2d 583, 585 (1st Cir.), *cert. denied*, 343 U.S. 926 (1952); *cf. Chandler v. Commissioner*, 226 F.2d 467, 470 (1st Cir. 1955).

⁴⁸ 193 F.2d 583 (1st Cir.), *cert. denied*, 343 U.S. 926 (1952).

radius of the taxpayer's home. On the other hand, the same court, in *Chandler v. Commissioner*,⁴⁹ held that automobile expenses incurred in a 37-mile trip were incurred at a distance sufficiently remote to qualify as "away from home" and therefore were deductible.

(b) *The Daily Routine Test.*—An additional alternative to the rigid overnight test was applied by the Tax Court to deny a deduction for meals consumed on the road if the taxpayer's travel was a matter of daily routine.⁵⁰ This approach prevents the deductibility of meal expenses eaten away from home for all those taxpayers whose business or employment requires long-distance daily travel but which is uninterrupted for any substantial rest or layover period. Common fact situations involve the traveling salesman or manufacturer's representative, and long-distance deliverymen and carrier employees engaged in so-called turnaround runs. The Tax Court viewed such taxpayer as no different than the factory worker who is unable to have one of his meals at home.⁵¹

It should be noted, however, that while the daily routine approach has been discussed and suggested as an alternative test for the deductibility of meals expenses,⁵² an examination of the cases in which it has been applied reveals that the Tax Court has not used it as such. Rather, the daily routine argument has been used in a negative sense to rationalize the denial of the meal deduction. If any test is going to be useful to the taxpayer or his representative, it must set forward standards from which it can be determined with reasonable certainty when an expense is or is not deductible.

(c) *The Extra Services Test.*—In contrast to the daily routine test, the Tax Court had, on several occasions under the 1939 Code, allowed an automobile expense deduction to an employee for non-overnight travel undertaken "in connection with" the performance of his services as an employee and not "solely in the performance of such services."⁵³

Although this language is hardly a model of clarity, it means that while a taxpayer may not be allowed a traveling expense for that travel which is part of his daily routine, he will be allowed such

⁴⁹ 226 F.2d 467, 470 (1st Cir. 1955).

⁵⁰ E.g., Jerome Mortrud, 44 T.C. 208 (1965); Fred G. Armstrong, 43 T.C. 733 (1965). See also Fred Marion Osteen, 14 T.C. 1261 (1950).

⁵¹ See Fred G. Armstrong, 43 T.C. 733, 735 (1965); Charles H. Hyslope, 21 T.C. 131, 134 (1953); Fred Marion Osteen, 14 T.C. 1261, 1262 (1950).

⁵² See Comment, *Deductibility of Business Expenses — The "Away from Home" Clause*, 11 ST. LOUIS L.J. 83, 91 (1966).

⁵³ Joseph M. Winn, 32 T.C. 220, 224 (1959) (emphasis added); see Irene L. Bell, 13 T.C. 344, 349 (1959); Kenneth Waters, 12 T.C. 414, 417 (1949).

a deduction for trips which are in the nature of extra services to the employer. An example is the case of an employee or agent who makes a weekly or monthly trip to report to his employer in a distant city.⁵⁴

(d) *Conclusion.* —The infirmity in the compromise approaches to the overnight problem lies in their flexibility. A determination of what constitutes an unreasonable distance or an extraordinary trip or whether the taxpayer is engaging in daily routine travel, is likely to promote litigation and requires a "case by case" approach. The uncertainty inherent in such determinations is undesirable in the field of taxation especially when it is realized that the meal expense deduction affects a substantial number of taxpayers.

C. *Arguments Supporting the Correll Decision*

In addition to the fact that the overnight or sleep or rest requirement provides a certain demarcation line between the deductibility or nondeductibility of meal expenses incurred in travel, both the Supreme Court in *United States v. Correll*⁵⁵ and the First Circuit in *Commissioner v. Bagley*⁵⁶ based their decisions on traditional arguments offered in support of the Service's position.

(1) *The Rule as a Matter of Statutory Construction.* —It is contended that the rule is required as a matter of statutory construction. Section 162(a)(2) refers to meals and lodging as a group. The phrase has so been used throughout its statutory and administrative history.⁵⁷ The linking of meals and lodging in the statute indicates, according to this analysis, that the meal expense is only deductible when incurred in conjunction with lodging.⁵⁸

As a matter of logic, this conclusion is vulnerable because one may equally well contend that the *lodging* expense is not deductible unless associated with meals. Furthermore, it is not true that the two terms have always been used together. Meals and lodging are used conjunctively in section 162, but under the adjusted gross income provisions, section 62 of the *Code*, they are separated; section

⁵⁴ See, e.g., Joseph M. Winn, 32 T.C. 220 (1959); Kenneth Waters, 12 T.C. 414 (1949).

⁵⁵ 389 U.S. 299 (1967).

⁵⁶ 374 F.2d 204 (1st Cir. 1967).

⁵⁷ See § 214(a) of the Revenue Act of 1921, 42 Stat. 339; T.D. 3101, 3 CUM. BULL. 191 (1920). See also O.D. 864, 4 CUM. BULL. 211-12 (1921).

⁵⁸ See *Commissioner v. Bagley*, 374 F.2d 204, 207 n.10 (1st Cir. 1967); cf. *Wooford v. Hooper*, 149 Tenn. 250, 259 S.W. 549 (1924).

62(2) (B) allows a deduction for expenses of "travel, meals, and lodging," whereas section 162(a) (2) allows a business deduction for "amounts expended for meals and lodging." If a deduction is allowed for lodging associated with business travel, there is nothing in the statute to deny the deduction of meal expenses associated with business travel but unassociated with lodging.

To this argument it is answered that the statute allows a deduction only for those expenses incurred while away from home and one is not away from home within the statutory language unless he requires lodging. Such a reply merely begs the question and one is led to the conclusion that it is simply not possible to resolve the issue solely on the basis of the statutory language.

(2) *A Matter of Judicial Choice.* —Because the statutory construction arguments for and against the overnight rule are equally unconvincing on both sides, the Supreme Court essentially resolved the issue by making what it felt was the most equitable choice. Writing for the Court, in *Correll* Justice Stewart said:

The sleep or rest rule avoids the obvious iniquity of permitting the New Yorker who makes a quick trip to Washington and back, missing neither his breakfast nor his dinner at home, to deduct the cost of his lunch merely because he covers more miles than the salesman who travels locally and must finance all his meals without the help of the Federal Treasury.⁵⁹

The Commissioner's strict overnight rule thus places all 1-day travelers, including the commuter, on equal footing regardless of the number of miles covered or the amount of time spent in travel.

III. CONCLUSION

The lack of legislative materials leave the overnight issue without the primary source upon which it should be resolved. Furthermore, the weakness of the arguments offered in support of the rule and having a foundation in the statutory language⁶⁰ adds little to the case for the sleep or rest requirement. However, because the administrators and courts are required to determine when travel and meal expenses are deductible and because the overwhelming practice has been to deny the deduction of commuting expenses, travel and otherwise, the question still remains: How does one determine whether a taxpayer has incurred business expenses away from home? Judicial alternatives have been examined⁶¹ but upon analysis seem to

⁵⁹ 389 U.S. at 303-04.

⁶⁰ See notes 57-59 *supra* & accompanying text.

⁶¹ See text accompanying notes 46-55 *supra*.

be undesirable because they are not capable of drawing guidelines sufficiently definite to permit a clear answer to the question. Administrative alternatives, although equitable, have proven too difficult to administer.⁶² Thus, whether the overnight rule is the most desirable administrative and judicial answer would seem to depend on whether it is commensurate with the policy which is the foundation of the travel expense deduction.⁶³ Despite its illogical nature, it would seem that the sleep or rest requirement best meets this test. As the court stated in *Commissioner v. Bagley*,⁶⁴ "We believe that fairness to the greatest number of people, and at the same time a practical administrative approach . . . is to accept the Commissioner's sleep or rest rule."⁶⁵

In conclusion, it seems strange that the legislature at no time chose to remedy what was clearly a serious drafting error. Throughout the enactments and reenactments of the travel expense statute a word or sentence could have clearly expressed the congressional policy thereby eliminating the judicial and administrative dilemma.

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⁶² See note 35 *supra*.

⁶³ See text accompanying notes 8-10 *supra*.

⁶⁴ 374 F.2d 204 (1st Cir. 1967).

⁶⁵ *Id.* at 207.